

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
NOVEMBER 10, 2010**

(Approved: December 9, 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, 1:47 p.m., Thursday, November 10, 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 it is 1:47 p.m. on November 10, 2010. And there's a quorum present of five Members of the Board. At this time, I'd like to ask the Planning Department to call the first item on the agenda.

B. APPEALS

1. **FAYE KASHIWA OTSUKA representing STREAM RESOURCES, INC. appealing the Director of the Department of Public Works' determination that roadway lots in the S. R. Inc. Subdivision application (DSA File No. 2.3118) are not "developable lots" as it pertains to Ordinance 2372 [Maui County Code, §18.04.020(C)] for property located off of Lower Ulumalu Road, Haiku, Maui, Hawaii; TMK: (2) 2-8-003:036 and former Lower Ulumalu Road (BVAA 20100003).**

Request to appoint another hearings officer.

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

Chairman Endo: Will the parties please make an appearance?

Ms. Jane Lovell: Good afternoon, Board Members. My name is Jane Lovell. I'm a Deputy Corporation Counsel. I'm not the Corporation Counsel assigned to this matter. That is Madelyn D'Enbeau, but we've never received notice that there was going to be a hearing in this matter I guess until yesterday when the amended notice came out. We don't have any paperwork on the request. It seems kind of irregular to us, but in any event, I have familiarized myself with the file in the last hour, and I'm here representing the Director.

Chairman Endo: Thank you.

Mr. Tom Leuteneker: . . . (inaudible) . . .

Chairman Endo: Could you use the microphone, as we're recording everything?

Mr. Leuteneker: Mr. Chairman, ladies and gentlemen, I'm Tom Leuteneker. I represent Stream Resources, as does Faye. When this appeal was filed, the Stream Resources requested a hearing

for a hearings officer, and there were three names provided to Stream Resources. And at that time, Blaine Kobayashi was representing Stream Resources and his first choice was Boyd Mossman, and I think his second choice was John McConnell, and the third person is Guy Haywood. As you all or most of you know, Blaine Kobayashi has gone on to the district court bench. I'm taking over the case from him. Stream Resources, and specifically, the principal, who is Eric Bryant, has had some experience with John McConnell, and he would prefer John McConnell over Boyd Mossman. I have great respect for both gentlemen. I've been involved with Judge Mossman in several commissioner cases where I've been the attorney in quiet title, and partition, and easement cases, and he's been appointed a commissioner. As a matter of fact, I just got back from Nahiku. Judge Mossman was in Nahiku appointed by Judge August to locate an easement in some land in Nahiku. So I'm familiar with Judge Mossman, of course, both as a circuit judge, but more recently as a commissioner. I've never been involved with Judge Mossman as a hearing officer in a Board appeal. I've been involved with John McConnell, of course, as a circuit court judge as well, and in one appeal that was done from the decision of the Department of Land and – not the Department of Land and Natural Resources, but Milton Arakawa's Department. And the reason we're here – the only reason we're here today– Oh, one more point, as I understand it, a contract was sent to Judge Mossman. It has not been signed. To our knowledge, it has not been signed. The only reason we're here this morning is to ask if you would reconsider the appointment of the hearings officer, and appoint John McConnell rather than Boyd Mossman. Thank you.

Ms. Lovell: Thank you. Like Mr. Leuteneker, of course, I have the greatest respect and aloha for both retired judges. However, on August 12th of this year, this Board entered an order, and the order was that a hearing officer would be appointed in the order agreed to by the parties. And the order was Judge Mossman, Judge McConnell, and if neither of those could serve, then Mr. Haywood. It seems to be kind of late in the game to be reconsidering that order. And obviously, if Judge Mossman is for some reason not able to serve or not willing to serve, then there is no need to vary this order. Then by this Board's order of August 12th, you would automatically go to Judge McConnell, but I have nothing here in the record that indicates that Judge Mossman has either refused to serve, or is technically unable to serve because some kind of conflict such as having a financial stake in the matter, being related by blood or marriage to one of the parties. So without something on the record other than the fact that one of the parties now wants a different hearing officer, I see no reason, and in fact, I see no legal authority for this Board to change its August 12th order.

