

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
JANUARY 10, 2008**

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, 1:33 p.m., Thursday, January 10, 2008, 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 Randall Endo: Public testimony will be taken at the start of this meeting on any agenda item in order to accommodate those individuals who cannot be present for later on. Is there anyone here who wish to testify on any of the items? Seeing none, we'll now close public testimony and go to the first agenda item.

B. APPEALS

1. **MICHAEL W. FOLEY appealing the DEPARTMENT OF FIRE AND PUBLIC SAFETY'S decision to require a 500 gallon per minute fire hydrant and a minimum 20 feet access road pursuant to Maui County Code, § 16.04B, and §§902.2.2.1 and 903.4.2, Uniform Fire Code for the Pohoula Subdivision (DSA File No. 1.287) located off of Piilani Highway, Pohoula, Kaupo, Maui, Hawai'i, TMK: (2) 1-7-002:026. (BVAA 20070010)**
 - a. **Appellee Milton Arakawa, Director, Department of Public Works, County of Maui's Proposed Findings of Facts, Conclusions of Law, Decision and Order; Certificate of Service**

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

Ms. Kapua`ala: Before you, Board, you have the Corporation Counsel's proposed finding of fact. And in addition to that which was distributed today, Corp. Counsel has amended that proposed findings in accordance with the appellant's objections. He just had two revisions that he requested, and she revised it as such. So if you agree with those two and it's noted in that email, then you can go ahead and adopt today's proposed findings before you.

Chairman Endo: Okay, anybody have any discussion? Questions? Or want to make a motion? Has the Planning staff had a chance to review this document?

Ms. Kapua`ala: Not really, no.

Chairman Endo: Okay, maybe we'll take a few minutes to read and then we'll take Warren's question. Yes, Warren?

Mr. Warren Shibuya: No, it's just a comment. I believe the Fire Department wanted 60,000 for this subdivision, and it didn't make any distinction as to 60,000 gallons of each lot in this subdivision. They said 60,000 gallons of water storage for the entire subdivision of three lots.

Chairman Endo: What area are you referring to, Warren?

Mr. Shibuya: No, no, I'm just trying to recall some of the discussions that we had in the earlier session. So as far as I'm concerned, whether they have 30,000 gallons at two lots, as long as it comes up to 60,000 gallons for that subdivision, I have no problem with it.

Chairman Endo: I still don't follow you, Warren. Are you referring to a portion in this document that you think is not clear? Or you wanted to amend anything?

Mr. Shibuya: No, it's not to amend or anything. It's just to clarify. It's just not a point where it needs to be amended. It's just on Point No. 12 on page 8, they have – and I quote here, "The 2006 amendments require 60,000 gallons as a minimum requirement for water storage on land zoned agriculture, Maui County Code, 16.04B.140." And that's basically what I thought. And I think in Mr. Giroux's case, he had just mentioned that they needed some clarification on it. And I had no problem with it other than the fact that as long as we have 60,000 gallons of water stored in that subdivision, I would have no problem. How they divided it, I would have no problem with that.

Chairman Endo: Okay, well, at this point, the decision has already been made. We already voted on it and everything. So what we're doing now is just reviewing the written order, making sure that it conforms to what we already orally decided at the prior meeting. So based on the documents we've got and the changes, it looks like the two parties have agreed both – I mean, based on Deputy Corporation Counsel Cheryl Tipton's email, it looks like the two parties are satisfied that this document meets what was decided at the last meeting. So, yes, Warren?

Mr. Shibuya: I just move to accept the draft as written.

Mr. Uwe Schulz: I second it.

Chairman Endo: Okay, so it's been moved and seconded to adopt the proposed findings of fact, conclusions of law, decision and order. And this is the most recently revised version that we were just handed today from Cheryl Tipton's office. Is that correct?

Mr. Shibuya: That's correct.

Chairman Endo: Okay, discussion? Seeing none, all those in favor, please say aye. Opposed?

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

VOTED: To adopt the proposed findings of fact, conclusions of law, and decision and order per the most recently revised version distributed to the Board today from Deputy Corporation Counsel Cheryl Tipton.

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

(Excused: K. Acks, H. Ajmani, and S. Castro.)

Chairman Endo: **Motion is carried, and the proposed findings of fact, conclusions of law, decision and order have now been adopted as ours for that appeal.** Moving on to the next agenda item.

