

LAND USE COMMISSION
MEETING MINUTES
January 6, 2011

Leiopapa A Kamehameha
Conference Room 406, 4th Floor
235 S. Beretania St.
Honolulu, Hawai'i

COMMISSIONERS PRESENT: Vladimir Devens
Duane Kanuha
Ronald Heller
Normand Lezy
Charles Jencks
Kyle Chock (arrived at 1:38 p.m.)
Lisa Judge
Nicholas Teves, Jr.

COMMISSIONERS EXCUSED: Thomas Contrades

STAFF PRESENT: Orlando Davidson, Executive Officer
Diane Erickson, Deputy Attorney
General (left at 12:20 p.m.)
Scott Derrickson, Staff Planner (attended
DR10-39 portion)
Bert Saruwatari, Staff Planner (attended
A09-782 portion)
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 9:45 a.m.

APPROVAL OF MINUTES

Chair Devens asked if there were any corrections or additions to the December 2-3, 2010, minutes. There were none. Commissioner Jencks moved to adopt the minutes. Commissioner Kanuha seconded the motion. The minutes were unanimously approved by a voice vote (7-0).

TENTATIVE MEETING SCHEDULE

Executive Officer Davidson provided the following:

- The regular tentative meeting schedule for the calendar year 2011 was distributed in the handout material for the Commissioners.
- The February 2-3, 2011 meeting will include a site visit and hearing on Molokai on February 3 for Docket No. DR10-41 Molokai Properties Limited.
- Any questions or conflicts, please contact LUC staff.

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

ACTION

DR10-39 Queen Lili`uokalani Trust ("QLT")

Chair Devens announced that this was an action meeting to consider DR10-39, Queen Lili`uokalani Trust's (QLT) Petition for a Declaratory Order requesting the Commission to determine and /or clarify the following two issues: (1) Whether a petition for a district boundary amendment can be deemed a proper filing, and therefore invoke the jurisdiction and authority of the Commission to process it under Hawai`i Revised Statutes ("HRS") §201H-38, HRS Chapter 205, and Hawai`i Administrative Rules ("HAR") §§15-15-50 and 15-15-97, when the petitioner's property interest in the petition area is in question; and (2) Whether a public body and body corporate and politic of the State of Hawai`i (i.e., an agency of the State of Hawai`i), upon petitioning the Commission for a land use district boundary amendment under HRS §201H-38 and HAR §15-15-97, is required to give statewide and county-wide public notice of its intent to file the petition under HRS §1-28.5.

APPEARANCES

Yuko Funaki, Esq., represented Queen Lili`uokalani Trust

Benjamin Kudo, Esq., represented Queen Lili`uokalani Trust

Bryan Yee, Esq., represented State Office of Planning

Mary Alice Evans, State Office of Planning (“OP”)

Diane Taira, Esq., represented Hawai`i Housing Finance and Development Corp., (“HHFDC”)

Jennifer Benck, Esq., represented Forest City Hawai`i Kona LLC

A. Bernard Bays, Esq., Co-Counsel, represented Forest City Hawai`i Kona LLC

Seated in the audience:

William Brillhante, Esq., represented Hawai`i County Department of Planning

Bobbie-Jean Leithead-Todd, Director, Hawai`i County Department of Planning

PUBLIC WITNESSES

None

PETITIONER - QLT

Ms. Funaki argued the reasons why the Petition for Declaratory Order should be granted and requested that the arguments and documents from Docket No. DR10-39 QLT Petition for Declaratory Order, dated October 11, 2010, the October 21, 2010 transcript for QLT’s oral arguments regarding its Petition for declaratory order, and QLT’s response to respondents or Intervenors HHFDC and Forest City Hawaii-Kona LLC’s Memorandum in Opposition to QLT’s Petition for Declaratory Order dated October 27, 2010; from Commission Docket No. A10-788, the October 21, 2010 transcript for QLT’s oral arguments on its Motion to dismiss the petition or in the alternative, deem the petition defective and its oral arguments on the notice of intent issue that was heard *in limine*. QLT’s written motion supplementing its oral motion made on October 21, 2010 to dismiss the petition or in the alternative, deem the petition defective (dated

(Please refer to LUC Transcript for more details on this matter.)

January 6, 2011 LUC meeting minutes

November 3, 2010); and the November 4, 2010 transcript for QLT's oral arguments regarding its motion to dismiss the petition or in the alternative, deem the Petition defective be incorporated in the record.

Chair Devens requested clarification on the documented evidence that QLT had submitted to support its position regarding ownership representation on Docket No. A10-788. Ms. Funaki responded that all the submitted exhibits and documents that she had referred to, the memorandum of understanding (MOU), the purchase agreement, and the representations made by HHFDC during the negotiations to acquire its property, the State budget of 1988, other documents and the appropriation of money for the purchase should be considered in this matter.

Chair Devens asked if the argument was more of a breach of contract claim. Ms. Funaki replied that it was and stated that she felt that the title and ownership documents submitted to the Commission were valid and indicated that HHFDC and Forest City owned the property.

Chair Devens inquired if the West Hawaii Today circulation included Hilo and other parts of the island. Ms. Funaki stated that West Hawaii Today was not considered to have countywide circulation for purposes of the State Procurement Office and expressed that both the Hawaii Tribune Herald and West Hawaii Today papers needed to be used to achieve county-wide publication for State Procurement Office purposes. Discussion ensued to clarify definitions of availability and legal circulation coverage. Ms. Funaki requested that the Commission adopt the definitions used by the State Procurement Office for county-wide and state-wide circulation.

Commissioner Judge excused herself at 9:58 a.m. and returned at 10:02 a.m.

Office of Planning ("OP")

Mr. Yee stated that OP incorporated its documents and arguments in Docket No. A10-788 in this matter and argued why the issues of DR10-39 and A10-788 were similar and why similar decisions and conclusions should be made in this case. Mr. Yee noted the reasons why he thought the Commission could refuse to consider a Declaratory Petition and would not be required to make a declaratory ruling; and stated that OP would rest upon its prior arguments.

There were no questions for Mr. Yee.

HHFDC

Ms. Taira stated that HHFDC also would likewise rest upon its prior arguments in A10-788 and asked that the arguments in Docket A10-788 be incorporated into the arguments for HHFDC in this case. Ms. Taira stated that she would like to have the LUC order in Docket No. A10-788 also be incorporated in the record; and argued that, for the sake of consistency, the same decision made for A10-788 be made in this case.

There were no questions for Ms. Taira.

FOREST CITY

Ms. Benck stated that Forest City agreed with the arguments of HHFDC and would also rest upon its prior arguments in A10-788 and asked that the Commission consider its rule HAR§15-15-102 which provided situations where the Commission could decline to issue declaratory orders and argued why the Commission should either decline to issue a declaratory order or issue an order that was consistent with A10-788.

There were no questions for Ms. Benck.

QLT REBUTTAL

Ms. Funaki stated that she did not oppose Ms. Taira's request to have the LUC order in A10-788 included and argued that she had identified HRS Chapter

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January 6, 2011 LUC meeting minutes

201H requirements from HAR§ 15-15-97(b)(2) and that the question was of the consequences of not waiving the rule for proper notification in 5 newspapers per the State Procurement Office. Ms. Funaki stated that QLT understood the actions that the Commission could take or not take in this matter but was seeking to resolve issues that were not addressed in the LUC A10-788 order.

Chair Devens requested clarification on what issues QLT felt were still outstanding and were not rendered moot in this matter after the Commission had made its decision on A10-788. Ms. Funaki stated that there were no moot issues as a result of the A10-788 decision and identified that QLT wanted to have the public interest aspect and future considerations for the public's interest clarified.

Chair Devens inquired if Ms. Funaki agreed that the notice of intent issue had already been ruled upon. Ms. Funaki stated that she did agree that the issue had been decided.

Chair Devens inquired if Ms. Funaki thought that the LUC had the authority and jurisdiction to decide the breach of contract claim before it. Mr. Kudo provided his perspective on the QLT position and argued why he felt it was necessary to file the Petition for Declaratory Order based on the purchase agreement between QLT and HHFDC and stated the results that he wanted to achieve with his filing.

Mr. Yee stated that the A10-788 decision could not be remanded on a declaratory petition and argued why it should not be rescinded.

Chair Devens moved for an Executive Session to consider the rights and authorities of the Commission. Commissioner Lezy seconded the motion. By unanimous voice vote, the Commission entered Executive Session at 10:08 a.m. and reconvened at 10:19 a.m.

Chair Devens asked if the Parties had any further arguments that they wanted to add to the record. There were none.

Chair Devens stated that as HHFDC, Forest City and OP had noted, the issues raised in DR10-39 were also raised by QLT orally and in writing in Docket No. A10-788. (In that docket QLT's oral and written motions on those issues were denied, and QLT had filed an administrative appeal from the Commission's decision in Docket A10-788, which is currently pending in the State Circuit Court for the Third Circuit.)

Chair Devens further stated that according to the Commission's administrative rules, HAR§15-15-100- within 90 days after receipt of a petition for declaratory order, the Commission shall either deny the petition, stating its reasons, issue a declaratory order, or set the matter for hearing as provided in HAR§ 15-15-103 of the Commission rules; and that, HAR§15-15-102 of the Commission rules provides that the Commission, for good cause, may refuse to issue a declaratory order by giving specific reasons- without limitation, among the grounds for refusal to issue a declaratory order are:

- (1) the questions are speculative or purely hypothetical and do not involve existing facts, or facts that can be expected to exist in the near future;
 - (2) the petitioner's interest is not of the type that would give the petitioner standing to maintain an action if the petitioner were to seek judicial relief;
 - (3) the issuance of the declaratory order may affect the interests of the commission in a litigation that is pending or may reasonably be expected to arise;
- or
- (4) the matter is not within the jurisdiction of the Commission.

Commissioner Heller moved to refuse to issue a Declaratory Ruling in DR10-39 on the grounds that it might affect the interests of the LUC in pending or threatened litigation. Commissioner Judge seconded the Motion.

There was no discussion.

The Commission was polled as follows:

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

Nays: None

Excused: Commissioners Chock and Contrades

The Motion passed (7-0).

The Commission went into recess at 10:26 a.m. and reconvened at 10:28 a.m. Commissioner Jencks returned at 10:36 a.m.

ACTION

A09-782 Tropic Land LLC

Chair Devens announced that this was a continued hearing on Docket No. A09-782 TROPIC LAND LLC, to amend the Agricultural Land Use District Boundaries into the Urban Land Use District for approximately 96.0 acres in Lualualei, Wai`anae District, O`ahu, Hawai`i, Tax Map Key No. (1) 8-7-09:02 (por.)

APPEARANCES

William Yuen, Esq., represented Tropic Land LLC

Arick Yanagihara, Tropic Land LLC

Dawn Takeuchi-Apuna, Esq., represented City and County of Honolulu,
Department of Planning and Permitting

Mike Watkins, City and County of Honolulu, Department of Planning and
Permitting

Bryan Yee, Esq., represented State Office of Planning

Ruby Edwards, State Office of Planning

Martha Townsend, Esq., Intervenor- Concerned Elders of Wai`anae

Alice Greenwood, Concerned Elders of Wai`anae

PUBLIC WITNESSES

None

SUBMISSION OF EXHIBITS

PETITIONER

Mr. Yuen offered Petitioner's Exhibits 71-81.

Mr. Yee stated that he had no objections provided that Mr. Yanagihara would be testifying further in this case. Mr. Yuen stated that he intended to use Mr. Yanagihara as a rebuttal witness.

(Please refer to LUC Transcript for more details on this matter.)

January 6, 2011 LUC meeting minutes

There were no objections to Petitioner's Exhibits. Exhibits were admitted into the record.

CITY AND COUNTY

Ms. Takeuchi-Apuna offered City's Revised Exhibit 3 and Exhibit 7.

There were no objections to City's Exhibits. Exhibits were admitted into the record.

OP

Mr. Yee did not offer any Exhibits.

INTERVENOR

Ms. Townsend offered Intervenor's Exhibits 27 and 28.

There were no objections to Intervenor's Exhibits. Exhibits were admitted into the record.

Ms. Townsend requested that due to the appearance order of Petitioner's cultural expert witness, that she be allowed to recall her witnesses if necessary. Mr. Yuen stated that he planned to have Mr. Aipolani testify on Friday morning January 7, 2011.

OP WITNESSES

1. Gail Suzuki-Jones- Energy Analyst- DBEDT

Ms. Suzuki-Jones used a PowerPoint presentation to describe the State's efforts to achieve energy efficiency, the different programs and activities that were occurring as a result of its efforts; and why Leadership in Energy Efficiency Design (LEED) standards were important to consider and adopt in design, planning and construction of new projects.

Mr. Yuen requested clarification on the cost/benefits of complying with LEED standards as they applied to Petitioner's proposed Project. Ms. Suzuki-Jones provided her perception of how Petitioner's proposed Project could comply with LEED standards and stated that she had not done a specific financial analysis for it.

There were no further questions for Ms. Suzuki-Jones.

2. Ruby Edwards- OP Planner

Ms. Edwards stated that the Office of Planning conditionally supported the Petition and used a PowerPoint presentation to describe the Petition Area, the proposed project; and the concerns and factors that OP had considered in determining its position-securing a long-term access agreement with the Navy for use of Lualualei Road, transportation improvement concerns, public use of Hakimo Road, long-term affordability and restriction on industrial use of the Petition Area, loss of agricultural land, compatibility with the Wai`anae Sustainable Communities Plan and other community concerns.

Mr. Yuen requested clarification on the proposed OP Condition that was similar to a Condition that was included for a business park on Maui. Ms. Edwards provided the details for the Maui County and Honolulu zoning ordinances considerations that OP had made in developing its proposed Condition.

Ms. Townsend requested clarification on the OP assessment of the proposed land use and zoning of the Petition Area and how anticipated increase in traffic on Hakimo Road would be handled and what access road terms OP was seeking if the Petition were to be granted. Ms. Edwards provided her perception of the considerations that were made in developing OP's position.

Ms. Townsend requested clarification on the definition of "spot zoning" and what resulting types of impacts the proposed project might have on the surrounding neighborhood. Ms. Edwards described how she perceived the term "spot zoning" and how it might influence neighboring properties and its use in planning and provided her opinion of what types of impacts might result if the Petition were granted.

Mr. Yee requested clarification on remarks that Ms. Edwards had made in her definition of "spot zoning". Ms. Edwards described how the county and state land use maps depicted classifications differently.

Commissioner Kanuha inquired if the State had any industrial or agricultural parks. Ms. Edwards replied that she did not know if the State had any existing industrial parks and acknowledged that there were agricultural parks and described how the agricultural park uses were constrained to accomplish State objectives for affordability.

Commissioner Jencks inquired if the State or County had enterprise zones, how Hakimo Road could be protected, and why OP supported the proposed Project when no access agreement to Lualualei Road had been secured. Ms. Edwards provided her recollection of existing enterprise zone benefits and responded that due to the public nature of Hakimo Road, no extraordinary controls could be instituted and explained how OP had determined its support for the proposed Project without a long term road use agreement with the Navy being secured.

Commissioner Jencks requested clarification on county traffic improvements that might be required for the Petition Area. Ms. Edwards responded that she was unable to answer the question.

Commissioner Lezy asked if there had been any efforts made by OP to communicate/confirm with the Navy, and what the minimum term for the Lualualei access road agreement was expected to be. Mr. Yee requested that the answer to this question be deferred till after conferring with the OP Acting Director before the end of the hearing.

Commissioner Lezy inquired what OP's assessment was of the negotiations that were occurring between the Petitioner and the Navy for the use of the road. Ms. Edwards stated that there were significant hurdles and described them. Ms. Edwards and Mr. Yee described the efforts that OP had made in communicating with the Navy.

Commissioner Teves inquired how long had the Navy allowed use of its access road or if its use had ever been restricted. Ms. Edwards replied that she did not know.

Commissioner Judge requested clarification on the legal access points to Hakimo Road and Lualualei Road and how they might be used. Ms. Edwards provided her understanding of where the legal access points were and how they might be utilized.

Commissioner Heller requested clarification on alternative road use in the Petition Area. Ms. Edwards provided her perception of how the alternative roads in the Petition Area were used.

Mr. Yee requested clarification on the access and existing easements issues in and around the Petition Area. Ms. Edwards described the existing easements that she was aware of and shared her understanding of the county and private access situations in the area.

Chair Devens requested clarification on the time requirements involved for the remaining witnesses. Mr. Yuen and Ms. Townsend provided their estimates, and Chair Devens acknowledged Mr. Yee's right to recall his witnesses if need be.

There were no further questions for Ms. Edwards.

The Commission went into recess at 11:43 a.m. and reconvened at 11:50 a.m. (Commissioner Jencks returned at 11:55 a.m.)

INTERVENOR WITNESSES

1. Dr. Marvin Puakea Nogelmeier-

There were no objections to Dr. Nogelmeier's appearance as an expert witness.

Dr. Nogelmeier described his work in translating Hawaiian historical and cultural material and provided his assessment of how the Petition Area was perceived by the ancient Hawaiian people and how it differed from Petitioner's submitted cultural assessment.

Mr. Yuen requested clarification on how the Petition Area may have had a role in past legends and cultural practices and how it may have been impacted by progress. Dr. Nogelmeier provided his perception of the significance of the Petition Area and how likely it may have been part of Hawaiian culture based on his studies and how it had been affected by time and landscape changes.

The City and OP had no questions.

Ms. Townsend requested clarification on the term “wahi pana”. Dr. Nogelmeier defined “wahi pana” as a noted place and provided his perception of the cultural significance of the term for native Hawaiian people and the need to protect the natural landscape.

Commissioner Heller inquired whether the Environmental Cultural Impact Assessment for the Petition Area was adequately performed. Dr. Nogelmeier responded that Hawaiian data translation was an ongoing process and that he estimated that only 2% of the existing data had been translated; making it difficult to say that Environmental Cultural Impact Assessments made today, without the benefit of the untranslated material, were adequate in evaluating the cultural aspects of an area. Dr. Nogelmeier described the efforts that were being made to accelerate the translation work and how it would reduce the time to approximately ten years for more thorough cultural assessments to be done.

There were no further questions for Dr. Nogelmeier.

The Commission went into recess at 12:20 and reconvened at 1:40 p.m.

2. Emil Wolfgramm- Expert-Polynesian Story-telling

There were no objections to Mr. Wolfgramm’s appearance as an expert in Polynesian storytelling.

Mr. Wolfgramm described the importance and significance of the geographic landscape in the stories of the Polynesian culture and explained how local landmarks were used to embellish aspects of common Polynesian tales and explained how these features differed and were used in the story telling of Maui and were embedded in cosmogony for Polynesian society and culture.

Mr. Yuen requested clarification on how universal Polynesian legends were “localized”. Mr. Wolfgramm described his experiences with different Polynesian societies and their storytelling methods.

The City had no questions.

Mr. Yee requested clarification on the concept of how a culture might be impacted by its landscape to determine the parameters of Mr. Wolfgramm's testimony. Mr. Wolfgramm provided his perception of how "cosmism" methodology and philosophy was used in storytelling.

Ms. Townsend requested clarification of how landscapes help tell stories and how topography was important. Mr. Wolfgramm explained how he thought landscape and topography was used in Polynesian storytelling and why he thought it was important.

There were no further questions for Mr. Wolfgramm.

3. Eric Enos- Expert in Cultural Practices

Mr. Yuen requested further qualification of Mr. Enos as an expert witness. Mr. Enos described his work experience, familiarity and local involvement with cultural matters.

There were no objections to Mr. Enos' appearance as an expert witness.

Mr. Enos stated his familiarity and work near the Petition Area and surrounding community and described how he culturally perceived development; and the presence of the Navy base and the impact of allowing an industrial park to be developed in Lualualei valley.

Mr. Yuen requested clarification on how Mr. Enos characterized development and farm cultivation. Mr. Enos described how he perceived different forms of development and farm uses for the land.

The City had no questions.

Mr. Yee requested clarification on how Mr. Enos perceived development could occur in the Petition Area. Mr. Enos provided his perception of how development should be allowed to occur.

Ms. Townsend requested clarification on how Mr. Enos practiced stargazing and farming. Mr. Enos shared his experiences of living and

recreating in the area and described his perception of the Naval presence in the valley.

4. Walterbea Alderger

Ms. Alderger expressed her experiences of growing up and living in the area and participating in cultural practices in the Petition Area and shared her vision for its future.

Mr. Yuen requested clarification on the familiarity that Ms. Alderger described and on her memories of farming that was performed in the Petition Area. Ms. Alderger described her observations and experiences with farming and cultural/religious practices in the Petition Area.

There were no further questions for Ms. Alderger.

The Commission went into recess at 2:53 p.m. and reconvened at 3:10 p.m.

5. Elizabeth Stack

Ms. Stack stated that she was the owner of the property adjoining the Petition Area and shared her knowledge of the history of the area and expressed her concerns with allowing the development of an industrial park in the Petition Area.

Mr. Yuen requested clarification on Ms. Stack's past ownership and sale of the property that was now the Petition Area. Ms. Stack described her involvement and ownership/sale of the Petition Area and stated that she thought that a golf course would be developed on it.

The City and OP had no questions.

Commissioner Lezy inquired if Ms. Stack or her representative had been involved in past discussions with the Navy over access easements and her property. Ms. Stack replied that she had discussions with the Navy in the 80's regarding boundary/road use, but had not negotiated directly with the Navy and not been contacted to participate in road improvements with the Petitioner's proposed users group.

Commissioner Judge asked about road access for tenants on the Stack's property. Ms. Stack stated that she did not have a written agreement with the Navy for the use of Lualualei Road and described how she thought her tenants gained access to their units.

There were no further questions for Ms. Stack.

6. Alice Greenwood

Ms. Greenwood described her experiences of living near the Petition Area, what her community activities were; and what her concerns were with allowing the development and operation of an industrial area in her neighborhood.

Mr. Yuen requested clarification on the membership and background of the Concerned Elders of Wai`anae group. Ms. Greenwood replied that the current membership of her group was approximately 1000 and described the manner in which the organization conducted itself; and her personal experiences and observations of events occurring in/around the Petition Area.

There were no further questions for Ms. Greenwood.

Chair Devens recessed the meeting at 3:46 p.m. and announced that the Commission would reconvene on January 7, 2011 at 9:00 a.m.