

LAND USE COMMISSION
MINUTES OF MEETING

May 18, 2006

Four Seasons Resort Lana`i
Manele Bay
Kaunolu Mauka Conference Room
Lana`i, Hawaii

COMMISSIONERS PRESENT: Thomas Contrades
Michael Formby
Duane Kanuha
Steven Montgomery
Ransom Piltz
Randall Sakumoto
Nicholas Teves

COMMISSIONERS ABSENT: Kyong-su Im
Lisa Judge

STAFF PRESENT: Russell Suzuki, 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 10:10 a.m.

ADOPTION OF MINUTES

Commissioner Piltz moved to adopt the minutes of May 4, 2006. Vice Chair Montgomery seconded the motion. Said motion was approved by voice votes.

TENTATIVE MEETING SCHEDULE

Mr. Ching reported that a tentatively scheduled (half-day) meeting in Kona is being considered on June 6th to hear a Motion for Reconsideration on the McCully docket. Mr. Ching also noted that the meeting sites (Maui or Big Island) for the July and August dates may be adjusted.

There were no questions posed by the Commission.

Chair Sakumoto welcomed the newest Commissioner, Nicholas Teves, to the Land Use Commission.

A89-649 LANAI RESORT PARTNERS

Chair Sakumoto stated that this was an action meeting on Docket No. A89-649 Lanai Resort Partners to consider: i) Intervenor Lanaians For Sensible Growth's Motion to Summarily Affirm the Commission's May 17, 1996 Findings of Fact, Conclusions of Law, and Decision and Order; and ii) to consider Castle & Cooke Resorts, LLC's Motion for Clarification of Findings Without Further Hearings; and other appropriate action, if any.

APPEARANCES

Bruce Lamon, Esq., represented Petitioner

Alan Murakami, Esq., represented Intervenor

Anthony T.J. Quan, Esq., represented Intervenor

Jane Lovell, Esq., represented the County of Maui Department of Planning

Jeffrey Hunt, Staff Planner, County of Maui Department of Planning

Laura Thielen, State Office of Planning

Mary Alice Evans, State Office of Planning

Chair Sakumoto noted that there were no public witnesses.

Chair Sakumoto stated that they have received an extensive briefing by all the parties and requested that the parties keep their arguments to 15 minutes if possible. Chair Sakumoto also noted that both motions, although they are titled differently, assert that there is sufficient evidence in the existing record from which the LUC can satisfy

the Supreme Court's remand. The LUC has had the opportunity to digest the briefs filed and requested that the parties focus their arguments to assist in expediting the process today.

Mr. Murakami began his argument and focused his discussion on three issues. The first issue was his belief that brackish water is not necessarily non-potable water. His second issue was that the findings are inconsistent since wells 1 and 9 were mistakenly believed to be outside of the high-level aquifer. The third issue was whether or not water is moving from the high-level aquifer to the lower levels of the Palawai Basin where they are being extracted by wells 1, 9, and 14.

Mr. Lamon stated that the LUC has seen his extensive memorandum in opposition to this motion and responded to Mr. Murakami's issues. Mr. Lamon discussed condition 10, wells 1 and 9, and chloride levels.

Commissioner Formby commented that the LUC is mandated by the Hawaii Supreme Court to clarify this decision by conducting further hearings if clarification cannot be made by the record alone..

Commissioner Piltz posed a few questions regarding Lanaians for Sensible Growth's (LSG) exhibit A, a map of the high-level groundwater identified by John Mink depicting water lines and to clarify whether line A is a pipeline or a waterline section.

Mr. Murakami was not sure exactly what that uppermost line was and explained that this is an old map and understood that well 10 in that area is not operational at all.

Mr. Lamon commented that this was a map prepared by Mr. Nance utilizing Mr. Mink's data and added that the lines are intended to show cross sections and is not a schematic to show pipelines.

Ms. Thielen stated that the Office of Planning (OP) believes that further hearings are necessary because water is a key issue and a State concern. Ms. Thielen also discussed issues of condition number 10 and non-potable water.

There were no questions posed by the parties or the Commission of Ms. Thielen.

Ms. Lovell stated that the County of Maui agrees with the State OP on this matter. Time has passed while this case was in the Hawaii Supreme Court and believed

that it would be wise to have a full evidentiary hearing with the more recent data and the current county policy.

Commissioner Piltz posed a few questions related to the effective date of the County's ordinance and the EPA standards.

Ms. Lovell noted that ordinance 2408 became effective April 27, 1995.

Vice Chair Montgomery raised a few questions regarding the new information and reports available.

Ms. Lovell stated that there are reports that are prepared by the resort and that the State's Water Commission may have further data.

Chair Sakumoto posed a few questions in reference to the State Water Code, the Hawaii Water Plan, and a draft water use plan for Lanai.