Chairman Endo: Just for clarification, my recollection is that it's basically by stipulation, the parties previously agreed to those three choices as hearing officer. Is that correct?

Ms. Lovell: I have the minutes here. I've read them. My colleague, Ms. D'Enbeau, initially took the position that she felt the Board should hear the controversy without a hearing officer, but then the other party requested a hearing officer. There was some discussion back and forth. And then at some point, Ms. D'Enbeau said:

Should the Board decide it doesn't want to hear the matter and does want to appoint a hearing officer, we have agreed on the order of hearing officers that would be acceptable. There's no dispute. It would be in order: Judge Mossman, Judge McConnell, and Guy Haywood.

So I take it that there was an agreement of the parties. I don't know if it became a formal stipulation, but in any event, the minutes reflect that it was moved by Mr. Tanner, seconded by Mr. Kamai to appoint a hearing officer in the order agreed to by the parties.

Chairman Endo: Okay. So I take it at this point that the County or Ms. D'Enbeau, even though she's not here, is not agreeable to changing the order?

Ms. Lovell: Not absent some legal reason for doing so, that's correct, such as a conflict, or an unwillingness, or an inability to serve.

Mr. Leuteneker: Mr. Chairman, I know of no reason such as Jane suggests. The only reason we're asking for it is because I prefer, based upon what I said to have John McConnell, and my client prefers to have John McConnell. And if the Board is willing to reconsider . . . (inaudible) . . . As I say, Judge Mossman has not yet signed the . . . (inaudible) . . .

Mr. Bart Santiago: I have a question.

Chairman Endo: Sure.

Mr. Santiago: When was the document submitted to Judge Mossman? Do we know?

Ms. Lovell: The contract doesn't come from our side of the office.

Chairman Endo: Are you referring to a contract for services to hire the hearing officer?

Mr. Santiago: Yeah.

Ms. Lovell: Yeah. I have no— I think that Trisha Kapua`ala usually handles the contracting. And I don't know that he hasn't signed. I mean, I'm not saying that Mr. Leuteneker's wrong. I just have no information one way or the other, but it takes some time to get these contracts together. It takes some time to get them out. I don't know who prepares them, but I think it's gonna cause another lengthy delay if we change courses in midstream. Really, I have no personal problem with Judge McConnell. It's just the process. Once this Board decides, I don't see any legal ability to change the Board's previous order.

Chairman Endo: Well, I think my guess would be that we could change it if we wanted to. The only question is whether or not we want to, but I'll ask Mr. Giroux to comment on that question as to whether or not the Board can change its prior order.

Mr. James Giroux: Yeah, it's not a matter of whether the Board can or cannot. It's more of an issue of procedure. There's no guidance in our rules about— This would be considered a motion to reconsider, but also, under *Robert's Rules of Order*, you're looking at amending something that's previously been adopted, which carries its own set of rules of procedure when a Board adopts something such as an order that results in a contract under fair play and fair notice that you would have a discussion at this meeting to say that in the future, you would wanna take up this issue so that all the Members were aware that there was something that was going to be changed, and that somebody had the inclination to make the motion at the next meeting to change it.

The second point is that if there's a request to change hearings officers, there should be some standard, some level, of burden of proof, I would say that for – as where somebody misses a deadline, we have an order to show cause. What is the cause? And usually in a situation like this, you would be coming forward and saying that the hearings officer is unable, or unwilling, or that there is a conflict, or I'm not comfortable with the hearings officer, or that the hearings officer has shown prejudice towards me. These types of arguments would be entertained by the Board.

One thing the circuit court is very wary of is because they have three courts sitting at the same level is for people to form shop, and try to go into the next courtroom thinking that it'll be more favorable to them. And the courts frown on that. So they do look at why – you know, kind of who you get as your hearings officer. There is an opportunity to pick them at the beginning. And once the game starts playing, you – there should be a level of reason or some explanation of why you wanna change the hearings officer.

So the answer is, you can. You do have the power to, but first of all, look at the reason. Second of all, look at the fact that a contract has gone out, not that it had been signed. We don't have that information. And thirdly of all, if somebody does have that inclination, then it's something that should be put on the agenda as an action that the Board may take in the future.

Mr. Rick Tanner: I have a question for Tom.

Chairman Endo: Yes.

