

BOARD OF APPEALS  
COUNTY OF HAWAII

HEARING TRANSCRIPT  
JULY 11, 2008

A regularly advertised hearing on the petition filed by **RESOLUTE INC.** (**BOA 08-000063**) was called to order at 10:25 a.m. in the West Hawai'i Mayor's Office, Conference Room, 75-5706 Kuakini Highway, Suite 103, Kailua-Kona, Hawai'i, with Joel Gimpel, Chairman, presiding.

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

ABSENT & EXCUSED: Kelly Ann Soo

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

Eric Bryant (President of Resolute Inc.), Appellant  
Klaus Conventz representing Appellants  
Christopher Yuen, Planning Director  
Molly Lugo representing the Planning Director

And no one from the public in attendance.

**PETITIONER: RESOLUTE INC. (BOA 08-000063)** - Appeal of Decision by the Planning Director dated March 17, 2008 denial for additional farm dwelling agreement application. The subject property consists of 500.734 acres and is located within Waiono Meadows Ranch Subdivision, Lot 10-A-1 Condominium Project, approximately 2.25 miles east of the intersection of Waiono Meadows Drive and Mamalahoa Highway, Holualoa, North Kona, Hawai'i, TMK: (3) 7-6-1:1.

**GIMPEL:** The next item on the agenda is Item No. 5. Petitioner is Resolute Incorporated. It's Board of Appeals No. 08-000063, and this is an appeal of the decision by the Planning Director dated March 17, 2008, denying an additional farm dwelling agreement application. The subject property consists of 500.734 acres and is located within Waiono Meadows Ranch Subdivision, Lot 10-A-1 Condominium Project; it's approximately 2.25 miles east of the intersection of Waiono Meadows Drive and Mamalahoa Highway, Holualoa, North Kona, Hawaii. The Tax Map No. is (3) 7-6-1:1. And I see people are now sitting at the table. And when we testify or speak, let's use the microphone, so that we can record this. Do we have the representative of the petitioner here and would you introduce yourself?

**CONVENTZ:** Klaus Conventz, P. O. Box 2308, Kailua-Kona, Hawaii, for Resolute Inc.

GIMPEL: Thank you. And the representative of the Planning Department?

LUGO: Good morning, Chair Gimpel and Members of the Board of Appeals. Molly Lugo, Deputy Corporation Counsel representing the Planning Director and the Planning Department.

GIMPEL: Thank you. All right, we have a file of matters. Are there -? What I would like to do at this point is ask the petitioner and the Planning Department representatives to present their theory of the case; what they intend to prove and then we'll get into the taking of the testimony and presentation of evidence. So Mr. Petitioner, Mr. Conventz, would you please outline your theory of the case and give us, in effect, an opening argument.

CONVENTZ: Yes, Mr. Chairman. By the way I would add that the president of Resolute, Mr. Eric Bryant, is present as well.

GIMPEL: Is he going to be a witness?

CONVENTZ: I believe so.

GIMPEL: We'll swear him in at that point. Thank you.

CONVENTZ: Thank you. We believe that the memorandum related to farm dwellings and minimum requirements have been wrongly applied in this particular case, since, as mentioned already, from the farm activity from calculations, it was based partly on the existing, partly on proposed. However, for the first and the second farm dwellings it's fairly easy. And we are talking about a-half acre versus 500-acre lots. And we also believe that the key issue is, which is misunderstood, that you cannot prepare 200 acres on a remote control. You have to be present, you have to prepare so much that it is simply not possible to -. And actually the memorandum would allow actually based on the background of the applicant, or petitioner in this case, is that with sufficient background, and pre-development for proposed farm activity is actually available under this memorandum. And also it states that in CPR situation that since the particular CPR owner has no influence on the other CPR properties, he should not be held singly to existing or otherwise proposed development of other CPR units, in this case five, of which we are talking about two, because he could never develop that. If you properly develop 500 acres for coffee, for cattle, for hardwoods, that takes enormous amount of infrastructure development. And with particular case comes something very important in there. If you have a typical 1-acre lot with an additional farm dwelling and a half-acre coffee, you wipe out the half-acre and plant the coffee, that's it. You don't even need a grubbing permit, you don't need a grading permit, nothing. In this case, for instance, if we start with four or five acres of coffee, you would still have grading permits because you need four or five large tanks scattered all over, since we have -. We have sufficient rainfall, but it is unevenly distributed throughout the year. So we need before, those five-acre coffee what was indicated might be sufficient to grant Mr. Bryant's petition. But that is you have to have driveways, you have to have building permits for those tanks, you have to have a grading permit, you have to have engineering. And Waiono is very special. Ki Emler made it quite clear anything in Waiono, since there were so much problems that there will be absolutely no forgiveness, there will be an engineering study for

the entire land. And that is also why in this particular case we would have to go first forward with a topo map, and then subsequently with a civil engineer. That's a couple of years' preparation. And then go for building permit, plumbing permit, electrical permit for the irrigation, and then plant; we cannot just go, in order to hurry up, plant in a hurry five acres to fulfill the rules of the law or in that case actually of the memorandum as an implementary rule to the law. I don't see any solution. You have to have, in that case, some housing there to actually start the work. We are ten miles from a hospital, we are ten miles from any shop, we are even from Mamalahoa Highway two and a quarter miles. And the owner is also, although it sounds always incorporated it is in fact an old fashion family with ten children which are home schooled as well. So they are not building a mansion up there also, although he needs a 10,000 square foot house. But the second one with around 2,000 or 2,400 square feet is very moderate, and that is for the people you need. And you need in Kona only reliable people who don't disappear after the second day, that if you want reliable people you need housing. And you have to provide that, and you have for security reason there. And it's such a jungle up there, you don't even know what's going on with your, what you are planting, or what you are actually have in cattle. And it is so overgrown that Mr. Bryant could actually go there, and say, hey, I've brought those 50 cattle in there. But there is not enough grazing; that is all overgrown with obnoxious weeds, brush like guava, and like Christmas berry. And he cannot build just for 200 acres. We've got to go, and that is also planned with the Conservation District, with Mary of the Conservation District. We worked on to do that in reasonable fashion, not to bare everything but step by step and with the least necessary means, not just bulldozer style and baring mountains like a lot of subdivisions do here, and which I disagree completely as a former civil engineer -.

GIMPEL: Mr. Conventz.

CONVENTZ: Yes.

GIMPEL: We'll -, you are getting into evidence now -.

CONVENTZ: Yes, sir.

GIMPEL: I don't want to hear evidence now -.

CONVENTZ: Okay.

GIMPEL: Because you are not under oath.

CONVENTZ: Yeah.

GIMPEL: What we want to hear is what you intend to prove. You intend to prove that the Director did this wrong, did that wrong, so forth and so on, that he didn't take into account these things. And then you will prove that later on with evidence and testimony. Okay? Thank you.

CONVENTZ: Yes. What's basically wrong in my position, opinion, on December 3<sup>rd</sup>, I applied for additional farm dwelling exclusively based on pre-development and proposed activity based on the background of the applicant. And also we went through to March 17<sup>th</sup> till the last day, till the last day where we got the denial, and we were still

talking about proposed farm activity. And the January 24 letter by the Planning Director actually said that we had brought the calculation, man-hour and income for the farm activity and that was exclusively again for the proposed farm activity. It wasn't even requested that we would calculate what I usually do in over 40 cases to bring up the activity of the neighbor, with 30, or neighbors, with 32 cattle or the income of, out of that one. So it was quite clear that we applied for one thing; and till the last day we were held to believe that we were still talking about the same thing, except for the background wasn't in question, Maui, Oregon and the County of Hawaii; when we got then a denial based on something existing. In fact, that denial goes so far to say that for the existing farm activity the petitioner bought an excise tax license. He didn't bring an excise tax license for neighbor; that was for his future activity, and it says so by date. In addition, there is one reason for denial that a building permit, which was actually in place since 2003, and then split in two in 2005, was effective on December 3, and was effective when I again reapplied on January 17<sup>th</sup>. Then this very building permit was then voided mid-February, and after we had applied and before the denial. And the fact is that it didn't have to be voided because the architect was changed, the footprint basically didn't change, only instead of one, there is a three-part structure, instead of one-story living quarter was now two. You don't need that, you need an additional permit for the change or a revision if the footprint doesn't change; but you don't have to void it. At the same time, there was a new, under a new architect a building permit for that one living part in the making, which has been approved 14 days or three weeks after the denial. Again, and then that denial said, see, you don't have even, there is no living quarters and there is not even a permit in play. I think that is capricious.

GIMPEL: Thank you. Go ahead.

LUGO: Thank you. The Board has before it a lot of information. We believe that the issue that is presented to the Board is actually quite simple. The appellant applied for a third and fourth farm dwelling on a parcel of land that has neither a first or second dwelling, and virtually no farm activity. The Director denied that application; and this denial was consistent with the Director's policy, with the policy of the Planning Department, not to approve third or higher numbered of farm dwellings based on strictly prospective farm activity. This requirement is intended to carry out State Law and the County Zoning Code. Under State Law, Chapter 205 of Hawaii Revised Statutes, no dwellings are allowed in the Agricultural District unless it's a farm dwelling. A farm dwelling means a single-family dwelling used connection with a farm or where agricultural activity provides income to the family occupying the dwelling.

The memorandum that the appellant has referred to is a policy guideline that describes the criteria for granting additional farm dwellings. And as I mentioned, the general policy is no third or higher numbered farm dwellings will be granted unless there is actual farm activity that will support a full-time worker for each additional farm dwelling above two. In this case, as I said, there is virtually no farm activity currently happening on the parcel. And so the appellant is arguing that the exception to the requirement that there be actual activity happening should apply in this case. That exception is that if the appellant has an established track record of substantial involvement in agriculture and they have plans to expand that activity, then there might be shown an immediate justification to have a third or higher farm dwelling approved without any current farm activity happening. What the Director will describe today when he testifies is why the information that was submitted by the appellant to show other experience was not enough to show that there was an immediate

need, an immediate justification, and enough background experience in ranching and growing coffee and hardwoods to justify approving a third and fourth farm dwelling without there even being any activity right now.

And I'd just like to bring the Board back to the policy of these rules for the Agricultural District, which is not to allow it to become a, you know, residential development. Any dwelling is supposed to be a farm dwelling; and so in order to ensure that that's the case there is criteria. And in this case that criteria wasn't met, so the application for the third and fourth were denied. We believe that was an appropriate decision consistent with the law, with the Department's policy and procedure; and we would ask the Board to uphold that decision. Thank you.

GIMPEL: All right. Thank you. Mr. Conventz, you can proceed with your -, oh, before we get to that, we have had submitted to us the Index to Record on Appeal and the materials also that were accompanying your petition. Can I have a motion to -, is there any objection to admitting those into evidence, all the materials?

BRYANT: What are you talking about?

GIMPEL: I'm talking about the materials that were attached to your petition and the Index to Record on Appeal that was provided by the Planning Department. Any objection to admitting those materials into evidence?

LUGO: No objection.

CONVENTZ: Yes, I objected first to the quality, which was quite different -.

GIMPEL: That is not -.

CONVENTZ: Yes.

GIMPEL: That is not a valid objection. You object to -. If you feel that they are not complete, you can make that objection; but as far as -, I don't understand what you mean by quality.

CONVENTZ: Actually, I directed the Board after the Planning Director belatedly provided his response, I objected that they did not comply with the Board's Rules and application, while we certainly did, and that not all the public record is actually included. For instance, related to the existing dwelling which had been commenced in 2003, there is very well such a permitted place, even if we have an argument about it. If it is not finalized as a dwelling, there is and there was since 2003 a building permit for that first farm dwelling in place after all.

GIMPEL: All right. That may not have been in the Planning Department files; that may have been in the Building Department (sic) files. As far as, and if you are referring to your letter of May 27, 2008, in which you -.

CONVENTZ: That, too, yeah.

GIMPEL: In which you -.

BRYANT: I have one potential objection -.

GIMPEL: Use the microphone, please, and when you are called upon; I'm talking now. Thank you.

BRYANT: Okay, okay, I'm sorry.

GIMPEL: You are complaining that use of certain things in the record is frivolous and that the substantial public record is conveniently ignored by the Planning Department; but you don't indicate that the Planning Department may not have had those materials in its files. If there are other materials in the public record that you know about, you are perfectly free to introduce them.

CONVENTZ: Yes.

GIMPEL: Yes, okay. But as far as the documents that have been submitted, are there any that are erroneous? That is what I'm asking. Can we introduce all of these documents into the record, not necessarily admitting that they are complete?

CONVENTZ: Yes and no. One thing, yes, that they are basically there; however, I have to object to what you stated before saying that the Building Division might know, the Planning Department does not. The Planning Department signs off on those permits, and they signed off on it, they were aware of the ones; because I was informed by the Planning Department, by Mr. Childs, who said, "Did you know there is not even a permit in place?"

GIMPEL: Okay, then all right -.

CONVENTZ: And they signed off on the new one -.

GIMPEL: We can deal with that. But if the materials that have been submitted are valid materials, admittedly perhaps incomplete, can you still agree to accept those into evidence -?

CONVENTZ: That is correct, sir.

GIMPEL: Not necessarily that may not be all the evidence, but that is evidence. Do you have any objections?

LUGO: I have no objections. And I was just going to say that I think the timeline as to the building permit, we can probably agree on it, just to establish through testimony, so -.

GIMPEL: Okay, all right. So we will accept the Index to Record on Appeal and the materials attached to the petitioner's petition into evidence. Now, let's proceed with the oral testimony. Do you want to introduce your witness, please.

CONVENTZ: Yes. Counsel also stated that there is no farm activity going on -.

GIMPEL: Do you want to present evidence?

CONVENTZ: No. Existing farm activity -.

GIMPEL: Do you have a witness to indicate that there is no farm activity going on?

CONVENTZ: On the neighbor lot, but counselor said there is literally no existing farm activity going on; there is 32 cattle, yeah, unless I misunderstood -.

GIMPEL: Do you have a witness to present to the testimony? Do you want to present evidence now, oral evidence?

CONVENTZ: Yes, well -.

GIMPEL: Who is going to do it?

CONVENTZ: Mr. Bryant.

GIMPEL: Then we'll swear him in. Yeah, okay, take the microphone, please. Do you swear to tell the truth, the whole truth and nothing but the truth?

BRYANT: Yes, I do.

GIMPEL: Okay. Proceed with the questions. And your name is?

BRYANT: Eric Bryant.

GIMPEL: Eric Bryant? B-R-Y-A-N-T?

BRYANT: Yes, sir.

GIMPEL: All right, ask your witness. You can question your witness.

CONVENTZ: Okay. Is there a building permit for the living quarters in effect?

BRYANT: As far as I know, there is, yes.

CONVENTZ: Was there one in effect when we applied the first time?

BRYANT: Yes, there was.

CONVENTZ: The second time?

BRYANT: Yes, there was.

CONVENTZ: And was there a permit voided for a building which had been commenced already in 2003 and voided in February 2008?

BRYANT: That's my understanding as in the paperwork as well as on the site. And it's also my understanding that the entire permits weren't voided, that there was an electrical and plumbing permit that were never voided and continued in effect.

CONVENTZ: And since it is related to the building permit, it shouldn't have been then voided as well -.

BRYANT: Right, cancelled at the same time.

CONVENTZ: Is there existing farm activity going on on at least two lots for Knowles and Buck Butterfield?

BRYANT: There certainly appears to be. The evidences is that the cows are running, and have some horses up there; and I believe that is in your package of information and it's in the testimony that you've got there.

CONVENTZ: How did you understand the initiation of the application, was for existing farm activity or based on your background with the predevelopment on proposed farm activity?

BRYANT: It was clear to me and I believe it's clear in the paperwork that when we put the whole package together, it was based on our existing activity in both Maui and Oregon where we run 1,500 to 2,500 animals on the two combined properties where we are managing over 4,000 acres of reforested basically pine trees where we are -, we also build cabinets in a shop over on Maui, we -. That's how we absolutely expected to make a presentation based on our background; that's the way the paperwork says it through the entire process, even down to asking me what my hours were going to be on a daily basis, how many hours I was going to be spending on the cows, how many hours I was going to spending on the trees, how many hours I was going to be spending at everything, asking me those kinds of questions, telling me to outline my day in order to validate my experience as well as the number of hours I was going to be devoting to this job. They even asked me that, and I was supposed to respond to these questions. And in the end, as far as I can tell, they denied me based on nothing. They made me provide -, we have stacks of material, we did research on teakwood comparing them to koa trees, we cut the -. The estimation of profit potential for growing koa is so high, it was so ridiculous that we took teak, which is about right now in the open market a third the value of koa, cut that in third and presented those numbers there; and it's still a ridiculous amount of money. So we were totally planning on using our existing experience in farming and raising trees and applying it up there; and in the end we were denied based on other people's farming activity, which was never our application. They required me twice to go down and get a business license; first we got it in the name of the vice president for accounting and tax and other purposes, then we got it, at the last day we got it for the business. And all the while they knew they were going to deny me based on somebody else's, the other farming activity that was or was not going on up there. Till the very last day, they were trying to get me to meet the terms and conditions that would result in our getting the permit, to the very last day. The last week I made several calls to Mr. Yuen's office, requesting that he call me back and us talk about it; I receive no calls back from his office. It was quite a struggle because all that we seek to do is farm up there. According to my understanding, the community plan, the community,

people want farming, they want koa reforestation. I mean, we've done acres on Maui, we've done 4,000 acres in Oregon in reforestation. And if that doesn't qualify me for reforestation up there, I don't know what does. I run 2,500 cows on the mainland – if that doesn't qualify me for knowing how to run cows, I don't know what does. If, I really don't, it's really been a challenge to me because I thought I was meeting all the requirements to prove that I had the capacity and the ability to do what I said I was going to do; and in the end they rejected us based on a whole different set of criteria, which they never even gave us a chance to rebut.

CONVENTZ: Was there at any time a question about the background within the County versus other tropical areas or Oregon?

BRYANT: Yeah, the rules seemed to be changing weekly. As we submitted the material, they either accept or reject it first based on, okay, you can't -, this activity doesn't qualify you because it's in Oregon, this activity doesn't qualify you because it's on Maui, you have to have activity here in the County of Hawaii, that's the only place you can qualify. And then later on they said, they just basically went back and forth, and I didn't know what I needed to submit and ultimately I believe they accepted, as Klaus mentioned earlier – how did you put it when they accepted all the -?

CONVENTZ: Based on the proposed farm activity with predevelopment and based on your background.

BRYANT: Yeah, they accepted the material that we submitted as -.

CONVENTZ: They accepted it as required.

BRYANT: As required.

CONVENTZ: That is in the acceptance letter.

BRYANT: So they had us doing all this stuff, creating all this material, creating all these files, doing all this research, and they accepted it into the files. And they rejected us based on something totally different; they never took it into consideration -. And I spent, as well as the guys with me, spent hundreds of hours researching everything that we were going to be doing, and then to be rejected -, and they said that work was a waste of time, you didn't need to do it, we are rejecting you based on farming activity that is or is not going on up there. And I was, to be honest with you, I was kind of -, I was a little bit shocked; I mean, we did a lot of work and our desire is to go up there and farm. That's what I do. I desire just to go up there and farm and to raise koa. Right now, koa is one of the -, is very unique as a tropical hardwood right now because the rest of the world's hardwoods are plummeting in price because everybody is cutting everything down around the rainforests around the world. The koa has maintained its value because it's so limited in supply. I mean, teak has come down, every imaginable rainforest hardwood has come down in price because of what they are doing in Brazil and all over the world and in Africa, is just cutting it all down. But koa is unique and it's rare. And nobody, as far as I know there are very few people that are reforesting here. There are very few people that I'm aware of, if any. I think I'm aware of one in down south that is planning to reforest in koa. And since one of my desires has been to, is to a sustainable kind of living, in 1998 as a group we committed to the

project over on Maui, which we are still committed to; and we had the desire to create a sustainable habitat for cows and for trees, and show that the combination to work with alternative energy, we were published in this Japanese magazine because of our work – here is our house on Maui, it's a sustainable home that utilizes both wind, solar, bio-diesel. The whole home is off the grid, we grow trees, we have cows, we make cabinets. We are showing that the whole process can be done on one property of 335 acres now on Maui. And that's what we do, and that's what I want to do; that's what we desire to do – I've got to note to turn these magazines backwards.

CONVENTZ: May I ask one more question? I think we filled that point.

GIMPLE: Yes.

CONVENTZ: If hypothetically somebody would ask you right now in order to get the AFDA to comply with the memo for instance, in order to comply with what is necessary for you, considering the infrastructure, water, irrigation and rainfall distribution if you would have, and security in what I call remote control, if you plant up there without having houses there, four or five acres coffee so that the Planning Director could say, okay, I can live with that and approve it, what is the problem?

BRYANT: Well, you first would asking me to subcontract out the work that we do. I mean that's the design, is that we do that work and we don't pay someone else to do it. We would probably pay in excess of four times our existing cost to get that work done by another subcontractor, at least if not more; and that's based on what I understand in Maui and what I understand in Oregon. But I'm not even sure that it wouldn't be six times or eight times here because of the availability of people to do it, the limited number of people to do it. You're also talking about an enormous amount of work, preparatory work, that's going to take just to get the topographical done and the water survey done. There's a ton of work to be done up there to get started. We did the same thing on Maui, we did the same thing in Oregon. We went into the properties, we secured residences, we got people established, we started working and we began to plan. That's what we did in Oregon, that's what we did in Maui; and that's what we're going to do here, that's what we'd like to do here.

CONVENTZ: One last question.

GIMPEL: Go ahead.

CONVENTZ: What time span, I assume again, hypothetically, that in order for the Planning Director to approve your application that you would have to go first and say, as an example, five acres of coffee with irrigation, with engineering, with topo map, with huge water tanks. Just this grading and everything, what time schedule do you think that would take before you get then an additional farm dwelling to build the first house? .

BRYANT: I know it's going to take a couple of years to lay the infrastructure down to create an environment where you can plant coffee or tea, which is really what I want to do, and begin planting the trees with any, with a high enough percentage of success. If we just go out there and start planting, the trees are doing to die if they're not cared for, and it's going to be a waste of money and investment. We need on the ground,

everything -. It's kind of like you need to prepare everything to get started on your first tree. I mean that I think in life everybody understands, that you have to do that kind of thing. We're not going to go up to the property and throw stuff up there. I mean, before we took over the property there was a considerable amount of koa poaching going on, and they lost lots and lots of trees to koa poaching. That alone represents a security risk to whatever we do up there. We need to go up there to establish fences. We need to go up there and make sure the pigs go out. For us to go in and plant coffee and plant trees and then have the pigs come and start rooting and destroy our crop, we're going to be wasting tens of thousands of dollars. We need to be up there. We need to be managing the project. That's what our desire is.

I can't see outside of hiring a guard and hiring people to stay up there how we would accomplish that and then they have to be up on the property from a security standpoint as well as from a planting, observing, planning standpoint. I can't do that from there. I have, I actually have seven children and my wife is due in 11 days, and right now she's home and we're hoping for a healthy happy baby. But I can't be back and forth on an every other day type basis managing the product. I need to be there managing the product. That's what I did in Oregon, that's what I did on Maui, and that's what I want to do here. That's my function in the corporation.

CONVENTZ:           And do you have home schooling? You mentioned home schooling, you're a parent -.

BRYANT:            Yeah, Klaus had mentioned that the size of the dwelling was an issue. If that was a major issue I, of course, could cut it back. But we do have a gal that helps my wife and her husband helps me; and they have a child and she's expecting in October. My mother lives with us at least 8 months a year; and we do have the children which we home school which we need both facilities and rooms for them to be home schooled. I have an office. My wife has an office. So we have two offices, two home school rooms, anywhere from four to five additional family or pairs staying with us and I have my seven children, expecting my eighth. My oldest is 17 ½ and he plans on staying; and right now he's working basically full-time for me as the, over on Maui. He is just doing the grounds around the house, the barn, the shop, the Quonset hut; and he's just taking care of that and he actually works for me full-time now. That's our overall setup, that's why we need a lot of space. I mean I have a lot of children, and I hope I'm blessed with more. So that issue that Klaus did mention to me was an issue. I wasn't even aware that would be an issue when we originally planned the house. I had no idea. It's a nice sized house, there's a lot of room; but we do have a lot of people. And my mother-in-law may end up living with us as well.

CONVENTZ:           I think that's it for now. The Board will have other questions anyway.

GIMPEL:            Thank you. Cross-examination, please.

LUGO:                Will you pass me the microphone.

CONVENTZ:           Oh sure, sorry.

LUGO: Mr. Bryant, do you understand that in denying the application for the third and fourth farm dwelling the Planning Department hasn't told you that you can't farm? I mean -.

BRYANT: Well, effectively that's why I just explained in effect they have told me I can't farm. They said your investment here is in jeopardy and we may -. Based on my observation of the lack of understanding the communication and according to the Sunshine Law everything is supposed to be done up front in the State. Based on what happened to me I am not sure that no matter what I do I will be issued a permit to do anything. What has happened is they have led around the block, and around the block, and around the block, and around the block and in the end denied me on something that they never asked one question about.

LUGO: When you say that they denied you on something completely different -.

BRYANT: Yes.

LUGO: What are you referring to?

BRYANT: We applied based on my experience and my background for the additional third and fourth farm dwelling, not based on any other farming activity around. We were denied based on the lack of other farming activity around. In the meantime they had me prove my experience, they had me prove everything that I, -. It appeared that my application was being accepted as prima facie evidence. It appeared that I was being accepted for who I was and they were just asking me to clarify all the points. But in the end it was like a mockery of what I had done. And they said, oh, all this paperwork everything you've done, all the money you spent, consultants you paid, investigations that you've done, is irrelevant because from the beginning you didn't qualify, and we never bothered to tell you that. So what am I supposed to do? I'm a farmer. That's what I love doing. That's my passion. And I spent all this time, all this money, all this effort in order to get an approval based on what I submitted. And I thought in good faith they were asking me questions which I answered in good faith; and then in bad faith they rejected my application saying all the work you did is meaningless because we're rejecting you based on the lack of other activity up there, which there is activity up there. And 32 cows according to Klaus is more than enough activity to get other dwellings approved on one-acre lots that only have a half acre of coffee. So I just feel like I'm being held to a double standard when all I want to do is what the community wants me to do. I want to replant koa. How many guys that went before the Board here want to replant koa? We have evidence that they've done it before, so I -.

LUGO: Okay, let me ask you this. When -.

BRYANT: So the answer to the question is no. I don't understand.

LUGO: Okay. When the Planning Department asked you to provide information about your prior experience you, as I understand it, submitted information and they were asking you to resubmit -.

BRYANT: Submitted, and resubmitted, and resubmitted, yes.

LUGO: Okay. Why did they ask you to resubmit information? What did they explain -?

BRYANT: Each time they said it was incomplete, they changed their reasons. Originally it was, oh, that doesn't count, in Oregon, and then, okay, that doesn't count, in Maui, you've got to submit something in the County of Hawaii. They were going back and forth asking me one thing, asking me another, oh, you don't have a business license, oh, the business license you have now is not good because it's in the name of the Vice-President and now you need a business license in the name of the corporation. They went back and forth and back and forth, and we submitted everything they asked. We tried to provide in good faith everything. And according to the application, according to the written testimony we did provide everything that they asked. In the end they said if you don't give us an extension, they said to me through Klaus, we will deny your application. They, so they threatened me with threat, duress and coercion. They're threatening me that if you don't sign this application, this extension, we're going to deny you. And I called them, and I called them and said, hey, I want an explanation, what's going on, what do you need, what haven't I provided? I heard nothing from the Planning Director. He did not call me back, not the common courtesy to call me back. In my business when people call me I make the best effort to call them back.

LUGO: Let's talk about your prior experience a little bit. Can you explain what timber operation you have on Maui?

BRYANT: On Maui?

LUGO: I thought I heard you say that when you were -.

BRYANT: Okay, we were growing trees both in Oregon where we have reforested 4,000 acres -.

LUGO: Was that information provided in your submittals because I haven't seen it in the -.

BRYANT: Yeah, I mean, it's in pictures, it's in the thing, we have it. We operate a 6600 deeded acre ranch plus about a 4500 leased acres from BLM, which we worked with them on both reforestation and we worked with them on -. There's a 250-acre reservoir that the public likes to use to fish and to camp, we worked with them on that. We allow the public to come and fish and to camp.

LUGO: Could you point to maybe where that information is in the record on appeal?

CONVENTZ: It's in the application called the Maui Operations. First of all, we would have brought much more about Oregon if there was ever an issue, because it was outright denied that Oregon would be acceptable as the background, of substantial background of the applicant; and that is why there are 13 pages about a Deming Ranch, which is a cattle and timber operation. And as I mentioned also I've done over 40 AFDAS.

And there was a discourse, there was a discussion. If there was something short, we provided it and we bent over backwards. And to answer also counselor's question about the hours, that was not only for the first time that gross income but net income for 50 years of Koa in the development stage, in the actual harvesting -.

LUGO: Excuse me, I actually asked the question of Mr. Bryant so I'd ask that he respond rather than -.

BRYANT: Okay. Refer to me what you want me to respond cause we asked the question -.

LUGO: I was unclear as to -.

BRYANT: Oh, you want to know where the evidence is?

LUGO: What 4,000 acres of forest you're talking about.

BRYANT: Yeah, we provided all of the evidence that was asked for and no other evidence was asked for. We have pictures of the various dwellings, we have pictures of the replanted forests.

CONVENTZ: Thirteen of the 11,000-acre ranch, the soil -.

GIMPEL: Would you please allow the witness to testify. You're not under oath, Mr. Conventz.

BRYANT: Yeah, okay, well, Klaus knows the organization of this file much better than I do because he's the one who put it together. I assume, I take, I believe Klaus is telling the truth that there's 13 pages of information about that Ranch, and no other information specifically pertaining to that Ranch was asked for. I provided everything I was asked to provide. If there was some deficiency in it, no one ask me and told me, hey, there's deficiency here. In the beginning of this process when we first purchased the property I never expected to have to go through this entire process. It was really a new thing. According to Klaus, according to neighbors that I know, Dan Bolton, Dave Lucas, they all said, oh, just put your plan together, get started. Dan welcomed me up in the neighborhood.

LUGO: Okay, well, in any case you are aware of what the law is now?

BRYANT: Well, no -.

LUGO: And that the, on agricultural land you can only have dwellings that qualify as farm dwellings?

BRYANT: And there's, well, it definitely qualifies as a farm dwelling.

LUGO: Okay, but there is currently virtually no farm activity -.

BRYANT: Well, not according to -.

LUGO: Okay, there's 32 head of cattle, correct?

BRYANT: According to Klaus that's substantial farm activity that would allow most people to get at least a second dwelling on -.

LUGO: And the second dwelling which you are a party to that agreement, your signature is on it, that was approved, correct?

BRYANT: Well, actually, they don't have the final paperwork on that, correct?

CONVENTZ: It's not back from the -.

BRYANT: Yeah, the final paperwork -.

LUGO: Regardless of that, it was approved, correct?

BRYANT: To our best knowledge it hasn't been recorded because we haven't seen any documentation to that effect.

LUGO: An application -.

BRYANT: And that's how short a period of time ago it was. And I am aware that he has a plan and I am aware that he hasn't been able to implement that plan because we went through a wet season and a dry season and he hasn't had the time to do it; and it only happened a couple of months ago. So I'm supposed to wait four years or three years for him to complete his farm plan in order to start my own? Where does it say that in the law?

SCHOEN: Excuse me, if I could interrupt. Mr. Bryant, could you please wait for the question to be finished.

BRYANT: Okay, I'm sorry, I'm sorry.

SCHOEN: Excuse me, just wait for the question to be finished before you answer because this is being recorded and it's very difficult to record and then transcribe over each other's testimony. So please wait.

BRYANT I apologize. I'm sorry.

LUGO: Let me ask this question. You understand how the law views a parcel of land that has been CPRd, which is your -?

BRYANT: No, I do not.

LUGO: Okay. Your parcel of land that you own with four other owners is divided -.

BRYANT: Three.

LUGO: Okay, three other owners, is divided into five units. Now that whole parcel is allowed to have one farm dwelling. Do you understand that?

BRYANT: I can only -.

LUGO: And any additional dwelling needs to go through the application process. So not each unit is entitled to have its own first dwelling. Do you understand that?

BRYANT: I cannot accept, I cannot accept that as law because I'm not an attorney. I do not have an attorney counsel here and -.

LUGO: Okay, well, that's fine. That's your answer I understand.

BRYANT: And so, and so you're telling me that if it is law or isn't law is irrelevant I'm not going to say that I agree with it without having specific confirmation from an attorney who is competent in the law to discuss that matter with me.

LUGO: That's fine. I didn't ask if you agreed I just asked you if you understood. Okay.

BRYANT: Well, understanding would apply that I knew what I was talking about, and in that regards I wouldn't know what I was talking about to a fine enough point that legally I would be, have, you know, that I would know what he was talking about.

LUGO: Okay, I have no further questions.

GIMPEL: Thank you. Are there any questions from Members of the Board? Go ahead, Kim, Ms. Tavares.

TAVARES: It's actually for Planning Director or counsel. That was going to be my question about the CPR or condominium project. How did this piece of property get that kind of zoning in the first place?

GIMPEL: Let's direct these questions to the witness that just testified -.

TAVARES: Okay.

GIMPEL: We can ask questions regarding that, because this witness wouldn't know the answer to that.

TAVARES: Right, right.

GIMPEL: So let's reserve that question to a later witness.

TAVARES: Okay.

GIMPEL: Thank you. Anything else?

TAVARES: Not right now.

GIMPEL: Any other questions of this witness from the Board? Let me see if I have. Let me see if I understand this correctly. There is no dwelling on that particular parcel, is that correct?

BRYANT: When you mean particular parcel do you mean the entire 500 acres or the 200 acres that we control?

GIMPEL: Let's talk first about the 200 acres that you control.

BRYANT: Okay. As far as I know there is no building or dwelling on that property existing now.

GIMPEL: Okay. Is there a dwelling on any other part of those 500 acres?

BRYANT: As far as I know, yes, there is.

GIMPEL: How many?

BRYANT: As far as I know there is, I think there are three buildings, although I'm not positive of that; and I believe that they would qualify as a dwelling. That is my belief.

GIMPEL: So on the 500 acres there are right now three dwellings?

BRYANT: Well, it depends. What's permitted and what's up there might be two different things. I do not know. I have never been invited on the other property. I know that the people live up there, I know that they have water and power in some fashion. They've never shared with me the details. I've seen the plans that Klaus has gotten from the Planning Department.

GIMPEL: Okay. And your proposal is to build additional farm dwellings, not a first dwelling because there already is a first dwelling somewhere on the 500 acres, correct?

BRYANT: I would say we, our proposal is to build a farm that will include two farm dwellings.

GIMPEL: Two, and those would be additional farm dwellings because there is already at least a first farm dwelling on the 500 acres.

BRYANT: I would agree with that. But once again I am not qualified in -.

GIMPEL: Okay, okay, but I just want to get your intention -.

BRYANT: Okay.

GIMPEL: So I understand it. I'm not arguing with you. So your intention is to build a third and fourth additional farm dwelling because there is already a first dwelling somewhere on the 500 acres.

BRYANT: Property, and a second dwelling that was supposedly permitted in recording which there's no final evidence of yet.

GIMPEL: Okay, all right. Fine. That's what I wanted to clarify in my mind as we go forward with this evidence. And you've also testified that you're conducting reforestry operations both in Maui and in Oregon, is that correct?

BRYANT: Limited in Maui, based on the scope of the Oregon one, yes.

GIMPEL: Okay, thank you. All right. Are there any other questions by members of the Board of this witness? All right, thank you. All right, do you have any other witnesses or testimony, Mr. Conventz, to present?

CONVENTZ: No, except for what, if there's any questions to me or rebuttal -.

GIMPEL: We can get that till later on.

CONVENTZ: Yeah.

GIMPEL: All right. You may go forward with your case. Thank you.

LUGO: Okay, I'd like to call as my witness the Planning Director, Christopher Yuen.

GIMPEL: All right, Mr. Yuen. Do you swear to tell the truth, the whole truth, and nothing but the truth?

YUEN: Yes.

GIMPEL: Thank you. And can you give your name and office, please.

YUEN: Yes, I'm Chris Yuen. My work address is 101 Pauahi Street, Suite 3, Hilo.

LUGO: Can you start by just explaining the process by which your staff is trained to review an application for an additional farm dwelling?

YUEN: Well, there's a rule that relates to it and then there is basically a staff memo that tries to put some consistency into decision-making.

LUGO: Okay. And the basic policy of the memo, what is that?

YUEN: Well, I think it's easier to start, like step back for the whole picture and discuss farm dwellings and dwellings in the State Land Use Agricultural District, starting with the first dwelling. The way the State Land Use Law works is that on lots created in subdivisions before June 4, 1976 your first house can be just a single-family dwelling. It does not have to be a farm dwelling. It does not have to be used in connection with a farm. I could go through the legal sections on this, but this is a result of the way the

State Land Uses Law was written. So the result of that is that in subdivisions like Hawaiian Paradise Park or Hawaiian Ocean View Estates which were created before 1976 the person, the lot owner, can just put a house on it and they don't have any legal requirement to do any kind of agricultural activity. On subdivisions created after that, on lots created after that date, in those subdivisions, a lot is created by a subdivision, then that by, as a matter of State law any house has to be a farm dwelling; and the counsel gave a definition of farm dwelling earlier. It's a single-family dwelling that's located on and used in connection with a farm or where agricultural activity provides income to the occupant. So then, so with the first -, when someone comes in for a building permit for a home that has to be a farm dwelling, if it's the first dwelling on the property, the Planning Department simply hands the person a farm dwelling notice that tells them that the house is supposed to be a farm dwelling. There's no application, there's no representations by the owner as to what they're going to do. It simply notifies them of this requirement. So the first house is very simple in a lot like that. I need to back up and say that this subdivision, it's mentioned in the file, this lot was created by a subdivision in 1999. I was thinking of, the 500-acre lot was created by a subdivision on 1999. Hence, the first house has to be a farm dwelling. So, and then by County Zoning Code and by a rule that was enacted in a follow-up to that provision of the County Zoning Code, any additional dwelling, actually, in these old lots or in the lots created after 1976, is called an additional farm dwelling. All right? So, and that requires an application process; and in the end if it's granted a farm dwelling agreement that commits the applicant to doing certain things. So the point of a staff memo is provide some guidance for approving houses. And in line with the spirit of both the County Zoning Code and the State Land Use Law these additional dwellings are supposed to be justified by agricultural activity on the property.

The standard for the second dwelling is fairly simple and relatively easy. It's a day's work of, enough agricultural activity to justify a day's work a week. And as you'll read in the memo although the rule seems to imply that there already be agricultural activity we've been allowing second dwellings based on plans, planned agricultural activity there. So if somebody submits a plan that says that they will implement enough agricultural activity for one day a week, the Planning Department will approve it. And there's a requirement that they implement a percentage of a plan. There's a recorded agreement to that effect. When the first dwelling is supposed to be a farm dwelling then we say you should have two days because there should be a day for the first dwelling which was supposed to be a farm dwelling and a day for the second dwelling. So that becomes two days work to justify the plan for the second dwelling. We wanted to be more stringent past the second dwelling. When you have a second dwelling you're supposed to have, as in this case here, there are supposed to be two dwellings on the property that are farm dwellings where they are located on or used in connection with a farm or where agricultural activity is providing income to the occupant. So the memo says it should be based on existing activity. There are supposed to be two farm dwellings. If there are two permits for two farm dwellings there should be existing activity enough to justify, enough to show us a full-time worker, one full-time worker. There is an exception for, in a memo, for plans, for planned activity. That's to accommodate the situation where you have an established farming operation with a track record that comes into a piece of property and says we are going to go into this piece of property, we've been doing agriculture, we want to start off, and we're going to do a big project, and we want to start off with three houses for the farm workers or the manager or whomever; and that was the gist of that exception to this.

LUGO: Okay, I want to back up a little bit and have you explain the implications of the fact that this 500-acre parcel is – is it a community (sic) property regime – CPRd, and why, although the proposed 10,000-square foot house that Mr. Bryant is -, would essentially be his first house, because the co-owners are planning on building the first and second -.

BRYANT: The first house was built -.

LUGO: Okay, why -.

CONVENTZ: Or (inaudible) -.

LUGO: Just hold on. Can you explain how the CPR works on a 500-acre parcel with different units?

YUEN: Well, this was a practice that was common until the County actually passed an ordinance to stop it from continuing, where instead of subdividing a piece of property people would create a condominium property regime. And what this did was it avoided the subdivision process, but it created what was in the marketplace the equivalent of a subdivided lot. And people would accept it, and people were able to legally buy and sell a condominium property regime entity or unit, so that from the standpoint of the County this property was subdivided to a 500-acre lot. Then using the State process of CPRs which has a legitimate function in dividing up the ownership in multi-family buildings, for example, people would say this, they would create what's called a limited common element which is an area which is for the exclusive use of one owner in a condominium and they would, you had to have an apartment, and the apartment or the building would be typically, as in this case, a 6 by 8 greenhouse shed. And in this case there's a 100 acres, there's a map drawn that's shows 100 acres as a limited common element. So in this case they were, usually most of these were done as two-unit CPRs. It was very, very common in agricultural areas. This one is a little unusual. And to give a little background of why this owner is in this position, it's unusual that there were more than two, there were five in this case. From the standpoint of the County the owners, they have one lot, though what I said about the houses is exactly the same as not affected by the CPR. There's a first house on the lot, there's a second house on the lot, there's a third house on the lot; and we don't care that it has been divided into two, or three, or five CPR units. From the standpoint of Mr. Bryant, somebody else has a house and somebody else has a 100 acres but he does not. That's how the CPR works.

Now we will accept in determining, remember this, I talked for a minute about one full-time, enough ag activity for one full-time worker. We will allow the owner of Resolute's CPR unit to aggregate farming activity on the other CPRs and count it toward that one, that requirement. I mean that's sort of an accommodation that they can count farming that's being done on the other properties toward their requirement. But that's an accommodation. You know, because it's being done on the same lot, the same rationale really is from, the same rationale as saying, well, there's one house on the property already.

LUGO: Okay. So I just want to make sure that that point is really clear. The whole 500 acres is allowed to have the first farm dwelling and each additional farm dwelling needs to go through the application process?

YUEN: Yes.

LUGO: Okay. When the appellant submitted the application for the third and fourth farm dwelling they were told that because there's no existing activity the only way to have a third and fourth dwelling approved would be if there were, as you explained, an established track record of, you know, substantial agricultural experience. The appellant has suggested that they did submit that type of information but then were denied anyway. Would you be able to explain why the information that the appellant submitted regarding other farming experience didn't rise to the level to qualify them for that exception to the general policy?

YUEN: If you look carefully at what was submitted and what the plan was for this property, first the plan for this property is to have a limited amount of cattle, to plant, I believe it's 10 acres, in coffee as an experiment to see whether it will grow well at the elevation, the coffee would be interspersed with koa; and then there's a plan for additional koa plantings and possibly additional coffee plantings. The information submitted shows a large cattle ranch in Oregon that's for sale that's being managed by a different corporation with the same individual involved in the corporation. So that doesn't have to be a big, the fact that the same individual is involved in the corporation doesn't have to be a big issue. We can look at the individual being involved. There is nothing in there about a forestation project and certainly nothing in there, there's nothing in any of the materials that you've seen about having planted 4,000 acres of pine trees on that piece of property. Then there is a statement there's a project in Maui that's under a different corporation, Stream Resources, Inc., again apparently the same individual or individuals involved, that states without any specificity that they have I believe something like, they have some cattle on the property and that they're experimenting with timber trees, no specificity as to we have planted "x" number of acres of timber crops. There is a statement of having some acreage in ornamental palms; and that's it. So we have nothing that relates to what looks like a speculative venture in either coffee or hard wood planting in Kona.

LUGO: Looking at the language that's in the memorandum that has been referred to, Memorandum No. 01-21 says "The only exception for granting a third dwelling without any existing activity would be if there was a farmer with an established track record on other property who has firm plans for expansion on a new parcel that clearly justifies more than one new dwelling being built immediately." So clearly it's not just any other similar experience would allow for someone to fall into this exception and, you know, based on your experience with the Planning Department as the Planning Director what the appellant submitted really wasn't enough to qualify for this exception?

YUEN: Right. That was the rationale for denying the request for the third and fourth dwelling. I don't believe, I hate to absolutely say this but I don't believe that we have granted third dwellings based on this exception. We've definitely granted third dwellings based on existing farm activity.

GIMPEL: I'm sorry. Could you repeat the basis on which you denied this application again, could you say that.

YUEN: Two dwellings having, two farm dwellings having already been approved with minimal existing farm activity, is not enough showing to justify third and fourth dwellings based solely on prospective proposed farm activity.

LUGO: I think there has been a little bit of confusion about the status of the first dwelling so I'm going to ask you some questions about that and the building permit, if you have knowledge of that.

YUEN: Just from the building permit record, just from records and what's in the file.

LUGO: Okay. In the denial letter it was stated that, or one of the reasons discussed was that there was at the time the application for the third and fourth dwelling was being considered there was not existing a building permit for the first dwelling?

YUEN: Yes. I think it's, what is says, if I could look at the record, I think it's, if I could look at the denial letter. All right. Okay, this gets a little complicated and I don't know how complicated, I don't know how detailed it's, I don't know what level of detail is really relevant. But there was a building permit for three structures, and as I recall one of the three was a dwelling and the other two were accessories.

LUGO: I think they were described as pods that were connected.

YUEN: All right, okay, originally it was a three-podded dwelling, a dwelling and 3 parts connected by walkways. At some point, the permit was changed so that two of the pods were no longer described as part of a dwelling but were now agricultural buildings of some kind. Then the part for the dwelling itself was voided. But as stated here a new building permit application is under review. And so there was a re -, I think a reapplication for the dwelling I think in the same, the same building.

LUGO: Okay. I'm mainly asking this question to correct what I think might be two misconceptions, so you tell me if this is right. The appellant has suggested that the Planning Department was wrong in saying that there was no existing building permit during the time that the application was being submitted when in fact, okay, let's see, the application was submitted on January 17<sup>th</sup>, that was the resubmittal after the first one which was incomplete. The following month in February the existing building permit was voided, okay, this was the period of time that the application is being considered. In March the application is denied; and it wasn't until April that another building permit for that first dwelling was reissued. So just based on the record of what was happening with the building permit it is correct that during the period of time that the application was being submitted there was not an existing building permit?

YUEN: This is too, no, honestly this is a more detailed chronology than I am familiar with.

LUGO: Okay.

YUEN: I do believe that what's stated in the denial letter on, date of March 17<sup>th</sup> is accurate. At that moment there was not a building permit for a house but there

was, there was not a building permit for a house on the property but there was one under review in the County.

LUGO: Okay, okay. Then that's what I just said, okay -. The other thing that I want to ask you is appellant said that there is a first dwelling on the house. Would there be a difference between accessories that are, say, a carport and a shed, I mean that's not really considered a dwelling, right? That doesn't, that's -?

YUEN: Well, I don't know -. Sometimes people are living in things that may not have permits. I don't know what's actually up there. There are some pictures in the file that are actually not of the permitted dwelling, I think, but sort of looks like one. But all I, you know, I mean I think it's, and I don't think there's any point of relevancy here beyond saying that there's a building permit for one house, there's an agreement that would permit a building permit to be issued for the second house, that's the "Golden Bay Additional Farm Dwelling Agreement" that's in the record, and they're applying for the third and the fourth house. So I think we're all on the same page that they're being treated as the third and fourth house. If there was this question, you know, we've had situations where owners have argued about who had the first house and who had the farm dwelling, you know, in terms of when the building permit applications -, but I don't think that's what's being discussed here. And if there's, the building permit record is fairly complicated. We're not trying to pull a fast one on anybody. I think we all are in agreement that there's another CPR unit that has, either has or will have the building -, currently it does actually have a building permit for the first dwelling. There is the agreement which would allow the building permit be issued for the second dwelling. That has not been, the building permit has not been issued, and that, we are dealing with an application for the third and the fourth dwelling.

LUGO: Okay. I have no other questions right now.

GIMPEL: Mr. Conventz, do you have any cross-examination?

CONVENTZ: Yes, certainly.

GIMPEL: Go ahead.

CONVENTZ: One question. I met you in 2001, 2002 when you had introduced actually the memorandum and we discussed it in this very room, you and I were the only ones present, is that correct, among other things?

YUEN: Your memory is better than mine. I'm willing to take what you have to say -.

CONVENTZ: It's okay.

YUEN: I'm certainly willing to take your representation of it.

CONVENTZ: Question. Am I correct or do you doubt that I did approximately 40 additional farm dwelling agreements which are usually between one and three acres?

YUEN: Yes. You've processed, you've been responsible for making a lot of additional farm dwelling applications, yes.

CONVENTZ: Did we at any time discuss, and I did it with Larry Brown too, but he's not here, pursued the purpose of the memorandum, was actually that the previous administrations had really practically rubberstamped, you agreed and I agreed to that, yes, there was just too flimsy and -.

GIMPEL: Ask the question, let him answer it.

CONVENTZ: That is, I'm getting to that, sorry, sir. But the point is we had double density development and it was rampant -.

GIMPEL: You are testifying. Ask the question, let the -.

CONVENTZ: Was the purpose, okay, sir. I got the, was the purpose to deal with situations like 500 acres, was ever any, or was it for the small where we had double density zoning?

YUEN: Well, it applies, the concept of, the concept that you have to have a standard for the houses beyond the first house on the lot applies regardless of the lot size. The thrust, certainly if you're saying was the major concern the fact that there were many subdivisions where say to take a typical example the property is zoned for 3-acre lots was created as a 3-acre lot, was then CPRd into two units and then each owner comes in for the farm dwelling, the second owner comes in for the second farm dwelling, that was certainly the more important problem or the more rampant problem that I was trying to deal with in 2000, in the 2001-2002 period, certainly, yes. But the idea of having a standard that you apply to lots generally is also valid.

CONVENTZ: Was it not one of the main issues that there was an absolute minimum farm activity and independent from the CPR? For instance, for one-acre lots for the second house, no CPR, for instance -?

YUEN: Right. The farm activity applies regardless of whether there's a CPR on the property or not. The idea behind the memo was to have some guidelines and basic standards as to what would be expected.

CONVENTZ: Is it correct if you have 3 acres or 1 acre that a half-an-acre coffee could do because your memo allows 1 acre? Did you approve 1-acre lots with less due to the improvements with far less than 1 acre coffee even -?

YUEN: Well, the memo talks about 1 acre of coffee. I can't tell you that, I couldn't sit here and say nothing has been approved with less than that. I would say probably some things have been approved with less than an acre of coffee for the second dwelling.

CONVENTZ: Do you agree with the statement that 32 cows are nonexistent while in addition I have approvals from your office where we had 10 and 20 acres with 6 acre paddocks, easily the second dwelling, and in one case plus a half an acre of coffee supported

the third dwelling, while 32 cows are now nonexistent if we go for the existing farm activity?

YUEN: Well, I'm sorry, I don't quite understand -?

CONVENTZ: Ten acres -.

YUEN: Yes.

CONVENTZ: Take 10 or say 20 acres, 10 percent of the size here, 20 acres and one goes with half acre coffee and one goes with 6 or 7 cattle. Are you aware that they were approved for the first and second and third farm dwellings?

YUEN: Not for the third, no.

CONVENTZ: Yes, sir. Okay. That was my question. Next question is don't you think that is, do you really believe that you can compare 500 acres with one-acre lots, even for the second one, leave alone for 3 or 4 acres for a third house?

YUEN: Well, it's a much larger property, yes.

CONVENTZ: Are you saying that since it's 200 acres you would have to have 100 cows to allow the second or the third farm dwelling while 4 or 5 cows are okay on small properties? What I'm getting at is isn't there a basic difference between small lots and a certain flexibility?

YUEN: Well, no, the way you asked the question I understood you to say, to start by asking would you require more for the second dwelling for 100 acres than 1 acre. The answer is no.

CONVENTZ: Okay. You in your memorandum for the first time you asked for 8 hours, for the second 8 hours, for combined weekly man-hours of 16. Are you aware that there are hundreds of hours involved in this application?

YUEN: Yes. If implemented it would be a major farming operation, yes.

CONVENTZ: Do you usually ask from the applicant, since we have three, four different farm activities that not only does he have to make a man-hour calculation but he personally, for instance, how much he spends of his days on the cows, on the trees and on the coffee and further detailed on the development and the maintenance? Are you aware of that?

YUEN: Well, I'm not personally involved at the stage where staff is discussing with the applicant what kind of information should be presented. There is a wide range of different kinds of farming activities so you wind up asking different kinds of questions for different kinds of actions. From what testimony I heard, what I gather from it, is that the staff is trying to give the applicant a chance to prove that they can qualify. The staff is not trying to figure out, is not trying to find, turn up evidence to trip up the applicant. The staff is trying to elicit information that will enable them to pass the application.

CONVENTZ: Yes. Do you indicate in the memo certain flexibility?

YUEN: Yes.

CONVENTZ: So there should be flexibility between 2 acres and 200, should there be, and the development considering the infrastructure, what is necessary, the security, the remote location?

YUEN: Well, there could be, there, you have to look at each situation, yes.

CONVENTZ: Next question. Are you aware that I was asked to provide a calculation for man-hours, and I said it in your Exhibit No. 7 my letter to you done in a hurry December 20, 2007. It says under paragraph 2, "You want calculation for man-hours, and an income projection for the next 25, 35 years," since we had short-term, mid-term and long-term farm activities "separate for coffee, cattle, and ohia?" Are you aware of that?

YUEN: Yes. Well, it's in the record. I, you know, I don't have any awareness of it other than what's stated in the record.

CONVENTZ: Paragraph 3 says, "You want the man-hours also separate for infrastructure preparation separated by farm activity." Are you aware of that?

YUEN: Insofar as it's shown in a letter in the file.

CONVENTZ: You heard counselor indicating that the applicant did not sufficiently provide background of his farm activity. Are you aware that there was at one time what the memo says farm activity within the County? Then there are additional letters from your office which allow other comparable tropical areas, but out right deny anything beyond that, are you aware of that?

YUEN: I'm not sure what you're asking. I'm not aware of any farm activity shown by this applicant within this County. I'm aware of farm activity as shown in the record, as I discussed in the beginning part of my testimony, on Maui and -.

CONVENTZ: That was not my question. My question was -.

YUEN: Okay.

CONVENTZ: Councilor mentioned that we did not provide sufficient background from Oregon or Maui while in fact your office accepted only background from the County, within the County of Hawaii. May I draw your attention on Exhibit 7 of Planning Director, paragraph 4, "You want the applicant's background within county (we cannot provide that); I don't understand why only a tropical or Hawaii County background should be acceptable, however, I need that clarification, and if Maui activity is acceptable or not to you."

YUEN: You're quoting your statement.

CONVENTZ: Yes. That was a letter to you which you received on December 21<sup>st</sup>, and that clearly, not just indicate, that any further calculation or anything of background by Mr. Bryant from Oregon was inadmissible. Don't you think that is harsh?

YUEN: You use the word inadmissible in a little different way than I do. It's -.

CONVENTZ: Maybe -.

YUEN: It's, it's, you could -.

CONVENTZ: But I believe everybody understands. Sorry, go ahead.

YUEN: It's material he can submit, and I believe he submitted material. But we're interested in, as I said, in somebody expanding an existing farming operation. And what is presented on Maui is in the record. It does not show any specific acreage. If you're talking about either a, there's certainly no coffee farming operation. There's a cattle, there's a proposed cattle operation which would not be a full-time, would not indicate a full-time employment in the cattle portion of the operation. There's a proposed timber operation where what's described on Maui does not give any information about types of trees, acreage planted and, in fact, describes it as "we are experimenting with different kinds of trees to see what would be best."

CONVENTZ: Are you aware that we wanted to bring more back-up information, that it was not accepted because it was then changed; and you said in your own paperwork that absolutely County only. That is why I say in that letter you will see from the 21<sup>st</sup> if it is within the County, we can't provide it. We would have stopped at that time not even pursued it.

YUEN: Well, I believe after that you have a January 21, 2008 letter from Stream Resources Inc., which describes what you're doing on Maui, what your client is doing on Maui; and that's what I'm referring to. So you did submit information about the Maui operation; and I've tried to characterize it as best as I can as to what's there and, you know, frankly what's not there. What's not there, if you have an on-going active farming operation you have, if you have employees you have a schedule, you have an employment form that's a 943 on Agricultural Laborers; if you have a net income, you have a State General Excise Tax Net Income; if you have a, if you have planting expenses that are, and you don't have net income, you have a Federal, you have a Tax Statement that shows you're taking a loss on the property. I mean all those kinds of things -.

CONVENTZ: Had you asked for all that?

BRYANT: But you never asked for that.

YUEN: If you have a planting plan -. I'm -.

GIMPEL: Let the man testify and answer your question. Do not talk over him.

YUEN: I mean, and the other thing I mentioned, you know, you have an appeal here where you have an opportunity to present anything that you want as an exhibit.

CONVENTZ: You are aware that no consideration for Maui or, counselor mentioned that we failed to provide any background information or further background information about the Oregon land. But at the same time it was ignored because we have brought and you also accepted it with letter of 24 where the required calculation and document had been provided and there was strictly provided calculation of man-hours and strictly on future development, not on existing; and it was nowhere requested. If you know of anything where it was requested that I would have to calculate the existing farm activity, please let me know.

YUEN: Well, on submission of the farm plan, the farm plan if implemented has a lot of labor in it. Understanding the farm plan is relevant to understanding whether we're talking about a speculative venture or whether we're talking about an expansion of an existing farming activity. So there is a relevance to submitting a farm plan -.

CONVENTZ: What is then -?

YUEN: I know your complaint seems to be that you feel that that was a waste of time. Your application was ultimately denied so I can understand why you feel that way. But it wasn't wrong to ask you to submit the farm plan.

CONVENTZ: Can you explain then why we applied and it was accepted by your office for, based on the background, based on the applicant, based on his previous experiences and based solely on preliminary, first the development then the proposed farm activity? Are you aware of that?

YUEN: I'm not sure I understand your question.

CONVENTZ: That our application in your office was accepted on January 24, our application of, resubmitted application of January 17<sup>th</sup>?

YUEN: Yes. There was a resubmitted application, yes.

CONVENTZ: That was strictly on proposed farm dwelling activity and based on the background; and it was then denied based on a building permit issue on an existing farm activity or lack thereof and nothing else, not based on his plan.

YUEN: Well, I do think that you, you did have the memo that talks about criteria for a third or higher number of farm dwellings that talks about existing activity being the basic guideline for a third or fourth dwelling and a track record of an established farming operation seeking to expand as being an alternative. So if your argument is that you feel that the Planning Department didn't sufficiently let you know what kinds of things you should have submitted, first, I do think that the memo indicates where we're going with these applications, what kinds of things, it says that existing is important, that if you're going to go on prospective there is an exception but it's an expansion of an existing activity. So the track record and the history and background of the applicant is important. And so, you

know, beyond that, I mean, you do have an opportunity to present anything you have at this hearing.

CONVENTZ: My question was actually we have an application for a proposed farm activity with predevelopment and the denial is on existing. Are you also aware that the applicant offered to bring from Maui or buy them here 50 cattle to bring that in? And it is in your denial as well. But it is just set aside, not even really mentioned under further small farm, but not as a basic reason for your denial. Why didn't you say okay bring the 50 cattle in? And we have 82 cattle.

YUEN: Well, I'm sorry, I -.

CONVENTZ: I'm referring to your denial letter on the reasons, permit a house, existing farm activity -?

YUEN: Right. There isn't, you know, there are a number of things that could be done to increase the existing farm activity that would show us that you could have, that you have enough activity that would employ a person full-time. There are a number of things that could be done, like planting coffee either on this property or on another, or on the Golden Bay property that has the agreement for the second farm dwelling.

CONVENTZ: And you also say in your memo that actually CPR owners, since they have no input or influence on the other CPR, should not be held to that and under their own, by their own and under their own merits. So, not waiting now for the second addition of farm dwelling by Golden Bay to be built, when do we do that with hardwood. And my question is as I said, it's very easy and in 14 days we have to have half acre coffee planted on the one acre, approved for the additional farm dwelling coffee. Now you said up in Waiono 5-acre coffee in order to get then your okay to farm, how long do you think that takes considering infrastructure, irrigation, weed control, grading, and water tanks? How long do you think that takes?

YUEN: Well, that I don't know. But if you, I mean, I think you just told me that somebody could plant a half acre of coffee in 14 days and we'd accept 4 acres of coffee plus the cattle there as a full-time, as justifying full-time employment.

CONVENTZ: You have seen the aerial photos. Are you aware of the heavy brush, Christmas berries, guava? Do you consider from an area no problem to get 50 cattle in there, but do you believe that there is enough grazing for the 50 cattle?

YUEN: I don't know.

CONVENTZ: And do you believe that if somebody just stumbles in to get the approval that would do it? But it is not even mentioned. How do you explain that?

YUEN: Well, no, I don't think the third dwelling would be approved just on 80 head of cattle.

CONVENTZ: Why did you then accept the application based on the proposed farm activity?

YUEN: You mean the second, for the second?

CONVENTZ: For the third and fourth, Mr. Bryant's application. Why was it actually acknowledged as completed and as required? We bent over backwards. Why did we have to go through 18 pages of calculations for hundreds of hours only to accept it as a completed application then to be denied later on on something completely different?

YUEN: Well, you're, there are two stages here. There's a stage of accepting an application in the sense that it has been brought forward, and staff says you filled out all the blanks, you signed it. I don't recall if there is, I don't think there is a fee with the additional farm dwelling. I'm not sure. But you have submitted, we accept your application, your application is accepted. That does not mean that the thing you are asking for in the application has been granted. So the application was accepted, it was taken in, additional information was asked for; but the application is under review. And at the end of the review of the application the request for the third and fourth dwelling was denied.

CONVENTZ: Do you have any explanation why until the day of denial till noon I was still required and requested and called by your office to bring certain paperwork to clarify that those three incorporations are actually under the same presidency and the excise tax license and all that, while in fact I was called at 3 o'clock and was told that – are you aware of that – that I had to be there within 15 minutes or it would be denied? And the denial letter was already done on something else, while at the same time also as opposed to ask a week earlier, although we still had the, we were 50 days, 53 days versus 60 days under the rule for denial automatic. So we had a week more. Why is it that an extension was asked for because you were still considering the application and when I got in touch with you, or my client, you never returned the call? I talked to Pat -.

LUGO: At this point I'm going to -.

GIMPEL: There's about 17 questions in there. Please -. You're asking him what, was he aware?

CONVENTZ: Yes, was he aware?

YUEN: Let me, I was going to say that you asked me several questions. You know, I'll do my best to answer the questions as best as I can remember them in turn. The first question I think you asked was basically why the staff keep asking me for more information, in particular why would they want to verify that the same people are involved in the same corporation. And as I said earlier, staff is trying to verify the information that they're receiving, they're in receipt. So they're getting paperwork that shows here's Deming Creek, LLC in Oregon, here's Stream Resources Inc. in Maui and here's Resolute Inc. on the Big Island. What is the connection between the three corporations? So they're asking you to bring in some documentation that the same people are involved. Okay, that's an answer to the first question. And if you want to follow-up I suppose you can do that or I can go on to what I remember as being your next question.

CONVENTZ: Go ahead.

YUEN: Okay. The next question was, there's a question about my returning your calls. I did ask staff to return the calls for you. I'm sorry, I really cannot answer, I cannot talk to everybody personally that calls me. I have to delegate some matters to other people in the staff.

CONVENTZ: My question is if I want to talk to you as a -.

GIMPEL: Let him respond to your questions. This is getting argumentative. This is cross-examination. You are supposed to be asking him details about his direct examination. Okay, I'll let you respond further. Go ahead.

YUEN: Okay, I mean that was my response to the one about the call back. I'm lost, there was another question -. The time extension?

CONVENTZ: Yes.

YUEN: I'm aware that staff, my understanding of the situation was that staff was at a point where if they had to make a decision based on what they had in front of them it would have to be a denial. So they said, they communicated that to you, either you ask for a time extension and give us more information or we have to issue a denial.

CONVENTZ: Are you aware that the time extension was not, otherwise I wouldn't even have called you, was not for more paperwork. That was done. But that if you, you threw that actually back the question I had to you as an independent person in that case between staff, you and me. If you throw it back on that, what benefit do I have? And I cannot remember in your tenure that, I call you very seldom, that you even called back. So what should have been the benefit by you giving it to the people back who couldn't tell me in the first place how long the extension was, and for what, and that you were still working on it?

GIMPEL: What is the question?

CONVENTZ: That is the question, why he didn't return the call and told Bennett, the very people -.

GIMPEL: He already answered that question.

CONVENTZ: Okay.

BRYANT: May I cross-examine, Mr. Chairman?

GIMPEL: No, you have a representative here who does the cross-examination.

BRYANT: Can I ask him some questions to ask?

GIMPEL: Go ahead and ask your questions.

CONVENTZ: Mr. Bryant asked since it wasn't quite clarified at the time we initially applied, there was a building permit for a living quarters, at the time we reapplied there was

a building permit for a living quarters. Whether the living quarters are there or not doesn't matter why, but the permit was in place. And shortly after, and then it was voided, and shortly after your denial it was reissued. So there was not really a missing building permit, or was there in your opinion?

YUEN: In response to the questions my counsel asked I did my best explanation that I can give on the sequence that happened with the building permit for the first dwelling.

BRYANT: Mr. Chairman, is there a rule which says I'm not allowed to ask a question. I wasn't informed of that rule procedurally.

GIMPEL: You are represented by Mr. Conventz so -.

BRYANT: I just don't remember seeing any rules that say I can't. It appears there doesn't.

GIMPEL: Your representative is the one who is authorized to ask questions. Okay?

BRYANT: Okay, I wasn't aware of that.

GIMPEL: All right. Are there any questions from the Board of -? Do I have any recross?

LUGO: I have just a couple follow-up questions.

GIMPEL: Okay, go ahead.

LUGO: You touched on this in your cross-examination. But eventually when staff was asking for the appellant to provide more information, that was in, in your experience, that was in an effort to really see if the appellant had the, could provide the type of information that would allow for the granting of the application, to do a thorough investigation, and not to put the appellant through some sort of wild goose chase and create a lot of extra work and be misleading?

YUEN: Well, you know, it's certainly not the idea to make people run around and do things for no reason. And just, I'm not directly involved in the back and forth; but I'm piecing together what I'm hearing. And the typical reason for asking for more information is to try to see if there's a basis upon which the application can be granted; or if there's information there but if there's loose ends with it to try to verify that.

LUGO: Might there be any alternative routes that the appellant could pursue to have a building approved without establishing some farm activity right now that would justify a third and a fourth farm dwelling?

YUEN: Well, aside from implementing some farming activity on the property, by agreement with, there is the second farm dwelling which actually this corporation is a signatory to the agreement for the second dwelling. By agreement with that owner they

could, if they want to proceed before that owner, they can make an agreement that they get the second dwelling instead and that that owner gets the third and the fourth dwelling. That's a possibility. I have no idea what the relationship between the various lot owners is. And the other alternative is to subdivide the property. It's zoned Ag-20, it can be subdivided into five lots, it can be subdivided into more. There are conditions and requirements to make a subdivision. But if you make a subdivision then each individual has, say you made a 5-lot subdivision with the acreages that people have currently with a little bit of common elements. Under the zoning it is subdividable to that and you would have to go through a subdivision process. But then every lot, the first house on each property then is the first house. That's another alternative.

LUGO: No further questions.

GIMPEL: Okay. Are there any questions by anybody on the Board of this witness?

DRURY: I have.

GIMPEL: Mr. Drury.

DRURY: Mr. Yuen, in the memo on additional farm dwellings on page 5 it recognizes pretty clearly that, this is page 28 of the index, "The applicant's farm plan must be sufficient on the unit he or she controls, because the applicant has no right to use or control the other unit." So in writing the memo you were aware that people in CPRs would be in a situation where they could be later in the queue of farm dwellings but have no control over those who are ahead of them in the queue?

YUEN: Right. So what this allows is say Golden Bay which has a second dwelling, suppose they never do anything. All right? This person is, the owner of the third unit is not stuck forever, but there's still the third, but they can then implement ag on their unit and get the third dwelling.

DRURY: But the criteria are much more difficult if you're in the third place?

YUEN: It is more difficult, yes.

DRURY: It's just kind of a hypothetical but had Mr. Bryant submitted exactly the same package of plans, finances and experiences that he gave for this and he was in the second place, would it have been approved?

YUEN: Yes.

DRURY: Okay.

YUEN: For the second, yes.

DRURY: All right. So in that sense it's completely arbitrary that someone else got to the post first to ask for the second farm dwelling and that because this unit happens to be later on that the requirements were much more difficult?

YUEN: Well, it's not under our control who comes in for the second versus the third or the fourth. But the owners all have to sign the agreement for any of the additional farm dwellings. So this owner signed the agreement allowing the second farm dwelling.

DRURY: Yeah. That assumes, of course, perfect legal knowledge that a lot of farmers don't have, but that's not your problem necessarily. But the reason I asked all that was have you ever run into another instance where there is an agricultural CPR of five units?

YUEN: There's one in North Kohala that has seven, and there are some with three, the vast majority have two. I'd hate to say, you know, it's one of these things you'd hate to say never. But I do know there's one with seven, I know of the one with seven that had the same situation of multiple-dwellings, a desire for multiple-dwellings came up. I don't know of another that's five or more other than these two, than the two properties that I'm talking about.

DRURY: So this is a rare situation?

YUEN: It's a rare situation.

DRURY: So the main question is considering on the final page of, you know, Memo 121 they say "with applications that appear very close to meeting the guidelines recommend approval," that with all that background, did the staff take all this into account, that it's a rare complex situation, that these folks seem to have a fair amount of farming background, and taken those special circumstances into account?

YUEN: The number of CPR units is not a special circumstance. The fact that at some point they decided to make on their own, you know, five units, seven units or whatever does not give them a leg up in getting more houses on the property. Part of the reason why, and I've been telling you this based on a discussion I had with an attorney who's most active in doing CPRs, he said I only do two-unit CPRs because we know – and this goes from before my administration as far as the relative ease of getting a second house on the property – I know we can get the second house, so I only did two and I didn't get greedy and do -. You know, because you could do any number. The State, under, you could have registered a CPR, you could register 1,000 if you wanted -.

DRURY: No, but the whole point was that in considering this -?

YUEN: Yes?

DRURY: Particular application on this particular 200 acres in this 5 CPR there was no special consideration of the extra, special circumstances and the plan that was given?

YUEN: Not any consideration of the five being a special circumstance, no.

GIMPEL: Any other questions from the Board? I have a couple. In your letter of March 17<sup>th</sup> denying this application on page, it's page 4 of the letter, page 18 in the record, you indicate that "Upon review of your application," etc., you denied it based upon

the following findings and conclusions. And the first one puzzles me. It says that “No dwellings exist on the subject 500.734 acre subject property.” You testified that at least one dwelling already exists, in fact two, because this is the third and fourth.

YUEN: No, exist. I think the operative word is “exist” versus having a building permit.

GIMPEL: But on the 500 acres?

YUEN: No. There is a building -.

GIMPEL: I believe the record will show that there are other buildings.

YUEN: There are other buildings but there’s no, at the point when this was written, there was no building permit for a dwelling on the 500 acres.

GIMPEL: Are there any dwellings on the 500 acres? It says “No dwellings exist.”

YUEN: I think, the assumption here is that there are no legal dwellings on the 500 acres.

GIMPEL: If there are no legal dwellings on the 500 acres then why is this being considered as a third and fourth dwelling?

YUEN: Because there is a building permit for -. There was a -.

GIMPEL: For one dwelling. So this could be a second and third.

YUEN: No. There was a building permit application under consideration at that time for the first dwelling, and -.

GIMPEL: Okay, and this application then would be for how many additional dwellings?

YUEN: There was, and at the same time there was an additional farm dwelling agreement in place which had been signed by, which had been approved by the Planning Department and signed by all of the owners which would allow the second dwelling to be put in place. So as far as the statement here that no dwellings exist, there was no existing legal dwelling on the property. And we have to always deal with -.

GIMPEL: Okay. So we’re missing the word “legal” then?

YUEN: Okay, and we always, you know, we always have to deal with the concept that we are approving legal dwellings. And so when I said I don’t know, I don’t know if there’s a, if there may be an illegal dwelling, which makes it worse. You know, if there is an illegal dwelling up there it makes the situation worse, but -.

GIMPEL: Okay. But, so, what we're missing is the word "legal" in this decision? It should have said no legal dwellings exist on the subject 500.734 property?

YUEN: At the time, yes, there was no building permit in effect for a dwelling at all on the 500 acres. There was one under consideration at that time.

GIMPEL: I understand the issue about the building permit. But your findings quite specifically said no dwellings exist, and that's why I was wondering about it. All right. Then we go to the memorandum; and let me entertain a couple of questions or pose a couple of questions on that. Mr. Drury pointed out that page 7 of the memorandum, which was page 30 of the record on appeal, which appears to direct staff to use their discretion in evaluating applications and, significantly in my view, recommending approval when the applications appear very close to meeting the guidelines. That's what your memorandum said. Okay, and then it goes on to say "Existing operations should be given more leeway in this respect." What do you mean by existing operations?

YUEN: Versus planned.

GIMPEL: Where?

YUEN: Oh, on the, actually in this memo on the site.

GIMPEL: It doesn't say that.

YUEN: Well, you're -.

GIMPEL: Existing operations you've also construed as being operations in which the applicant is participating perhaps elsewhere in Hawaii County or in this case perhaps Maui County or Oregon?

YUEN: Well, as I discussed earlier, that's to deal with a situation where you have an established farmer who can legitimately present something and say we are going into this site, and here's what we've been doing, and here's what we're going to do; and it makes sense. It's, it's not a -.

GIMPEL: Okay. I understand it. So the existing -.

YUEN: Right.

GIMPEL: I'm sorry, I'm sorry. I shouldn't have interrupted. Go ahead.

YUEN: It's not a speculative venture. It's somebody who had, and this is meant to deal with -. This is just a scenario. You have a farmer who has, say they have a lettuce farm in Lalamilo and they acquire a site somewhere else on the island. They're going to go in and they're going to expand their operation. They want to have workers on site, they want to build houses for them on site, not to be tied in to -. What this memo would otherwise say is, oh, you're only doing this based on plans, you can't do it, we won't let you start off with three or four houses because you're only basing this on plans. You're showing that you've done it, you affirm plans to expand on a place where you need to do it -. And if

you look at what has been presented to us you have nothing that shows you that there's an expansion of an existing economic forestry operation.

GIMPEL: Okay. But the point is, is that the geographical location of the existing operations is not necessarily confined to Hawaii County. It could be Maui County, it could be Eugene, Oregon or somewhere like that, so long as it -. Your evaluation is based upon the application and the relevance of those existing operations, wherever they may be, to this particular thing. You don't limit the scope of existing operations. All you do is say give it more leeway in this respect. That's what your memo says. Now I want to get to what force this memo has. It was not adopted as a rule, correct?

YUEN: No.

GIMPEL: Okay. It is guidance to staff?

YUEN: Right.

GIMPEL: Okay And so you're telling staff, as I read this memo, these are the general things you should consider, and when you're talking about these applications, one, if it's close, say yes; and, two, especially when existing operations are involved, are basis for the application, give them more leeway. Is that a short way of capsulizing this memo?

YUEN: Those are, what you said are two valid points to the memo but there are other things in the memo.

GIMPEL: I understand that. But, I mean -.

YUEN: Those points, yeah -.

GIMPEL: That's what you're telling staff. You're giving staff a bunch of guidelines and saying, hey, okay, that's fine, but if it's close, say yes.

YUEN: Yes. Okay -.

GIMPEL: And if it's existing operations involved, give them more leeway. That's what you're saying?

YUEN: Yes.

GIMPEL: Okay. Thank you. That's my question. Any other questions from staff? All right, do you have any more witnesses?

LUGO: No.

CONVENTZ: No.

GIMPEL: All right. It is now 12:30. I propose we break for lunch. We will come back, hear final argument; and then it'll be decision time. Is that acceptable to everybody?

PARTIES AND BOARD MEMBERS: Yes.

GIMPEL: All right, we will break for lunch and we will be back here at 1:30.

DRURY: One thirty?

GIMPEL: Well, it's now 12:30.

DRURY: Yeah, can we make it in 1 hour with the restaurant?

GIMPEL: I think so, 12:45, okay, an hour and 15 minutes. All right? All right, we'll adjourn till 1:45. Thank you.

RECESSED The Chair called a recess at 12:30 p.m.

RECONVENED The meeting reconvened at 1:45 p.m.

GIMPEL: We'll now continue. We are now at the point of hearing final arguments, so let us proceed with Mr. Conventz, please.

CONVENTZ: Thank you, Mr. Chairman. I want to have a very short one in saying that the applicant applied for one thing and was denied for a different reason and that he bent over backwards and did what he could, can, and also considering the size of the investment, it's also the creation of the development plan, the General Plan. Do we really like and support this kind of application or not? If we go strictly by the letter of the memorandum you can decide any which way you choose or translate it or interpret it by the administration. And I think in that case the applicant's feet will really be held to the fire beyond limit. Thank you.

GIMPEL: Thank you for your brevity as well as your completeness. Thank you. Your turn.

LUGO: Thank you. I'd like to first focus the Board on what the standard of review here is. And as the Board is familiar per your own rules, you can reverse the decision made by the Director only if based upon a preponderance of the evidence this Board finds that: The Director erred in his decision, that the decision is in violation of the Zoning Code or other applicable law, and here we have State Law that comes into play, or that the decision was arbitrary and capricious or characterized by an abuse of discretion. And I think that the facts in the testimony that was presented today show that this was a decision grounded in policy, grounded in law, was a sound decision not based on any abuse of discretion. And we would ask that the Board uphold this decision.

I'm just going to go over briefly some of the law that comes into play here. By State Law Chapter 205 of the Hawaii Revised Statutes, in an agricultural district no dwellings are permitted unless they are a farm dwelling. And in order to ensure that that requirement is met the Director has established criteria for when a dwelling will be allowed in an agricultural district. And as you've heard the general rule is that any farm dwelling beyond

two will not be allowed unless there is actual on-going agricultural activity enough to support one full-time worker for each additional farm dwelling above the second. There is a very narrow exception. That's described in the memorandum; and that is when an applicant with an established track record of significant involvement in agriculture demonstrates an immediate need to have more than, to have the third or more farm dwellings. And the appellant was given an opportunity to provide this information because it clearly didn't fall into the general requirement that, you know, demonstrate to us that there is on-going activity. The only way that they would have justified the need for a third and fourth was if there was that other experiences. And you have the files in front of you. There just wasn't demonstration through actual evidence, through, you know, the real receipts and concrete information that would show that this party has the kind of experience that would justify an immediate need for a third farm dwelling and a fourth farm dwelling.

I also wanted to just address that the injustice or sort of inequitable result that one of the Board Members pointed out in the fact that because this is a CPR property, well, how is this appellant going to be able to build a house if the other approved dwellings, you know, they don't seem to be going anywhere. Well, under the law there isn't any exception to give special treatment to CPR owners. And, in fact, if the Director were to, you know, grant this third farm dwelling with no farm activity happening and no established track record but just because this is a CPR unit holder and it's the only way they can, you know, build the dwelling they want to build, that would be possibly an abuse of discretion, because that's not one of the criteria for an additional farm dwelling. You know the Director has suggested there might be alternative routes for the appellant to be able to build a dwelling, perhaps by seeking to subdivide the property. And, of course, the decision to deny the additional farm dwelling at this point in no way restricts the appellant from engaging in farm activity, getting the agricultural plans that he has proposed going, and then submitting for a third farm dwelling when there is actual agricultural activity happening that would justify. So, you know, just in conclusion the law is very clear on agricultural land, only farm dwellings are allowed. There is criteria established to ensure that that requirement of the law is met. In this situation the decision was based on sound policy and based on the law; and we ask that the Board uphold the decision. Thank you.

GIMPEL: Thank you. Are there any, I'll give one more chance for the Board to ask any questions that they want to ask, or we'll go into deliberations.

DRURY: Could I ask one question of Mr. Bryant?

GIMPEL: Yes, certainly, go ahead.

DRURY: I'd like to ask one question of Mr. Bryant as a witness. Mr. Bryant, during the, at any point were you informed by the County or by a real estate agent or by anyone that being the third person in line to request a farm dwelling would entail very different requirements from being the first or second?

BRYANT: The indication that I got during the process was based on historical execution of a plan that it wouldn't be that difficult, and that because we were doing so much of what the County plan wanted, everyone thought we'd be looked very favorably upon. So in terms of somebody coming to me and saying, look, you know, you're not going to be able to get this even if whatever experience you have or whatever situation, this is

very, very difficult to do, no. And I think at the time if Klaus has, I mean, he has done many of these appeals; and according to him he has never encountered the kind of hoops and hurdles that we were required to jump through in order to, at least appear to have the ability to get the dwelling. So -.

DRURY: When you signed off on the first and second farm dwellings as you had to do -.

BRYANT: I only signed off on the second one. I wasn't involved in the first one.

DRURY: So you're not aware of any possible ramifications of -?

BRYANT: We actually all got together -.

DRURY: Were you ever aware of any ramifications of signing off on that?

BRYANT: We actually got together with the realtor, and it was Dave Lucas, and we talked to Klaus, and we talked about was this a horse race to see which neighbor can get the first application? And the general consensus was, no, this wasn't a horse race, and if everybody work together, there shouldn't be a problem because everybody was going to go up there and execute their plan. So I would say no.

GIMPEL: Okay, are there any other questions? All right, then you have something you want to say?

LUGO: No.

GIMPEL: Okay, thank you. All right, I'd like a motion on this; and then we can discuss it among the Board. Can I have a motion either to adopt or to approve the petition or to deny the petition? Do I hear a motion?

TAVARES: Okay, I'll make a motion to uphold the Planning Director's decision on this, on this appeal based on the facts.

GIMPEL: Okay, is there a second?

MAEDO: Second.

GIMPEL: There is a second. All right, we can have discussion. You want to start?

TAVARES: Okay, yeah. You know, when I looked through all of the papers last night my biggest thing was the type of zoning that it has, the CPR; and I didn't know what that was about, but I know what that is about today. I was just wondering why it wasn't a subdivision. But do you understand the difference now between a subdivision and what you've actually got? I mean, that's the point here, is that doing - I don't know if I could really ask questions - but my point is that, you know, this is the way it's laid out. The County law, maybe it's not this way any more but it used to be this way where people can do that; but because of all the paperwork that I've read and what I heard today, we're talking

about apples and oranges when, you know, when we're talking about the parcel and the plan and, you know, the plot plan and all of this stuff. We're talking about the big 500 acres. And when you say but, but I'm only doing this, I'm only doing that on my part, but it has really got to be a big plan. I got that message personally from when I tried to do something like this with another piece of property for a community center. They still wanted to know what everything was going to be on that lot before you can do one thing. This one is one lot also. So that's why the decision.

BRYANT: Are you saying that what people plan to do -?

GIMPEL: We're not discussing this now -.

BRYANT: Okay, okay, I thought she was asking me -.

TAVARES: Sorry.

CONVENTZ: It sounded like she wanted information, sorry.

BRYANT: Sorry.

GIMPEL: Yes, okay, that's all right. Any other discussion by Members of the Board? Mr. Drury.

DRURY: Okay. For discussion purposes I don't think the Department can be faulted for not carrying out the law. On the other hand there is a, for me, troublesome element of arbitrariness to the whole procedure. One argument in that direction is there does seem to be a disjunction between the three criteria in the March 17<sup>th</sup> letter that laid out the reasons for the denial, basically no dwellings exist on the 500-acre larger parcel, there has been no farm activity in connection with the second agricultural dwelling, and what's the third, and there has been no evidence of existing agricultural activity on the subject property which supposed to, I would imagine, refers to CPR 3 and 5. There's a disjunction between that and the thrust of the application that Resolute submitted, apparently with encouragement from the staff. And that application seemed to be based on paragraph 6 of page 5 of the 0121 Memo, that you seem to be, if I understand correctly, shooting for the exception with experience being in that position of the third or fourth ag dwelling. My understanding is that you submitted background of experience and as well as fairly detailed plans with the understanding that you were going to make it through with this experience. So there is disjunction there; and I don't know enough about the process to know whether there was adequate informing both ways. Obviously I wish it had been settled but it wasn't.

The second thing that makes me uneasy is that the memo wisely sets out a fair bit of leeway in these situations and there seems to be giving people benefit of the doubt. The final page of it says if something is close then try to approve. And I'm not convinced that the discussions couldn't have gone further, that maybe there could have been one more irksome round of really show us your experience and then we'll give it a good consideration. So I'm not sure that everybody did everything they could. I do take seriously the General Plan injunctions that we do want to encourage diversified agriculture. This is obviously an outfit that has got some money and can invest in infrastructure, and they're stuck in a position because they are roped together with owners in the CPR. There's arbitrariness to that. They

are unable to determine the actions of the other owners and yet they are subject to the action or inaction of other owners that they can't control. So I would have said I would hope that the Department would have shown more mercy in maybe going through another round and see if they could work out some kind of settlement. So those are my reservations.

GIMPEL: Any other comments or observations? All right. I guess that falls on me to the end. I pretty much agree with Mr. Drury's observations in this. I think, first of all, we have to attribute the Planning Department staff's actions, of course, to the Planning Director; and I think the Planning Director's memo as we talked about earlier during the examination period clearly urges approval or recommendation of approval by staff if the case is close. And it also urges staff to give existing operations more leeway. Taken together and given the facts that have been put into evidence, including the size of the property in question, the scope of the planned operations and the extensive experience in agriculture of the applicant, albeit perhaps not in this precise type of agriculture but nevertheless agriculture, I think an immediate need could well have been found to be established. In fact, in my view it was established for a third and fourth residence.

So my feeling is that the Director's denial was arbitrary in this case had he given full weight to all of those factors and followed his own memo which said give them the benefit of the doubt, really. So those are my comments. Are there any others? All right, the motion before us is to uphold the Director's decision. So a yes vote would uphold the decision. Can we call the roll.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Ms. Maedo?

MAEDO: Yes.

KAWAHA: Mr. Drury?

DRURY: No.

KAWAHA: Ms. Hart?

HART: No.

KAWAHA: Mr. Hendricks?

HENDRICKS: Yes, yes.

KAWAHA: And Chair Gimpel?

GIMPEL: No.

KAWAHA: Chair, there are three ayes and three noes.

GIMPEL: All right. So the Director's decision is not upheld.

KAWAHA: Yes.

GIMPEL: All right. May we have a motion then to uphold the petition of the petitioner, the application of the petitioner. Okay?

DRURY: So moved.

GIMPEL: Any second?

HART: Second.

GIMPEL: All right, Mr. Drury would you please explain your motion.

DRURY: I just explained my reservations about the original motion. I think the County was not acting illegally. I don't think they were misusing facts. Perhaps they could have had more facts at their disposal. My wish was that there would have been given all the effort on both sides more attempt at a settlement. I guess it's too bad that it had gotten this far. So I made the motion because the other one got nowhere and this may also get nowhere, but let us find out.

GIMPEL: Any other discussion? Okay, let's call the question, call the roll please.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Ms. Hart?

HART: Yes.

KAWAHA: Mr. Hendricks?

HENDRICKS: No, no.

KAWAHA: Ms. Maedo?

MAEDO: No.

KAWAHA: Ms. Tavares?

TAVARES: No.

KAWAHA: Chair Gimpel?

GIMPEL: Yes.

KAWAHA: Chair, there are three ayes and three noes.

GIMPEL: Can I ask counsel what the effect is. We have neither motion passed. I've been advised that we should go into executive session. Can I have a motion to go into executive session, please.

HENDRICKS: So moved.

GIMPEL: Second?

TAVARES: Second.

GIMPEL: All in favor aye?

MEMBERS: Aye.

GIMPEL: Okay. We will be just a few minutes. Thank you.

EXECUTIVE  
SESSION

The Board went into executive session at 2:08 p.m. and came out of executive session at 2:18 p.m. by a motion made by Mr. Hendricks, seconded by Ms. Tavares and unanimously carried by a voice vote.

GIMPEL: We have been advised that we have no decision at this point so we are going to defer this matter to allow counsel to research the effect of the votes today; and we will defer it till our next meeting at which time we hope to have a definitive yes or no.

TAVARES: Next meeting or next Kona meeting?

GIMPEL: Next meeting in Hilo. I don't think anybody wants to wait too long. So can I have a motion to defer?

HENDRICKS: So move.

GIMPEL: Second?

MAEDO: Maedo second.

GIMPEL: All in favor aye?

MEMBERS: Aye.

GIMPEL: Any opposed? Thank you. This matter will be deferred until our meeting in Hilo which is August -?

KAWAHA: The 8<sup>th</sup>.

GIMPEL: August 8<sup>th</sup>. Okay. And we will deal with it quickly then. Thank you all.

BRYANT: Thank you.

CONVENTZ: Thank you.

LUGO: Thank you.

GIMPEL: Okay.

The discussion ended at 2:20 p.m.

Respectfully submitted,

Sharon M. Nomura, Secretary

A T T E S T:

Noriko Sauer, West Hawai'i Secretary