

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
FEBRUARY 25, 2010**

**(APPROVED: 3/11/2010)**

**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, February 25, 2010, 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: This meeting of the Board of Variances and Appeals will now come to order. Let the record reflect that it is February 25<sup>th</sup> 2010, 1:34 p.m., and there is a quorum of seven Members of the Board present today. At this point, I'd like to request Ms. Kapua`ala to introduce the first agenda item.

**B. APPEALS**

1. **VICTOR V. CAMPOS and MYRNA J. CAMPOS appealing the Planning Director's Notice of Violation (NOV 20090014) for the un-permitted storage of damaged vehicles on property located at 1215 Lower Main Street, Wailuku, Maui, Hawaii; TMK: (2) 3-4-039:076 (BVAA 20100001)**
  - a. **Applicant's Motion Requesting a Time Extension for Filing a Notice of Appeal**
  - b. **County of Maui's Hearing Memorandum**
  - c. **County of Maui's Exhibit List; Exhibits "A" - "L"**

Ms. Trisha Kapua`ala read agenda item B-1 into the record.

Chairman Endo: Will the parties please come forward and state their names for the record?

Ms. Mary Blaine Johnston: Deputy Corporation Counsel appearing on behalf of Jeffrey S. Hunt, Director of the Department of Planning.

Ms. Kapua`ala: Mr. Chair, I don't see the appellant in the audience here.

Chairman Endo: Okay. Do you know whether they were planning on attending?

Ms. Kapua`ala: I believe so. The – his – one of his secretaries came to the office yesterday trying to submit more documents which were duplicates of what you already have. So I'm pretty sure that he was aware of today's meeting.

Chairman Endo: Well, why don't we do this? If there's no objection from the Board, we'll pass this item, and take it up after the next item. Is there any objection to that? Can you confirm service of the notices, Trisha?

Ms. Kapua`ala: Yes, sir. He was served hearing of today's – I'm sorry, he was served notice of

today's hearing on January 14<sup>th</sup> 2010.

Chairman Endo: Okay. So if there's no objection? Hearing none, we will pass this item, and move on, and come back to it. Mary Jane, is that okay?

Ms. Johnston: That's fine.

Chairman Endo: Mary Blaine, sorry.

2. **MEH LIMITED PARTNERSHIP appealing the Director of Public Works' determination that preliminary subdivision approval for the Sunset Estates Subdivision (DSA Subdivision File No. 3.1834) is null and void for property located off of Waipuilani Street, Kihei, Maui, Hawaii, TMK: (2) 3-9-046:013. (BVAA20090003)**
  - a. **Appellant MEH Limited Partnership, by and through its Attorneys, Carlsmith Ball, LLP's Motion for Reconsideration and to Reopen the Hearing Based Upon Newly Discovered Evidence; Exhibits "A" and "B"**
  - b. **County of Maui's Memorandum in Opposition to MEH Limited Partnership's Motion for Reconsideration and to Reopen the Hearing Based Upon Newly Discovered Evidence; Exhibits 12 & 13**

Ms. Kapua`ala read the agenda item B-2 into the record.

Chairman Endo: Will the parties please state an appearance?

Mr. Tom Leuteneker: Mr. Chairman, Members of the Board, my name is Tom Leuteneker. I'm an attorney with Carlsmith Ball and I represent the subdivider, MEH Partners.

Ms. Johnston: Deputy Corporation Counsel, Mary Blaine Johnston, appearing on behalf of the County of Maui.

Chairman Endo: Okay.

Ms. Johnston: Specifically for Milton Arakawa, Director of the Department of Public Works.

Chairman Endo: Okay. I'm assuming there's no presentation by the Planning Department. Is that correct, Trisha?

Ms. Kapua`ala: Yes.

Chairman Endo: Okay, so what we'll do is we'll take up your motion now, but before we do that, I'll open it up to the public if there is any public testimony on this agenda item. If anyone wishes to speak, please come forward right now and sign up on the sign-up sheet. Seeing no one coming up, we'll close public testimony as to this specific agenda item. Okay, so let's— We have your

written motions and memorandums. So—

Ms. Johnston: Chair Endo, before we proceed, I've received about 11 o'clock or so this today, notice that MEH Partnerships has appealed the decision of the Board to the Second Circuit Court. It is the County's position that by now filing the notice of appeal, it moves the jurisdiction of this matter from this Board, and it's now in the hands of the court. And so I believe it would be improper to go forward with this hearing today because I don't believe you have jurisdiction to even entertain this motion.

Chairman Endo: Okay. Mr. Leuteneker?

Mr. Leuteneker: Yeah, I have a different view. Maybe it's like a Catch-22, but it's clear from the law that we must file an appeal to the Circuit Court within 30 days of the decision. Actually, it says when the decision is sent out. The decision came down on the 19<sup>th</sup>. It was signed by your Chairman on the 19<sup>th</sup> of January, and we filed an appeal to the Second Court on the 17<sup>th</sup> of February, which was in the 30-day period, which we must do as a matter of law. So had we not filed the appeal, then the County's position would be if we didn't prevail here that we have no right to appeal. So we had to file the appeal to preserve our position.

As I see the situation, and Ms. Johnston hadn't cited any rule that says that this Board lost jurisdiction, but I view it, if you'd like, if you permit me, as similar to a situation in the Circuit Court, the rule in the Circuit Court is once there's a final decision, you must file a notice of appeal within 30 days. However, if something else goes on in court so that it's, in fact, not a final decision, then the appeal period is extended. That's the exact thing that happened here. Something else is done with this Board. Namely, the Board has decided it's appropriate to consider our motion. So I think that's what happened is that the 30-day period hasn't begun to run yet, and it hasn't begun to run yet until this Board decides whether their – whether you're going to allow us additional hearing. If you decide you're not going to allow us additional hearing, it seems to me that the appeal period would begin from that decision. Namely, that you're not going to allow us additional hearing. So I believe that this Board does have jurisdiction, and it has not been deprived of jurisdiction by our filing the appeal in the Circuit Court.

Chairman Endo: Mr. Giroux, you want to give us your advice on this one?

Mr. James Giroux: It looks like everybody's shooting from the hip today. My recollection – no, my understand – my understanding of – and I have practiced in the Circuit Courts before also is that a motion to reconsider does not extend deadlines.

Now, in the appellate arena where issues of extensions have come up, specifically, extensions, the Supreme Court doesn't give the lower court any jurisdiction to extend times. So there is some jurisdictional issues raised when we're dealing with issues of time. Administrative law puts the practitioners in a strange place because a lot of times what goes on in administrative law doesn't always mirror real law, the law I like to call the real law, because we're an administrative Body trying to make administrative decisions based on administrative law. And that puts practitioners in a very strange place because we don't – we look in our rule, we don't have a rule. We don't have a rule. And if you look at the rules that just were recently passed based on notices of violation, we did specifically put a rule in there that said we would not consider motions of

consideration. The difference is, is today, we're using a different set of rules because we are looking at an appeal.

The appeal rules follow our contested case rules. Our contested case rules state that a person or a party in a contested case can at any time during the proceeding file a motion. You could be listening to a motion for anything right now. So there does come a time when the agency needs to decide whether or not it wants to assert its jurisdiction over the case. And I think that's what the parties are asking for today is nobody can point to a rule of law that says you can or cannot, but you are today going to be asked, do you, in the context of this case, does it appear with the information you're going to get today from the arguments that the decision that you're going to make will assert your jurisdiction over it – over the decision? So you are aware that there's an appeal filed in Circuit Court. The record will be transmitted to the Circuit Court. What you're being asked today through the motions is to make a ruling to at least consider the ability of the litigants to continue to litigate in an agency arena. And that's going to have to fall in your hands. I mean, you're going to have to decide this procedural issue because it's an interpretation of your rule. The Circuit Court would interpret it on a right or wrong – just, you know, right or wrong, but it is – it would be looked at de novo by the Circuit Courts to see whether or not what you do today is procedurally proper. Absent case law, absent rules, basically, all the lawyers in this room are trying to advise you based on what we understand as the process, but ultimately, you nine people are the process.

Chairman Endo: Thank you. Thank you, Mr. Giroux. If the Board's okay, the Chair would like to make a recommendation, and then see if there's a consensus on the recommendation. Since the rules are not entirely clear, I think the Chair feels it would be better to err on the side of allowing us to consider the motion, but at the same time, recognizing the objection of the County, and allowing them to raise that with the Circuit Court. So in other words, the Chair recommends that we proceed to hear the motion and rule on the motion. And if we rule and grant the motion and reopen, but perhaps, we're doing it erroneously because we don't have jurisdiction, then the County can always still raise that at the Circuit Court level. So by doing it that way, we err little bit on the side of the public applicant to give them a little bit of benefit of the doubt since the rules are not one hundred percent clear although we could rule, of course, to deny the motion for reconsideration in which case it sort of doesn't really matter that much, and they'll just move forward with their appeal to the Circuit Court. Is that okay? Yes, Hari?

Mr. Harjinder Ajmani: I was not in the meeting of November 25<sup>th</sup> when this thing was decided. So I'm not – I have gone through the documents, but I'm not totally aware of all the arguments and some of the other things that may have happened. So my thinking was that this Board has already ruled on this. And the Board's decisions can be appealed in the Circuit Court. It will be proper to go through the procedure and let the County defend how this new evidence that has come up, how it will be taken by the Circuit Court because I don't think – the only reason to reopen will be the new evidence that has been submitted. And I don't know whether we can review all the repercussions of that earlier letter that the County has written to somebody else, and what were the circumstances, and how it was happening. I don't know whether it's proper for us to reopen an already decided case.

Chairman Endo: Well, that is definitely the question. From a procedurally perspective, if you believe that our written decision and order is equivalent to a final judgement from which nothing

further can happen, and at that point the only recourse would be an appeal to the Circuit Court, then yes, we shouldn't hear this possible motion keeping in mind, of course, that the record is already final. So the new evidence that they're purporting to purpose or they've proffered would not be heard by the Circuit Court because that's not part of the record below, and they can't add it in.

Mr. Giroux: Could I ask the attorneys? I think we are going to allow you to argue. Can the attorneys address the issue of if this issue of new evidence is not ruled on, or we don't rule in your favor, is there a process in the Circuit Court where you can raise the issue of a possible remand back to this Body in order to reopen the case?

Ms. Johnston: My understanding is that the record – let's just say that you decide not to go forward today, you say go to the Circuit Court, which is what the County is arguing, the record would consist of not only the hearing – minutes from the hearing, the findings of fact, conclusions of law, but it would also include Mr. Leuteneker's motion for reconsideration, and the County's response to that motion for reconsideration. I would argue that the reply memo which was filed after the appeal was noticed should not be part of the record. The arguments that are raised in the notice of appeal, his statement of the case to this Circuit Court are identical to the arguments that he's advanced today for a reason for the Board to reopen. So he retains his ability to make the same arguments he would make to this Board today in the Circuit Court because that would all be part of the record. So I do agree, however, with James that this is a very cloudy area. You do have a rule in the Civil Rules of Procedure after a final decision's been put in within ten days to file for a reconsideration, you know, of the decision based on a variety of different reasons. Administrative rules don't have that. So it is kind of unchartered territory. This might be the case that makes some case law on it. I don't know. The arguments he wants to make today, he should be able to raise in front the Circuit Court because they are part of the record that was submitted before the appeal was noted.

Chairman Endo: Okay. Bill?

Mr. William Kamai: I got a question for Corp. Counsel. So say we grant the motion for reconsideration, that we listen to their arguments, and that we side with reopening the case, what happens in Circuit Court?

Chairman Endo: Then they would withdraw their appeal, most likely.

Mr. Leuteneker: Yeah, presumably, then it – sorry, presumably, then the 30-day appeal period wouldn't have run, so we can withdraw our appeal, and depending upon the outcome, re-file it again, but we don't want to do that unless everybody's real clear that we don't waive our appeal rights.

