

LAND USE COMMISSION
MEETING MINUTES

April 21, 2011

Conference Room 405, Fourth Floor,
Leiopapa A Kamehameha,
235 S. Beretania Street, Honolulu, Hawai`i 96804

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

COMMISSIONER ABSENT: Lisa Judge

STAFF PRESENT: Orlando Davidson, Executive Officer
Diane Erickson, Deputy Attorney General
Scott Derrickson, Staff Planner (attended A87-
617 DW/Bridge `Āina Le`a portion)
Bert Saruwatari, Staff Planner (attended A09-
782 Tropic Land LLC portion)
Riley Hakoda, Staff Planner/Acting Chief Clerk

COURT REPORTER: Holly Hackett

AUDIO TECHNICIAN: Walter Mensching

CALL TO ORDER

Chair Devens called the meeting to order at 9:24 a.m.

APPROVAL OF MINUTES

Chair Devens asked if there were any corrections or additions to the April 8, 2011 minutes. There were none. Commissioner Jencks moved to approve the minutes. Commissioner Heller seconded the motion. The minutes were unanimously approved by a voice vote (8-0).

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 upcoming May 12-13, 2011 meeting will involve travel to Kaua`i and the second meeting in May will involve travel to Lanai.
- Any questions or concerns- please contact LUC staff.

ORAL ARGUMENT, DELIBERATION AND ACTION

A09-782 Tropic Land LLC

Chair Devens announced that this was a meeting for Deliberation and Action on Docket No. A09-782 TROPIC LAND LLC's Petition 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

Michael Nekoba, 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

Jesse Souki, Director, State Office of Planning

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

Alice Greenwood, Concerned Elders of Wai`anae

Chair Devens stated that Commissioners Chock, Heller, Jencks, Kanuha, Teves and he had previously affirmed that they were ready to deliberate on this docket at the April 8, 2011 meeting and asked if Commissioners Contrades and Lezy if

they were also ready to deliberate. Commissioners Contrades and Lezy each acknowledged that they were.

PUBLIC WITNESSES

1. Candace Fujikane

Ms. Fujikane stated that she opposed the proposed project and described the results of a survey taken by her of farmers near the Petition Area; and how she perceived farming would be negatively impacted if the proposed project were approved.

There were no questions for Ms. Fujikane.

Chair Devens noted that late written testimony had been received via email from Harry Choy, President, West County Farm Bureau.

There were no further public witnesses.

COMMISSIONER QUESTIONS

Commissioner Teves asked if there had been any further developments between the Petitioner and the Navy regarding easements to the Naval Access Road. Mr. Yuen stated that the Navy had changed its position during recent discussions and now wanted to dedicate the road to the City and County; and described the Navy's new proposal.

Commissioner Kanuha inquired what the Petitioner's position was relative to the Navy's new offer. Mr. Yuen responded that Petitioner was willing to accept the Navy's terms.

Commissioner Jencks asked what the differences were between the old and the new representations that had been made to the Commission. Mr. Yuen described the differences and explained how the Navy had attempted to dedicate the access road to the City and County in the past, and what the current proposal included.

Commissioner Jencks asked the City and County if improvements to the access road needed to meet certain standards. Ms. Takeuchi-Apuna acknowledged that certain standards had to be met and that the process would involve determining what improvements needed to be made and completed before the City and County would accept a dedicated road.

Commissioner Kanuha inquired if the City and County was aware of the Navy's new proposal and what options the City would have if the road was offered for dedication. Ms. Takeuchi-Apuna replied that this was the first she had heard about it and that she would need to check on what the City's options would be.

Commissioner Lezy stated that he questioned the import of the Navy's change in position since it still did not secure access to the road and the evidentiary portion of the hearing was closed. Mr. Yuen agreed that the record was closed to new evidence and stated that the Petitioner did not have a timeline or cost estimates for making the improvements to the road.