Mr. Tanner: Tom, you had mentioned that the order has not been signed yet. As of what date and time do you know that it hasn't been signed?

Mr. Leuteneker: I can't answer the question . . . (inaudible) . . . Trisha told Fay that–

Chairman Endo: Tom, please use the mic.

Mr. Leuteneker: I'm sorry. Trisha told Fay that the contract – I don't know the date, but Trisha told Fay that contract has not been signed and returned by Judge Mossman.

Mr. Tanner: Was that yesterday, or today, or when was that?

Mr. Leuteneker: Last week.

Mr. Tanner: So it well could be signed right now, if the last update you had was a week ago.

Mr. Leuteneker: It's possible. I don't think the Board has it. We don't have it. So we don't know.

Chairman Endo: Any questions or–?

Mr. Santiago: I'll make a comment. I think it would be prudent for us to check into the status of the contract at this point. I wouldn't recommend making a change based on not knowing the information has been signed, or not even knowing whether or not it was delivered to Judge Mossman, when it was sent, is my perspective.

Chairman Endo: Okay. Well, let's ask Corporation Counsel. I think that we don't have to worry too much about the contract going to Judge Mossman, because if this Board did want to change hearings officers, I don't think we're contractually obligated to actually use Judge Mossman, even after he signed it. In other words, we can sign him up, and say, oh, we changed our mind, so we're not gonna use your services. It's not like we have to use him, but I'll ask.

Mr. Giroux: Now that you mention it, I would have to see the wording of that contract, because I think this is why it takes us so long to get these contracts out because some people do haggle about those clauses about whether or not there's—

Chairman Endo: A termination clause?

Mr. Giroux: Yeah. And without that information, I wouldn't be able to advise you. Yeah, these contracts aren't standardized. I wish they were, but that is an argument that if somebody – a contract is valid once there's acceptance. And when you sign it, that's an acceptance. So unless the document itself negates that, we would not know at this point.

Mr. Tanner: I'm prepared to make a motion.

Chairman Endo: Sure.

Mr. Tanner: I would make a motion that the Board's decision on the selection of the hearings officer remain unchanged.

Chairman Endo: Okay.

Ms. Bernice Vadla: I'll second it.

Chairman Endo: Okay, it's been moved and seconded to deny the applicant's request to change the current selection of hearings officers. Discussion? None? Okay. All those in favor of the motion to deny the request, please say aye. Okay, the Chair votes aye.

It was moved by Mr. Tanner, seconded by Ms. Vadla, then

VOTED: To deny the applicant's request to change the current selection of hearings officers.

(Assenting: R. Tanner, B. Vadla, R. Phillips, B. Santiago, R. Endo.)

(Excused: B. Kamai, R. Shimabuku, S. Castro, K. Tanaka.)

Chairman Endo: **So the motion denied.** Thank you. Okay, moving on to Item C-1.

C. UNFINISHED BUSINESS

- 1. PAUL K. NISHIDA of the NISHIDA FAMILY TRUST appealing the Planning Director's Notice of Violation for maintaining a construction equipment**

**storage and baseyard within the agricultural district for property located at 756 Pulehu Road, Kula, Maui, Hawaii; TMK: (2) 2-3-060:006 (BVAA 20100005)
(Continued from the October 28, 2010 meeting.)**

- a. **Paul K. Nishida's proposed findings of fact, conclusions of law; certificate of service.**
- b. **Appellee Director, Department of Planning, County of Maui's proposed findings of fact, conclusions of law; decision and order; certificate of service.**

Mr. Cerizo read the agenda item into the record.

Chairman Endo: Good afternoon.

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

Mr. James Takeyesu: James Takeyesu, appearing on behalf of the Appellant who will be here shortly. He's outside.

Chairman Endo: If I recall correctly at our last meeting on this matter, we had set parameters for, I believe, 20 minutes per side for closing argument? Is that correct?

Mr. Takeyesu: That is correct.

Chairman Endo: Okay, so we will allow the Appellant to go first, Mr. Takeyesu. And you can reserve – you wanna tell me now how much you wanna reserve?

Mr. Takeyesu: I would want to split it in half.

Chairman Endo: Split in half. So I'll let you know when you hit ten minutes then.

Mr. Takeyesu: My concern is you have a lot of the Board Members not present today. So I was gonna request a deferral so that more of them can be in attendance.

Chairman Endo: Okay. We should address that now then.

Mr. Takeyesu: If you would.

Chairman Endo: You wanna say anything more?

Mr. Takeyesu: I know that the other – the absent Board Members were present during the evidentiary hearing. And I just feel that it would be important for them to also participate. I'm not sure what the procedure is after closing argument. I know under the rules, there's like 45 days before, I guess, a final decision has to be made. So I don't know if they will be able to participate or what the procedure is because of Mr. Giroux's concerns about how circuit court is treating this type of proceeding. So there's gonna have to be a longer process to be sure that whatever is

finalized, if it does go to court, will be able to withstand judicial scrutiny.

Chairman Endo: Okay. Ms. Johnston, will you speak to the motion?

Ms. Johnston: Yes. The County's prepared to go forward today. I noticed we do have a bare quorum. I don't know whether if we go ahead and present closing argument that the Members that aren't here could maybe review the transcript of the closing argument. They've heard the evidence or up on the evidence whether they could participate in deliberations. It was our understanding that we would be the only thing on the agenda today, and we could do our closing arguments, and hopefully, the deliberation could be completed today on this matter. That may be serendipity even if we do get to the closing arguments whether or not you guys can finish deliberation today. So I really would leave it up – I mean, maybe some of the other Board Members would like to speak to the issue. I can do either way. I can go forward, complete the oral argument, or put it off to another time.

Chairman Endo: Okay, Board Members, we have a motion by the Appellant to defer the matter to another hearing date. Discussion?

Mr. Tanner: I can certainly understand the request, but we don't have guarantees as to a future date of who's gonna be there again either, but I understand.

Mr. Santiago: I think it's important to have the other Board Members participate in the process since they've been through most of this.

Chairman Endo: Okay.

Mr. Santiago: We need to coordinate the dates that we're all available, which we've done in the past.

Mr. Tanner: Defer to the Chair.

Chairman Endo: Well, yeah, I can go either way, whatever the pleasure of the Board. I certainly would not – I certainly would prefer not to have to hear 40 minutes of closing argument, not make a decision, and then have to hear it all over again because we have to bring in more people and refresh our memory.

Ms. Johnston: Is there any way we can get an idea, if it's deferred, when it might be deferred to? I'm not sure what your guys' agenda looks like.

Mr. Aaron Shinmoto: Wednesday, November 24th. The day before the Thanksgiving is a Wednesday, and December 9th is a regular meeting. If not, January, 2011. We only have two more meetings left for this year.

Mr. Takeyesu: January—?

Mr. Shinmoto: November 24th is the Wednesday before Thanksgiving, and December the 9th is a regular Thursday meeting. After that, we have to go next year, 2011.

Ms. Johnston: I think the Wednesday before Thanksgiving would be a very un-holiday kind of time. Just before – a lot of people do take off before– What does the agenda look like on December?

Mr. Shinmoto: For both meeting dates, the 24th and December the 9th, we have variances scheduled. So it's not gonna be a free day for the Board Members. There's one case on each day I believe. So you will be meeting.

Ms. Johnston: In January, what about the first meeting in January?

Mr. Shinmoto: She needs to get her calendar for the next year if you want to take a two-minute break.

Chairman Endo: Okay, we'll be in a two-minute recess.

(A recess was then taken at 2:12 p.m., and the meeting reconvened at 2:14 p.m.)

Chairman Endo: Okay, we're back in session.

Mr. Shinmoto: The next available would be – the first meeting in January will be tied up with a workshop and an appeal. The 27th of January will be the next available, but that also has a variance, but we can schedule this with that.

Chairman Endo: Okay. Well, now knowing all of that, do the parties have any further comments?

Mr. Takeyesu: I think we'd be available on any of the dates. If in the meantime, we could contact the other Board Members, because at this point, we don't know what dates are best for them, and then just notify us. As I said, we'll be available on any of those dates.

Ms. Johnston: I would prefer to have it – if it's January 27th that they it set. Then if for some reason that is not gonna work, then change it then. I hate to leave it just free-floating.

Chairman Endo: Okay, but the 27th has a variance on it already?

Mr. Shinmoto: Yes.

Chairman Endo: So then there's no difference between that and using a November or December date then?

Mr. Shinmoto: No, except that it's the holidays.

Chairman Endo: Except that it's the holidays, true. Mr. Takeyesu, if we do defer, you'd prefer a November, December, or January date, or no preference?

Mr. Takeyesu: Probably November. . . . (inaudible) . . . Again, you know, it's probably good to contact who would be available.

Ms. Vadla: How many of us need to be here?

Chairman Endo: Well, we have enough right now. Five is enough.

Ms. Vadla: I understand, but he's asking for the rest of the Board Members. You want the full—?

Mr. Takeyesu: Well, I know we can't guarantee that everyone will be available. It's just that a bare quorum . . . (inaudible) . . .

Chairman Endo: So basically, if we passed the motion, we'd just defer to another date, and then if there's still only five, or six, or whatever there, we can just go forward. We could still go forward, or they could consider another motion, but then just decide that at that time. So why don't we act on the motion if there's no further discussion? The exact date is not that big a deal. We should just maybe decide whether to defer it or not, and then we'll pick an appropriate date. I think we could just do that. So essentially, there's a motion on the floor, or do I need a motion from the Board?

Mr. Giroux: Yeah . . . (inaudible) . . .

Chairman Endo: Okay, so there's a motion before us from the parties, so we need a motion from the Board to either grant the motion or deny the motion.

Mr. Santiago: I'll make a motion to grant it.

Chairman Endo: Okay, to grant the deferral.

Mr. Tanner: Second.

Chairman Endo: It's been moved and seconded to grant the request for a deferral.

Mr. Shinmoto: Are you gonna mention the date?

Mr. Santiago: We have three options that we – to consider.

Chairman Endo: Yeah, we're gonna for – at the request of the Appellant, shall we go for the November date?

Ms. Johnston: That's the one I raised the objection to. I prefer it be in December.

Mr. Shinmoto: The November date is November 24th. The December date is December the 9th. The 24th is the day before Thanksgiving.

Ms. Johnston: So it's another Wednesday.

Chairman Endo: Okay.

Ms. Vadla: Sounds less of a chance of getting everybody here.

Chairman Endo: In December?

Ms. Vadla: No, in November.

Chairman Endo: November. Okay, so Corp. Counsel objects or doesn't like November?

Ms. Johnston: I think the likelihood of more people being here in December rather than the day before Thanksgiving is probably a greater probability that we'll have more people here.

Chairman Endo: So you'd rather have December?

Ms. Johnston: Yeah.

Chairman Endo: Okay. Knowing all that, we'll let the maker of the motion—

Mr. Santiago: Okay. I'll make a motion to grant the deferral of the next hearing till December 9th.

Mr. Tanner: Second.

Chairman Endo: Okay, it's been moved and seconded to defer this matter to the December 9 meeting. Discussion? All those in favor, please say aye. The Chair votes aye. All opposed, say no.

It was moved by Mr. Santiago, seconded by Mr. Tanner, then

VOTED: To defer this matter to the December 9 meeting.

**(Assenting: B. Santiago, R. Tanner, B. Vadla, R. Phillips,
R. Endo.)**

(Excused: B. Kamai, R. Shimabuku, S. Castro, K. Tanaka.)

Chairman Endo: **Motion passes, and the deferral is granted. This meeting will continue on December 9.** Thank you. 1:30. Moving on to Item D-1, status update on BVA's contested cases.

D. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Mr. Cerizo: We have no status on the BVA contested cases today.

E. NEXT MEETING DATE: November 24, 2010, Wednesday

Chairman Endo: Our next meeting date is November 24, 2010. It's a Wednesday again. Is there any further business of the Board? Announcements? No? This meeting is then adjourned.

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 2:20 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
Rachel Ball Phillips
Bernice Vadla
Bart Santiago, Jr.
Rick Tanner

Members Excused:

Kevin Tanaka, Vice-Chairman
William Kamai
Ray Shimabuku
Steven Castro, Sr.

Others:

Aaron Shinmoto, Planning Program Administrator, Planning Department
Francis Cerizo, Staff Planner, Planning Department
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel