

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
JUNE 12, 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 1:30 p.m., Thursday, June 12, 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: At this time, we will take up our first item on the agenda.

**B. APPEALS**

1. **Determine hearings officers to preside over the following matters:**
  - a. **THOMAS D. WELCH, ESQ., MANCINI WELCH & GEIGER, LLP representing MAKILA LAND CO., LLC, appealing the Director of the Department of Public Works' letter dated March 25, 2008, amending the preliminary approval letter dated March 3, 2008 for the Makila Nui Subdivision (DSA File No. 4.957) located off of Pua Niu Way, Launiupoko, Lahaina, Maui, Hawai`i; TMK: (2) 4-7-001:025 (BVAA 20080003)**
  - b. **THOMAS D. WELCH, ESQ., MANCINI WELCH & GEIGER, LLP representing MAKILA LAND CO., LLC, appealing the Director of the Department of Public Works' letter dated March 25, 2008, amending the preliminary approval letter dated September 11, 2006 for the Makila Ranches - Phase 1 Subdivision (DSA File No. 4.924) located at 373 Haniu Street, Launiupoko, Lahaina, Maui, Hawai`i; TMK: (2) 4-7-001:027 (BVAA 20080004)**
  - c. **THOMAS D. WELCH, ESQ., MANCINI WELCH & GEIGER, LLP representing MAKILA LAND CO., LLC, appealing the Director of the Department of Public Works' letter dated March 25, 2008, amending the preliminary approval letter dated October 17, 2006 for the Makila Ranches - Phase 2 Subdivision (DSA File No. 4.927) located off of Kai Hele Ku Street, Launiupoko, Lahaina, Maui, Hawai`i; TMK: (2) 4-7-001:026 (BVAA 20080005)**
  - d. **THOMAS D. WELCH, ESQ., MANCINI WELCH & GEIGER, LLP representing MAKILA LAND CO., LLC, appealing the Director**

**of the Department of Public Works' letter dated March 27, 2008, amending the preliminary approval letter dated October 17, 2006 for the Makila Ranches - Phase 3 Subdivision (DSA File No. 4.929) located off of Kai Hele Ku Street, Launiupoko, Lahaina, Maui, Hawai'i; TMK: (2) 4-7-001:030 (BVAA 20080006)**

Ms. Trtisha Kapua`ala: Let me try and consolidate this: Mr. Thomas D. Welch of Mancini, Welch and Geiger representing Makila Land Company appealing the Director of Public Works' letters dated March 25, 2008, amending the preliminary plat approval letter dated March 3<sup>rd</sup>, 2008, and September 11<sup>th</sup> and October 17<sup>th</sup>, 2006 for the Makila Nui and Makila Ranches Phase I, II – Phases I, II, and III Subdivisions which are DSA File Nos. 4.957, 4.924, 4.927, and 4.929 located in Launiupoko, Lahaina, Maui, TMK: (2) 4-7-001: parcels 25, 27, 26, and 30, which are BVA File Nos. 20080003, 04, 05, and 06. And here representing Makila Land Company today in Mr. Welch's stead is Mr. Geiger of Mancini, Welch, and Geiger.

Mr. James Geiger: Good afternoon, Mr. Chair, Members of the Board, the only thing I would move is that – in regard to the BVA 20080006, the letter that's being appealed is dated March 27, 2008 instead of March 25, 2008. Otherwise . . . (inaudible) . . .

Ms. Kapua`ala: Thank you, sir.

Chairman Endo: Okay, we'll have the appearance of counsel for the County.

Ms. Jane Lovell: Good afternoon, Chair Endo, Members. My name is Jane Lovell, Deputy Corporation Counsel, and I'm representing the Director of Public Works in these four appeals.

Chairman Endo: Thank you. Unless there's any objection from any of the Members or the parties, we will consider all four appeals at the same time with anticipation that we'll hire or appoint one hearings officer for all four. Any objections? Seeing none– Oh, yes?

Ms. Lovell: Yes, that's what we were going to recommend, actually. And the parties have already met and agreed that if he is available, we would be satisfied with Judge McConnell as Hearings Officer. We believe that these four appeals present mostly, if not exclusively, questions of law. And therefore, it would be – it would make a lot of sense to have a hearings officer appointed.

