

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
NOVEMBER 21, 2012**

**(Approved: 1/10/13)**

**A. CALL TO ORDER**

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Kevin Tanaka at approximately, 1:31 p.m., Wednesday, November 21, 2012, in the Planning Department Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Island of Maui.

A quorum of the Board was present. (See Record of Attendance.)

Chairman Kevin Tanaka: Good afternoon. I'll now call the meeting of the Board of Variances and Appeals to order. It is now 1:31. We have a quorum of six of us here. First item on our agenda, Trish?

**B. APPEALS**

1. **To determine a hearings officer to preside over the following matter, and conduct a pre-hearing conference, should the Board designate itself to hear the case:**
  - a. **RODNEY KILBORN appealing the Director of the Department of Parks and Recreation's decision to not allow a stand up paddle surfing event at Hookipa Beach Park located off of Hana Highway, Haiku, Maui, Hawaii; TMK: (2) 2-5-004:025 (BVAA 20120010).**

Ms. Trisha Kapua`ala read the agenda item into the record.

Ms. Kapua`ala: And I'd like to introduce the appellant, Mr. Rodney Kilborn.

Ms. Mary Blaine Johnston: Deputy Corporation Counsel, Mary Blaine Johnston, representing the Director of the Department of Parks and Recreation in this matter. We're here today . . . Mr. Kilborn has filed an appeal. We need to get a hearing date for the appeal and we're asking that the Board appoint itself as the hearings officer. The case is that Mr. Kilborn had wanted to put on a stand up paddle contest at Hookipa in mid-February and was turned down. So time is kind of time critical, and that's why we're asking the Board to take this over to hear it as quickly as possible. If we go through selecting an outside hearings officer, there's not only the cost but there's all the delays inherent in that. And I think Trisha had said that the December 13<sup>th</sup> meeting is available, if that's OK with all of you.

Chairman Tanaka: OK. So you are both agreed that the 13<sup>th</sup> would be . . . ? OK. OK. James, as far as what you are describing telling me, we need to . . .

Mr. James Giroux: If the Board decides to take on the hearings officer's role, all we need to do

today is to figure out the prehearing schedule. If the parties are ready to agree to a prehearing schedule, we can do that today. Basically, we need the witnesses . . . witness lists, exhibit lists, and exhibits to be exchanged by a date certain. And that would be determined on the record. And if there's any motions that need to be filed, that also should be determined by a date certain. So, Trish, if there's dates, maybe we can agree on maybe a week out, 14 days before. We should have a conversation with the litigants to see what would work best.

Chairman Tanaka: Typically, would it be a minimum of seven days before that December date?

Ms. Kapua`ala: Fourteen days, 14 or 15 days. So what would be acceptable for us would be Thursday, November 29<sup>th</sup> or Friday, November 30<sup>th</sup> for the witness list, exhibit list, and exhibits to be due, submitted to our department by 4:30. One original, plus 15 copies, please. And the staff would also like to request that the applicant use alphabetical exhibits, and that the County use numerical.

Ms. Johnston: Is it possible to move that date up to December 3<sup>rd</sup> because I'm gonna be on vacation for that . . . first vacation in two years for a week?

Ms. Kapua`ala: Sure.

Ms. Johnston: OK. Thank you. So December 3<sup>rd</sup>. That will give Mr. Kilborn . . . (inaudible) . . .

Chairman Tanaka: Mr. Kilborn, is that acceptable to you? OK.

Mr. Giroux: If there's any motions anticipated, pre-hearing, pre-trial memos, anything like that, we'll just make the same date, December 3<sup>rd</sup>, be the drop dead deadline for that. And then our rules take care of any response, just in case. Discovery issues, if they should arise, should be brought to our attention as soon as possible. Any subpoenas need to be served on the Chair.

Chairman Tanaka: OK. Board Members, it has . . . the request has been made that this Board on December 13<sup>th</sup> shall act as the hearings officer to hear this appeal. Any concerns? Any questions? Any discussion regarding that?

Mr. Ray Shimabuku: Looking over my schedule, I look like I'm not gonna be here. And being a stand up paddler myself, it's very interesting to me in hearing this thing, but I, you know . . .

Chairman Tanaka: Well, James, please verify that the . . . on that December 13<sup>th</sup> date, if there is a quorum, right, no matter what we will hear it on the 13<sup>th</sup>? Whichever Members are present becomes the hearings officer for the appeal which ultimately goes back to a full Board and a decision is rendered?