C. UNFINISHED BUSINESS

- 1. Letter of November 6, 2007, from Gladys C. Baisa, Chair, Maui County Council Planning Committee, to Jeff Hunt, Director, Planning Department, regarding parking assessment fees for developments within the B-CT Country Town Business and HD1 and HD2 Historical Districts (PC-13)**

Ms. Kapua`ala: Board, regarding this November 6 correspondence from County Council, Ms. Baisa, being one of the newer Council members came across this ordinance that's in the back of this letter, and suspected that nothing was done. So she wrote this letter to the department just kinda fishing to see if there was any status. And just as she suspected, Planning did not commission this study, nor did Council urge Planning to commission this study. So it will be brought to the attention of our current Director and Deputy Director to see if they'd like to appropriate budget funds to begin this study, or else Ms. Baisa will be urging Planning during the budget sessions to appropriate money for this study. So this is just for your information. The Planning Department will respond to Ms. Baisa in this regard. And if there's any comments or concerns, we would be happy to let Ms. Baisa know that it was brought to your attention.

Chairman Endo: Okay, thank you.

Mr. James Giroux: Trish, was there any response to my comment the last time this came up of whether or not the MRA area was also considered as being one of the areas that needs to be studied in order to get some kind of fund started so that they could take in-lieu fees?

Ms. Kapua`ala: No.

Mr. Francis Cerizo: The parking assessment fees ordinance is to give the Council authority to assess parking assessments in areas. So we have areas that's – "The study shall be limited to Paia, Wailuku, Makawao, and West Maui." So those are the areas that basically – you know, the urban areas that are being considered for assessment fees. But prior to any fees being levied, the study needs to be done. So in answering your question, Makawao and Paia are country town business areas. And I would think that depending on the funding, if they wanna be all inclusive of those areas, the final decision will be on the Commission – no, no, on the Council.

Mr. Giroux: Because my concern was that it sounds like this is a type of study that the MRA would need to do in order to get their issues resolved as far as parking within the redevelopment area.

Mr. Cerizo: Well, that's true. I mean, they would be involved in the process, but as far as the – who's gonna do the assessment study, it'll probably go through our Planning Department. One of the divisions will handle it. And as far as community input from the different Commissions or Agencies would be solicited.

Mr. Giroux: So are there any plans to have the MRA actually exposed to this comment from Ms. Baisa as far as so they can comment on whether or not they'd like to be included in the study?

Mr. Cerizo: Yeah, we'll do that. We'll have them be part of the process or response.

Mr. Shibuya: Let me understand this a little bit more. You're asking that the Board of Variances and Appeals be part of this study process?

Mr. Cerizo: No, the Board is – this is just information to you. You have no – you need not to respond.

Mr. Shibuya: Okay, thank you.

Chairman Endo: Okay, moving on to the next item.

**D. APPROVAL OF THE DECEMBER 12, 2007 AND DECEMBER 13, 2007
RECESSED MEETING MINUTES**

Chairman Endo: We have the approval of the minutes: December 12, '07, and December 13, '07. The Chair will entertain a motion to approve these minutes.

Mr. James Shefte: So moved.

Mr. Schulz: Second.

Chairman Endo: Okay, it's been moved and seconded to approve both the December 12 and December 13, 2007 meeting minutes. Any questions? Discussion? Corrections? Seeing none, all those in favor, please say aye. Opposed?

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

VOTED: To approve the December 12, 2007 and December 13, 2007 recessed meeting minutes as written.

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

(Excused: K. Acks, H. Ajmani, and S. Castro.)

Chairman Endo: **Motion is carried and the minutes are approved.** The next item: the Director's Report on contested case hearings.

E. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Chairman Endo: There's a written status sheet today for your members' information.

Ms. Kapua`ala: Okay, this is a list of outstanding appeals, the farthest one dating back from 2005 which is the Maui's Best Gift and Craft Fair. Judge McConnell is – we'll be meeting next Thursday for another one of these contested cases on this list. And we'll be touching bases as far as how to proceed with the various cases he has with the Board one of them being this. And he has – the last phone call I got from him regarding this is that he has an order that he will forward to the Board dismissing this case. And you – once you receive that order, then you can decide what you want to do with it: whether forward it to another hearings officer, hear it yourself–

The Hiolani Ranch Appeal–a decision and order will be forwarded to you very shortly. Judge McConnell was on vacation in the Mainland during the holidays and finished the decision and order. So we'll finalize it and forward it to you very shortly.

