

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
JANUARY 29, 2009**

**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 1:40 p.m., Thursday, January 29, 2009, 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. **BLAINE J. KOBAYASHI of CARLSMITH BALL, LLP representing KEHALANI HOLDING COMPANY, INC. appealing the Director of the Department of Public Works' issuance of a Notice of Violation (V 20080036) for the construction of a "shack dwelling" on property located off of Pi'ihana Road, Wailuku, Maui, Hawai'i; TMK: (2) 3-4-032:001 (BVAA 20080010) (Continued from the December 11, 2008 meeting.)**

a. **County of Maui's Hearing Memorandum; Exhibits 1-7**

2. **BLAINE J. KOBAYASHI of CARLSMITH BALL, LLP representing KEHALANI HOLDING COMPANY, INC. appealing the Director of the Department of Public Works' issuance of a Notice of Violation (V 20080037) for the storage of junk cars and debris on property located off of Pi'ihana Road, Wailuku, Maui, Hawai'i; TMK: (2) 3-4-032:001 (BVAA 20080011) (Continued from the December 11, 2008 meeting.)**

a. **County of Maui's Hearing Memorandum; Exhibits 1-7**

Mr. Francis Cerizo read the first agenda item into the record.

Chairman Endo: Okay, is there anyone here from the parties making an appearance? Seeing none, is there any public testimony on this item? Seeing none, we'll close public testimony on this item. We'll note for the record that there is a stipulation to continue the hearing on this matter until April 23<sup>rd</sup> 2009, 1:30 p.m., signed by both Mary Blaine Johnston and Blaine Kobayashi for both of their respective parties. I think what we wanted to do or the Chair would recommend is that we send a letter to them saying that we're not going to give them any more continuances so that we can get – keep the pressure on them to move forward rather than continuing it all the time. Is there any objection to sending such a letter? No? Do I have unanimous consent? Any comment? Hari?

Mr. Harjinder Ajmani: Yeah, I think this has already been postponed from December 11<sup>th</sup> one time so we shouldn't give them any more postponement. I agree with you completely.

Chairman Endo: Okay.

Mr. Warren Shibuya: I agree, Mr. Chair, that we've been scheduling these hearings for these

Board of Variances and Appeals  
Minutes - January 29, 2009  
Page 2

individuals and appellants, and we're not able to address these in a timely fashion. And I believe that our function here is to help the appellants and to hear them in a timely manner. And here we are, and they're asking for a continuance or delay. So, yes, I agree, please send the letter.

Chairman Endo: Okay. Then by seeing no objection, we will consider it by unanimous agreement that we'll send such a letter to the parties. Trisha, you need any clarification? This is for the first agenda item. We just want to send them a letter telling them that please take notice we're not giving them any further – we're not going to grant any further continuances.

Ms. Trisha Kapua`ala: Okay. I will let the attorneys know. I did get to speak to Corporation Counsel Mary Blaine Johnston today, and she let me know that the matters that are withholding the scheduling of the hearing is very complex. Apparently, there's some squatters on the land. And they will be having to go to court for other matters besides the BVA appeal. It's not having to do with the notice of violation, but ownership matters. So the hearing is – that's the reason why they've requested the continuance.

Chairman Endo: Okay.

Mr. James Giroux: Do we have a hearings officer already for this case?

Ms. Kapua`ala: No, sir. We have yet to find a hearings officer to determine how we're going to dispose of this appeal.

Mr. Giroux: Okay, so that would be – that's what's going to be firm at the next meeting is the choosing of the hearings officer?

Ms. Kapua`ala: Yes, I will communicate that to the attorneys as this is the second continuance of the first meeting on this matter.

Mr. Giroux: And Trisha, I see two matters, two BVA numbers.

Ms. Kapua`ala: Yes, sir.

Mr. Giroux: 01 and 11. So I would take it that this would encompass both matters?

Ms. Kapua`ala: Yes. There are two tax map key numbers. That's the only reason why there are two appeals. Oh, no, I'm sorry. There are two separate NOV's; therefore, two appeals.

Chairman Endo: Okay, so if there's no objection from the parties or from the Members, we'll send a letter as to both agenda items dealing with the same matter with Kehalani Holding Company. Okay, seeing no objections, that's what we'll do. Okay, we'll move to Item B-3.

3. **MARK M. MURAKAMI, ESQ. of DAMON KEY LEONG KUPCHAK HASTERT representing TROY AND SUSAN McCASLAND appealing the Director of Planning's Notice of Violation (NOV 20080002) for the operation of a transient vacation rental at property located at 451 'Ilikahi Street, Lahaina, Maui,**

**Hawai'i; TMK: (2) 4-6-006:039. (BVAA 20080002) (Deferred from the November 26, 2009 meeting.)**

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

Ms. Kapua`ala: And the County has just passed out to you a double-sided document which is the – it's a stipulation to dismiss. There has been a settlement. A settlement has been reached on this matter, and that agreement has been forwarded to the Mayor's Office for signature. So both parties have agreed to settle. And if you've liked to hear more about this case, we can put this item on another agenda as a communication item, and Mary Blaine Johnston would be happy to appear to explain the terms of the settlement to you, if you're interested to know the details.