Mr. Giroux: Right, if you don't have a quorum, then my advice would be that you do the report and report to the full Board for a decision. But if you do have a quorum, if it's agreeable to the litigants that the quorum can make that decision and process the findings of fact, decision of law and order.

Chairman Tanaka: Yeah, so ideally . . . yeah, ideally on the 13<sup>th</sup> there will be a quorum and a decision will be made on that date. For both parties, is that agreeable?

Ms. Johnston: That's fine.

Chairman Tanaka: OK.

Mr. Rick Tanner: Mr. Chairman, do we need a motion and a vote to appoint ourselves as the hearings officer?

Mr. Giroux: Yeah. So whatever . . . to take the dates, the deadlines, and the decision to be the hearings officer, just take it as one motion, and then . . . if there's no disagreement, and then that'll just be part of the record.

Ms. Kapua`ala: Excuse me, Mr. Chair. I'd like to bring it to the Board and the parties' attention that we do have a variance hearing that day as well as a determination of a hearings officer for a second appeal for the Piilani Promenade. I'm not sure what the status of that case is because I know they did go before the State Land Use Commission for an order to show cause. So I'm not too sure what's gonna happen with that. But if that's still on the agenda, it should be a quick item. And again, we have a public hearing for a variance on that day. So we're not gonna have the full 1:30 till 4:30 or whatever it is that the Board can commit to on that day. So just wanted to bring that to your attention just in case you might have an idea as far as the timing is concerned as to your line of questioning and your case, etc.

Chairman Tanaka: OK. Then, Trish, then my question would be, 14 days later, the end of December, is there a meeting?

Ms. Kapua`ala: There is no meeting on the week of Christmas. I am prepared with the Planning Conference Room's schedule and if the Board feels or the applicant or appellee feels that we should schedule it on a different date rather than a regularly scheduled meeting date of the Board, then we could arrange for a special meeting for a contested case hearing, which is not a public hearing. It's private.

Chairman Tanaka: OK. There's another change in our meeting time, starting earlier. Is, I guess, the room available, for one thing?

Ms. Kapua`ala: Yes, it is. It is. And the other agenda item, both applicants have received their notice that their meeting will start at 1:30 or soon thereafter. So having the contested case prior to 1:30 would be proper.

Chairman Tanaka: Yeah. I would prefer that rather than setting a special date. Here's the kicker: I'm leaving on a flight that afternoon. So 5 o'clock. Let's see for a start, Board Members, who are here, who will be available that day. OK. So there are three Board Members who are not here that would hopefully be here. If it came down to it, I could be here, but I absolutely have to leave by a certain time, if that was necessary. I'm hoping that that would work. So let's say . . . How much time would be, you think, how much earlier would we need to start?

Mr. Giroux: Or maybe we can ask . . . as far as . . . we're not gonna hold you to it, but how many witnesses do you anticipate to call?

Mr. Rodney Kilborn: . . . (inaudible) . . .

Chairman Tanaka: Sorry. If you can . . . if you can . . . sorry, if you can speak into the mic.? Identify yourself and speak into the mic., please.

Mr. Kilborn: OK. Rodney Kilborn. I would suggest probably two or three, not more than that. That'll be sufficient. If it's too much, three, then I can just stay with two.

Chairman Tanaka: Oh, no, we're just kinda looking for a gauge. We will not hold you to that. Trish, you said that the other items have been scheduled for 1:30. At this date, you know, three weeks out, changing that time . . .

Ms. Kapua`ala: Is possible.

Mr. Giroux: Yeah, let me address that. If we start and we run into the 1:30, for Sunshine Law reasons and public hearing reasons, we can start, call the meeting, take public hearing, take public testimony, and then we can look at where we're at as far as the testimony on the appeal case. If we're close to deliberation, what we can do is, we can tell the variance that, you know, to . . . that we're gonna recess their case for a couple of hours, and then finish the litigation case, and they won't have to, you know, re-notice. If we can finish by 4:30, 5:00, 4:30, the variance, that would be great. But if we can't, we can then recess or we can table that variance for another date certain on the record, and they wouldn't have to go through the public hearing process again as long as the parties understand what the next hearing date is and it's announced at the meeting. So we can be flexible. We should probably let the variance people know that, you know. Probably if they're flying in witnesses and stuff from off-island or whatever, we need to know that.

Ms. Kapua`ala: In the Piilani Promenade appeal, I believe they have attorneys from Oahu that I'm not too sure are gonna be appearing or not. And I believe for the variance, he does have an architect that is not on-island.