Ms. Lovell stated that the Hawaii Water Plan is being updated by all the counties and that the County of Maui has a separate water and development plan for each island that makes up their county. Ms. Lovell added that the standard for chlorides has been set at 250 ppm for Lanai with respect to irrigation water for golf courses. Ms. Lovell commented that the County sees further proceedings on this docket as an opportunity to look into this matter with more recent trends.

Commissioner Formby commented that he concurred with Ms. Lovell and added that it would be a disservice to the LUC to limit themselves to a record that clearly produced inconsistent findings in the 1996 order.

Commissioner Piltz concurred adding that the LUC should take in as much information as needed to come to a good decision.

Mr. Murakami stated that the resort has been producing the exact same charts each year on the water level heads, the salinity levels, and the amount of pumpage from each of the wells in the high-level aquifer.

A recess break was taken at 11:25 a.m. The meeting reconvened at 11:45 a.m.

Mr. Lamon briefly summarized Petitioner's motion and discussed issues of condition number 10 and the findings in the 1991 order.

Chair Sakumoto posed questions regarding the standard for potability, leakage into wells 1 and 9, condition number 10, and petitioner's motion to amend the 1996 order.

After a brief discussion, Mr. Lamon noted that Petitioner would like the opportunity to be very much involved in further proceedings by the LUC to define condition number 10 and would like to be heard on what that definition should be.

Mr. Murakami reiterated his argument that brackish water is not necessarily non-potable water and added that the LUC was under the impression that wells 1 and 9 were non-potable and that he believed they were relying on a false impression and unequivocal statements at that time.

Commissioner Formby posed a few questions regarding the Order to Show Cause and condition number 10.

Commissioner Piltz questioned the date of the first water pumped into the golf course.

Mr. Lamon replied in June of 1993.

Commissioner Piltz commented that he was trying to get clarification on the time period and noted that the proceedings went through three years before it was accepted in 1996 and added that in 1993 condition number 10 was considered when wells 1 and 9 were perceived as potable water.

Ms. Thielen stated that the OP has examined the record and it appeared that the former LUC did not really define what was meant or where the line is when brackish water becomes non-potable. Ms. Thielen added that they are recommending that this Commission conduct hearings to determine that line and to also determine whether there are other contaminants.

There were no other questions posed by the parties or the Commission of Ms. Thielen.

Ms. Lovell stated that the County had nothing further.

A recess break was taken at 12:30 p.m. The meeting reconvened at 12:55 p.m.

Chair Sakumoto stated that the LUC is now in deliberations and will not entertain any comments or questions by the parties unless they are specifically directed by the Chair to respond directly to the question being asked.

Commissioner Formby commented that he appreciated the efforts of the LSG and petitioner for their motions that would allow the LUC to decide this matter without further hearings. However, based on what he has reviewed up to this point and the arguments heard today, he believed that there is a need for further hearings to develop a more practical interpretation of condition 10.

Commissioner Piltz concurred with Commissioner Formby and added that the LUC needs to hear more on the issues that have been brought up by the parties and also by the state and county.

Vice Chair Montgomery commented that he is attracted by the existence of new data and the best available science that has been gathered since the earlier action by the Commission.

Chair Sakumoto commented that they all agree that water is a very important issue and added that the LUC could not make a decision on condition number 10 using solely the record that is before them. Chair Sakumoto stated that the Hawaii Supreme Court has authorized this Commission to hold further hearings if they felt necessary and that is a responsible thing for the LUC to do at this time.

Commissioner Formby moved to deny Intervenor Lanaians for Sensible Growth's motion filed on March 31, 2006 and to deny Castle & Cooke Resorts, LLC's motion filed on March 31, 2006 and to conduct further hearings consistent with the Hawaii Supreme Court's opinion in Lanai Company, Inc. v. Land Use Commission. The motion was seconded by Commissioner Piltz.

The Commission was polled as follows:

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

The motions passed with a vote of 7 for the motions and 2 absent.

Commissioner Formby commented that his motions were made irrespective of the fact of whether the LUC was going on a preponderance of the evidence or a summary judgment standard and that either standard was a basis for his motion.

Chairman Sakumoto polled the Commissioners as to whether this fact would cause them to change their votes and no commissioners changed their vote.

Chair Sakumoto stated that the LUC has set this matter for hearing on June 7, 8, and 9, 2006 on Lanai.

Mr. Murakami asked for some guidance regarding the scope of these future hearings.

After a brief discussion, Chair Sakumoto noted that a prehearing order will be issued, which will outline the matters to be brought out at the hearings and that staff will work with the parties to discuss these issues.

The meeting adjourned at 1:10 p.m.

(Please refer to LUC Transcript of May 18, 2006 for more details on this matter.)