Chairman Endo: Okay. Is there a second alternate or first alternate that you also have selected?

Mr. Geiger: Not at this time. We believe Judge McConnell will be available . . .  
(inaudible) . . .

Chairman Endo: Okay. So both parties are agreeable to that selection?

Ms. Lovell: Yes.

Mr. Geiger: (Inaudible)

Chairman Endo: Okay. At this time, what I'll do is open it up for public testimony. Is there anyone in the public who wishes to testify in this matter being Items 1a, b, c, and d? Seeing none, we'll close public testimony. At this time, the Chair will entertain a motion to appoint Judge McConnell as the Hearings Officer for these four appeals.

Ms. Rachel Ball Phillips: So moved.

Chairman Endo: Okay. It's been moved.

Mr. Kevin Tanaka: Second.

Chairman Endo: And seconded to approve Judge McConnell as – well, appoint Judge McConnell as our Hearings Officer for these four appeals. Discussion? No? Anything else the parties wanted to mention? No? Okay. In that case–

Mr. Warren Shibuya: Mr. Chair?

Chairman Endo: Yes?

Mr. Shibuya: Can we get some kind of a feedback in terms of the progress of this case? Let's say maybe two months from now, we have some kind of feedback as to the progress that they've made, not necessarily the conclusion, but how we're getting along.

Ms. Lovell: I could respond, perhaps.

Chairman Endo: Okay.

Ms. Lovell: What Judge McConnell usually does in these cases is he sets a relatively early conference of the parties. And then he issues a scheduling order. And so I think it would probably be relatively easy for us to make sure that the Board is copied on the scheduling order.

Mr. Shibuya: Okay. Thank you.

Mr. Geiger: Presumably it would be filed with the – should be filed with . . . (inaudible) . . .

Chairman Endo: Sure.

Ms. Lovell: But it may not get to all of the Members. I mean, we could try to make sure that you actually get a copy.

Mr. Shibuya: Okay. Thank you.

Chairman Endo: Okay. Planning Department, any questions or comments before we take a vote? No? I'm also assuming that the Hearings Officer will be instructed to do just one report back to the Board dealing with all four appeals.

Ms. Lovell: Yes, I think that would be appropriate.

Mr. Geiger: I think maybe we should let the Hearings Officer decide that, but I assume that's what's going to happen.

Chairman Endo: Okay.

Mr. Tanaka: Actually, I have a question.

Chairman Endo: Sure.

Mr. Tanaka: For whatever reason if Judge McConnell is unavailable, does that mean that it'll be brought back to determine a hearings officer?

Chairman Endo: Yeah, usually it would be good if they could pick one or two alternates. That way they wouldn't have to come back, but in this case, since they haven't been able to agree upon the alternates, if Judge McConnell can't do it, then they'll have to come back to the Board for another appointment. So they – you understand that, right?

Mr. Geiger: Yes, we understand that.

Chairman Endo: Okay. Yeah. Okay, any further discussion? If not, all those in favor of the motion to appoint Judge McConnell as the Hearings Officer for the four appeals, please signify by saying aye. Opposed?

It was moved by Ms. Ball Phillips, seconded by Mr. Tanaka, then

**VOTED: To appoint Judge E. John McConnell as the Hearings Officer for all four appeals.**

**(Assenting: R. Ball Phillips, K. Tanaka, W. Kamai, W. Shibuya, and S. Duvauchelle.)**

**(Excused: J. Shefte, H. Ajmani, and S. Castro.)**

Chairman Endo: **Okay, the motion is carried and Judge McConnell is appointed. .**

Ms. Lovell: Thank you.

Chairman Endo: Thanks.

Mr. Geiger: Thank you.

Chairman Endo: Next item is Sunshine Law Training by Deputy Corporation Counsel Giroux.

## **C. COMMUNICATIONS**

### **1. Sunshine Law Training**

Mr. James Giroux: Hello. This – I had this put on the agenda. As you might remember, we actually did have our orientation meeting where we went over all of the stuff. And one part of it was the Sunshine Law. And from what I remember, we did a pretty good overview of the Sunshine Law. The thing is is that the County was in a lawsuit–Smith v. Arakawa–and within the settlement of that, one of the terms of the settlement was that the Corporation Counsel would actually give you a copy of this memo that I passed out, which is the – we call it the Professor Van Dyke’s Treatise on the Sunshine Law. If you go through it, it’s pretty useful because it breaks it down into pretty usable format for understanding the Sunshine Law. And I’ll just run through it really quick.

He goes over the discussion of what meetings are. And I also went over that with you about discussing, you know, what is a meeting, what’s not a meeting, what bodies are governed by the Sunshine Law. And all you have to know is that we are. And he also goes over the definitions of what board members can and cannot talk about.

And he also goes into the agenda. And our agenda is done by staff, but just so you know that we run into issues of, you know, if something’s not on the agenda, if it’s not the agenda, and this treatise does a pretty good breakdown on the importance of following the agenda so we don’t get into trouble as far as getting people who find out

that we've changed the agenda, and object, or any matter like that.

He also goes into what are some exceptions to the Sunshine Law, and what is an emergency meeting, what constitutes a recessed meeting, and what an executive session is. And those are important terms for you to know being on a board that is governed by the Sunshine Law because those matters do arise. And we do enter sometimes pretty detailed discussions about what our action should be. And so it's important that you understand, you know, why we are taking our time discussing the issues of going into an executive session or having a recess. And a lot of times, these things are left up to the vote of the board. So just to let you know that reading this will give you a very good understanding of what we're talking about when we go into those discussions.

The treatise also goes into taking of minutes, which the staff does, and the importance of getting these minutes out within 30 days as far as the public has a right to see those minutes, to see what kinds of decisions we've made, and they have a right to have it within 30 days. And this is good to know just because you – if Members of this Body, if you wanna know what's going on in other meetings or other types of organizations that are under the Sunshine Law, you know that these minutes have to be available within 30 days.

And then it goes into enforcement. And we talked about the different ways the Sunshine Law is enforced. A lot of times it's a self-governing law that the members are really held at an honor system to follow the spirit and the word of Chapter 91, but also there's injunctions. People can file lawsuits against us, if they think we've violated the Sunshine Law. And if we did violate it, it can be found that our actions are voidable and can be voided by a Judge, if we are found to be in violation of the Sunshine Law. And also, if there is a knowing violation of the Sunshine Law, we could find ourselves in criminal prosecution for the violation of it if it's so outrageous that we've violated the rights of the public to know what's going on in the government. So that's basically the treatise in a nutshell.

And I passed out earlier the OIP when I did this the first time—the OIP Open Meeting Guide to Sunshine Law. And it basically follows the same format. So it's just another version of it. And we're just trying to make sure that we're in compliance with the Smith v. Arakawa. So – and again, you know, like if there's any questions about the Sunshine Law, feel free to— And this just helps you to grasp the vocabulary and the concepts. And then as a Board, we can work out the details and make sure we're in compliance. And then that's it.

Chairman Endo: Any questions for our Corporation Counsel Deputy? No? Okay. We'll move on to the next item: May 8 Meeting Minutes.

**D. APPROVAL OF THE MAY 8, 2008 MEETING MINUTES**

Chairman Endo: If everyone has had a chance to review those minutes, the Chair will entertain a motion to approve them.

Mr. Shibuya: Move to accept.

Mr. William Kamai: Second.

Chairman Endo: Okay, it's been moved and seconded to approve the May 8, 2008 meeting minutes. Any discussion? Seeing none, all those in favor, please say aye. Opposed? No?

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

**VOTED: To approve the May 8, 2008 meeting minutes as presented.**

**(Assenting: W. Shibuya, W. Kamai, R. Ball Phillips, K. Tanaka, and S. Duvauchelle.)**

**(Excused: J. Shefte, H. Ajmani, and S. Castro.)**

Chairman Endo: **Okay, the motion is carried and the minutes of May 8, 2008 are approved.** Moving on to the Director's Report and the Status Update on the BVA's Contested Cases. Ms. Kapua`ala?

**E. DIRECTOR'S REPORT**

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

Ms. Kapua`ala: Thank you. The only update is that the Hearings Officer which was approved on this May 8<sup>th</sup> meeting is in the process of doing their contract. So we got the contract back from Finance, which is really quick, and they're now trying to sign it and get it back to us. Other than that, there's no change.

Chairman Endo: Okay. Thank you.

Mr. Giroux: Trish, what was the turnaround on that contract?

Ms. Kapua`ala: May 8<sup>th</sup>, and I got it back last week, a month.

Mr. Giroux: That's not bad because we were looking at what-four month turnarounds before?

Ms. Kapua`ala: Yes.

Mr. Giroux: Did they mention any-?

Ms. Kapua`ala: So it goes from Finance to Corp. Counsel back to us, and then that took a month. I'm sorry. Go ahead, James.

Mr. Giroux: Was there any reason that you know of why the turnaround's getting better or-?

Ms. Kapua`ala: I do. I think it's because Traci, I've noticed, no longer does these. It is now Adrienne. And I think Adrienne is - you know, she's-

Mr. Giroux: I was hoping it was more of a system than- I was hoping we were finding some, you know, methodology that-

Ms. Kapua`ala: Well, Traci, being the Deputy Corp. Counsel-

Mr. Giroux: Which has a lot of other responsibilities.

Ms. Kapua`ala: I mean, not Deputy, but First Deputy, has a lot more responsibilities. I think that Adrienne, which is Finance's administrative attorney is a lot more quicker in response.

Mr. Giroux: Well, anyway, it's good news for us. I just wanted to look into that and see if the Board, you know, understood, because we were running into this why are the contested cases taking so long to process. And it just seemed like that seemed like one of our biggest hurdles was to get the hearing officer on board. So I'm really happy to hear that.

Ms. Kapua`ala: So in two months, Warren, this one, the contract will be signed.

Mr. Shibuya: Okay. Very good. Thank you. I'm watching. I'm watching because I hope they have the conclusion before I leave.

Ms. Kapua`ala: Your term, you mean?

Mr. Shibuya: Yeah, before my term expires.

Chairman Endo: Okay, moving on. Our next meeting date is June 26, 2008.

**F. NEXT MEETING DATE: June 26, 2008**

Chairman Endo: For the new Members, in case you're getting really bored because the meetings have been very short ever since you joined us—

Ms. Sandra Duvauchelle: You mean the honeymoon period's over.

Chairman Endo: Yeah. This is not normal. This is very unusual that we've had a whole series of very short meetings. Normally our meetings run till 4:00 or so. Yeah, so, but at least we can all go back and watch the NBA finals now. Okay, so are there any other announcements?

Mr. Giroux: Just one is just so everybody knows that one of the contested cases we have coming up is the Rager. So anybody who was not here during any previous meetings, please get up to speed, read the transcripts, because we're gonna hit the road running when that comes up. So it's gonna be – because there were so many continuances and things, we're gonna have to deal with some procedural matters in that. So I just wanted— One of the fundamental things is that we want everybody to be on the same page as far as knowing the same information.

Chairman Endo: When is that one coming up?

Ms. Kapua`ala: The 26<sup>th</sup>, the next meeting.

Chairman Endo: Okay.

Ms. Kapua`ala: Sandra and Kevin just got copies of the transcript today of Ms. Rager's past transcripts. And Tremaine will send another copy of Ms. Rager's past transcript with the new agenda next week.

Chairman Endo: Okay. Any other announcements, questions, or information?

Mr. Shibuya: I wanna thank the staff for providing this copy of the March 3<sup>rd</sup> letter. Thank you very much. Thanks for handing it out to us.

Chairman Endo: Is this part of the appeals on the prior item?

Ms. Kapua`ala: Yes. This letter was the subject matter of the first appeal, BVAA 20080003. And inadvertently, the – this letter was not on record in their notice of appeal.

Chairman Endo: Okay. Alright. Seeing as there's no further business, the meeting is adjourned.

**G. ADJOURNMENT**

There being no further business to come before the Board, the meeting adjourned at 1:47 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  
Rachel Ball Phillips  
William Kamai  
Kevin Tanaka  
Sandra Duvauchelle

**Members Excused:**

Stephen Castro, Sr.  
Harjinder Ajmani  
James Shefte

**Others:**

Francis Cerizo, Staff Planner  
Trisha Kapua`ala, Staff Planner  
James Giroux, Deputy Corporation Counsel