

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
MAY 10, 2007**

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Randall Endo at approximately, 1:34 p.m., Thursday, May 10, 2007, 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.)

B. APPEALS

1. To determine a hearings' officer to preside over the following matter:

AZALEA COMMUNICATION LLC, appealing the Planning Director's Notice of Violation (NOV 20060021) for a chain link fence adjacent to public open space, readily visible to the public, whereby it is prohibited by the Wailuku Redevelopment Area Design Guidelines for property located at 2086 Main Street, Wailuku, Maui, Hawai'i; TMK: (2) 3-4-013:098. (BVAA 20070002)

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

Chair Endo: Thank you, Ms. Kapua`ala. Is there a video presentation?

Ms. Kapua`ala: No, sir.

Chair Endo: Is the applicant from Azalea Communication present? Would you please come forward and state your name?

Mr. Cecil Morton: Good afternoon. My name is Cecil Morton. I'm the owner of Azalea which owns a 100 percent of the property at 2086 Main Street. I was the one that filled out the application and forwarded it to your department. And unfortunately, black and white photographs – black and white copies of colored photographs don't show up very well, so I apologize. Excuse me if you did get copies of the pictures – if everyone did. And if you didn't, I have some originals here to show you.

Chair Endo: Mr. Morton, you realize we're not taking any action at this time on your matter?

Mr. Morton: No, I didn't know that.

Chair Endo: Yeah, according to the agenda, we're here today to determine a hearings' officer to preside over your appeal.

Mr. Morton: Okay.

Chair Endo: So at this time, before we get into discussing that issue, is there a Planning Department report at this time?

Ms. Kapua`ala: No, sir. The hearings' officer, after conducting the contested case hearing, provides you with a proposed findings of fact, conclusions of law, decision and order that you take action on.

Chair Endo: Okay. At this time then, Mr. Morton, let me explain to you where we're at. We're going to decide whether to appoint a hearings' officer to conduct a contested case hearing, which is a quasi judicial hearing where both sides would put on their case, and have the opportunity to ask for documents, and discovery from each other, put on witnesses, etc. And then that hearings' officer would create a report and come back to us with a recommendation on how to rule on your appeal.

Mr. Morton: Okay.

Chair Endo: There is an alternative, of course, that we might be considering today, which is assuming we have enough time on our next meeting's agenda or subsequent agendas, we might be able to handle your matter without appointing a hearings' officer especially, if it looks like the case is not as complicated, or long, or time-consuming, which is part of the reason why we would appoint a hearings' officer to take over some of the – to delegate some of the burden of evidentiary hearings. But before we actually discuss that – well, we could hear your position on those two options.

Mr. Morton: I'm not familiar with either. This is the first time I've been in this position, so I wouldn't know which – if one was a better choice than the other, or if one was more fair than the other, or if one was more expeditious than the other.

Chair Endo: Okay. In that case then, we'll ask the – is Corporation Counsel here?

Mr. Richard B. Rost: Yes.

Chair Endo: Okay. Could you make an appearance, please?

Mr. Rost: Deputy Corporation Counsel Richard B. Rost.

Chair Endo: Okay. You folks have a position on whether you'd like a hearings' officer appointed or whether we should handle it on our own?

Mr. Rost: I would take the position that this is a very simple matter, and probably the Board could act as the hearings' officer.

Chair Endo: Okay. Before we do that—

Mr. James Giroux: If the applicant is okay with that position, if you want the Board to handle it, we should probably take care of whether or not you want a pre-hearing meeting, and whether or not you are looking to use any rules of discovery. If you feel that you've gotten all the information you need to present your case, and you're confident that you're ready to go forward, you can let the Board know, and they could probably set it for an actual evidentiary hearing before them at their next available meeting. So what we're trying to figure out now is how much do you want as far as preparation time and necessity. And then that will also mean kind of — that will determine how they want to go forward as far as whether or not they also want to spend that time to conduct those types of things.

Mr. Morton: When Corporate Counsel says it's an easy case, I've often been told that means it's a shut case. In terms of preparing myself, I have prepared myself; however, I've never been on a winning team that has six or eight people in front of me, and I'm alone. So this is all new. So I really don't — I want to take this very seriously as you all are, and I have a case. My position is clear. I believe I've written it down on the appeal forms. And I just wanted to be able to explain myself if it was required any further. So I don't think I've answered your question except to say that this is all new, so it's up to all of you what you would like to do.

Mr. Giroux: Maybe I should literate what rights you do have as somebody who has presented an application for an appeal. Basically, you have a right to present your evidence. You have a right to cross examine any evidence. That means ask questions of whoever is going to testify opposing your case. And you also have the right to state fully your case in front of the Board. So it's just a matter of how you want to exercise that.

Mr. Morton: Okay. If we were to proceed today, is that an option?

Chair Endo: We probably cannot because of the Sunshine Law.

Mr. Giroux: Yeah, the way we've agendaed it, we actually have stated that today would be the discussion about how we would proceed. But if you're comfortable with just going forward with what you have as far as if you don't have any witnesses in mind that you have to present, or you don't have any discovery that you want to subpoena or anything like that, then the next available hearing date would probably be within the next two weeks. So if both of the parties would be prepared to do that, then maybe we can dispose of this expeditiously.

Mr. Morton: Okay. And both parties is the County versus Azalea? I see.

Chair Endo: That's correct.

Mr. Aaron Shinmoto: Mr. Chairman, maybe we should ask for a five-minute break so we can maybe sit down with Mr. Morton and kind of explain. I don't believe he understands exactly what is going on.

Chair Endo: Okay.

Mr. Morton: I understand that the Planning Department didn't define what is – what exists on the property.

Mr. Shinmoto: No, no, I'm talking about the procedure.

Mr. Morton: No, the procedure's fine. I understand that in two weeks possibly, there'll be a hearing. And if I have witnesses or any other information other than what I have here in my little yellow folder, then that's the hearing in two weeks.

Chair Endo: Well, why don't we do this? Let's go and take public testimony, if there is any. I'll note for the record any letters. I noticed that there is one. Let's take some questions from the Board, and let's take a short recess after that.

Mr. Morton: Excuse me, sir. You said there's a letter?

Chair Endo: Yes, an e-mail.

Mr. Morton: Should I have received a copy of that or not?

Chair Endo: Sure, you should get a copy right now.

Mr. Morton: Okay. Thank you.

Chair Endo: So at this time, I guess I should ask the department staff if there are any letters of support or opposition?

Ms. Kapua`ala: Yes, sir. Before you, you have an e-mail that was delivered to the department from Susan Halas in opposition.

Chair Endo: Okay. At this time, I'll open the meeting up to a public testimony. Is anyone here who wishes to speak on this matter? Seeing no one, we will close public testimony at this time. Does anyone on the Board wish to ask any questions of the applicant or of the Planning Department before we start deliberating?

Mr. Giroux: I guess for Corporation Counsel, how many witnesses do you foresee calling for your case?

Mr. Rost: Most likely two.

Mr. Giroux: And have those two witnesses' names been given over to the appellant?

Mr. Rost: We haven't really exchanged anything . . . (inaudible) . . . appellant.

Mr. Giroux: So that's probably something that they – you have to establish them giving notice to each other about their witnesses and any documents that will be presented. You might want to establish that right now.

Chair Endo: Okay. Let's take a five-minute recess.

(A recess was then taken at 1:44 p.m., and the meeting reconvened at 2:00 p.m.)

Chair Endo: At this time, I would like to describe one possible way that we could do things. Because this matter seems like it's a fairly, straightforward matter, and won't require much discovery, we won't have too many witnesses, and not too many exhibits, it's the Chair's opinion that it would be okay for this Body to act as the hearing officer. So whoever is here at the next meeting, assuming that's the next – that's the date we set for the hearing, the Body would conduct the contested case hearing, the two sides would be allowed to put on their witnesses, and show their documents, and we would proceed accordingly with our rules. Is there any comment from the applicant as to proceeding in that fashion?

Mr. Morton: No, I understand.

Chair Endo: Okay. How about Corporation Counsel?

Mr. Rost: I'd agree with that procedure.

Chair Endo: Okay. In that case, I would entertain a motion to that effect from a Member?

Mr. Uwe Schulz: I so move.

Chair Endo: Okay.

Mr. James Shefte: Second.

Chair Endo: Okay. It's been moved and seconded that the Body, the Board of

Variances and Appeals shall serve as the hearings' officer for this appeal. Is there any discussion? Seeing none, all those in favor, please say aye. Opposed?

It was moved by Mr. Schulz, seconded by Mr. Shefte, then

VOTED: That the Board of Variances and Appeals shall serve as the hearings' officer for this appeal.

(Assenting: U. Schulz, J. Shefte, R. Phillips, W. Kamai, K. Acks, and W. Shibuya.)

(Excused: H. Ajmani and S. Castro.)

Chair Endo: Okay. **Motion is carried.** Okay, so at this time, we'd like to just go over a few housekeeping matters with the two parties. Tentatively, I believe the Planning Department has said that the next meeting is on May 24?

Ms. Kapua`ala: Yes, sir.

Chair Endo: And we have availability on our agenda, so we can hold the hearing at that time. Is that a mutually satisfactory date?

Mr. Morton: Yes.

Mr. Rost: Yes.

Chair Endo: Okay. Then, if there's no objection from the Board, what I would like to do is impose the following deadlines on the parties: to exchange all exhibits with each other no later than one week prior to the hearing on May 24. At that same time, one week prior – no later than one week prior to the hearing, to exchange a list of all your witnesses that you intend to call. And at that time, you can also submit an optional pre-hearing statement as to your case. It's optional, though. In addition, keep in mind that if for some reason your position changes, and you want to call 55 witnesses, and take a whole lot of our time, please let us know because then things might change procedurally on how we handle the matter. At this time, we would anticipate that the matter only take no less – no more than two hours of the BVA's time to hear all the evidence. Is there any objection to using that procedure amongst the Board members? Okay. Is there any comment on those procedures from either of the parties?

Mr. Rost: No.

Mr. Morton: Do we exchange information directly or through the Planning Department?

Ms. Kapua`ala: You serve both. You serve one copy to the department on behalf of the Board of Variances and Appeals, and serve one copy to the Department of Corporation Counsel.

Mr. Morton: Thank you.

Chair Endo: There probably are rules also as far as the number of copies you have to submit and everything. I would recommend you take a look at the rules of the Board of Variances and Appeals. And you might want to also consider retaining counsel to assist you, but it's not required.

Ms. Kapua`ala: Can I state something on the record?

Chair Endo: Sure.

Ms. Kapua`ala: That we did amend those rules at a meeting. And I stand corrected. Thank you for reminding me. The rules say that 15 copies are required to be submitted to the department, but it was amended to be three plus one original to the department, but that's in the case of a hearings' officer who is not the Board. So, James, it would be pretty safe to go back – revert back to what the rules say, yeah? Fifteen?

Mr. Giroux: If the department could just make sure that all the Board members have any documents that they are going to need to be looking at. I'm assuming that most of the documents will be entered into evidence at the time of the hearing, but before the hearing, the two parties should at least be on notice about what documents are going to be introduced. So–

Ms. Kapua`ala: With all that being said, I think 15. We'll go back to what the rules say: 15.

Ms. Kathleen Acks: Will we be getting that information in our packets for next–?

Mr. Giroux: No, no, you're going to be getting that information as they present their cases like at a trial.

Mr. Francis Cerizo: Chair, on the two hours limitation, is that two hours per person, or two hours total?

Chair Endo: No, it was not a strict limitation, but it's just explaining to the parties our anticipation of the matter. And I was anticipating two hours for the whole thing.

Okay. So for the parties information, it's 15 copies that they need to provide?

Ms. Kapua`ala: Yes, of witness lists, pre-hearing statements, and the like.

Chair Endo: Okay. So you need to submit – so the parties will submit 15 copies to the Planning Department and just one copy to the opposing side? Is that correct?

Ms. Kapua`ala: To Corporation Counsel.

Chair Endo: To Corporation Counsel and vice versa.

Ms. Kapua`ala: Yes.

Chair Endo: Okay.

Mr. Morton: One last question. It took over four weeks for me to get one document signed by the Planning Department in my effort to apply to the MRA, and it's a document that is part of the MRA application. Hence, if I am requesting certain records from the Planning Department today, as an example, and the time period would remain the same—four weeks—what do I do to inform everyone about the lack of availability of those records for the 24th hearing date?

Ms. Kapua`ala: Whatever documents you require, we can get them to you by tomorrow.

Mr. Morton: Okay. Great. Wonderful.

Ms. Kapua`ala: Mr. Morton, for the record, could you clarify your mailing address? I know your address of record. The Planning Department has had trouble contacting you.

Mr. Morton: Right, 150 Paahana Street.

Ms. Kapua`ala: 150—?

Mr. Morton: Paahana Street, Kahului.

Ms. Kapua`ala: Thank you, sir.

Mr. Morton: And that's the same as Azalea which is on this letter directly from your department.

Chair Endo: Oh, and one final thing for the parties, based on the current procedure we've set up there, there won't be a pre-hearing conference. We'll just go straight to the contested case hearing on May 24th. Are there any other questions or comments? Okay. Thank you. With that, let's move to the next item on our agenda: the Approval of

the April 12, 2007 Meeting Minutes.

C. APPROVAL OF THE APRIL 12, 2007, MEETING MINUTES

Mr. Schulz: I so move.

Mr. Shibuya: Second.

Chair Endo: It's been moved and seconded to approve the April 12, 2007, meeting minutes. Any discussion? Seeing none, all those in favor, say aye. Opposed?

It was moved by Mr. Schulz, seconded by Mr. Shibuya, then

VOTED: To approve the April 12, 2007 meeting minutes.

**(Assenting: U. Schulz, W. Shibuya, J. Shefte, R. Phillips,
W. Kamai, and K. Acks.)**

(Excused: H. Ajmani and S. Castro.)

Chair Endo: **Motion is carried. The minutes are approved.** Moving on to the Director's Report.

D. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: Everything is going smoothly. There is no update for you today.

Chair Endo: Okay. Thank you, Ms. Kapua`ala.

E. NEXT MEETING DATE: May 24, 2007

Chair Endo: Our next meeting is May 24, 2007. If there's no further business or requests from the Board Members, we'll stand – or we'll adjourn. Meeting adjourned.

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at approximately, 2:10 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairperson
Warren Shibuya, Vice-Chairperson
Kathleen Acks
William Kamai
Rachel Phillips
Uwe Schulz
James Shefte

Members Excused:

Harjinder Ajmani
Stephen Castro, Sr.

Others:

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