

MINUTES

PLANNING COMMITTEE September 3, 2008

A meeting of the Committee of the Whole of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Councilmember JoAnn A. Yukimura, Chair, at the Historic County Building, Room 201, Lihu'e, Kaua'i, on Wednesday, September 3, 2008, at 9:08 a.m., after which the following members answered the call of the roll:

Honorable Daryl W. Kaneshiro
Honorable Shaylene Iseri-Carvalho
Honorable Mel Rapozo
Honorable Tim Bynum, Ex-Officio Member
Honorable Jay Furfaro, Ex-Officio Member

EXCUSED: Honorable Ronald Kouchi

Minutes of the August 6, 2008 Planning Committee Meeting.

Upon motion duly made by Councilmember Rapozo, seconded by Councilmember Bynum, and unanimously carried, the Minutes of the August 6, 2008 Planning Committee Meeting was approved.

The Committee proceeded on its agenda items as follows and as shown in the following Committee reports which are incorporated herein by reference:

CR-PL 2008-6: on PL 2008-3 Communication (8/21/2008) from Committee Chair JoAnn A. Yukimura, requesting agenda time to receive an update from Dr. Karl Kim, University of Hawai'i at Mānoa, Department of Urban and Regional Planning, on the "Important Agricultural Lands" Kaua'i pilot study done for the State Land Use Commission.
[Received for the record.]

CR-PL 2008-7: on PL 2008-4 Communication (8/22/2008) from Committee Chair JoAnn A. Yukimura, requesting that the Planning Director be present to provide an update on the Kaua'i Important Agricultural Lands Study.
[Received for the record.]

There being no objections the meeting was recessed at 12:21 p.m. The meeting reconvened at 1:36 p.m., and proceeded as follows:

PL 2008-5 Communication (8/26/2008) from Committee Chair JoAnn A. Yukimura, requesting agenda time to receive a briefing from the Planning Director on the "Burmeister Enforcement and Settlement Agreement."
[This item was deferred.]

JOANN A. YUKIMURA, PLANNING COMMITTEE CHAIR: Mr. Costa, I'll suspend the rules.

There being no objections, the rules were suspended.

IAN COSTA, Planning Director: Good afternoon, Councilmembers. Ian Costa, Planning Director.

Ms. Yukimura: Good afternoon. Can you give us a rundown of the situation?

Mr. Costa: Okay, I will provide you with responses to the questions that was posed and a formal response reflecting the same will be transmitted. It's in the process of being signed. Okay.

Ms. Yukimura: Staff, can we have those questions circulated, please? Go ahead.

Mr. Costa: Okay. So, the first question was "Because the four single-family residences were built prior to 1972, are they considered legitimate non-conforming structures, i.e., they are considered "grandfathered"? And our response is that the subject parcel contained four single-family residences built prior to 1972, approximately circa 1965 based on our records gathered from the Real Property Division. When the CZO was adopted in 1972, the allowable residential density for that particular parcel based on the parcel size and the zoning designation of R-4 is three units, three residential units. Therefore, three units are considered conforming and one unit is considered non-conforming based on the provisions of Article 23, which is the legally non-conforming uses and structures section of the CZO.

Ms. Iseri-Carvalho: Question on that.

Ms. Yukimura: Yes.

Ms. Iseri-Carvalho: Are we going to do it question...

Ms. Yukimura: We can do it question by question. Does that complete your answer?

Mr. Costa: Yes.

Ms. Yukimura: Okay. Question from Councilmember Iseri-Carvalho.

Ms. Iseri-Carvalho: I'm sorry, you said there were four residences?

Mr. Costa: Four residences.

Ms. Iseri-Carvalho: And all were built prior to '72?

Mr. Costa: Yes.

Ms. Iseri-Carvalho: And now three of those residences are all right and one isn't. Which one isn't?

Mr. Costa: Well, upon adoption of the CZO that only allowed for a density of three...

Ms. Iseri-Carvalho: All right.

Mr. Costa: ...three are conforming to that provision and one, obviously there's four, is considered non-conforming.