Chairman Endo: Okay. Well, before we do that, we'll open it up for public testimony. Anyone can provide testimony on this agenda item. Seeing nobody coming up, we'll close public testimony on this agenda item. Is there anyone in the Board that wants to say anything on this matter?

Mr. Kevin Tanaka: Actually, I am curious. I don't feel the need for it to be an agenda item at a meeting. Is there a summary or an analysis/summary that can be—?

Mr. Giroux: It can just be a communication item.

Ms. Kapua`ala: Yeah, it could just be a communication.

Mr. Tanaka: I'd like to know.

Ms. Kapua`ala: Okay.

Mr. Giroux: And, Randy, just for the record, I'd just – the language, it reads "Stipulation to Dismiss Appeal," but I believe this was a NOV, so it actually would be a Stipulation to Withdraw an Appeal—just so it's clear on the record.

Chairman Endo: Okay. So if there's no objection from anyone on the Board, we will just consider it a withdrawal of the appeal rather than a dismissal of the appeal. Seeing no objection, we'll consider that agreed upon by unanimous consent. So we can move on now to Item 4.

**4. MAUI'S BEST GIFT & CRAFT FAIR, LLC appeal of the notice of violation issued by the Director of Planning in regard to the use of property located at 270 Lahainaluna Road, Lahaina, Maui, Hawaii, TMK: (2) 4-6-010:025. (BVA 20050013, BVA 20050024, BVA 20050027)**

**a. County's Prehearing Memorandum**

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

Ms. Kapua`ala: Representing the County is Deputy Corporation Counsel Madelyn D'Enbeau. Representing the previous property owner Mr. Barry Brown is Jim Geiger. And representing herself

Board of Variances and Appeals  
Minutes - January 29, 2009  
Page 4

today – oh, I'm sorry, Ms. Evelyn Goo is here with her attorney. Thank you.

Mr. Anthony Ranken: (Inaudible)

Chairman Endo: Could you use the microphone because we're recording?

Mr. Ranken: Yes. So my name is Anthony Ranken. Jim – James Fosbinder was her attorney for a time in there, but the last – the original appeal was filed through Bill Crockett who is longer counsel. So I have some information in response, but I believe we're all agreement that if I can go ahead, Ms. D'Enbeau?

Ms. Madelyn D'Enbeau: I can explain.

Mr. Ranken: Okay, fine.

Ms. D'Enbeau: Good afternoon. What happened is the matter was put on the agenda. The County filed a prehearing memorandum which I think you all have copies of on January 21<sup>st</sup> setting forth the fact that this case we thought should be dismissed for failure to prosecute. That the last thing that had happened was on August 13<sup>th</sup>, Judge McConnell, the hearing officer, had held this – it says settlement – apparently, it should've been a status conference, and Mr. Fosbinder didn't show up. After I had filed that, Judge McConnell filed an order to show cause on January 22<sup>nd</sup>. And I think you all have copies of the order to show cause. And he has set a hearing for February 5<sup>th</sup> at his office. And we have all agreed, I believe, the attorneys here that it would be appropriate for this question of whether or not the case should be dismissed to be heard first by Judge McConnell, and then he could make his recommendations so that we'd proceed through the hearing officer rather than directly through the Board. So if that's alright with the Board, that would be the way we would think would be appropriate to proceed.

Mr. Ranken: And let me just confirm that I'm in agreement with that. And furthermore, I don't feel the need to take the valuable time of everybody here. I could answer some of the things in the prehearing memorandum, but let me just say I'll do so if there's any Member of the Board that has doubts about proceeding in the way we've agreed otherwise, probably no need to say anything more.

Chairman Endo: Mr. Geiger, you have anything to say?

Mr. James Geiger: No, I think it should be handled in front of the hearings officer.

Chairman Endo: Okay. So you're basically requesting a continuance as far as presenting here until after the hearings officer has a hearing on February 5<sup>th</sup>?

Ms. D'Enbeau: That's correct.

Chairman Endo: So you have a date that you prefer or suggest?

Mr. Ranken: I actually was not requesting a continuance. Perhaps we have a misunderstanding on that. I think that the hearings officer could initiate further action. I mean, he will either be

Board of Variances and Appeals  
Minutes - January 29, 2009  
Page 5

dismissing the case, or setting further conferences or hearings, or setting the matter for a hearing on the merits. And I see no need for us to have a scheduled date to check back in with you folks. If the hearings officer makes a recommendation to dismiss the case, then I believe that would come to your attention anyway. And if he has a hearing on the merits, well, no sense us coming back in a month or two because that hearing probably won't be for several months.