Commissioner Jencks requested clarification on who would be required to participate in improving the access road for dedication purposes. Mr. Yuen replied that the Navy's expectation was to have all current licensees participate in making the improvements, but that Petitioner had not had time to discuss this matter with the other licensees.

Commissioner Lezy requested clarification on what the Navy's position was on providing a long-term lease option. Mr. Yuen described how he perceived the Navy's dedication of the access road would permanently benefit the proposed project if it were approved.

Chair Devens inquired if the Parties had anything more they wished to add to the record. Ms. Dawn Takeuchi-Apuna responded that the City had nothing further to add. Mr. Yee stated that if the Petition were approved, the Conditions would need to be adjusted to accommodate the road dedication and that there were technical issues to be resolved to handle the introduction of the

new evidence presented by Petitioner. Ms. Townsend argued why it would be a procedural irregularity to consider Petitioner's latest information.

Commissioner Lezy made a motion to enter into Executive Session to consult with legal counsel concerning the legal rights, duties and obligations of the Commission. Commissioner Chock seconded the motion. By a voice vote, the Commissioner unanimously voted to enter into Executive Session and exited the meeting room at 9:50 a.m.

The Commission reconvened at 10:00 a.m.

Chair Devens stated that the Commission would not accept or consider the latest representations made by Petitioner since the evidentiary portion of the hearing had been concluded; and inquired if any of the Parties opposed the Commission's position. None of the Parties questioned, commented or opposed the Commission's position.

Commissioner Kanuha moved to approve the Petition subject to ten Conditions which he described. Commissioner Contrades seconded the motion.

Chair Devens requested clarification on a pre-condition that related to obtaining approval for long-term access to the Navy road within 5 years. Commissioner Kanuha described how he perceived the condition regarding road access would apply.

Commissioner Lezy expressed his concerns about access to the Petition Area and described why he considered the actions of the Petitioner premature and problematical if access could not be obtained after the Petition were granted and an Order to Show Cause became necessary.

Commissioner Jencks described why he considered access to the Petition Area to be an essential and fundamental component in deciding whether or not to grant the Petition.

Commissioner Kanuha described how he had considered the access issue in making his motion.

There was no further discussion. The Commission was polled as follows:
Ayes: Commissioners Kanuha, Contrades, Teves, Chock and Chair Devens.
Nays: Commissioners Lezy, Jencks, and Heller.

Executive Officer Davidson announced that per Hawaii Administrative Rules §15-15-13, the motion did not obtain the necessary six votes to grant the boundary amendment and failed five votes to three with one excused and according to the Commission's rules, the petition was denied. Chair Devens directed LUC staff to prepare the proper documentation for the Decision and Order.

The Commission went into recess at 10:20 a.m. and reconvened at 10:38 a.m.

DELIBERATION AND ACTION

A87-617 Bridge `Āina Le`a, LLC and DW `Āina Le`a, LLC

Chair Devens announced that this was a deliberation and action meeting on Docket No.A87-617 in the matter of the Petition of Bridge `Āina Le`a LLC and DW `Āina Le`a Development LLC regarding DW `Āina Le`a's Motion to Amend Conditions 1, 5, and 7 filed August 31, 2010; DW `Āina Le`a's Motion to Reconsider and to Defer Entry of Final Findings of Fact, Conclusions of Law, and Decision and Order; and Request for Hearing; and the Adoption of the Proposed Findings of Fact, Conclusions of Law, and Decision and Order Reverting the Petition Area.

Chair Devens noted that late written testimony via email had been received from Frank Snow.

Chair Devens polled the Commission on whether they were ready to deliberate on this matter. Commissioners Chock, Contrades, Heller, Jencks, Kanuha, Lezy, Teves and Chair Devens acknowledged that they were.

APPEARANCES

Bruce Voss, Esq., represented Co-Petitioner Bridge `Āina Le`a LLC

Alan Okamoto, Esq., represented Co-Petitioner DW `Āina Le`a Development LLC

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

Bryan Yee, Esq., represented the State Office of Planning

Jesse Souki, Director, State Office of Planning

PUBLIC WITNESSES

1. Pane Meatogae Jr.

Mr. Meatogae stated his affiliation with Local Union #3 and provided the reasons why his organization supported the proposed project.