Mr. Giroux: So to answer your question, if we take action, that action would be seen as opening up their timetable to appeal because the Judge would say, well, if the case is still going on, then you appealed too early. We're not– They'll refuse to take jurisdiction because there's no case and controversy yet that's final. So your action will actually have an effect on that.

Chairman Endo: Okay. So if there's no consensus whether to even hear– Yes, Hari?

Mr. Ajmani: I have one other question. Has there been any other case where we have reopened the decision already made in the past?

Mr. Giroux: Hari, since the time I've been with the County, it just seems like every case I'm on is the first time the County's ever done something. In fact, today is the first NOV from our new rules. So what I can tell you is, is that we have reopened – the last case we had, we reopened for further evidence on something that a hearing officer had given us a report and recommendation. And that's about the closest that we've got to actually reopening a case or granting a motion to reconsider. I think we have in the past had motions to reconsider that had been just denied, but that – from my memory, which is, you know, only goes back a few years, that's what I can remember. You can ask Staff. Staff might have a deeper well of memory about that.

Mr. Ajmani: Does Staff have any memory of that?

Ms. Kapua`ala: I would concur with Mr. Giroux.

Mr. Giroux: Thank you.

Chairman Endo: Okay, so the Chair's recommendation was to hear the full argument of the parties on the motion, but allow the County to, of course, keep their objections on the record. And they can always argue later on that we actually should not have even ruled on this motion because we lacked jurisdiction. And I guess to make it maybe a little simpler, Hari, you could always use that – if you believe we don't have jurisdiction, then you can just vote to deny the motion for reconsideration on that basis. So in other words, rather than just voting on a regular basis, meaning you don't believe they met the criteria for a reconsideration, you could say, well, I don't think we even have jurisdiction, so I'm going to vote no on that basis. So I would like to – the Chair would like to proceed, anyway, if there's no objection from the Members. Is that okay? No objection? Okay, so let's hear the argument on the motion for recon. And, Mr. Leuteneker, you can also further elaborate on the jurisdictional issue, if you want also. You know, it sort of becomes one of the issues of the motion also.

Mr. Leuteneker: Yeah, maybe I should just make one comment in regard to what James said. And that is that there are rules, as James said, in the Circuit Court after there's been an entry of a final judgement to ask for reconsideration for various reasons, and this is similar to that, although you don't have a rule on that so that we're not really doing something here different from what we would be doing if we were in a court situation. So I'm thinking that if we do this as a motion for reconsideration as we've asked – as we've characterized it that we're consistent with what would happen in a court setting. So I don't think it's improper, but let me if I may.

First, we want to thank you for allowing us to make our presentation on our motion for reconsideration. The – this involves a subdivision in Kihei. And the subdivider is MEH Partners. MEH Partners is a limited partnership. The general partner is Steve Parker. The limited partner is Dr. Eugene Wasson's Pension Plan. And both Steve Parker – most of you know Steve Parker, and most of you may know Gene Wasson are in the room with us today.

Steve Parker, as the general partner, has been processing this subdivision with the consultants, of course. The subdivision is called the Sunset Estates Subdivision. Steve applied for an

extension of the subdivision. There were seven extensions of the subdivision granted in the past by the Director of Public Works, Milton Arakawa. Steve applied again. The application was six days late. Milton Arakawa denied the application to extend the subdivision for one more year, and determined the subdivision to null and void. Now, this Board – the denial by Mr. Arakawa was appealed to the BVA by Steve Parker, and this Board had a hearing. And this Board has submitted findings of fact, conclusions of law, and a decision and an order. And in that decision and order, there is a statement by this Board, and I want to refer to it. The – for your benefit, Mimi Johnston’s memorandum has – in addition to her argument, had two relevant things attached to it. One is the – a decision of this Board, and the other are the minutes of the hearing.

I want to specifically refer to the decision, one of the basis for the decision of this Board. The basis – and this is what the Board said, “Under Maui County Code, 18.12.060, the Director–,” I’m paraphrasing a little bit, “The Director has no authority or discretion to extend the 15-day filing requirement for a request for an extension of time to obtain final subdivision approval.” It’s our position that, in fact, the Director of Public Works does have the discretion to extend the 15-day rule. The evidence of that – there’s several pieces of evidence of that, but one of the pieces of evidence of that is a letter dated January 3, 2002. And it concerns obviously, not this subdivision. It concerns a subdivision in Kipahulu called the Kipahulu Kai Subdivision. That letter was written by then Director David Goode, and it was signed by Milton Arakawa. Milton Arakawa was the Deputy Director of the Department at that time. And I just want to read– That letter, by the way, is attached to our memorandum that we filed with this Board. Just one paragraph in that letter says this–and again, this letter is talking about not this subdivision, but the Kipahulu Kai Subdivision–it says:

Our records indicate that the subdivision expired on May 22, 2001. Therefore, your request for an extension of time was submitted approximately seven months late. Although this was an after-the-fact request, we will grant you a time extension and the new expiration date is December 22, 2002.

Now, we think that letter is important for at least two reasons: one, because it’s new evidence that this Board did not consider at the hearing. It wasn’t presented to the Board. It is hard evidence of the fact that the Director indeed does have discretion to waive the 15-day rule. Here, we’re talking about a six-day late filing of the application. So Milton got the application nine days before the subdivision ran out. In this Kipahulu Kai Subdivision, it was seven months late. So this letter is hard evidence that the Director certainly, in 2002 had the discretion to waive that rule, and, in fact, he did waive the 15-day rule.

Now, Lesli Otani testified at the hearing, and she said two things briefly. She said speaking about the 15-day rule, and again, this is in Mimi Johnston’s memorandum, and it is the testimony that was recorded at the hearing on the appeal, and Lesli said, “Many, many years ago, the Department was more lenient.” And then she said, “I think it was around 1999 or 2000 where prior to that our Director was Charlie Jencks and David Goode where it was more lenient.” So to me, that testimony tells us that, in fact, from 1999 till at least 2002, the Directors were waiving the 15-day requirement so that they had the discretion to waive the 15-day requirement.