The Hanohano LLC Appeal—we're having – it's taken a long time to contract the second choice, Mr. Mark Honda, as hearings officer because of Finance's paperwork. They're requiring his Federal tax I.D. no., and social security no., etc. So for this case, as well as the Anthony Lum residence, he has not been contracted. And we haven't begun hearings on these cases.

The Anthony Lum Residence Appeal IV—I mistakenly put Randy as the hearings officer. If you remember, they asked that he be the hearings officer, and due to conflicts in scheduling, Randy declined. So the second choice was Mr. Mark Honda.

And the last two—we do have progress on the Ritz Carlton Appeal. We'll be meeting next Friday with Judge McConnell. And the West Maui Village Appeal, we are still waiting for Judge McConnell's signature on the contract. Other than that, you have Mr. Foley's appeal which we just disposed of, and Ms. Stephanie Rager who will be having a contested case hearing before you, the Board, as the hearings officer next BVA meeting.

Chairman Endo: Yes, Warren?

Mr. Shibuya: Trisha, just getting back to the first item that you discussed, the reason for Judge McConnell dismissing the issue is because the County and the previous landowner are resuming settlement negotiations, and then coming up with a possible solution or resolution? No?

Ms. Kapua`ala: No, the property has been sold. The appellant is on their second attorney. The first attorney did a total of more than five requests for government records. And what's it called, James?

Mr. Giroux: (Inaudible)

Ms. Kapua`ala: No.

Mr. Giroux: What did they want?

Chairman Endo: Discovery?

Ms. Kapua`ala: For discovery, they just kept on asking questions that we couldn't provide answers to.

Mr. Giroux: Is it through interrogatories?

Ms. Kapua`ala: Interrogatories, yes, numerous, I mean, more than five. And when she hired her second attorney, he didn't even show up to the conference, the prehearing

conference. So he's – Judge McConnell, quite frankly, is tired of this case. They're just dragging it on to the point of the property got sold. The use no longer exists. It's a new Planning Director. He just – he doesn't want to deal with it anymore, I think. That's why he's dismissing this case.

Mr. Shibuya: Okay, so he will be remanding it back or at least providing it back to us saying that he no longer wants to be the hearing officer for this issue? And that the issue, we can decide whether we wanna continue with it or dismiss it also, then?

Chairman Endo: No, I think reading this correctly, and I may be wrong, but it sounds like Judge McConnell is gonna recommend that we dismiss the whole case, and we have to take that up not that he's just recusing himself as hearings officer. Is that correct, Trisha? That's how I read this.

Ms. Kapua`ala: You would know about this than me, Randy. He simply said he's gonna produce an order to dismiss this case.

Chairman Endo: Yeah, so that should be – because it's a dispositive order, he can't actually do it himself. He would have to recommend that we do it based on whatever reasons he's–

Ms. Kapua`ala: But where would that leave the County?

Chairman Endo: Pardon?

Ms. Kapua`ala: Do you know where that leave the County? We'll just–

Mr. Giroux: Because it's an appeal, right?

Ms. Kapua`ala: Yes.

Mr. Giroux: Yeah, so if the appellant does not participate, that would be an issue of whether or not– It's their rights that they need to preserve. And if they're not gonna participate, then it raises an issue of lack of prosecution.

Ms. Kapua`ala: On their–?

Mr. Giroux: On their part.

Ms. Kapua`ala: And so the notice of violations that are in question would still be outstanding?

Chairman Endo: Yeah, probably he's just gonna recommend that we affirm the decision

below then, right?

Mr. Giroux: Yeah, it'll be like a default.

Chairman Endo: Like he wants to stop the contested case part and just resolve it because of non-cooperation or something like that. That's what I'm guessing.

Mr. Giroux: It would be almost like if you get an NOV, and then you don't file for an appeal. Then the County would just proceed as it would in that manner. But it should probably be clear in the order when it comes.