Mr. Giroux: For the Piilani case, is that for scheduling or is that for evidence?

Ms. Kapua`ala: To determine a hearings officer.

Mr. Giroux: Oh, OK. Just a hearings officer, so that can be taken cared of quickly. It's the variance that is gonna be the one that we're gonna . . . if the architect is coming in and such, so . . .

Chairman Tanaka: OK. Yeah, I mean, in trying to schedule this, either end of the spectrum, if we start early, we finish, and . . . but then, you know, if we finish at 12:00, we gotta wait till 1:30. Or the other end where at 1:30, we're still in . . . we're still discussing this item. So I don't know. Any suggestions? 1:30, two hours earlier? 11:30 rather than 1:30 on that date? You wouldn't be able . . . ? You wouldn't be here.

Ms. Kapua`ala: Mr. Chair?

Chairman Tanaka: Yes?

Ms. Kapua`ala: I've just been notified that we can feed you lunch.

Chairman Tanaka: OK. Let's see. If we do that, again, if we do not have quorum, if there are just four of us here, we would be able to listen to and act as hearings officer to the Board itself. So let's go ahead and schedule that. I mean, hopefully, either Pat or Bernice . . . Yeah. OK. Let's . . . does two hours sound doable? 11:30 instead of . . . ? Is that doable for you?

Mr. G. Clark Abbott: Yeah, fine.

Chairman Tanaka: OK. OK. So let's set that date, then. We'll keep all of those . . . all . . .

Ms. Kapua`ala: Mr. Chair, we'd like to feed you. Let's schedule that a little earlier, maybe 10:30 or 10:00. Then we can . . . whenever it concludes, you can break for lunch and then resume again at 1:30 to your regularly scheduled date, hearing time.

Chairman Tanaka: 10:30?

Ms. Kapua`ala: Rather than powering through 10:30 till the . . .

Mr. Giroux: Not just the evidence, but you're gonna have to have time to deliberate. So just take that into account.

Chairman Tanaka: OK. OK. So let's set 10:00, 10:00, 10:00. Alrighty. Ten o'clock. Sorry, what date is that again?

Ms. Kapua`ala: December 13<sup>th</sup>.

Chairman Tanaka: OK. December 13<sup>th</sup> with all other dates . . . all stated dates as far as disclosure, and evidence, and exhibits. OK. With that, Board Members, any other comments or discussion? OK. So with that, I need a motion for this Board to hear this . . . become the hearings officer for this appeal.

Mr. Teddy Espeleta: So moved.

Chairman Tanaka: OK. It has been moved. Do I have a second?

Mr. Tanner: Second.

Chairman Tanaka: It has been moved and second. All those in favor, please say aye. Any opposed?

It was moved by Mr. Espeleta, seconded by Mr. Tanner, then

**VOTED: To become the hearings officer for this appeal and to hear this matter on December 13, 2012 at 10:00 a.m.**

**(Assenting: T. Espeleta, R. Tanner, R. Shimabuku, J. Haraguchi,**

**G. Abbott.)**  
**(Excused: P. De Ponte, B. Santiago, B. Vadla.)**

Chairman Tanaka: Alrighty. **We'll hear this matter 10:00 a.m., December 13<sup>th</sup>.** Thank you.

**C. APPROVAL OF THE OCTOBER 25, 2012 MEETING MINUTES**

Chairman Tanaka: OK. Next item is approval of our October 25<sup>th</sup> 2012 meeting minutes.

Mr. Abbott: Motion to approve as accepted . . . (inaudible) . . .

Chairman Tanaka: OK. It has been moved to accept the minutes. Is there a second?

Mr. Tanner: Second.

Chairman Tanaka: All those in favor, please say aye. Any opposed?

It was moved by Mr. Abbott, seconded by Mr. Tanner, then

**VOTED: To accept the October 25, 2012 meeting minutes.**

**(Assenting: G. Abbott, R. Tanner, T. Espeleta, R. Shimabuku,  
J. Haraguchi.)**

**(Excused: P. De Ponte, B. Santiago, B. Vadla.)**

Chairman Tanaka: **Minutes are approved.** Next item, Director's report. Trish?

**D. DIRECTOR'S REPORT**

**1. Status Update on BVA's Contested Cases**

Ms. Kapua`ala: I'm happy to report that we actually had a contested case scheduled for today. You're supposed to have a hearing today, but they decided to withdraw and apply for a variance instead, after talking with their Director. So that appeal was removed off the agenda for today. That was the Strini Subdivision. Also, the Linex Appeal, that Molokai appeal, they settled as well with the Public Works Director. So David Goode has been working hard to knock these out of the park for you guys. Other than that, I may have another appeal to determine a hearings officer scheduled probably not till next year. But you guys are pretty clear with contested cases.