Ms. Iseri-Carvalho: So, do you have the TMKs? Because I have TMKs, I believe in this...or is referred to residence 1, 2 and 3.

Mr. Costa: There's only one TMK that contains all four residences.

Ms. Iseri-Carvalho: Okay, and we talk about 1, 2 and 3...and 4, okay. So, which three were deemed to have been under the...I guess deemed as legal in a sense, based upon the '72 law.

Mr. Costa: Well, going in, we don't...when you determine that because of the density requirements, four exists, only three are allowed. We don't necessarily try and decide for the Department which one that is. I don't know if that's what you're inferring.

Ms. Iseri-Carvalho: That is. You know, how do you enforce a law against a party...

Mr. Costa: Well, if you have four houses on your lot and only allowed...

Ms. Iseri-Carvalho: Three. Okay. So, I guess and I'm not sure what the remedy is...

Mr. Costa: Yes.

Ms. Iseri-Carvalho: But normally when we talk about structures that are illegal, you know, especially on the State level, it's that, you know, remove the structure and we won't enter into negotiations because you never had a lawful permit allowing you to have that amount of structures to begin with.

Mr. Costa: Okay, but I'm not sure we're talking about illegal structures. We're talking about legally non-conforming structures.

Ms. Iseri-Carvalho: Non-conforming and conforming. Okay, we get three, right, that are...

Mr. Costa: Allowed by density, allowed by the code.

Ms. Iseri-Carvalho: Three that are allowed, okay. So, if they're not allowed, what is the term you use if it's not...

Mr. Costa: If it occurred before we created the law? Legally non-conforming.

Ms. Yukimura: So, it's allowed, but it's called non-conforming.

Mr. Costa: (Inaudible), otherwise known as grandfathered.

Ms. Yukimura: When it's a non-conforming use, it's still allowed, but it's not in accordance with the CZO that was passed after it was built.

Mr. Costa: Right.

Ms. Iseri-Carvalho: Okay, so what is...

Mr. Costa: A law adopted later...

Ms. Yukimura: Right.

Mr. Costa: ...is what rendered it non-conforming.

Ms. Yukimura: Right and you can't make a law retroactive. So, it's non-conforming, but it's not illegal.

Ms. Iseri-Carvalho: Wait. That's not my question. Okay, prior to 1972, how much structures was allowed on the property? Do we have the amount of...I mean, when...all structures were (inaudible)...

Mr. Costa: There was no...

Ms. Iseri-Carvalho: ...all at the same time, right?

Mr. Costa: There was no density limitations prior to 1972.

Ms. Iseri-Carvalho: Okay. Were these structures all built at the same time or do we have the dates on which ones?

Mr. Costa: Based on Real Property records, yes, there were four that were built...

Ms. Iseri-Carvalho: Same time?

Mr. Costa: Yes.

Ms. Iseri-Carvalho: And what year were they built? I know you said before 1972.

Mr. Costa: Based on records, approximately 1965.

Ms. Iseri-Carvalho: Okay. And then there was a law that came into existence in 1972.

Mr. Costa: Correct.

Ms. Iseri-Carvalho: That based upon the density, they were only allowed...

Mr. Costa: Which limited the property to three.

Ms. Iseri-Carvalho: ...three. Okay, but they had already received permits and everything you're saying was legal in 1965 when they were built.

Mr. Costa: In '72 when the code was adopted, yes, they existed legally.

Ms. Iseri-Carvalho: No. In '72 when the code was adopted you said three were allowed based on the code.

Mr. Costa: Prior to that adoption.

Ms. Iseri-Carvalho: So, prior to 1972...

Mr. Costa: Yes.

Ms. Iseri-Carvalho: ...and at the time you're saying they were built in 1965. In 1972 is when these three structures...well, four structures, three were deemed to be all right because you only could have three structures as opposed to four.

Mr. Costa: Right.

Ms. Iseri-Carvalho: Okay, so then what was the action of the Planning Department subsequent to this?