There were no questions for Mr. Meatogae.

2. Brian Yee

Mr. Yee stated that he was a project manager for the Gas Company and expressed why his company supported granting additional time to the proposed project and allow its completion.

There were no questions for Mr. Yee.

3. Althea Cazimero-Kahai (for Charles Nahale)

Ms. Cazimero-Kahai read testimony on behalf of Charles Nahale in support of the proposed project and submitted the testimony to the Commission.

There were no questions for Ms. Kahai.

4. Michael J. Riehm

Mr. Riehm expressed his reasons for supporting the Petition and submitted written testimony.

There were no questions for Mr. Riehm.

5. Edward Brown

Mr. Brown stated that he was the regional manager for Goodfellow Brothers and described why his company supported the proposed project. There were no questions for Mr. Brown.

6. Nichole Kanda

Ms. Kanda described how she perceived small businesses would benefit from the proposed project and provided her reasons for supporting the Petition.

There were no questions for Ms. Kanda.

7. Kelly Wakayama

Ms. Wakayama expressed her support for the proposed project and requested that the Commission grant Petitioner more time to complete its project.

There were no questions for Ms. Wakayama.

8. Kirk Izawa

Mr. Izawa stated that he was Director of Operations for Oceanic Cable and expressed why his company supported the proposed project.

There were no questions for Mr. Izawa.

9. Jack Holshue

Mr. Holshue stated that he was a manager for the Kona Home Depot Store and provided the reasons why his company supported the proposed project.

There were no questions for Mr. Holshue.

There were no more Public Witnesses.

DELIBERATION AND ACTION

Chair Devens inquired if the Commission had any further questions for the Parties.

Commissioner Kanuha noted that Ms. Leithead-Todd had not attended the prior meeting on this docket and asked if she wished to provide any final comments to the Commission.

Ms. Leithead Todd stated that the County's position that the Petition Area was appropriately designated for development and should retain its urban designation had been consistent and provided her perception of how the Petition Area fit into the Hawaii County plans for the region.

Commissioner Jencks requested clarification on whether the entire region had been zoned. Ms. Leithead-Todd responded that the entire area had been zoned and described how she perceived areas had been zoned for urban classification and how the County had finalized its processing of the Petition Area's zoning.

Commissioner Kanuha moved for an Executive Session. Chair Devens seconded the Motion. By a unanimous voice vote, the Commission exited the room to enter into Executive Session at 11:03 a.m. and reconvened at 11:15 a.m.

Commissioner Kanuha moved that Conditions 5 and 7 be retained "as is" and that Conditions 1(b) and 1(c) of the existing Decision and Order be deleted in their entirety. Commissioner Teves seconded the motion.

Commissioner Kanuha related the experiences that he had with dealing with this docket during his term and described the past and present factors that he considered to formulate his motion.

Commissioner Jencks stated that he echoed Commissioner Kanuha's comments and described how Hawaii County should be allowed to handle this matter.

Commissioner Heller stated that he respectfully disagreed with Commissioner Kanuha's motion and shared his interpretation of the statutory framework that he felt made reversion the appropriate action for the Commission to take.

Chair Devens noted that Commissioner Kanuha's points were well taken, but that he agreed with Commissioner Heller's assessment of what the duties and obligations of the Commission were by statute and administrative rules; and needed to consider the representations made by the petitioner to the Commission and the financial capability of the Petitioner to honor them.

There was no further discussion.

The Commission was polled as follows:

Ayes: Commissioners Kanuha, Teves and Jencks.

Nays: Commissioners Lezy, Heller, Contrades, Chock and Chair Devens.

The motion failed three to five with one excused.

DELIBERATION AND ACTION

Chair Devens announced that this was Deliberation and Action on DW 'Āina Le'a's Motion to Reconsider and to Defer Entry of Final Findings of Fact, Conclusions of Law, and Decision and Order; and Request for Hearing.