Chairman Endo: Yeah, that's true. So what we'll do is maybe send a communication of some sort to Judge McConnell telling him if he does recommend dismissal then to come and schedule something with us at that time otherwise, just to proceed with the hearing. Okay.

Ms. D'Enbeau: Thank you very much.

Chairman Endo: Did anybody else on the Board have any questions? None? Okay. Thanks. Alright. Sorry about that. I should've made them stay until you get to ask questions. Luckily you guys didn't have any questions for them. Okay.

**C. APPROVAL OF THE JANUARY 15, 2009 MEETING MINUTES**

Chairman Endo: We have the January 15, 2009 meeting minutes. If you all have had a chance to look it over, the Chair would entertain a motion to approve.

Mr. Shibuya: I so move to accept the minutes.

Ms. Rachel Ball Phillips: Second.

Chairman Endo: Okay, it's been moved and seconded to approve the January 15, 2009 minutes. Any discussion? No? Seeing none, all those in favor, please say aye. Opposed, please say no.

It was moved by Mr. Shibuya, seconded by Ms. Phillips, then

**VOTED: To Approve the January 15, 2009 Meeting Minutes as Presented.**

**(Assenting: W. Shibuya, R. Ball Phillips, K. Tanaka, H. Ajmani,  
R. Endo.)**

**(Excused: J. Shefte, S. Castro, W. Kamai, S. Duvauchelle.)**

Chairman Endo: **The motion is carried and the minutes of January are approved.**

**D. DIRECTOR'S REPORT**

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

Chairman Endo: Moving on to the Director's Report on the Status Update on BVA's Contested Cases. Trisha?

Ms. Kapua`ala: That was the update: the Maui's Best Gift & Craft Fair. That is the only update I

Board of Variances and Appeals  
Minutes - January 29, 2009  
Page 6

have to report.

**E. NEXT MEETING DATE: February 12, 2009**

Chairman Endo: Okay, so we're done then. Our next meeting is February 12, 2009. Another short meeting. Does anybody have anything they want to mention? Any request for items to be on the next agenda?

Mr. Shibuya: I did want to bring up with the Members here to expedite some of the hearings' things. One of the suggestions was to have a setup where we have the hearings officer follow some procedures. And some of the procedures would be to have a discovery schedule, a motion schedule, initial hearing schedule so that during this time, both sides, the appellant, as well as the County will be able to present their arguments early on and give some kind of a timeline when they could be completed. This way, we don't have an extended type of hearings officer employment, if you will, where you have delays upon delays, and changing of attorneys further delaying the actual completion of the hearings officer's decision and order. I would like to work with James, our Corporate Counsel, a little bit more to draft some kind of a letter, and to identify some kind of a procedure, and then present it to the Board, if that's okay. It's not a prescription now, but it's something that we can discuss. And it's just a draft. It's just ideas on how we can expedite hearings officers conducting their job.

Mr. Giroux: Warren, we can also, if you want to get together and work on that, we can in the future put it on as a workshop, and then let the Body give their input, too, on it. And if it's agended as a workshop, hopefully, maybe some people from the community who have been hearing officers or who are on the hearing officers' list may show up and give their input, too, on what you're looking at as those procedures.

Mr. Shibuya: Okay. That sounds good. Let me work with you and draft up something, and then we'll play it, and go from there. Thank you.

Chairman Endo: So later on, they can just make a request to put it on the agenda, right? They don't have to request it right now?

Ms. Kapua`ala: Yes.

Chairman Endo: Okay. Alright. Is there no status update, Trisha, to go back? Is there a status update on the appeal with the—I forgot their name—the brand new one, the one where the Fire Department intervened?

Ms. Kapua`ala: That is still scheduled for your next hearing which is February 12<sup>th</sup>. Not an appeal but intervened, contested case, so it's still a variance.

Chairman Endo: It's a variance.

Ms. Kapua`ala: Yes.

Mr. Shibuya: Kaanapali Royal Condominiums—is that the issue?

Board of Variances and Appeals  
Minutes - January 29, 2009  
Page 7

Ms. Kapua`ala: No, no. This is the Luke Family Subdivision that was applied for as a variance. However, the Department of Fire and Public Safety was granted an intervention to become a party to the case. So although they'll be conducted in a manner like an appeal where there'll be cross examination and swearing in of oath, the criteria that you will measure the – determine your decision is still the variance criteria.

Chairman Endo: I wondered if – I was just thinking. I don't know if it's appropriate to really talk about it, but it's sort of just part of the update, so we'll kind of squeeze it in there. I was wondering if maybe if they thought there might be a way to settle it before the contested case. If they wanted to, I would be willing to have a mediation meeting with them, with both the Fire Department and the Luke Family.

