

LAND USE COMMISSION
MINUTES OF MEETING

November 4, 2005
Aloha Beach Resort Kauai
3-5290 Kuhio Highway
Kapa`a, Kauai, Hawaii

COMMISSIONERS PRESENT: Thomas Contrades
Michael Formby
Kyong-su Im
Lisa Judge
Duane Kanuha
Steven Montgomery
Ransom Piltz
Randall Sakumoto

COMMISSIONERS ABSENT: None

STAFF PRESENT: Diane Erickson, Deputy Attorney General
Anthony Ching, Executive Officer
Maxwell Rogers, Staff Planner
Sandra Matsushima, Chief Clerk
Holly Hackett, Court Reporter
Walter Mensching, Audio Technician

Chair Sakumoto called the meeting to order at 9:05 a.m.

ADOPTION OF MINUTES

Chair Sakumoto noted an addition to the minutes of October 19, 2005, page 9, regarding the Bridge Aina Lea matter, noting that the minutes should reflect that "Petitioner's counsel requested that the Commission take action at that time." He also proposed corrections to the paragraph so that it reads "After a discussion, Chair Sakumoto noted that there were numerous exhibits that were filed on October 18 and 19, and the supplemental memo filed on October 19, and that the Commission is dissatisfied with Ms. Bouslog's testimony. Chair Sakumoto suggested that the Petitioner prepare a case that considered the need

to address questions that were brought up today by the Commission. Chair Sakumoto adjourned this docket item till the next meeting on November 4, 2005 in Kauai.”

Commissioner Piltz added that on page 10, his comments regarding the mitigative measures of \$93 million should have instead been \$193 million. It was suggested to staff that a footnote be added to that part of the minutes to indicate that the correct figure is \$193 million instead of the \$93 as cited by Commissioner Piltz.

Commissioner Piltz then moved to adopt the Land Use Commission meeting minutes of October 19, 2005 as amended and the minutes of October 20, 2005. Vice Chair Montgomery seconded the motion. The minutes of October 19, 2005 and October 20, 2005 were approved by voice votes.

TENTATIVE MEETING SCHEDULE

Executive Officer Anthony Ching reported that the next meeting will be on Maui to commence with the Pulelehua hearing and would include an action item on the Consolidated Baseyards housing study. Mr. Ching noted that the December 1 and 2 meetings originally scheduled for Kona may shift to Maui. He proposed to continue the Pulelehua hearings and to hear the exceptions by the parties in the Kuleana Ku`ikahi docket at that time. The January 19 and 20 meetings will shift to the Big Island to continue with the McCully docket. Mr. Ching commented that although the schedule of dockets may appear clouded, the calendar dates are firm.

After a discussion and clarification of the LUC’s calendar, there were no further questions posed by the Commission.

SP05-399 KAUAI ATV, LLC (Kauai)

Chair Sakumoto stated that this was an action meeting to consider issuance of a Special Permit for approximately 12,437.79 acres at Koloa, Kauai, Hawaii involving the expansion of use and additional structures within a previous County permitted staging area and expansion of commercial recreational activities involving the increase and change in the number of vehicles allowed for guided all-terrain vehicle

tours, water activities in the Waita Reservoir, two paint ball parks, and a speedball tournament field.

APPEARANCES

Walton Hong, Esq., represented Petitioner

Ollie Rivera, Kauai ATV, LLC

David Hinazumi, Grove Farms

Myles Hironaka, Deputy Director, County of Kauai Planning Department

John Chang, Esq., represented State Office of Planning

Abe Mitsuda, State Office of Planning

Chair Sakumoto asked Petitioner if staff had informed them of the Commission's policy regarding reimbursement of hearing expenses and if they had any comments or objectives to the reimbursement policy. Mr. Hong replied that they had reviewed the policy and had no comments.

Staff Report

1. Max Rogers

Mr. Rogers provided a brief summary of staff's report and discussed issues related to the identification of the petition area, procedural history, issues for clarification, and presented photos of the site.

Mr. Hironaka stated that publication and notification requirements were properly addressed and that hearings were held in September. Mr. Hironaka added that the County recommends approval with conditions for this applicant.

Mr. Chang noted that the State had no questions.

Commissioner Contrades raised a few questions related to the number of accidents that had occurred on the tours, the availability of first aid, and the source of CPR training for the guides.

Mr. Hong replied that there have been very few accidents and no serious injuries and noted that the County already requires that first aid kits are equipped on the ATVs, radio telecommunications and an emergency response plan with the fire department. Mr. Hong added that the tour guides are trained in first aid and CPR.

Commissioner Contrades asked about the maximum traveling speed of the ATVs, and the duration of the tour. Mr. Rivera replied that while they can travel up to 40 mph, but they have set the maximum speed to 20 mph and that the speed limit is at 15 mph. The tour lasts approximately 4 hours including stops for lunch and several breaks.

Vice Chair Judge referenced the correspondence received from Malama Maha`ulepu and raised questions related to their written concerns that Petitioner is utilizing the coastal area.

Mr. Hong replied that the “alternative” route is rarely used and that it does not come close to the coastal area, as the route is on the cane haul roads. Mr. Hong added that the “alternative” route is only used in emergency situations or when weather conditions are really bad and storming.

Commissioner Im raised a few questions related to the ATV route and the “alternative” route as shown on the County’s map, the lands owned by Grove Farms, the issues raised in the Malama Maha`ulepu letter regarding native Hawaiian birds, and the number of times Petitioner has utilized the “alternative” route.

Mr. Rivera explained that they normally do not use the “alternative” route but has recently taken a film crew to film and photo the area for about 10 minutes. Mr. Rivera added that they have been in this area approximately twice a year in the past 4 years and do not get paid for taking the film crews out, but benefit through name promotion and exposure for Kauai ATV.

Commissioner Piltz asked for the average number of people on tour each day and if the 200 maximum figure set by the County is too limiting for his business. Mr. Rivera replied that there is an average of 30 people per day and that the 200 maximum is a possibility maybe once or twice during the peak summer month, but realistically, is not a limiting number.

Vice Chair Montgomery had a few questions and concerns regarding Ms. Blauch’s correspondence about being previously allowed access to the Waita Reservoir, and the Kauai Aquatic fishing clubs.

Commissioner Im raised questions relative to the right of entry agreement with Grove Farms and the limitations of its 10-year term. Commissioner Im questioned if the permit (if approved) would be granted to the general user of

the area, as a special permit request is not typically for activities but rather for a land area.

After a discussion, there were no further questions posed by the parties or the Commission.

State's Witness

1. Abe Mitsuda

Mr. Mitsuda stated that the Office of Planning is in support of the applicant and the recommendation made by the County Planning Commission. Mr. Mitsuda added that they have discussed the matter with Peter Young, Chairman of DLNR, and he recommended that consideration be given by Grove Farms to allow that the trails be used by private ATV owners, if possible, to keep them out of other sensitive areas, and to further explore these contingencies or possibilities with the DLNR.

There were no questions raised by the parties or the Commission.

Chair Sakumoto stated that the Commission can take action to approve, approve with modification, or deny this application and that staff has recommended in their report that an additional condition be imposed to those previously imposed by the County Planning Commission.

Commissioner Piltz moved to approve Special Permit No. 05-399 Kauai ATV as forwarded by the County Planning Commission, and to include staff's recommend changes. The motion was seconded by Vice Chair Judge.

Chair Sakumoto asked that staff read the condition.

Mr. Rogers read the condition and noted that the Planning Commission did not specifically indicate a general condition that the Petitioner should adhere to the representations made in the annual report.

Commissioner Contrades questioned if the Petitioner would have the right to change the tour routes at any time without coming before the LUC. Mr. Rogers replied that the tour routes are not subject to change and may only be used as represented to the Kauai Planning Commission and to the LUC.

Commissioner Im asked if Grove Farms was a party to the County approved permit. Mr. Rogers replied that the Petitioner notified the Planning Commission that Grove Farms has joined the process, which was acceptable to the Planning Commission.

After a discussion, there were no further questions posed by the Commission.

Chair Sakumoto noted that the motion is to approve the Special Permit with the addition of 1) staff's recommended condition; 2) with modification to condition no. 1; and 3) the addition of the general condition that Petitioner adheres to the representations made to the Planning Commission and the LUC.

The Commission was polled as follows:

Ayes: Commissioners Piltz, Judge, Contrades, Formby, Im, Kanuha, Montgomery, and Sakumoto.

The motion passed with 8 ayes.

Chair Sakumoto expressed his appreciation to Mr. Rivera for allowing the Commission on his property and to Mr. Hironaka for hosting the Commission at the HCPO conference.

Mr. Hironaka expressed his appreciation to the LUC and staff for having Mr. Eber as a guest speaker at the conference.

A recess break was taken at 10:25 a.m. The meeting reconvened at 10:50 a.m.

A87-617 BRIDGE AINA LE`A, LLC and BANTER, INC. fka PUAKO HAWAII PROPERTIES (Hawaii)

Chair Sakumoto stated that this was an action meeting to consider Petitioner Bridge Aina Le`a LLC and Banter, Inc.'s Motion To Amend Conditions 1 and 8 of Amended Findings of Fact, Conclusions of Law, and Decision and Order Dated July 9, 1991.

APPEARANCES

Bernard Bays, Esq., represented Petitioner

Robert Martin, Esq., represented Petitioner

Joshua Treveye, Esq., represented Petitioner

Bobbie Jean Leithead-Todd, Esq., represented County of Hawaii Planning Department

John Chang, Esq., represented State Office of Planning

Abe Mitsuda, State Office of Planning

Mr. Bays noted that Mike Bowen from Westwood was scheduled to attend this meeting but because Westwood will complete an acquisition this week, Mr. Bowen was not able to attend.

Chair Sakumoto noted that there were no public witnesses.

Chair Sakumoto noted that due to the Commission's flight schedule, they would need to end by 2:00 p.m. Chair Sakumoto also noted that in the event they are unable to finish this item today, the LUC's future calendar and agenda items would not allow this matter to be heard until the LUC's second meetings in January. Chair Sakumoto commented that Petitioner should therefore manage his time efficiently. Chair Sakumoto added that at the last meeting, Petitioner's counsel wanted the Commission to take action at that time and if Petitioner believes that they are in a position today, they should keep in mind that the County and the State have not had their chance to make their own presentation.

Admission of Additional Exhibits

Mr. Bays began his presentation and provided new exhibits 29, 32, 33, and 34, and also Exhibits 31a to 31g from Dr. Bouslog. Mr. Bays added that he would like to have Dr. Bouslog testify and answer questions that the Commission had from the last meeting.

Chair Sakumoto commented that it is up to the Commission to admit these new exhibits and to allow Dr. Bouslog to testify. Chair Sakumoto reminded Petitioner that these new exhibits were submitted late and noted that he was unsure whether or not the Commission could properly digest the new materials. Chair Sakumoto repeated his call that Mr. Bays manage his time available to the Commission to hear this matter and still expect the LUC to take some type of action today.

Mr. Bays offered exhibits 31a to 31g, 29, 32, 33, and 34. There were no objections by the parties and the Commission. Said exhibits were admitted into evidence.

Petitioner's Witness

1. Ann Bouslog

Ms. Bouslog discussed the questions raised by the LUC at the last meeting and explained the changes to the figures in the analysis which addresses only the affordable housing, finished lot costs, the number of units in each segment, gross sales revenue, main infrastructure and financing costs, and market unit costs.

Ms. Leithead-Todd had a few questions regarding the proposed figures and compounding, vertical construction and infrastructure costs, finished lot costs, and net loss comparisons.

Mr. Chang noted that the State had no questions.

Commissioner Formby raised questions relative to the new exhibits, its proposed figures, the burden on the market units, and profit.

Commissioner Im had questions and concerns regarding the finished lot costs for the market priced units, development costs, land acquisition and planning, and the purchase price of the property. Mr. Bays interjected that it was 25 million dollars for the total costs, including planning fees.

Commissioner Im also raised questions related to the carrying costs, backbone infrastructure, and if Petitioner had a pro forma for the project. Commissioner Im raised concerns whether there was a clear preponderance of evidence for decision-making and referenced HAR §15-15-77 (a).

A recess break was taken at 12:00 p.m. The meeting reconvened at 12:20 p.m.

Mr. Bays discussed the issues raised by Commissioner Im regarding the pro forma for the project. Mr. Bays also discussed Exhibit 31, and the 20% reduction scenario for affordable housing.

Vice Chair Montgomery referenced the written testimony of Stacey Davis that was received by the Commission at this meeting. Vice Chair Montgomery

questioned the concern raised in the letter as to the possible use of the Special Improvement Financing By Community Facilities Districts program and asked if Dr. Bouslog was familiar with this technique.

Ms. Bouslog stated that they are mechanisms to help make affordable housing successful, however it is not the intention of the Petitioner to use this technique for this project.

Ms. Leithead-Todd reported that the County is in support of the amendment and rested her case.

Mr. Chang noted that the State had no questions.

Commissioner Kanuha raised a few questions relative to the County's support for this petition, the necessary zoning and discretionary approvals to proceed, the affordable housing condition, and the difference between the County's housing agency and the Office of Housing and Community Development.

Vice Chair Judge posed a few questions regarding the development of the golf courses that were previously approved within the master plan area and its compliance of Act 205.

Chair Sakumoto asked the County if Petitioner has any discretionary approvals remaining that may interfere with the timeline to proceed. Ms. Leithead-Todd replied that the subdivision approval has not been approved yet and noted that the County has observed that some subdivision approvals have been held up due to challenges raised during this administrative procedure.

EXECUTIVE SESSION

Vice Chair Judge moved that the Commission enter into executive session under §92-5(a)(4) to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities. The motion was seconded by Commissioner Piltz. Said motion was unanimously approved by voice votes.

The Commission entered into executive session at 12:50 p.m.

The open meeting reconvened at 1:05 p.m.

Chair Sakumoto reconvened the open meeting and noted that the Commission will continue with the proceedings and called upon the State's witness to testify.

State's Witness

1. Abe Mitsuda

Mr. Mitsuda summarized the Office of Planning's testimony and added that the State recommends the minimum housing standard without restricting the County's ability to require affordable housing and offered the State's proposed language amending condition number 1.

Ms. Leithead-Todd commented that the County is in support of OP's recommendation.

Mr. Bays noted that Petitioner also supports the testimony of Mr. Mitsuda and the Office of Planning.

Mr. Chang added that if the Commission is willing to accept the proposed language, they would be happy to provide a copy to all the parties.

Chair Sakumoto noted that the Commission's usual turn around time for production of transcripts is approximately one (1) month and because the Commission has been hearing this docket every two weeks for the past 2 months, some of the Commissioners have not received the transcripts or were not present at all of these proceedings.

After Chair Sakumoto received legal citations from their Deputy Attorney General, Chair Sakumoto asked the parties if they were willing to waive the requirement that the Commissioners have heard and examined all of the evidence, pursuant to §91-9(d), HRS.

Mr. Bays commented that he believes that most of the Commissioners have heard much of the testimony and for that reason, they are willing to waive the requirement.

Ms. Leithead-Todd stated that the County was willing to waive that and added that although the Commissioners have not reviewed the transcript, they have received all of the exhibits.

Mr. Chang noted that the State is also willing to waive that provision identified by the Chair.

Chair Sakumoto referenced the condition on Petitioner's Exhibit 32 and noted that the Commission understands that the Petitioner is asking for some relief, but is not clear on what they are asking for. Chair Sakumoto added that the Commission is trying to determine what is being requested and needs a firm position from the Petitioner in writing in order to take action.

Mr. Bays stated that condition number 1, as contained in Exhibit 25, is their original request and had reluctantly submitted another draft in his desire to provide flexibility and balance for his client. Mr. Bays then withdrew Exhibit 32 and noted that Petitioner stands on Petitioner's Exhibit 25.

There were no objections to the withdrawal of Petitioner's Exhibit 32.

Commissioner Piltz expounded on the need for affordable housing and noted that he is willing to give an affirmative vote on this matter if only Petitioner keeps Exhibit 32 on the record.

Chair Sakumoto commented that whether or not Exhibit 32 is kept on the record, the conditions need to be laid out by the Commission and noted that given the changing representations of the Petitioner, he was only trying to establish whether the Petitioner wanted to keep it in or withdraw it.

Commissioner Formby noted that the Petitioner's counsel indicated that Exhibit 32 had been withdrawn at the request of the Chairman. Commissioner Formby indicated that this last minute withdrawal was based upon the State's proposed language, and not what was put forth by this Commission.

Mr. Bays stated that they will keep Exhibit 32 on the record.

Mr. Chang offered the State's proposed condition as State's exhibit next in order. There were no objections by the parties. Said exhibit was submitted into evidence.

Chair Sakumoto then closed the evidentiary portion of the hearing and the Commission went into its deliberations.

Vice Chair Judge moved to grant the motion by Bridge Aina Lea LLC and Banter Inc., to amend condition 1 of the amended Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order dated July 9 1991 as amended on September 29, 1993 to include the following Findings of Fact, Conclusions of Law, and Conditions of Approval; and to deny the Movant's motion to amend condition number 8. Commissioner Kanuha seconded the motion.

Vice Chair Judge then began to read her proposed 31 findings of fact.

Commissioner Im raised concerns for using specific numbers based on Petitioner's representations and added that it was his personal opinion that more discussion should be considered before approving this project noting that the Petitioner had not even completed a fully developed pro forma.

Chair Sakumoto stated that the findings are basic numbers to establish the project's feasibility or not.

Commissioner Formby added that the representations that were made via affidavit and testimony are simply projections and he believes it was appropriate to include these numbers that were represented to the Commission.

Chair Sakumoto referenced Petitioner's Exhibit 33, item 7, related to the time-share ownership. After a discussion, it was agreed to add a finding no. 32.

Vice Chair Judge offered and discussed three (3) amended conditions no. 1a, 1b, and 1c.

Commissioner Formby had a concern with 1c indicating a conflict with the language in conclusion no. 1a, and offered a friendly amendment to remove 1c.

Vice Chair Judge agreed and removed condition no. 1c.

Commissioner Im raised a few questions on the condition to have the Petitioner execute contracts with specific contractors within a certain time period.

After a discussion on the contractual timeline and documentation, Vice Chair Judge noted to remove condition no. 1b and include it all in condition no. 1a, as discussed.

Chair Sakumoto asked Commissioner Kanuha if he agreed to second the amended motion with amendments that had been offered by Vice Chair Judge. Commissioner Kanuha replied in the affirmative.

The Commission was polled as follows:

Ayes: Commissioners Judge, Kanuha, Contrades, Formby, Im, Montgomery, Piltz and Sakumoto.

The motion passed with 8 ayes.

The meeting adjourned 2:15pm

(Please refer to LUC Transcript of November 4, 2005 for more details on this matter.)