Commissioner Heller moved to deny the motion. Commissioner Contrades seconded the motion.

There was no discussion.

The Commission was polled as follows:

Ayes: Commissioners Heller, Contrades Lezy, Chock and Chair Devens

Nays: Commissioners Kanuha, Teves and Jencks.

The motion passed, five to three with one excused.

DELIBERATION AND ACTION

Chair Devens announced that this was deliberation and action on whether to adopt the Bridge 'Āina Le'a LLC and DW 'Āina Le'a Development LLC's Proposed Findings of Fact, Conclusions of Law & Decision and Order Reverting the Petition Area as the Commission's Final Findings of Fact, Conclusions of Law & Decision and Order Reverting the Petition Area.

Mr. Voss requested that Chair Devens recuse himself from decision-making on the proposed decision and order based on the Chair's conflict of interest.

Chair Devens inquired what the conflict was. Mr. Voss stated that he had obtained information that Chair Devens' firm had been involved in a lawsuit against Petitioner Bridge`Āina Le`a LLC in the past over water rights and why he perceived a conflict of interest existed.

Discussion ensued to establish the administrative, statutory and factual basis involved with Mr. Voss' request. Mr. Voss stated that he had obtained the information two days before the April 8, 2011 final argument before the Commission, and that he had notified DW `Āina Le`a Development LLC's counsel that he would be raising this issue but had not notified OP or Hawaii County. Mr. Voss further represented that the litigation had concluded and was settled in 2003.

Commissioner Teves excused himself at 11:58 a.m. and returned at 12:01 p.m.

Chair Devens inquired if OP and Hawaii County had any concerns about his participation in the proceedings. OP and Hawaii County responded that they had no concerns regarding Chair Devens' continued participation.

Commissioner Lezy requested clarification on what personal or pecuniary interest Mr. Voss perceived Chair Devens would have in the outcome of this docket. Mr. Voss described the benefits that he perceived Chair Devens would receive from participating in this docket.

Commissioner Kanuha moved to enter into executive session. Commissioner Heller seconded the motion. By a voice vote, the Commission unanimously voted (8-0) to enter into executive session.

Before entering into executive session, Chair Devens stated for the record that he did not recall the litigation described by Mr. Voss and did not recall any participation in the case.

The Commission exited the meeting room at 12:07 p.m. and reconvened at 12:20 p.m.

Chair Devens stated that after a review of the information that Mr. Voss provided, and based on the advice and consultation with the Deputy Attorney General, there did not appear to be grounds for recusing himself, and OP and Hawaii County did not raise any concerns about his participation. He noted that the information could have been brought to the Commission's attention in a more timely fashion and that no objection was raised by Mr. Voss regarding his participation in the preceding two motions that were voted on by the entire Commission in the same matter. He added that he had contacted his office during the recess to gather more information relating to Mr. Voss' allegations and was informed that Hale Wailani Partners, who was a party named in the lawsuit, was not a current client of his firm.

Commissioner Heller moved to adopt the proposed Findings of Fact, Conclusions of Law, and Decision and Order as dated March 10, 2011 as the Final Findings of Fact, Conclusions of Law, and Decision and Order, with amendments which he read into the record. Commissioner Contrades seconded the motion.

Commissioner Kanuha stated that although he would be voting against the motion, he supported Chair Devens' disclosure statement and did not believe that there was any conflict of interest during these proceedings.

Commissioner Contrades stated that he supported the motion and provided his reasons for voting for it.

There was no further discussion.

The Commission was polled as follows:

Ayes: Commissioners Heller, Contrades Lezy, Chock, Teves and Chair Devens

Nays: Commissioners Kanuha, and Jencks.

The motion passed, six to two with one excused.

Chair Devens announced that Commissioner Kanuha and Jencks would be concluding their service to the Commission and thanked them for their service. Commissioner Contrades echoed Chair Devens remarks.

There being no further business to discuss, the meeting was adjourned at 12:33 p.m.