Ms. Kapua`ala: Okay, so would it be appropriate for me to offer that to them right away? And if they agree, then we can take it off the agenda, and they can meet with you privately?

Chairman Endo: I don't know. What do you think?

Mr. Giroux: Yeah, and maybe you can wrap that into kind of like a prehearing where they make sure that the parties are exchanging whatever documents they want to introduce and stuff. Maybe that'll put the parties at ease, too, to know, you know, as far as what to expect when they do – if they do proceed to the hearing.

Ms. Kapua`ala: The County just submitted their prehearing documents. And the Lukes were not planning to submit any further documents. They were going to use their variance application as their exhibits. So in essence, we have everything we need.

Mr. Giroux: Yeah, then just set it like a prehearing mediation meeting.

Ms. Kapua`ala: So this is only if the parties are willing to settle instead of go forth with the variance hearing? You're welcoming them to meet with you in mediation of the matter?

Chairman Endo: Well, sometimes in a contested case, the hearings officer would actually make it mandatory. They don't have to actually agree to settle, but it's mandatory that they come to the meeting.

Ms. Kapua`ala: I guess you could make it mandatory.

Chairman Endo: But I don't care, I mean–

Mr. Tanaka: That's in an effort to so that they don't come back to the Board?

Chairman Endo: Yeah. If they could come up with a settlement– Oh, wait, they still have to come and ask for the variance.

Mr. Giroux: Ultimately, the variance is on your shoulders.

Chairman Endo: I guess the only thing they could do is if they settle and said, well, we'll change our request and we're going to ask for something less, and the Fire Department says, well, this lessor

Board of Variances and Appeals  
Minutes - January 29, 2009  
Page 8

amount that you're asking for of a variance is okay with us, then their dispute is kind of at an end. And then they still have to make a presentation to the Board, but at least they've partially resolved it. That's the only possible—

Mr. Tanaka: Yeah, but potentially, if that's the case and that happens, they find some common ground, they come back to the Board, and the Board says, no, no, no, sorry, we're sticking to the original requirement so—

Chairman Endo: Yeah, even if they were to ask for something half as much of a variance, we could still say no. So it's not like they can agree by themselves to completely resolve it unless they just decide to withdraw their variance. That, they can do.

Ms. Kapua`ala: I do know this is a longstanding matter. They first appealed, but yet they had no — they tried to seek relief by appealing, but they had no decision to appeal because the Fire Department never gave them anything in writing. It was just many meetings at the Fire Prevention Bureau. So we returned the appeal and asked them, you know, provide us a document to appeal from. And instead, they submitted a variance instead. And then the Department of Fire intervened to become a party to the case. I mean, the Lukes are — they've been trying to seek relief for a while.

Chairman Endo: I would suggest that we just make it optional at this point. And ask them if they want to have a meeting before the actual hearing that I'd be happy to meet with them for one hour or whatever. Hari?

Mr. Ajmani: I think the purpose to have a meeting would be that if you can convince them that they can — if your meeting with them will shorten the case here so we can settle it in one meeting, that will be the only real benefit of your meeting.

Chairman Endo: Yeah.

Mr. Ajmani: Otherwise, you know, how it happens, if it gets delayed, then it goes to three meetings later, and all of those funny things happen.

Chairman Endo: Right. That would be the other goal would be to make it clear how everything works so that everything goes efficiently at the hearing, yeah.

Mr. Ajmani: That would definitely be a benefit of your meeting with them beforehand.

Chairman Endo: So is there any objection to that from the Members?

Mr. Shibuya: No, I appreciate you, Randy, taking the time and offering this.

Chairman Endo: Yeah, well, only up to one hour. So just to restate it then, so there's no objection by the Board to having me offer a meeting before the hearing if the parties want one to narrow the issues, and to talk about procedural items, and to possibly resolve some of the issues if the parties can agree upon. And it's not mandatory. If one party doesn't want to show up, if they don't think there's anything to resolve, then they can decline, and it's not a problem, and we just move forward

Board of Variances and Appeals  
Minutes - January 29, 2009  
Page 9

with the hearing.

Ms. Kapua`ala: Okay. Thank you.

Chairman Endo: Okay. Alright. Anything else? No other matters? Alright. This meeting is adjourned.

**F. ADJOURNMENT**

There being no further business to come before the Board, the meeting adjourned at 2:02 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI  
Secretary to Boards and Commissions

**RECORD OF ATTENDANCE**

**Members Present:**

Randall Endo, Chairman  
Warren Shibuya, Vice-Chairman  
Harjinder Ajmani  
Rachel Ball Phillips  
Kevin Tanaka

**Members Excused:**

Sandra Duvauchelle  
Stephen Castro, Sr.  
William Kamai  
James Shefte

**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, Office of Corporation Counsel