Nothing has happened between 1999 and 2002 to change the fact that the Director has the discretion. The ordinance is exactly the same. It’s exactly the same now as it was when David

Goode, and Charlie Jencks, and Milton to the extent he was involved because he signed this letter exercised their discretion to waive the 15-day rule. Nothing has changed in the ordinance. So our position is that necessarily, the discretion since it once existed, and there's been no change in the law, must exist today. Milton Arakawa must today, since he did have it, and it wasn't taken away by anything that we know about must have the discretion to waive the rule today.

Now, the ordinance says that when a subdivider's used up his year and the subdivider comes in to renew the application that the subdivider must show good cause. And Milton Arakawa, there's absolutely no question about this, has the discretion to determine whether there is good cause presented by the subdivider to allow the subdivision to continue for a year. Good cause from a large point of view is a substantive issue. And the good cause obviously normally is the subdivider says we have a lot of conditions to meet imposed primarily by the County, sometimes by the State. And we're in the process of meeting them. And for various reasons, we haven't been able to meet them. So we need more time to meet these. And Milton Arakawa has decided seven times previously in this subdivision that good cause existed, and he extended the subdivision seven times.

Now, good cause as I say is a substantive issue. The 15-day rule isn't a substantive matter. It's a procedural matter. It's a procedural matter. As a matter of procedure, did Steve get the application in one day too late or six days too late? And the question is, how can the Director have the discretion to find good cause, but not have the discretion to waive the 15-day rule? It doesn't make any sense because one, is the important, substantive; and the other is the less important, procedural.

For Milton to exercise his discretion to find good cause that the subdivision should be continued, and to extend the subdivision, he must have the discretion to waive the 15-day rule. And so what I'm saying is that as a matter of common sense, the waiver of the 15-day rule is a matter that must be within the Director's discretion. And in addition to that, we know that the Director had that discretion and exercised it between 1999 and 2002.

Now, that's not the end of it because the Board of Variances and Appeals' rules and regulations, which I have, in Section 12-801-81 sets out the standards of appeal. And this says, the Board, namely, you, may reverse the decision or order if the substantial rights of the petitioner may have been prejudiced because of the decision. Based on – these are the criteria, as I see it, where you have the authority to reverse the decision you made. There's three criteria. One is if there was a clearly erroneous finding of material facts or erroneous application of the law. First criteria, clearly erroneous fact or law. Secondly, the rule was arbitrary or capricious in its application. In other words, the Director was arbitrary or capricious in refusing to waive the 15-day rule. And thirdly, there was a clearly an unwarranted abuse of discretion. Those are the three criteria that are set out by this Board's rules.

Now, we think that there's an erroneous finding of fact and erroneous application of the law here, because as I read before, the Board has concluded that the record doesn't have discretion. And as I've argued, we think it's clear that the Director does have discretion because he exercised it, and he does have discretion because he has to have it if he's going to exercise his good cause discretion.



Now, I've heard some reasons why there is maybe supposed to have been a change between what happened in 2002 and what's happening now. And the County might say we've changed our minds. Now we're going to follow what we view as the requirement of the ordinance. If that's the position of the County, to me, that's arbitrary and capricious. It's arbitrary and capricious for them to say five years ago, you subdivider, you could apply late, but now, you subdivider, you cannot apply late, and there's been no ordinance change. It's the same ordinance.

Finally, by extending the date for other subdivisions, for the Kipahulu Kai Subdivision, and as Lesli Otani said that the Directors were more lenient, which implies, of course, that there were other instances where the rule was waived, by extending the date for prior subdivisions, and not extending the date for this subdivision, we think that Milton clearly engaged in a clearly unwarranted abuse of discretion. He abused his discretion. And that's not to say that I'm finding fault with Milton because I think Milton believes that he doesn't have the discretion. I think that this Board needs to find that he does have discretion. And that by – and if this Board finds that he does have discretion, by refusing to allow the subdivision to continue, he's abused that discretion.

Just to wind up, as we all know, the application was six days late. The subdivider's been working on this project for eight years. If the subdivision must reapply and go through another eight or more years of subdivision application, the subdivider – nobody would suggest otherwise. The subdivision – the subdivider is severely prejudiced. There's no question about that. Prejudice isn't one of the specifically stated reasons for reconsidering, but certainly this Board, as an overview of what the County's doing, I think has the right to look at prejudice.

And there's an interesting thing because there's three items of prejudice in this. One, the subdivider is prejudiced by not allowing the subdivision to go forward. I believe that the County is prejudiced by not allowing the subdivision to go forward and I'll tell you why. And you folks all know this very well. This subdivision, and Francis Cerizo knows this better than I and better than most of us, the County departments spend a lot of time reviewing subdivision applications, a lot of time, a lot of departments spend a lot of time. If this subdivision dies, that time is lost. It's all gone. It's lost. We aren't in an economic climate where we can say, well, we don't care. Let our County people spend all its time and we just let it be lost. We don't have that luxury. So there's prejudice to the subdivider. There's prejudice to the County. But on the other side of the coin, there's no prejudice that I can see. I don't think anybody can say that there's prejudice to the County, if the subdivision is allowed to continue. It's only six days.

So with that, we would ask that respectfully, if this Board would consider allowing us to reopen and present more testimony which would kind of put meat on the summary that I just made. Thank you.

Chairman Endo: Thank you. Ms. Johnston?

Ms. Johnston: Thank you. I'll try to be very brief. First of all, the Board should deny the motion for reconsideration based on an argument that there's newly discovered evidence in the form of this 2002 letter. In fact, the evidence, as I put in my memo, that in the past, there were some times when the 15-day rule was not abided by – that existed. So that happened. It was in front of the Board to the testimony of Ms. Otani when you made your decision. You said, yes, in the past, some of the – this rule wasn't followed, but since then, the rule has been followed. So this letter is not new evidence. We maybe didn't have this specific letter, but the concept was presented.

Second, the argument – Mr. Leuteneker starts with the argument that begs the question. He said, in the past, the Director had the discretion. That's begging to the question. In the past, the Director didn't follow what the Maui County Code says. You know, the gorilla in the room, and I want to talk about it, is there were abuses perceived by the public in the past by an arbitrary. You get an extension of time to have us consider your subdivision. You don't. And steps have been taken so that it looks – so that the practice now is everybody is treated the same way in accord with what the Maui County Code says. The code gives discretion to the Director on the issue of whether there's good cause for the subdivision time to be extended. That's the substance. It does not give the Director discretion on the procedural aspect with you've got to file it within 15 days. You could file your request for extension of time a year ahead, and have, say, okay, I see now it's January. I'm going to file again in January. No, it's going to take me two more years. You don't have to wait till the last minute.

And the final thing I want to say is even within the letter that Mr. Leuteneker has presented, well, Director Goode says, okay, you get the extension this time, but let me point out in the future, we're going to abide by the 15-day deadline. If the Director were to have the discretion, the code could be amended to give him that discretion, and then you'd have a whole another set of hearings you'd be hearing regularly whether you'd abuse it in this case or not. The code is very clear. You have this – the Director has discretion of determining whether it should be extended. No discretion on the deadline. And that's just the language on the code. Thank you.

Chairman Endo: Thank you. At this point, I'll allow the Board Members to ask questions of the parties, attorneys. Or if there's no questions, you can begin deliberation. Hari?

Mr. Ajmani: I think I just want to get more familiar with it, and this question may have been asked in the past or not but, Mr. Parker, why were seven extensions sought before this lot was ever denied?

Mr. Steve Parker: Hi, I'm Steve Parker. I'm the general partner of MEH Limited Partnership. Could you restate your question, please?

Mr. Ajmani: My question was that it looks like that there were seven extensions granted by the Board of – by Mr. Arakawa, and the last one was denied because it was submitted six days late or something. My question is what was – what were those six extensions sought for? Were you changing the subdivision plan or meeting the Planning Department requirements or–? I mean, I just want to get familiar with this substantive issues behind those extensions.

Mr. Parker: Originally, the plans for the subdivision did change. Every time that we had meetings with the Kihei Community Association, they would redraw our plans for us. So they wanted it to look one way and our engineer had it looking another way. So it did change over a period of time. The last portion of the time delay that we had was primarily getting the SMA approval going through the SMA process. And that was granted in February of last year when we finally got our SMA approval which, again, dealing with the Planners, there were issues of archaeological. There were issues of flood plains. We hired consultants and answered all the questions, and traffic studies, etc., etc. Well, we finally got approval from the Planning Department during the SMA process, and that occurred in February of last year. And we were then having to redo some items in the subdivision because of items that came up in the public hearing at the SMA hearing process. So,

yes, the subdivision did change in design over a period of time. And a lot of the time, extensions were having to deal with us getting SMA approval.

Mr. Ajmani: Okay. The preliminary subdivision was for six lots? The preliminary subdivision was for six lots?

Mr. Parker: That was – the original application was for six for lots fronting a privately-owned street. The original subdivision for six lots abutting the street that is immediately makai of us, but it's a privately-owned street and required 75% approval of the private property owners on the street. That street's never been dedicated to the public so we were never able to get approval of the private owners of that roadway for the subdivision. Then we had to redesign the subdivision to do the entire parcel. Rather, we were going to do in phases: front – do the first six lots, get that done, and then do the second phase, which was the balance of the raw land. But having been denied by that association or that group of owners, we then changed the design of the subdivision which started out with two cul-de-sacs in the subdivision. The Kihei Community Association didn't like it. We ended up with a loop road. We lost a number of lots doing that, but we were accommodating how the Kihei Community Association wanted it to look like. And finally, when we got through with all the community input is when we made the application for the SMA process, and we were finally granted again, as I said, February of last year.

Mr. Ajmani: Okay. Thank you.

Chairman Endo: Yes, Jim?

Mr. James Shefte: I have a question for Mr. Parker. Was there some really unusual circumstance that caused you to ask for the extension after the deadline date, this last one that's causing all this humbug for you now?

Mr. Parker: Well, the buck stops here. I was late, but previous to that, my engineer had been doing all of the correspondence with the County for the application for extension. And he e-mailed me in – like toward the end of May saying you – you know, you guys should make the application for the extension. So it was going to come under my letterhead, but I didn't pay attention to the rules. I just looked at it as July 2<sup>nd</sup> was the expiration date of the subdivision, and I figured I just needed to get it in ahead of that date. I didn't realize– Is your question what remained to be done to ask for an extension or was my explanation going to what your question was?

Mr. Shefte: Your explanation was just fine.

Mr. Parker: Okay, well, it was basically, the engineer had done it all the years prior to that, and he put it in my plate this past year.

Mr. Shefte: Thank you.

Chairman Endo: Okay. Further questions? Bill?

Mr. Kamai: Not for Mr. Parker.

Chairman Endo: Or for anyone? No?

Mr. Parker: Thank you very much.

Mr. Kamai: Just make a motion or--?

Chairman Endo: Yeah, motions are fine, yeah.

Mr. Kamai: I'd like to make a comment.

Chairman Endo: Sure.

Mr. Kamai: Yeah, I just wanted to comment on Ms. Johnston's presentation about the past Directors abusing their – or misusing their discretion to grant prior subdivision approvals in the past. Under this 18.12.060 for filing, what wasn't said was if these past Directors, Mr. Jencks or Mr. Goode, was in fact extending this permit under good cause. I think that wasn't presented in any of the facts regarding their – abusing their powers as Directors. But I do agree with her that there's nothing new in terms of evidence that we haven't seen before. That all the testimony regarding our decision that was made earlier to deny this variance remains the same.

Chairman Endo: Appeal, deny this appeal.

Mr. Kamai: Yes.

Chairman Endo: Hari?

Mr. Ajmani: Yeah, I think I have– This letter by itself does not tell me whether this couldn't have been error by itself. This could have been a mistake that they granted the extension when they shouldn't have. So just by saying that since they have given an extension once in eight years ago so the County should always give extension to the deadline now because they have given it once, so therefore, it should be allowed under the discretionary powers of the Department of Public Works' Director. So I agree with Bill. This really doesn't – this is not sufficient evidence to reopen, or reconsider, or definitely not reverse our decision.

Mr. Kamai: Again, we don't know if the extension granted in the past by past Directors was for good cause. And if it was, then that was something that should've been presented to us regarding the 2002 letter that Mr. Goode signed extending past the deadline.

Chairman Endo: Well, just for clarification, it is quite confusing, but there's two different things we're talking about. Okay? One is granting an extension—that an additional year. You have to have good cause before the County will give you an extension of a year to complete your subdivision. And then the other rule is, but you've got to submit that request 15 days in advance of the expiration of the original application. And so there's no written – there's nothing that says the standard on the 15-day submission rule, whether that can be waived for good cause or not. There's nothing really there under good cause. So good cause doesn't apply to the 15-day procedural rule. The good cause only applies to whether or not to grant them the whole one year extension. So it's a little bit mixed up when you're thinking about it. Maybe you can say it's implied

that you could consider a good cause for the other one, too. And I think the argument was made that if there's discretion for one, you should have discretion for both, but that's for you folks to decide. That was the argument at Council.

Mr. Giroux: Randy, just for the record, because a findings of fact, decision and order might have to be made on this issue, as far as my understanding is that there should be some kind of standard of what is new evidence. And I didn't hear either party argue for or against any standard of what is new evidence. My understanding in my years of litigation was that I had to make some kind of – almost an accusation that the evidence that I found was somehow hidden from me, or that there was no way in my capacity I could've gone and gotten that evidence, or that that evidence didn't exist at the time of litigation. And I didn't hear any type of argument in that sense as far as whether or not that is a standard that the litigants are looking at. And I'm just wondering. Is it because the attorney now didn't have a chance to go get that, or the litigant just didn't exercise his powers to go and get that evidence?

Chairman Endo: Well, I think he raises a good point, and he's drawing from the rules from courts, because the courts have rules on how you grant a motion for reconsideration, and what is new evidence so they can grant the motion for reconsideration. Unfortunately, in this case, we don't even have a rule that says we can do motions for reconsideration. So there's no real specificity as to what our standard should be for granting a motion for reconsideration so – but, you know, drawing from the courts is a good resource, if nothing else. I think that's partly why we're kind of grappling with the gray area kind of thing. But I guess he's – you're also pointing to the parties. If the counsel wants to make an argument on that vein as to the standard for–?

Mr. Leuteneker: Yes, of course, I wasn't involved in the case. Had I been involved in the case when we had the hearing, I'd change his argument. It would be very good. Well, you knew about it. She could've brought it. Why didn't you bring it? But I wasn't involved in the case. He didn't know about it. And I agree with you. There's a question about whether it's newly discovered evidence in terms of not being available. One definition of newly discovered evidence is was it available at the time of the hearing. Well, it was available at the time of the hearing. So based on that sentence, it's not really a newly discovered evidence, but for purposes of this Board considering the denial of this subdivision, it's certainly very relevant and certainly wasn't considered last time. So I think on that basis, it can be considered newly discovered evidence.

Ms. Johnston: If I may speak to that? It's our position that it's not new evidence because the fact that in the past extensions of time had been given by the Director was presented to the Board through the testimony of Ms. Otani. She said, yeah, in the past, this happened a few times. We're not doing that anymore. You know, we're expiring a lot of these subdivisions. So the concept that in the past the Director may have– And I don't– When I use the word "abuse" of discretion, he didn't have any discretion. I didn't mean to – I don't know what the reasons are why Mr. Goode did it. I'm not trying to assign anything to him. I'm just saying the perception is that you have a rule. It implies to everybody. It implies to everybody in the same way. And you don't have any modifier here that says the Director can look behind why you're not – why you didn't file your request on time. So the evidence was before you. It's in the minutes. Yeah, it was done in the past. It's not done now.

Chairman Endo: Okay. Well, I think we've heard a lot. So the Chair would request a motion one

way or the other be made so we can move forward. Hari?

Mr. Ajmani: Okay. I will make a motion that let's not reconsider this appeal and let it go take the next course.

Chairman Endo: Okay, so a motion to deny the motion for reconsideration.

Mr. Ajmani: Yes.

Chairman Endo: Okay. Second?

Mr. Shimabuku: I second.

Chairman Endo: Okay, it's been moved and seconded to deny the motion for reconsideration. Discussion? Hearing no further discussion, all in favor of the motion to deny the motion for reconsideration, please say aye. Opposed, please say no.

It was moved by Mr. Ajmani, seconded by Mr. Shimabuku, then

**VOTED: To deny the motion for reconsideration.**

**(Assenting: H. Ajmani, R. Shimabuku, W. Kamai, K. Tanaka, J. Shefte, R. Phillips.)**  
**(Excused: S. Castro.)**

Chairman Endo: **The motion is carried by the Board and the motion for reconsideration is denied.** Thank you. Okay, at this point, Trisha, can we call back the first item?

2. **VICTOR V. CAMPOS and MYRNA J. CAMPOS appealing the Planning Director's Notice of Violation (NOV 20090014) for the un-permitted storage of damaged vehicles on property located at 1215 Lower Main Street, Wailuku, Maui, Hawaii; TMK: (2) 3-4-039:076 (BVAA 20100001)**
  - a. **Applicant's Motion Requesting a Time Extension for Filing a Notice of Appeal**
  - b. **County of Maui's Hearing Memorandum**
  - c. **County of Maui's Exhibit List; Exhibits "A" - "L"**

Ms. Kapua`ala read the agenda item B-2 into the record.

Chairman Endo: Okay. Will the parties please state their name for the record?

Mr. Victor Campos: I'm Victor Campos, owner of Campos Auto Body and Towing.

Chairman Endo: Good afternoon.

Ms. Johnston: I'm Deputy Corporation Counsel Mary Blaine Johnston appearing on behalf of Planning Director Jeffrey Hunt.

Chairman Endo: Okay, before we begin to hear the motion requesting a time extension for filing a notice of appeal, is there anyone in the public who wishes to testify on this agenda item? Seeing no one stepping up, and hearing no request, we will close public testimony on this agenda item, and proceed with the motion. Mr. Campos, you want to summarize what you're requesting by your motion?

Mr. Campos: My motion is I'm trying to get Mr. Collins to get my case on it. And I would like to get one extension on the variance, and cut off on the fine until I get this request extension so Mr. Collins can take my case for this sign that they went grant me for the parking for more than 25 cars on my property. And I went to the State and get the application to park more than 25 cars. And they went grant me and sign the paper that I will be parking more than 25 cars in my facility. Apparently, the County wants to take back the sign – that they went sign the permission of my storage lot on Lower Main Street.

Chairman Endo: Okay. Mr. Campos, I'm going to interrupt you a little bit just because I understand that is your appeal that is the – that's the substance of your actual appeal, but at this point, we're just going to initially hear your motion for an extension of time.

Mr. Campos: Yes.

Chairman Endo: Yeah, so–

Ms. Johnston: Could I comment?

Chairman Endo: Yes.

Ms. Johnston: The NOV was issued on August 7<sup>th</sup>, and he actually filed his appeal on September 3<sup>rd</sup>. So it looks like to me the appeal was timely filed. There's no need for an extension of time.

Ms. Kapua`ala: Could Staff comment as well?

Chairman Endo: Yes, what is the – what are they actually asking to extend then?

Ms. Kapua`ala: The appeal was filed timely; however, was incomplete. They still needed a written analysis justifying the appeal, documentation of ownership, a filing fee of \$550, proof of service that the notice was served properly. And those documents would be submitted after the deadline to appeal. So because the Staff feels that it's not our jurisdiction, we don't have the authority to extend deadlines to appeal ourselves, we ask that they submit a motion for time extensions that you may allow him to appeal although his application was not timely submitted.

Chairman Endo: Oh, I see. So you're considering his appeal as being not complete?

Ms. Kapua`ala: Yes.

Ms. Johnston: Okay, we have no objection to the granting of the motion so he can have his day in court, as it were.

Chairman Endo: Okay. How much time is he – are you requesting, Mr. Campos?

Mr. Campos: I'm requesting at least 90 days because I talked to Mr. Collins that just get the extension then he will be representing me on this settlement of what – why they taking back the authorization for park 25 cars.

Chairman Endo: Okay, is there any objection to that?

Ms. Johnston: No. So my understanding is you want to continue this hearing until your attorney can come and represent you?

Mr. Campos: Yes.

Ms. Johnston: Okay, we have no objection to that.

Chairman Endo: Well, it's not just a continuation of the hearing. It's 90 days in order to finish making a complete appeal.

Ms. Kapua`ala: He did make a complete appeal. The motion for a time extension, you would have to – the Board would have to act on to allow the appeal to go forward. And then I think his wanting to extend the time further is like Ms. Johnston said, a continuation of the actual hearing.

Chairman Endo: Okay, so there's actually two things you're requesting that's wrapped together then. So the appeal is now complete.

Ms. Kapua`ala: It is now completed.

Chairman Endo: But it was completed after the deadline. That's why we're granting that first extension.

Ms. Kapua`ala: Yes. So if you do grant his motion, then he can go forward, and you will hear his appeal.

Chairman Endo: Okay. Okay, now we understand.

Mr. Shimabuku: I have a question. So the appeal was made in a timely fashion; however, it was incomplete?

Ms. Kapua`ala: Yes, yes.

Chairman Endo: Okay. So the filing fee has been paid, Trisha?

Ms. Kapua`ala: Yes.



Chairman Endo: So when was the – just to be clear on the record, when exactly was the appeal deemed complete?

Ms. Kapua`ala: We gave Mr. Campos a deadline. We asked him to complete his application on November 3<sup>rd</sup>. We gave him a deadline of November 18. And he submitted his documentation with his motion for a time extension on November 18.

Chairman Endo: Okay, so it's basically an extension to November 18 then, in terms of the filing of the notice of appeal?

Ms. Kapua`ala: Yes.

Chairman Endo: Okay. Okay, so basically this request is just for the past, to make the past all good, and then also granting the 90 days continuance in terms of the hearing date on the appeal. So it serves two parts at this point. Okay, any--? And there's no objection from the County?

Ms. Johnston: No, the County has no objection.

Chairman Endo: Okay.

Mr. Shefte: In that the County has no objection to the request, I move that we grant him – first of all, we approve the extension as the County laid out to November 18<sup>th</sup> for his proper filing. And that – give him 90-day extension forward from this date for him to take care the rest of his problems considering legal counsel.

Chairman Endo: Is there a second?

Mr. Shimabuku: I second.

Chairman Endo: Okay, it's been moved and seconded as stated to grant the extension and to grant the continuance of the hearing date on the appeal as described previously. Discussion? Okay, no further discussion. All in favor of the motion, please say aye. Opposed, please say no.

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

**VOTED: To grant the extension and to grant the continuance of the hearing date on the appeal as previously described.**

**(Assenting: J. Shefte, R. Shimabuku, H. Ajmani, W. Kamai, K. Tanaka, R. Phillips.)**

**(Excused: S. Castro.)**

Chairman Endo: **The motion is carried and your extension is granted.**

Mr. Campos: Thank you.

Chairman Endo: Oh, I'm sorry. Should we – did you want to set a date right now, Trisha?

Ms. Kapua`ala: The Board's calendar is open on May 27<sup>th</sup>. May 27<sup>th</sup> would be the next available hearing date in 90 days.

Chairman Endo: Is that okay, Mr. Campos?

Mr. Campos: It's okay.

Chairman Endo: Is that okay, Ms. Johnston?

Ms. Johnston: Mr. Wright is my witness and he has to be on Oahu on that date. So could we maybe set it for the next meeting after that?

Ms. Kapua`ala: June 10<sup>th</sup>.

Chairman Endo: Mr. Campos, is June 10<sup>th</sup> okay?

Mr. Campos: That would be fine.

Chairman Endo: Is that okay, Ms. Johnston?

Ms. Johnston: Yes.

Mr. Kevin Tanaka: Question: we're actually setting that date as the hearing?

Ms. Kapua`ala: Yes.

Mr. Tanaka: Now, by granting 90 days and – well, just over 90 days, I'm assuming if that's the next hearing available, if by chance something comes up that – you know what I mean? That meeting, that hearing date cannot be accommodated, how does that affect what we just said, okay, 90 extra days, but if that date isn't met, it'll be 115 days?

Mr. Giroux: You're asking if there's a–?

Mr. Tanaka: Yeah, if there's a consequence to that.

Mr. Giroux: I don't believe so. I think our rules say that once we've gone into a contested case, then as long as it takes us to litigate the issue. Only after we get into producing the order after we've heard all evidence, then a deadline will then be triggered again.

Chairman Endo: That's correct. We're not extending the time to complete the whole matter to that date. We've just granted the extension on the appeal to make it proper and we're just setting the hearing date.

Ms. Kapua`ala: I do like to comment on the fact that Mr. Campos' notice of violation will remain outstanding until that hearing date. And should the Board find favor with the County, then Mr.

Campos will be responsible for the appropriate fine, civil fine, initial fine, and daily fine which is a thousand dollars a day.

Chairman Endo: So, Mr. Campos, you understand what she said?

Mr. Campos: Yeah, I understand.

Chairman Endo: Just because you filed an appeal with us doesn't stop – doesn't freeze everything. Any fines that you might be liable for, it can continue to be incurred during this time, if you don't win on your appeal.

Mr. Campos: Well, Mr. Collins will take care of that fee.

Chairman Endo: So in fact if you wanted to, if you get Mr. – your attorney on board faster, you can always make a request for an earlier hearing. Just call up Ms. Johnston and ask for an earlier hearing, you know, and then we can accommodate that, too.

Ms. Kapua`ala: Yes, yes, sir.

Mr. Campos: So that means that you cannot stop that from the daily fees?

Chairman Endo: No, we don't have any power to rule on the fees. We're only – we will only rule on whether or not your appeal is valid or not. So if we rule that your appeal is valid and reverse the order of the NOV, then there would be no fines. If we affirm the NOV, that's all we do. We don't say what your fines are. The Planning Department and the County Executive Branch does that.

Mr. Campos: Okay.

Chairman Endo: Okay. Okay, thank you. Trisha?

### **C. COMMUNICATIONS**

- 1. SEASHORE PROPERTIES, LLC appealing the Director of Public Works' Notice of Violation (V 20090014) for exterior renovations without first obtaining the proper permit for property located at 93 Hana Highway, Paia, Maui, Hawaii; TMK: (2) 2-6-002:027 (BVAA 20090001)**
  - a. Stipulation to Dismiss with Prejudice**
  
- 2. MICHAEL BASKIN of SEASHORE PROPERTIES, LLC appealing the Director of Public Works' Notice of Violation (V20090018) for completing interior renovations without first obtaining building permits for a commercial building located at 93 Hana Highway, Paia, Maui, Hawaii; TMK: (2) 2-6-002:027 (BVAA 20090002)**
  - a. Stipulation to Dismiss with Prejudice**

3. **MICHAEL BASKIN of SEASHORE PROPERTIES, LLC appealing the Director of Public Works' denial to reissue Notice of Violations (V20080061 and V20090014) for completing interior renovations without first obtaining building permits for a commercial building located at 93 Hana Highway, Paia, Maui, Hawaii; TMK: (2) 2-6-002:027 (BVAA 20090004)**

- a. **Stipulation to Dismiss with Prejudice**

Ms. Kapua`ala: Under Communications, Seashore Properties, LLC, received three notices of violations from the Director of Public Works. Mimi, were you—?

Ms. Johnston: I was. Yeah, I'd like to report, yeah.

Ms. Kapua`ala: Okay, Seashore Properties, LLC appealing the Director of Public Works' notice of violations: 20090014, and 20080061, and 0014 for, for the property located at 93 Hana Highway, Paia, Maui, Hawaii, TMK: 2-6-002:027. And these are BVA file numbers: BVAA 20090002, 0004.

Ms. Johnston: Okay. Mary Blaine Johnston, Deputy Corporation Counsel. I was assigned to these two cases. We did reach a satisfactory settlement agreement, and Seashore Properties paid fines totaling about \$9,600. Actually, once the NOV's were issued, Mr. Baskin took steps and quickly resolved it, so the process worked in this case.

Chairman Endo: Thank you.

#### **D. APPROVAL OF THE FEBRUARY 11, 2010 MEETING MINUTES**

Chairman Endo: Okay. If everyone's had a chance to look at the February 11, 2010 meeting minutes, the Chair would request a motion to approve them.

Mr. Ajmani: So moved.

Mr. Tanaka: So seconded.

Chairman Endo: Okay, it's been moved and seconded to approve the February 11, 2010 meeting minutes. Discussion? Hearing none, all those in favor, please say aye. Opposed, please say no.

It was moved by Mr. Ajmani, seconded by Mr. Tanaka, then

**VOTED: To grant the extension and to grant the continuance of the hearing date on the appeal as previously described.**

**(Assenting: H. Ajmani, K. Tanaka, J. Shefte, R. Shimabuku, W. Kamai,  
R. Phillips.)**

**(Excused: S. Castro.)**

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

**E. DIRECTOR'S REPORT**

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

**F. NEXT MEETING DATE: March 11, 2010, Thursday**

**G. ADJOURNMENT**

Chairman Endo: If there is no further business of this Board, announcements, birthdays, parties, this meeting is – the next meeting will be March 11, 2010. Meeting adjourned.

There being no further business to come before the Board, the meeting adjourned at 2:44 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI  
Secretary to Boards and Commissions II

**RECORD OF ATTENDANCE**

**Members Present:**

Randall Endo, Chairman  
Kevin Tanaka, Vice-Chairman  
William Kamai  
James Shefte  
Rachel Ball Phillips  
Harjinder Ajmani  
Ray Shimabuku

**Members Excused:**

Stephen Castro, Sr.

**Others:**

Francis Cerizo, Staff Planner, Planning Department  
Trisha Kapua`ala, Staff Planner, Planning Department  
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel  
Lesli Otani, Civil Engineer, Department of Public Works, Development Services Administration