

LAND USE COMMISSION
MEETING MINUTES
November 4, 2010

Ballroom #1 &2, King Kamehameha's Kona Beach Resort Hotel
75-5660 Palani Road,
Kailua-Kona, Hawai`i 96738

COMMISSIONERS PRESENT: Vladimir Devens
Kyle Chock
Duane Kanuha
Ronald Heller
Normand Lezy
Charles Jencks
Thomas Contrades
Lisa Judge
Nicholas Teves, Jr.

COMMISSIONERS EXCUSED: None

STAFF PRESENT: Orlando Davidson, Executive Officer
Diane Erickson, Deputy Attorney General
Scott Derrickson, Staff Planner
Riley Hakoda, Staff Planner/Acting Chief Clerk

COURT REPORTER: Holly Hackett

AUDIO TECHNICIANS: Walter Mensching

CALL TO ORDER

Chair Devens called the meeting to order at 9:38 a.m.

APPROVAL OF MINUTES

Chair Devens asked if there were any corrections or additions to the October 15, 2010, minutes. There were none. Commissioner Jencks moved to adopt the minutes. Commissioner Chock seconded the motion. The minutes were unanimously approved by a voice vote (9-0).

TENTATIVE MEETING SCHEDULE

Executive Officer Davidson provided the following:

- The regular tentative meeting schedule for the calendar year 2010 was distributed in the handout material for the Commissioners.
- Any questions or conflicts, please contact LUC staff.

There were no questions or comments regarding the tentative meeting schedule.

ACTION

A10- 788 HHFDC/Forest City Hawai`i Kona, LLC

Chair Devens announced that this was a continued hearing, oral argument, deliberation and action meeting on Docket No. A10-788 to consider the Petition to amend the Agricultural Land Use District Boundaries into the Urban Land Use District for certain lands situated at Keahuolū, North Kona, consisting of approximately 271.837 acres.

APPEARANCES

Steven Lim, Esq., and Jennifer Benck, Esq., represented Forest City Hawai`i Kona, LLC
A. Bernard Bays, Esq., Co-Counsel, represented Forest City Hawai`i Kona, LLC
Craig Iha, Esq., represented Hawai`i Housing Finance Development Corp., (“HHFDC”)
William Brillhante, Esq., represented Hawai`i County Department of Planning
Bobbie-Jean Leithead-Todd, Director, Hawai`i County Department of Planning
Bryan Yee, Esq., represented State Office of Planning
Abbey Mayer, Director, State Office of Planning
Benjamin Kudo, Esq., represented Queen Lili`uokalani Trust (“QLT”)
Yuko Funaki, Esq., represented Queen Lili`uokalani Trust

PUBLIC WITNESSES

1. Jill Dian`ne

Ms. Dian'ne stated her professional credentials and provided the reasons why she supported the Petition.

There were no questions for Ms. Dian'ne

2. Jonathan Lee

Mr. Lee represented that he was speaking on behalf of the business manager for the Plumber & Fitters Union and provided the reasons why his organization supported the Petition.

There were no questions for Mr. Lee.

3. Mark Travalino

Mr. Travalino provided the reasons why he supported the Petition.

There were no questions for Mr. Travalino.

4. Maria Elena Watai

Ms. Watai expressed how she felt the proposed Project could benefit the Kona community.

There were no questions for Ms. Watai.

5. Jeremy Gambing

Mr. Gambing provided his reasons for supporting the proposed Project.

There were no questions for Ms. Gambing.

6. Emily Gambing

Ms. Gambing expressed her reasons for supporting the proposed Project.

There were no questions for Ms. Gambing.

7. Dillon Watai

Mr. Watai shared his reasons for supporting the Petition.

There were no questions for Mr. Watai.

8. Elaine Watai

Ms. Watai provided her reasons for supporting the proposed Project.

There were no questions for Ms. Watai.

9. Hiram Rivera

Mr. Rivera described the need for affordable housing in the area and expressed his reasons for supporting the Petition.

There were no questions for Mr. Rivera.

10. Wendell DeCoito

Mr. DeCoito provided his perspectives on how the proposed Project could benefit the local community.

There were no questions for Mr. DeCoito.

11. Ken Melrose

Mr. Melrose represented that he had participated as a member of the HHFDC selection committee that chose Forest City to develop the proposed project and provided the reasons for his support.

There were no questions for Mr. Melrose.

12. Janice Palma-Glennie

Ms. Palma-Glennie expressed her concerns and reasons for opposing the proposed Project.

There were no questions for Ms. Palma-Glennie.

13. Charles Flaherty

Mr. Flaherty provided his reasons for opposing the proposed Project.

There were no questions for Mr. Flaherty.

14. Shannon Rudolph

Ms. Randolph voiced her reasons for opposing the proposed Project.

There were no questions for Ms. Rudolph.

There were no other Public Witnesses.

PRESENTATION OF EXHIBITS

All Parties indicated that they had no further exhibits to present.

INTERVENOR QUEEN LILI'UOKALANI TRUST'S WITNESSES

1. Mark R. Boud- Market Analysis and Economics Expert

Mr. Boud stated his professional credentials and work experience; and

described his concerns about the Petitioner's market analysis figures for residential densities and the commercial component of the proposed Project based upon his review of the Hallstrom report and the analysis provided by Thomas Holliday.

Commissioner Lezy excused himself at 10:22 a.m. and returned at 11:02 a.m.

The Commission went into recess at 10:40 a.m. and reconvened at 10:57 a.m.

Ms. Benck requested clarification on Mr. Boud's work experience; past studies that he had conducted for QLT, and the assumptions and criteria that he used to evaluate the feasibility and marketing report by the Hallstrom Group and Mr. Holliday's analysis. Mr. Boud described his past work and the findings and extent of his studies; and provided his perspective on determining and providing for acceptable residential densities and the commercial needs for the Petition Area and the marketplace.

Mr. Iha requested clarification on Mr. Boud's testimony on community master plans, how the evaluation of Forest City's Master Plan had been performed and on how feasible affordable housing requirements were determined. Mr. Boud stated that he had not done work for Forest City and described the methodology used for his review; and provided his understanding of the marketplace for affordable housing units and commercial facilities.

Mr. Brilhante had no questions.

Mr. Yee requested clarification on the findings for the market appeal for the residential densities offered by the proposed project and on the analysis and criteria used for evaluating the Hallstrom Group report. Mr. Boud described how he had performed his study, analyzed his data and made his conclusions.

Commissioner Heller requested clarification on the methodology used for Mr. Boud's calculations and review. Mr. Boud described his methodology and calculations and provided his perspective of how different results could be achieved to make the project more desirable.

Commissioner Lezy excused himself at 11:37 a.m. and returned at 11:42 a.m.

Commissioner Judge requested clarification on whether "New Urbanism" design considerations were made when reviewing the proposed project and on how other Hawai'i communities compared to it.. Mr. Boud described how he perceived the term "New Urbanism", explained how his evaluation was influenced by it and provided his opinion on the design features of other communities.

Commissioner Kanuha requested clarification on whether any other reference resources other than the Hallstrom report were used in the study. Mr. Boud identified the additional maps that he used in his analysis and described the factors that were considered in his market report.

Commissioner Jencks requested clarification on how project costs and density could affect its marketability and ability to obtain financing; and the design densities that were used for the Waiawa plan. Mr. Boud provided his perspective of what would occur in different project scenarios and stated that depending on the factors involved, overbuilding commercial space might be justifiable. Mr. Boud recalled that he had used a gross density of 5 for the Waiawa plan.

There were no further questions for Mr. Boud.

The Commission went into recess at 11:55 a.m. and reconvened at 1:19 p.m. (Commissioner Teves returned at 1:20 p.m., Commissioner Lezy returned at 1:28 p.m., Commissioner Contrades returned at 1:32 p.m.)

Commissioner Lezy excused himself at 1:33 p.m. and returned at 1:55 p.m.

2. Keith Niiya- Traffic Engineering Expert

Mr. Niiya stated his credentials, identified a correction to QLT Exhibit 36 and described his findings relative to his review of Mr. Okaneku's traffic report. Mr. Niiya described the models and methodologies used by traffic engineers to construct Traffic Impact Analysis Reports ("TIAR") and provided his understanding of what the possible consequences of making TIAR errors could be; and related how he felt the Department of Transportation ("DOT") analyzed TIARs, suggested mitigation measures and pro rata share calculations for the proposed Project.

Mr. Lim requested clarification on Mr. Niiya's work experience, success with obtaining DOT approvals and appearing before the Land Use Commission. Mr. Niiya described his accomplishments and past activities and shared how he perceived that the DOT and other agencies evaluated and accepted TIAR reports; and how the proposed Project's TIAR information did not agree with his perceptions of the situation and analysis. Mr. Niiya concurred that if the DOT accepted a TIAR, it was satisfied with the TIAR's content and that no special treatment had been given to the proposed Project.

Hawai'i County had no questions.

Mr. Yee requested clarification on Mr. Niiya's experiences with gaining TIAR acceptance, the differences between his oral and written testimony, determining what happened or would happen to the TIAR review findings; and the amount of communication that had occurred with different parties about the findings. Mr. Niiya recalled the project that the DOT had accepted prior to his LUC appearance and stated the reasons for the differences in his oral and written testimonies; and recounted what had occurred in regards to disseminating the TIAR analysis information and what could be done to make any needed corrections.

Commissioner Kanuha requested clarification on why it was so difficult to get the DOT to accept a TIAR and what entity usually requests the TIAR. Mr. Niiya provided his understanding of who requests the TIAR, why the DOT processing was challenging and how “no further comment” was used rather than granting approval by the DOT.

Commissioner Kanuha requested clarification on who prepares TIARs in Hawai`i and whether given the same project, they would have the same results. Mr. Niiya identified the parties that he was aware of who prepared TIARs locally and stated that there could likely be different results.

Chair Devens requested clarification on whether the DOT performed the same type of evaluation that Mr. Niiya did and how discrepancies detected by DOT were resolved. Mr. Niiya described how he perceived the DOT analyzed and corrected/resolved TIAR discrepancies.

Chair Devens requested clarification on Mr. Niiya’s understanding as to how the TIAR approval process with DOT operated. Mr. Niiya described his experience that the process was ongoing till a notice of “no further comment” was received.

Commissioner Kanuha requested clarification on how “fair-share” determinations were made during the TIAR approval process. Mr. Niiya provided his perception of when and how determinations of “fair-share” amounts were made.

Mr. Kudo requested clarification on when the pro-rata share calculation was done. Mr. Niiya provided that the base data needed to be acceptable to DOT before the pro-rata calculation was performed.

Mr. Kudo requested clarification of how Petitions could appear before the LUC without having DOT approval and acceptance of their TIARs. Mr. Niiya replied that without DOT approval and acceptance, Memorandums of Understanding (“MOU”) or Memorandums of Agreement (“MOA”) with various agencies needed to be secured before appearing in front of the Land Use Commission. Mr. Niiya provided his perspective on when these types of documents needed to be prepared during the TIAR approval process.

Mr. Lim requested clarification on whether the September 23, 2010 DOT letter to Forest City constituted a MOA. Mr. Niiya stated that he did not consider the letter an MOA and provided his perception of what an MOA was.

Mr. Yee requested clarification on the number of projects where Mr. Niiya had an MOA, MOU or an Agreement in Principle in place before testifying before the Land Use Commission. Mr. Niiya could not recall.

There were no further questions for Mr. Niiya.

The Commission went into recess at 2:20 p.m. and reconvened at 2:37 p.m. (Commissioner Judge returned at 2:40 p.m.)

3. Lianne Crabbe- QLT Vice President/ Development Manager

Ms. Crabbe described her corporate position and responsibilities and stated the financial situation and community role of QLT; and provided the reasons why QLT decided to intervene in this matter. Ms. Crabbe recalled QLT's participation in meetings with Petitioner's representatives and the challenges that QLT perceived with the proposed development.

Mr. Lim requested clarification on the status of QLT's LUC Docket No. A89-646 and planned development for its land areas. Ms. Crabbe expressed that the plans for the docket identified by Mr. Lim were still under consideration and updated QLT docket and development information to the best of her knowledge. Ms. Crabbe described QLT's awareness of the 201H exemptions requested by the HHFDC/Forest City proposed development; and what its concurrency agreement efforts and "fair share" concerns for traffic mitigation in the area were.

Mr. Iha and Mr. Brillhante had no questions.

Mr. Yee requested clarifications on the negative impacts that would result to QLT if the Petition was granted; and what mitigation costs were anticipated by QLT. Discussion ensued on what and how potential mitigation costs would affect QLT if the TIAR were flawed and the "fair-share" costs were miscalculated; and who would require QLT to make mitigation payments.

Commissioner Kanuha requested clarification on the "working" development plans that QLT had and how long they had been underway. Ms. Crabbe stated that the plans had started in 2002 but were still ongoing and not finalized.

Commissioner Kanuha inquired about the extent that QLT had developed its urbanized lands. Ms. Crabbe responded that approximated 50 of 300 acres had been developed.

Commissioner Lezy inquired about the economic market considerations that QLT was making in its development plans. Ms. Crabbe stated that some of the information was confidential due to competitive reasons and provided her perception of the project information that she felt she could disclose.

Commissioner Lezy requested clarification on the reasons why QLT had decided to intervene and why no other neighboring property owners were involved. Ms. Crabbe described why and how QLT had decided to intervene and speculated what might have discouraged the participation of other intervenors.

Commissioner Kanuha requested clarification on the traffic mitigation requirements for the 50 acres that QLT had developed. Ms. Crabbe provided her understanding of what improvements QLT had to make and why they were necessary.

Chair Devens noted that Ms. Crabbe made some very strong and important points and requested clarification as to what grounds the Commission could use to deny the petition based on the applicable decision making criteria. Ms. Crabbe provided her perception and stated that aside from the TIAR, density matters in the area concerned her.

Mr. Lim requested clarification on Ms. Crabbe's perception of Forest City's participation in preparing for the development of the Petition Area and on QLT's involvement with other communities that might be impacted by the proposed development. Ms. Crabbe expressed how she felt Forest City had been involved and described the contact that QLT had with neighboring communities.

There were no further questions for Ms. Crabbe.

The Commission went into recess at 3:45 p.m. and reconvened at 4:07 p.m.

PETITIONER REBUTTAL WITNESSES

1.Sorab Rashid- Traffic Engineering & Analysis Expert

Mr. Rashid described his review and comparison findings for Mr. Okaneku's traffic report and the methodologies and assumptions used in the TIAR; and shared his perception of Mr. Niiya's report.

Commissioner Lezy excused himself at 4:10 p.m. and returned at 4:22 p.m.

Mr. Iha, Mr. Brilhante and Mr. Yee had no questions.

Mr. Kudo requested clarification on the assumptions and conclusions that were made in the review of Mr. Okaneku's report. Mr. Rashid described the various considerations that were made to evaluate the findings of Mr.Okaneku's report and how the methodologies and modeling for traffic studies were formulated and analyzed.

Commissioner Heller requested clarification on how and why certain subjective adjustments were made in traffic reports when computer modeling was not available. Mr. Rashid described how he performed his review and arrived at his conclusions and stated that another engineer could have come to a different conclusion in this situation.

There were no further questions for Mr. Rashid.

Chair Devens declared the evidentiary portion of the hearing closed. Mr. Kudo inquired about the status of his declaratory relief order and on the oral motion that he made at the October 21, 2010 meeting. Discussion ensued to clarify Mr. Kudo's concerns.

The Commission went into recess at 4:30 p.m. and reconvened at 4:32 p.m.

Chair Devens requested clarification on Mr. Kudo's oral motion. Mr. Kudo read transcript records from the prior hearing and agreed that the prior *in limine* arguments resolved the notice of intent portion of the oral motion but that the acquisition of property contract portion of the oral motion needed to be addressed.

Chair Devens moved for an Executive Session. Commissioner Teves seconded the motion. By a unanimous show of hands the Commission entered Executive Session at 4:33 p.m. and reconvened at 4:42 p.m. (Commissioner Judge returned at 4:43 p.m.)

Chair Devens stated that Mr. Kudo's Motion needed to be addressed.

Commissioner Heller moved to deny QLT's Motion to dismiss, referring both to the oral Motion made on October 21, 2010 and the written Motion made November 3, 2010 on the grounds that the notice issue had already been addressed and decided by the Commission; and that the contract issue was outside the jurisdiction of the LUC. Commissioner Jencks seconded the Motion.

There was no discussion.

The Commission was polled as follows:

Ayes: Commissioners Heller, Jencks, Chock, Contrades, Judge, Kanuha, Lezy, Teves and Chair Devens.

Nayes: None

The Motion passed 9-0.

Chair Devens inquired if all Parties had received copies of the written Supplemental Motion by QLT.

All Parties confirmed receiving the Motion.

Mr. Iha requested that the Petitioner's November 1, 2010 Supplemental Memorandum in Opposition to QLT's Petition for Declaratory Order in DR 10-39 docket be included in the record on this docket (AA10-788) to make it more complete. Chair Devens confirmed that it had been included .

There were no additional filings.

FINAL ARGUMENTS

HHFDC

Mr. Iha described the background and intent of HHFDC's participation in the development of the proposed Project and argued why the Petition should be granted.

Forest City

Mr. Lim recapped the 201 H project efforts of Forest City and argued the reasons why the Petition should be granted.

Hawai'i County

Mr. Brillhante stated that the County supported the proposed Project and argued why it should be approved.

OP

Mr. Yee recalled the events that had occurred between the Petitioner and OP that resulted in the proposed Findings of Fact, Conclusions of Law and Decision and Order before the Commission and stated that OP strongly supported the proposed Project and argued the reasons why the Petition should be granted.

QLT

Mr. Kudo stated the reasons for QLT's intervention in the Petition and argued why the QLT's concerns should be considered in constructing the conditions in the Decision and Order if the Petition were granted.

Mr. Iha argued that the development agreement cited by Mr. Kudo should not be allowed since it was not in evidence and that QLT did not take the opportunity to inquire about it when HHFDC-Mr. Fujimoto was testifying. Chair Devens acknowledged Mr. Iha's objection.

Commissioner Kanuha requested clarification on the County's position regarding stipulations between OP and Petitioner. Ms. Leithead-Todd stated the County's position on Condition 4-Pro-rata share and Condition 16-County Civil Defense; and concurred that the County did not have any objections to the OP and Petitioner stipulations due to the outcomes of recent County Council 201H Resolution decisions.

Commissioner Judge requested clarification on what the County update requirements for TIARs were and what the proposed affordable housing range would be. Ms. Leithead-Todd provided her understanding of what the County requirements for TIAR updates and mitigations would be and expressed that the affordable housing price range was under review by the developer's agent and subject to HHFDC approval.

Commissioner Heller requested clarification on the latest submission of the Petitioner's Findings of Fact, Conclusions of Law and Decision and Order. Ms. Benck represented that the biggest change was to its procedural section and explained the balance of updates .

Commissioner Contrades requested clarification on what County's figures were for affordable housing and shared his concerns about the types of units that would be offered to the public and the possible burdens the State would be left with if the proposed Project failed to appeal to the marketplace. Ms. Leithead-Todd expressed how County had made

adjustments to the income ranges to compute its affordable housing rates and provided her opinion on how she perceived affordable housing and the proposed Project would be received by the public.

Commissioner Jencks requested clarification on the development's phasing, its affordable housing components, and offsite improvements. Ms. Leithead-Todd provided her understanding on the timetable that the proposed Project would be following to provide market, commercial and affordable units and described the proposed Project's anticipated affordable income requirements; and what the County requirements would be for county roadways and the extent of the exemptions that the County had granted.

The Commission went into recess at 5:50 p.m. and reconvened at 6:04 p.m.

Commissioner Heller requested clarification on what condition(s) were in place to assure affordable housing quotas would be met. Ms. Benck described how Petitioner had represented it would substantially comply with the proposed conditions.

Commissioner Jencks requested clarification on the delivery schedule for affordable housing units and Forest City's commitment to the Project. Mr. Randle and Mr. Wollenstrom of Forest City assisted Ms. Benck in answering how the amount of affordable housing units for the marketplace would be determined. Mr. Wollenstrom stated that Forest City had already committed a million dollars to the Project and described the negotiations that had been done to advance it.

Chair Devens confirmed that all Parties had received the LUC notice regarding the opportunity to submit supplemental documents to the Commission in this matter. All Parties confirmed that they had received the notice.

DELIBERATION

All Commissioners and Chair Devens indicated that they had no objections to the expedited hearing procedures, concurred in the waiver of certain procedural rules of the Commission and were prepared to deliberate.

Commissioner Kanuha moved to approve the Petition for the purposes of discussion. Commissioner Jencks seconded the Motion. Discussion ensued to determine the various conditions that would be included in the final version of the Findings of Fact, Conclusions of Law, and Decision and Order.

Commissioner Judge proposed to add a Condition regarding parks and playgrounds- "The Petitioner shall design and construct a minimum of 28 acres of park and shall include at least 10 playground facilities." ; and add to the existing Condition regarding the solid waste management plan so it would read- "Petitioner shall develop a solid waste management plan in conformance with the integrated solid waste management act HRS- Chapter 342G and this plan shall emphasize waste diversion and recycling."

Commissioner Jencks proposed to amend the Condition regarding water conservation measures to add to the current wording-“Petitioner shall design for and utilize for all irrigation purposes, reclaimed water from the Kealakehe sewage treatment plant when that source is delivered to the project boundary.” and word the transportation condition to read-“Petitioner shall mitigate all project generated traffic impacts as recommended and/or required by the impact analysis report (TIAR) prepared for the project that has been reviewed and accepted by the State Department of Transportation (DOT) and the County of Hawai`i. No final subdivision approval shall be issued until the Petitioner has executed an agreement with DOT and the County of Hawai`i committing to the implementation of all necessary measures to mitigate the direct impact of the project on the surrounding roadway system as well as to the level of funding and participation for Petitioner’s pro rata share of reasonable transportation improvements.”

Commissioner Heller requested clarification on the number of acres referenced by Commissioner Judge’s suggested condition. Discussion ensued to determine the correct acreage and it was decided that 25 acres was acceptable.

Commissioner Lezy commented on whether the 45 day deadline schedule was a feasible method to approve an expedited petition and recognized the community contributions of QLT and the value of the issues that had been presented by its intervention. Commissioner Lezy stated his support for the Petition and inquired if the Petitioner had any concerns about the recommended condition changes as proposed. Mr. Lim responded that based on what had been heard, that Petitioner conditionally agreed to the conditions.

Commissioner Judge requested clarification on how the Commission wished to have the “affordable housing” condition represented in the Decision and Order. Commissioner Heller indicated that he felt that his question on affordable housing satisfactorily linked it to Condition 22- Compliance with Representations to the Commission and defined what was representations for affordable housing were.

Chair Devens proposed that the condition on transportation read: “Petitioner shall mitigate all project generated traffic impacts to State roadways as recommended and/or required by the Traffic Impact Analysis Report (TIAR) prepared for the Project that has been reviewed and accepted/approved by the State Department of Transportation (DOT). Petitioner shall not submit applications for subdivision of the residential lots or plan approval for the multiple family and/or commercial units within the Project until the Petitioner has executed an agreement with DOT committing to the implementation of all necessary measures to mitigate the direct impacts of the Project on the surrounding State roadway system as well as to the level of funding and participation for Petitioner’s pro rata share of State regional transportation improvements.”

Chair Devens proposed that the condition regarding Automatic Order to Show Cause be worded "If Petitioner fails to comply with the deadlines contained in Condition 21, the Commission shall issue and serve upon the Petitioner an Order to Show Cause, as required or as provided by law, and the Petitioner shall appear before the Commission to explain why the Petition area should not revert to its previous Agricultural classification or be changed to a more appropriate classification."

Commissioner Kanuha recognized the demands of the expedited 201H process and stated his support for Chair Deven's proposed change

Commissioner Contrades stated that he would be voting against the proposed Project and provided his reasons for opposing it based on his past experiences with trying to provide affordable housing in the State of Hawai'i.

There was no further discussion.

Commissioner Kanuha agreed to amend his motion with the proposed amendments that the Commission had discussed. Commissioner Jencks seconded the amended motion.

The Commission was polled as follows:

Ayes: Commissioners Kanuha, Jencks, Chock, Heller, Judge, Lezy, and Chair Devens.

Nays: Commissioners Contrades and Teves.

The Motion passed 7-2.

Chair Devens instructed LUC staff to prepare order as discussed.

The meeting recessed at 6:40 p.m.