Ms. Kapua`ala: Okay. Oh, one more thing I forgot to add to this: there's a Nona Lani Cottages Appeal that's scheduled before you on February 14th. The matter arose because the landowners – trying, in the middle of this transient vacation rental enforcement by the department, submitted for a community plan amendment and change in zoning to make their property legal as – right now, they're grandfathered transient vacation rentals. They'd like to be rezoned to be hotel which would outrightly allow their transient vacation rental use. The department, as a blanket procedure, accepted the application, and ordered that they cease operation by January 1, 2008, and they appealed that. So that hearing is scheduled before you and it's an actual hearing on January 14, 2008. Since then, the Corporation Counsel's litigators assigned to this have met, and are questioning if this is an appealable order because it reads like a notice of warning, which is not a notice of violation. So they may – discussions were made to ask the appellant to go to Circuit Court to get a declaratory ruling to see if the Board of Variances and Appeals is the proper venue, if that makes sense. So by the time we meet on the 14th, they'll hopefully have some progress on that.

Chairman Endo: You mean the 14th or the 24th?

Ms. Kapua`ala: February.

Chairman Endo: Is that different from the Rager Appeal? Is that something different?

Ms. Kapua`ala: Yes.

Chairman Endo: Oh, okay, sorry. I'm getting them mixed up.

Ms. Kapua`ala: Yes, that was one progress that we have been discussing a lot, just so you know. And it'll be before you in February. I may or may not be here. I may be having a baby.

Chairman Endo: Or it's possible that they might have to come to us, and we make a decision as an interim decision – well, our position is whether or not it's appealable, and

then they take it up to Circuit Court, but who knows.

Ms. Kapua`ala: If you look at the rules, I think they saw that. That in your rules, that declaratory rulings – the decisions out of declaratory rulings are appealable to Corporation Counsel, and then that order is appealable to Second Circuit Court. And they found a conflict in that because Corporation Counsel is the one saying, no, you can't appeal a notice of warning. Then the Board would appeal to Corp. Counsel regarding that. Typically when an appellant goes to Circuit Court without exhausting their administrative remedies that Corp. Counsel would oppose it because of that reason. For this case, they will not oppose it. They want them to go straight to Circuit Court, and not only get a ruling on the fact that you can appeal a notice of warning, but also on some TVR interpretations that the Planning Department is standing firm on, which is the subject of the matter of the appeal. You'll receive the appeal documents which lay out the zoning interpretation that the County as well as the appellant has. And I'm not sure if the Board wanted to take authority on it. You know what I mean? Be the authority on zoning interpretations. That was another reason why they wanted to go to court directly.

Chairman Endo: Okay.

Mr. Giroux: Trisha, just before I leave, before you go on maternity, can you earmark the Board of Variances' decisions that we have denied variances, because it's very critical that those orders go out in a timely fashion. Okay? So can you just look in your records and see which variances we've denied in the last few months? You need to make sure we're gonna meet the deadlines to get those orders out.

Ms. Kapua`ala: Okay.

Chairman Endo: So for like the Mike Foley one, we have to sign that pretty soon, I guess, then, huh?

Ms. Kapua`ala: Yes, I'll go ahead and redraft the document in the Board's format and have you sign it.

Chairman Endo: Okay.

Mr. Giroux: And we denied the Alonzo's one, right?

Chairman Endo: No, we granted it.

Mr. Giroux: There was one we denied, though, recently.

Chairman Endo: We denied–

Mr. Schulz: The subdivision, the Upcountry lot.

Chairman Endo: Yeah, the right-of-way, the minimum right-of-way in Upcountry.

Mr. Giroux: Right. What was the name of that one?

Mr. Shefte: Fleetwood.

Ms. Kapua`ala: Oh, okay. That'll be the next decision and order coming up to you, James. Okay, thank you.

Chairman Endo: Alright, shall we move on to the next--? Is that it, actually?

Ms. Kapua`ala: Yes.

F. NEXT MEETING DATE: January 24, 2008

Chairman Endo: We have our next Board meeting: January 24, and I guess it might be fairly long since we're gonna do the hearing on the NOV appeal. So we'll get ready for an exciting meeting. Hopefully everybody can come. Does any of the members, or staff, or Corporation Counsel have any further announcements? Questions? No? Seeing none, we will be adjourned to our next meeting. Thank you.

G. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 1:55 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
Warren Shibuya, Vice-Chairman
Uwe Schulz

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William Kamai
Rachel Ball Phillips
James Shefte

Members Excused:

Kathleen Acks
Harjinder Ajmani
Stephen Castro, Sr.

Others:

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