Chairman Tanaka: OK. As far . . . you know, the December 13 variance, right, you said we have, what type of variance is that we're looking at?

Ms. Kapua`ala: It's a setback variance for the research and technology park in Kihei.

Chairman Tanaka: OK. OK.

Ms. Kapua`ala: It's something that we possibly could support and that would quicken the hearing.

Chairman Tanaka: Make it even easier.

Ms. Kapua`ala: Yeah.

Chairman Tanaka: Oh, OK. OK. Sorry, James, to back up, the . . . that item that Trish just described and the Piilani hearings officer, determination of a hearings officer, would it be possible . . . ? I guess not. No matter what, we'd have to start at 1:30?

Mr. Giroux: Yeah, 1:30, because the variance would have a public hearing notice. So we would have to start at 1:30 because of that notice.

Chairman Tanaka: It has already been . . . yeah. OK.

Ms. Kapua`ala: You know, James, you bring up a good point, because I could give them proper notice, 15 days, but unfortunately, it's already been published in the *Maui News* for 1:30, which is . . . required 30 days prior to the public hearing, so that happened November 13<sup>th</sup> or so. So it'll be in the paper at least two or three more times.

Mr. Giroux: So for the Promenade, the appeal, is that of the Planning Director or the Public Works Director's decision?

Ms. Kapua`ala: The Promenade is the Planning Director's decision to not enforce the State Land Use Commission's conditions of approval.

Chairman Tanaka: Yeah, it's the same thing except now instead of Public Works, they're going after the Planning Department.

Ms. Kapua`ala: Planning, yes, because we're charged with enforcing State Land Use Commission's decisions.

Mr. Giroux: Do we know when . . . ? Because they had the hearing. We're waiting for the Land Use Commission's decision and order, right? Do we know what the timing is on that?

Ms. Kapua`ala: I don't know. I haven't touched base with Jane on that.

Chairman Tanaka: Yeah, because they did appear before them I guess was the end of August, right, the 20-something of August?

Ms. Kapua`ala: Recently, I saw it in the paper. It was on the front page. I can follow up with Jane, and if we can take this off the agenda, that would be good.

Mr. Abbott: Someone in the State Land Use said the sale did not follow the original guidelines.

Mr. Giroux: We should probably not get into that.

Chairman Tanaka: Well, when was that in the newspaper? I've been going online every once in a while trying to look up what the *Maui News* had stated so . . .

Ms. Kapua`ala: I think I recall seeing it in the paper last week where it talked about Will Spence going to Oahu to testify. Saturday, it was in the paper.

Chairman Tanaka: OK. OK. I'll check again. OK. Let's see. Next item I see here, January 24<sup>th</sup>, Lanai meeting.

## **2. January 24, 2013 Lanai Meeting**

Chairman Tanaka: As far as those here, if you can see that far ahead on your schedule, do you anticipate being available and attending the meeting? One, two, three. OK. OK. Yeah. OK. 'Cause I'll provide my typical answer that I'm afraid to get seasick, as long as there's quorum and our Vice-Chair there.

### **E. NEXT MEETING DATE: Thursday, December 13, 2012**

Chairman Tanaka: OK. Our next meeting date is that December 13 at 10 o'clock. We will hear this appeal and then at 1:30, the other items. Anything else that we need to know? Board Members, any discussion? No? Have a Happy Thanksgiving. We shall see you all on the 13<sup>th</sup>. Meeting adjourned.

### **F. ADJOURNMENT**

There being no further business to come before the Board, the meeting adjourned at approximately, 1:56 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI  
Secretary to Boards and Commissions II

### **RECORD OF ATTENDANCE**

#### **Members Present:**

Kevin Tanaka, Chairman  
Rick Tanner, Vice-Chairman  
Teddy Espeleta  
Gene "Clark" Abbott  
Jacqueline Haraguchi  
Ray Shimabuku

#### **Members Excused:**

Patrick De Ponte  
Bernice Vadla  
Bart Santiago

**Others:**

Aaron Shinmoto, Planning Program Administrator, Planning Department  
Francis Cerizo, Staff Planner, Planning Department  
Trisha Kapua`ala, Staff Planner, Planning Department  
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel