

been cited has the right to appeal this violation to a group called the Board of Appeals. It's something like the Planning Commission. It's a group that's appointed by the Mayor and really serves as a check or a control on the Planning Director running amok and violating the rights of the public. So the Board of Appeals can overturn the violation notice. They have a standard of review where if the Planning Director is clearly erroneous or the Planning Director has acted in violation of the law or acted arbitrarily and capriciously, the Board of Appeals can overturn that violation notice.

Now when the violation notice goes out, it typically will say you have, and let's take the example of a person running a business out of a residential area that they're not supposed to run. It will say you will have "x", you know, you must stop running your business. If you keep violating it from this date forward you will have a fine of \$100 a day. That's a typical violation notice. The law says that, currently the Zoning Code says that if you appeal that violation notice, the enforcement and the penalties are stayed until the appeal is finished. And so what happens is that if a person then makes an appeal they can continue running the business without accruing these fines until the appeal process has been finished at the Board of Appeals. This sometimes takes several months. So no matter how poor their case is they have an incentive to file the appeal. So we have noticed, and people start to understand this, that we get lots of appeals in this situation. So our proposal is that it changes so that the fines, if they continue to operate the fines will continue to run. Now if they win at the Board of Appeals, naturally they were right, we were wrong, there's no fine. But they have to take that risk if they choose to operate. So it doesn't mean, now they, and we don't ever -. You noticed my inspectors did not have guns strapped to their sides. We never actually go out with a gun and say you have to stop doing what you're doing. We give them a piece of paper that says you have to stop doing what you're doing. If it's an urgent matter, we can go to court, and go to court and get an injunction. So the person, you know, they have a choice. If they really feel that they are correct and they want to take that chance, then they can continue operating. Then they will accrue these fines if this passes the way it is. But it will take away this incentive of people to appeal just to buy time.

WATANABE: Thank you.

ALAMEDA: Question.

WATANABE: Mr. Alameda.

ALAMEDA: Sure, thanks. Thanks, Mr. Director. I like your way of explaining it, which allowed me some questions. So how much does it cost to appeal?

YUEN: It's \$250.

ALAMEDA: Okay. Now if they end up correct and the Department is wrong, do they get all their money back from the fines? Because they've got to pay up to the appeal, right, their proposal?

YUEN: We will never have actually the collected the fines pending the appeal. I mean, well, the fines will accrue.

ALAMEDA: Right. But they're not paying it since the fines -.

YUEN: They do not have to pay them.

ALAMEDA: Okay, so if they are correct they don't pay the fines?

YUEN: That's right.

ALAMEDA: Even if it's accrued it doesn't matter?

YUEN: Right. Then it will be wiped out.

ALAMEDA: Right. But if the Department is correct, then they pay those fines that are accrued?

YUEN: Right.

ALAMEDA: And the law is saying right now that once they appeal, fines, there's no accrument; so there's a big motivation for them appeal just so they can stop accrument. Is that correct?

YUEN: Right.

ALAMEDA: And this proposal, what you're sharing with us, would eliminate that option for them so that it will decrease the motivation just to appeal?

YUEN: Exactly.

ALAMEDA: Got it. Thank you.

WATANABE: Yes, Mr. Woodward.

WOODWARD: Yeah, Chris, I'd like to ask, if they appeal and fines have been set at a certain level and they lose their appeal, do they have to pay the fine between the time that they appeal and the time the appeal is judged in your favor or not?

YUEN: If they continue the activity, yes.

WOODWARD: Okay. So if they appeal it puts the fines on hold but it doesn't stop them so that if they lose the appeal they have to pay those fines for the days between the time that the appeal was filed and the time that they were denied?

YUEN: Right. If this amendment is passed, that's what would happen.

WOODWARD: But that's not what happens now?

YUEN: Correct.

WOODWARD: Okay. And also I think you ought to get guns for the inspectors.

WATANABE: I thought you were from California, not Texas.

WOODWARD: I lived 22 years in Texas.

WATANABE: Do we have any further questions on this? Mr. Iwashita?

IWASHITA: Thank you, Mr. Chair. So this language is it intended just to the fines or - ? I guess, cause I'm not really familiar with any other provisions of a violation notice. But is this just intended for fines or for other kinds of provisions?

YUEN: It would really just apply to the fines because we, to actually stop -. We give somebody a violation notice that says that they're supposed to stop. But if they continue they only, we have only two choices: One is that they're getting a daily fine; and then we can go to Court for an injunction. But we don't have the power to physically make somebody stop. But say the Court, if somebody doesn't stop, eventually you're in contempt of court and eventually there are sheriffs and there's police; and then you get to that point. So as a practical matter this only affects the running of a fine. Now, again, if we had something really urgent, even at the present time we could go and get an injunction against somebody. That, but if somebody, you know, we see a serious violation that we think needs to be stopped right away and we cite with a notice of violation and the person keeps doing it, if you think about the physical aspect of when somebody, you give somebody a piece of paper that tells them to stop doing what they're doing and they keep doing it and you'd have to take it to the next level, we don't have the ability to use force to make them actually stop.

WATANABE: So the only times you would it consider urgent is say like when you have irreparable harm or what is deemed to be irreparable harm to either the environment or surrounding neighborhood?

YUEN: Right, right.

WATANABE: Okay, okay. Yes, Mr. Iwashita.

IWASHITA: If the intent is that it's to apply to fines, then can we limit the language to fines? Cause, you know, some creative lawyer might come along and make some kind of argument that, you know, like Ivan. But if it's intended just to apply the fine aspect of a violation notice then it'd be my preference that the language be limited to that aspect.

WATANABE: Would you care to comment or maybe, cause we're not going to make a decision today, possibly think that over? And if you decide in favor maybe you could present a revision at the subsequent meeting in West Hawaii.

YUEN: We could have our Deputy Corporation Counsel look at that.

WATANABE: Take a look at that.

YUEN: Right.

WATANABE: Cause I'm not sure you want to make that call on the fly. Does that satisfy you?

IWASHITA: Sorry I made work for you, Ivan.

WATANABE: I beg your pardon?

IWASHITA: Just apologies to Ivan on the record.

WOODWARD: Mr. Chairman?

WATANABE: Yes, Mr. Woodward.

WOODWARD: If I might have one question. If we change the language on this, do we have to bring it back here again? I mean it has to go to Kona. If we change the language does it have to come back here?

WATANABE: It may, yeah. It may if the language is, I would say, substantive, a substantive change. It sounds like it may not really be a substantive change, if anything.

WOODWARD: Thank you.

WATANABE: And, again, I'm not sure that it would even come about at this point. I would leave it up to the experts.

WOODWARD: That would be Mr. Torigoe's call, I would think.

ALAMEDA: Mr. Chair?

WATANABE: Yes, Mr. Alameda.

ALAMEDA: Just one final thought on my end. So if the Board of Appeals, how many members on the Board of Appeals?

YUEN: Seven.

ALAMEDA: Okay. And if their job primarily is to keep the Director in check from running amok, they wouldn't consider this action on the Director's part as part of running amok, or would they embrace this action on your part, Mr. Director?

YUEN: Well, the Board of Appeals still has jurisdiction over the violation. So if they think it's not a violation, they can reverse the violation; and then there's no violation and there's no fine. The person can also appeal, for example, the amount of the fine. They typically appeal the whole idea of the violation. But the Board of Appeals can modify the Director's decision if, again, following the standard of review. If they find that it's arbitrary, capricious, violates the law, a clearly erroneous decision, they can reverse or modify the Director's decision. This doesn't take away that power from the Board of Appeals. All it does is if the Board of Appeals actually sustains the Director's decision then the person who has done the violation, if

they have continued to operate or continued in the violation during the time of the appeal they will have an additional fine that's accrued. So then they have to be careful about their decision to continue.

ALAMEDA: Okay. I was just thinking I thought it might, I like the proposal because it would limit the frivolous appeals, if you will.

WATANABE: Do we have any further -? Mr. Woodward.

WOODWARD: Well, I think it's basically a great idea. You can't use the Board of Appeals as an out if you've committed a violation to avoid the penalties; and that's what people are doing right now. You know, if the IRS tells you owe money, they are not going to wait, you know; and you've got to pay it now. Same thing should be true here, that is if there has been a violation you pay the fine. If, you know, you take it to IRS court, or to the Federal courts, and you win then the IRS gives you your money back. Same thing ought to happen here. If you go to the Board of Appeals and you win, then we give you your money back, not a problem.

WATANABE: Thank you. Do we have any further comments?

ALAMEDA: Well, I'm ready to make a motion or -. Are we deferring?

WATANABE: Yes, we would be deferring, so maybe it'd be simpler if we defer by consensus to continue to the next West Hawaii meeting. With that, if everyone is okay, all in favor of continuing to the next West Hawaii meeting, please say aye.

COMMISSIONERS: Aye.

WATANABE: Any opposed? Thank you. By the way, for the record there was no one signed up to testify for this.

The discussion ended at 10:05 a.m.

Respectfully submitted,

Sharon M. Nomura, Secretary