Mr. Costa: So, that would be deemed a non-conforming use. Residential use is limited to the number of dwelling units provided for in the CZO.

Ms. Iseri-Carvalho: Okay, so what...

Mr. Costa: Additionally, we then need to look at whether any of them are non-conforming structures. In other words, do they meet setbacks.

Ms. Iseri-Carvalho: So the first thing you looked at was whether or not there was a non-conforming...there was one that was for a non-conforming use, right?

Mr. Costa: Right, identifying the non-conforming use.

Ms. Iseri-Carvalho: We don't know which one. One of the four was non-conforming use.

Mr. Costa: Correct.

Ms. Iseri-Carvalho: Now, when there is a non-conforming use, what is the remedy to the land owner? How do they become conforming?

Mr. Costa: They can either remove it if you're talking non-conforming use...

Ms. Iseri-Carvalho: Right. We're only at use now. We're not...

Mr. Costa: A remedy could be a use permit for that...

Ms. Iseri-Carvalho: Okay, so obtain a use permit.

Mr. Costa: Usually it's a use that is no longer permitted, yeah, that is not permitted.

Ms. Iseri-Carvalho: Okay.

Mr. Costa: So, a use permit or as provided in Article 23, if that...they can maintain that use as long as that use isn't abandoned for more than a year.

Ms. Iseri-Carvalho: Can maintain the non-conforming use?

Mr. Costa: Yes.

Ms. Iseri-Carvalho: Okay. And the non-conforming use is the fact that it's being used as a residence?

Mr. Costa: Yes.

Ms. Iseri-Carvalho: Okay. So Article 23 can maintain the non-conforming use for a period of?

Mr. Costa: As long as that use has not ceased for a year or more.

Ms. Iseri-Carvalho: And who would determine whether that use is ceased or not? I mean do you guys actively monitor and enforce?

Mr. Costa: It's not always easy.

Ms. Iseri-Carvalho: So, I mean, they don't follow any document to show what the use is of that property?

Mr. Costa: We rely on other County records such as Real Property and whatever we can get together because we don't constantly monitor who's living in what.

Ms. Iseri-Carvalho: Okay or probably unless you get a complaint of some sort that you would go out.

Mr. Costa: That's right.

Ms. Iseri-Carvalho: All right. So now, after you determine this, you guys send out a Notice of Violation? Is that what you do?

Mr. Costa: Yes.

Ms. Iseri-Carvalho: And when did you send out the Notice of Violation?

Mr. Costa: I'm sorry, I...

Ms. Yukimura: Can we move on? That comes in one of the questions.

Ms. Iseri-Carvalho: No.

Mr. Costa: I'm sorry, I don't have the Notice of Violation.

Ms. Iseri-Carvalho: It doesn't say that.

Ms. Yukimura: Okay, I thought where the citation was, but you're right.

Mr. Costa: I can go get it. I have it downstairs.

Ms. Yukimura: You have it downstairs?

Mr. Costa: Yes.

Ms. Yukimura: Okay, why don't we keep going through the questions and then we'll...

Mr. Costa: Okay.

Ms. Yukimura: We'll ask you to get that.

Mr. Costa: "Under the law and your policy guidelines, what is the significance of the fact that they were built prior to 1980 and used for transient vacation rental purposes since acquisition by the owner? Didn't the 1980 date apply only to multi-family units?"

Ms. Iseri-Carvalho: Okay. Before that, there was a question that asked whether or not the non-conforming use was considered grandfathered, and your response to that was no, right?

Mr. Costa: Yes, legally non-conforming is otherwise known as grandfathered.

Ms. Iseri-Carvalho: I'm sorry. So, grandfathered as what? I mean, you have a definition of grandfathered?

Mr. Costa: No. It's called legally non-conforming.

Ms. Yukimura: Yeah.

Mr. Costa: It's become commonly known as grandfathered, but that's not an official term that is in the CZO.

Ms. Iseri-Carvalho: Is in anywhere? Okay. So, go ahead, so under the law, your policy guidelines, what is the significance...

Mr. Costa: "Under the law and your policy guidelines, what is the significance that they were built prior to 1980 and used for transient vacation rental purposes since acquisition by the owner. Didn't the 1980 date apply only to multi-family units?" And our response is there is no significance of the 1980 date which is applicable to the subject property. Section 8-17.5 of the recently adopted Ordinance 864 relating to Transient Vacation Rentals does reference September 22, 1982 as a cutoff date for timeshare and multi-family transient vacation rentals. The subject parcel is not used as a timeshare and is not a multi-family transient vacation rental. Therefore, the September 22, 1982 date is not relevant to the subject parcel.

Ms. Iseri-Carvalho: Okay, you have that typed out or written, your responses?

Mr. Costa: Yeah.

Ms. Iseri-Carvalho: Okay, can we get a copy of the responses then? And then for the public's benefit, I think you would want to read your responses, but at least it'll be easier for us to follow along.

Ms. Yukimura: Because we're only going...Is that your only copy?

Mr. Costa: Yes.

Ms. Yukimura: So, we're going to have to stop. Why don't we go on and have the copies made at the time where we break and we get all the information, if that's okay?

Ms. Iseri-Carvalho: I'm sorry? Well, I'd like the responses while I'm going through it.

Mr. Costa: Well, I'm reading it to you.

Ms. Iseri-Carvalho: So, if you want to take something else, right. But, I mean, we've got like several questions in one, you know, on this one at least in number 2, so I'd like to know what...

Ms. Yukimura: It would be useful if you could bring copies with you when you come.

Mr. Costa: Again, just because I didn't have it signed by the Mayor, I did not want to distribute.

Ms. Yukimura: I see.

Council Chair Furfaro: Excuse me just for moment, Councilwoman.

Ms. Yukimura: Yes.

Council Chair Furfaro: That is a good point that it is appropriate that Administrative Directives be signed off by the Mayor, but I would like to take the next 10 minutes as we previously were assured that by 2 o'clock we'd be on the tax bill. So, if we can go from there. If we have to recess, we will ask you to come back.

Ms. Yukimura: Are you able to continue, Mr. Costa?

Ms. Iseri-Carvalho: He gave his only copy to make copies. I mean...

Ms. Yukimura: Well, you know what? Why don't I recess...I mean suspend the rules and let anybody testify while we're waiting.

Mr. Rapozo: Thank you.

Council Chair Furfaro: Okay, that would work.

Mr. Rapozo: That's what I was going to suggest.

There being no objections, the rules were suspended.

Ms. Yukimura: Okay, so is there anybody from the public who wishes to testify? Ms. Diamond and Ms. Elmore will follow.

CAREN DIAMOND: Aloha, good afternoon, Caren Diamond. Thank you. As a coastal advocate for the community of Wainiha and Hā'ena, this has been on our agenda for quite a long time. It's been four years that we've waited for an answer from the Planning Department. Four years that this illegal fence and the illegal structures were being enforced on by the Planning Department. So, we do have some concerns about how this enforcement agreement came out, and to follow upon where you were, just talking about these non-conforming structures, these structures, I believe, are all non-conforming due to their flood...because they're on

the ground. And so the flood rules have changed so that you can't construct houses on the ground any more. So they're non-conforming for more than reasons of setback, you know, reasons of flood compliance, and I believe, one of the things for non-conforming structures is that they're not supposed to be enlarged. And so, what these structures did was not only was there supposed to be three of them, but there's four of them, but they enlarged the structures. And so the seaward structures were enlarged seaward with...and here's from the Building Department, which I'll give you if you would like, building plans, and it says they added about 7 feet by 40 feet of deck structure on the southeast side of the structure above the ground and then again they added another 6 feet by 10 feet of deck structure on the northeast side of the structure. So, you know, what these did was enlarge the structure on the ocean side.

Ms. Iseri-Carvalho: Excuse me, Caren, what residence number is that? Do you know? Because we got four.

Ms. Diamond: You know, I want to give these to you and you can look at them better. I got them right from the Building Department.

Ms. Iseri-Carvalho: Okay, I'll follow up with...

Ms. Diamond: It has a picture and maybe you can see where it is and I can finish...

Ms. Iseri-Carvalho: Okay, yeah, if you can finish.

Ms. Diamond: ...if you don't mind. Thank you. So these structures were enlarged seaward and the reason that matters is because the beach has disappeared there. I'm not talking about in winter. I'm talking about in summer. July, August, September, there is absolutely no beach at Oneone. There's several reasons why there's no beach. One is because the structure was enlarged in the seaward direction. The second reason is because vegetation was planted all over this beach. So when this landowner acquired this land, the first thing he did was cut the shade trees down, plant vegetation, put in a huge load of compost right in the ocean, right on the beach which washed into the ocean, and planted this whole area. So, we've lost the beach there. There is no lateral access at all there.

Now, I think the thing that we find really distressing about this project is this was an after-the-fact permit and I want to read you the original...This was what, Ian, I guess, couldn't find when they cited the owner for this house. And it says, this was December 1, 2006 and it says, "However, processing of these requests must be held in abeyance since the property is a shoreline parcel within a special management area of the County of Kaua'i and subject to the shoreline setback rules and regulations. Any development on such properties must comply with the rules and regulations which requires the submittal of a shoreline survey certified by the State. Upon receipt of this survey, we can then determine if your proposals are located within the 40-foot shoreline setback area."

Ms. Iseri-Carvalho: Wait, can we get a copy of that? And what is the date of that?

Ms. Diamond: This is December 1, 2006. In 2008, this was approved, but they never did get the certified shoreline and instead, there was this shoreline map by Ron Wagner which is right here, which is not certified, which shoreline follows dune crest. There is no certified shoreline. So while, you know, and I hope Ian will get into the contents of the enforcement agreement.

Mr. Rapozo: The non-enforcement agreement.

Ms. Diamond: The non-enforcement agreement, yes, more correctly. But there never was a certified shoreline and instead just this document, which is not a shoreline, and then...sorry. So, I did want to read from the enforcement agreement, if I can just take one minute to go get. Is that okay?

Council Chair Furfaro: It's not my...This is a Committee meeting, not a Council meeting.

Ms. Diamond: Sorry. I just wanted to...

Council Chair Furfaro: So, you have to get that permission from the Committee Chair.

Ms. Diamond: May I get a document?

Ms. Yukimura: Yes, go ahead.

Ms. Diamond: Thank you. Sorry.

Council Chair Furfaro: Have you found it?

Ms. Diamond: No...sorry, here it is. It's right here. So this is an enforcement agreement that...I'm not sure who put this enforcement agreement together. On the very last page, it says that Ian Costa acknowledged that he executed this document as his free act and deed of the Planning Department and it's signed by James Tagupa as well, which says it's approved as to form and legality. But I'm not sure if really the Planning Department ever really wrote this because it doesn't seem like a document that would have come from Planning and I'm going to read you just a few excerpts from it. Number 9 says, "Based on a survey of the crest of the beach berm fronting parcel 34 as of August 13, 2007, as shown on the survey map by Wagner Engineering Service, Inc., being Exhibit "A" hereto, Residences #1, #2, and #3 are situated considerably more than 40 feet from the crest of the beach berm." This is based on a survey. This isn't based on a certified shoreline. I have never, ever heard the beach berm used as a point of reference. It's certainly...our setback bill does not point of reference the berm. Number 12 goes, "It is the intention of the parties and underlying purpose of this agreement that the Residence #4 is too close to the shoreline and shall be removed at such time the crest of the active beach berm reaches Residence #4." Well, if it's the intention of this agreement that #4 Residence is too close, then why did they skip the shoreline certification? Whose interest is it to skip that shoreline certification? And I want to say that the last shoreline certification for this parcel was in 1980. Ron Wagner puts this parcel right now at 39,000 square feet and in 1980 the parcel was 24,321 square feet, and in 1979 it was 21,828 square feet.

Ms. Iseri-Carvalho: I'm sorry, you went too quickly there.

Ms. Diamond: Sorry.

Ms. Iseri-Carvalho: Could you give me the square footage again for the various dates you just ran down.

Ms. Diamond: Sure, yes. In 1979 it was 24,321 square feet.

Ms. Iseri-Carvalho: Okay.

Ms. Diamond: 21,828 square feet. In 1980 it was the same. In 1979 it was

Ms. Iseri-Carvalho: I'm sorry. You said 1979 it was 24,321 square feet.

Ms. Diamond: Yup.

Ms. Iseri-Carvalho: 1980 was the same.

Ms. Diamond: Right.

Ms. Iseri-Carvalho: What was the next date?

Ms. Diamond: 21...1979...'78, sorry.

Ms. Iseri-Carvalho: Oh, okay, '78. It was...

Ms. Diamond: 21,828 square feet.

Ms. Iseri-Carvalho: All right.

Ms. Diamond: And now, it's miraculously 39,000 square feet.

Ms. Iseri-Carvalho: And what date is that?

Ms. Diamond: That's by Ron Wagner's survey and the one that the Planning Department used for this application, which is dated August 13, 2007.

Ms. Iseri-Carvalho: And give me that date.

Ms. Diamond: August 13, 2007.

Ms. Iseri-Carvalho: And how much was the square footage?

Ms. Diamond: 39,000 square feet. That's the kind of thing that happens when you don't have a certified shoreline.

Council Chair Furfaro: Excuse me, excuse me, Committee Chair. The timer did go off. I...

Ms. Yukimura: Yes.

Council Chair Furfaro: I'm not sure exactly...no, we had announced to other members here we've got about 20 minutes, 20 people from the audience signed up to testify. So, it is your intention to let Caren continue to give us some questions that we can follow up later with the Planning Director? Is that your intention? Okay.

Ms. Yukimura: I'd like to have you finish your testimony. Can you sum up?

Ms. Diamond: I am. I am just about done. Actually this is really the most crucial aspect of it is how the County can approve development, after-the-fact development with such poor standards and such a disappointment to the public and such a poor outcome because these four cottages are being used for vacation rentals. They advertise as business; they advertise for honeymoons; they advertise

for small business functions; they advertise for retreats and reunions. This is a business happening far too close to the ocean. And when the waves come up, I guess the Planning Director won't be there, but somebody's going to be, and this County...we would hope doesn't really do their after-the-fact permits in this way where a landowner can get whatever they want just by constructing it and then coming afterwards and getting it all approved.

Ms. Yukimura: Thank you. I'm going to ask for questions and then we're going to cut this off and go into the real property taxes.

Mr. Rapozo: Okay, I understand. I just got one real question because I know Caren and I'm not sure how long the real property tax thing is going to go.

Ms. Yukimura: It's going to be a while.

Mr. Rapozo: I don't know when this will come back on today. Caren, I hope you can stay. I know it's tough for you. But the improvements and I ask it because I know you're very familiar with what's going on down there. They have a...They've stated the value of these improvements, these after-the-fact improvements, at \$96,500. That's close to \$100,000, which would change the status of the permit. Do you believe that they have a wooden fence, a chain link fence, increase in sizes of four residences and cutting a laundry, all of those things and they're claiming the value is \$96,500. Is that accurate from what you've seen down there?

Ms. Diamond: The four cottages went from being run-down cottages to being restored to like new. And if you can restore four cottages for less than \$95,000, then the answer is yes. And if you can't, the answer is no.

Mr. Rapozo: Yeah, okay. And it's just interesting that because it now makes this SMA permit a minor.

Ms. Diamond: Right.

Mr. Rapozo: But I'm looking at the estimate that was provided by the construction company whose address is 3135 Akahi Street and I also look at the address of the attorney that prepared the application and it's 3135 Akahi Street. You know, I'm kind of suspicious that in fact, and I'll ask Ian when the inspectors went down to find out, in fact, if that is an accurate number. Because it really changes the application process tremendously. But thank you very much for your information and we'll talk, Caren. Appreciate that.

Ms. Diamond: Thank you, thank you for the time.

Ms. Iseri-Carvalho: I got a question. We have been talking about the residences 1, 2, 3 and 4. So, is it that this laundry building is a separate structure from these residences?

Ms. Diamond: I think so.

Mr. Rapozo: Yeah.

Ms. Iseri-Carvalho: And...well, we'll ask Ian because it doesn't seem to indicate whether or not there were the necessary permits with respect to the laundry building and I don't know when the date of that laundry building was constructed. Do you know that? I mean, was it recent, was it back?

Ms. Diamond: I do remember a laundry building being there in 1980, but I don't know if it was in its present form that it is because all the buildings have been redone.

Ms. Iseri-Carvalho: Okay. Well, we'll clarify all the structures that are there and the wall and the gate and all of that with Ian when we come back and go into the agreement. So...

Ms. Yukimura: Thank you. Any other questions of Ms. Diamond at this point? If not, thank you very much.

There being no further questions, the meeting was called back to order.

Ms. Yukimura: We're going to take a recess in the Planning Committee so we can go to the Real Property Tax Bill now because we know there are a lot of you in the room who have come for that bill. And so, I declare the Planning Committee in recess.

There being no objections, the meeting was recessed at 2:05 p.m. The meeting was reconvened at 10:32 p.m., and proceeded as follows:

Ms. Yukimura: We have one last item. I'm going to recommend deferral on this Burmeister 2008-5 and I was wondering if I might ask Councilmember Rapozo if he might meet with the Planning people beforehand with Caren Diamond, with or without Caren Diamond, kind of distill the issues like Council Chair does with the Finance on the audit, and then bring it back with the issues that are really...

Council Chair Furfaro: Compressed, condensed.

Ms. Yukimura: Yeah, is that possible?

Mr. Rapozo: I, I'll try. I mean, you know, trying to track down Ian...

Ms. Yukimura: I mean we get real clear about which are the houses and what are the issues that we disagree...

Mr. Rapozo: I mean there's some bigger issues I guess. For me, it's a...as I read the...what they call an Enforcement Agreement which is actually a non-enforcement agreement, really that bothers me. And so I don't have a problem meeting with...

Ms. Yukimura: And I think the crux came down with they were afraid to assert it in court. They were afraid to assert something in court.

Mr. Rapozo: That was one of the responses that I got, was that the reason they didn't pursue was simply because they didn't think a judge may agree with them and that's not for them to decide.

Ms. Yukimura: And if that's the...it gets distilled down to that, I have no objections. In fact, I think we should have the discussion here on the table. But just verifying, you know, all the different pieces of it might help if you could do it off-line.

Mr. Rapozo: I have...you know the concerns, really, I think and Caren made mention of one which was pretty critical I think, the certified shoreline was not required.

Ms. Yukimura: Right.

Mr. Rapozo: That's a big one.

Ms. Yukimura: But it was required for a renovation, right? There was...

Mr. Rapozo: Well, that was the recommendation.

Ms. Yukimura: Was it a new structure?

Mr. Rapozo: Yes and at the time the violation was issued, it was required, and it was never done. And, so, you know, and then I think the construction seaward of the structure is another big issue. What bothers me is that settlement agreement required and if you read it, it says that the permits shall be issued after-the-fact. And that was part of the so-called Enforcement Agreement and that bothers me because now that mandates the Planning Department to issue permits after-the-fact and we are stuck with that agreement. It's an agreement that was made between the Planning Department and the developer or the violator and signed by the County Attorney's Office.

Ms. Yukimura: That's right, that's right.

Mr. Rapozo: So that bothers me. And I, you know, it's almost like we're condoning the illegal behavior, even though this Council (I can't remember if it's this Council, but one of the Councils) passed that zero tolerance resolution which carries no real weight, but expresses our concern about allowing after-the-fact permits allowing structures that affect our beaches and coastlines. That is my concern and that's why I appreciate you putting it on the agenda because I think the public needs to know what goes on and that...I walked that beach. I actually visited that wall years ago before the structures were built or modified. And what bothers me is that when the big debate over the wall was being held, when all that controversy in the community, that owner still went out and made more construction without permits. So, for me it's...and we allowed that to happen and for whatever reason...now we've entered into an agreement that we're pretty much bound by, in my opinion, and I'm actually shocked. I didn't...if you noticed the date of the agreement, the signature was this year.

Ms. Yukimura: And so, maybe, you know, the key questions are on what grounds did you sign that agreement. I mean, what was the Planning rationale for doing that and why was the certified shoreline not required. So, maybe distill it down to three questions and then let's put it...

Mr. Rapozo: And the other bigger question that...I don't know how we'll resolve this. I guess we gotta go out and...I'll go check with Planning. Is the estimate on the...or the declaration of the amount of repairs under a \$100,000 making it a minor permit versus a major?

Ms. Yukimura: Right, right.

Mr. Rapozo: I mean if we...I don't know of any construction projects today that go for under \$100,000 and...

Ms. Yukimura: And I think that problem comes up over and over again because they accept the valuations of the applicant.

Mr. Rapozo: And I believe there is a major problem with that, and I believe that's a problem that sanctions in order for the Department because if in fact we just take it for face value so we can stop a major permit from being required and we go with the SMA minor, you're totally circumventing the entire process.

Ms. Yukimura: Right.

Mr. Rapozo: And that warrants some serious...

Ms. Yukimura: That certainly is worthy of discussion.

Mr. Rapozo: Yeah.

Ms. Yukimura: Okay, so maybe if you can get the three or four key questions and then we can focus on that in the next meeting?

Mr. Rapozo: I'll try, I'll try.

Ms. Yukimura: Councilmember Iseri-Carvalho.

Ms. Iseri-Carvalho: I think the agenda item is limited in that I think the bigger question is what is the Planning Department's policies and procedures on after-the-fact permitting. Many times during the budget we kept asking that question and they said they don't do after-the-fact permitting. I mean, basically, that was the answer. I don't believe Ian ever admitted to actually doing an after-the-fact permit. But we've asked that question every budget because it gets raised all the time from the Hanalei community. So, I guess for me, I would like to see that bigger question, you know, and how many times has it happened if it has happened because my understanding was that it has never happened.

Ms. Yukimura: And so maybe that's another...

Ms. Iseri-Carvalho: That's another issue.

Ms. Yukimura: ...agenda item. So if you want to craft an inquiry or request for a report from the Planning Department about what their policy is to after-the-fact permits, maybe we can do that.

Ms. Iseri-Carvalho: And then the other question, you know, raised by Councilmember Rapozo about the valuation, etc., we do have a Sea Grant Position now that we can utilize for these kinds of purposes. And one of the things that was raised in the interview with or I guess it wasn't an interview, but in a meeting with the Sea Grant person was that that was one of the primary, I thought, responsibilities would be to update the rules and procedures so that it could allow us more teeth and not have the County Attorneys come in and say, well, we're afraid to lose in court, so let's just or bring it to court, so let's just agree to what you want.

Ms. Yukimura: Uh-huh.

Ms. Iseri-Carvalho: You know and try to cut down on also the other litigation. So, you know, I think...I don't know how the Planning Department is utilizing that position, but clearly that Sea Grant was meant to be an independent research position that provides the kind of expertise and guidance into updating those rules of the Planning Commission.

Ms. Yukimura: Okay. So, you'll craft something.

Ms. Iseri-Carvalho: Draft those two things.

Ms. Yukimura: So with that, if there's no further discussion, the Chair will entertain a motion to defer.

Upon motion duly made by Councilmember Shaylene Iseri-Carvalho, seconded by Councilmember Rapozo, and unanimously carried, PL 2008-5 was deferred.


There being no further business, the meeting was adjourned at 10:40 p.m.

Respectfully submitted,

Wilma Akiona

Wilma Akiona
Secretary

APPROVED at the Committee Meeting held on October 1, 2008:


JOANN A. YUKIMURA
Chair, Planning Committee