

LAND USE COMMISSION
MEETING MINUTES

August 24, 2012

**The Royal Lahaina Resort Maui Ball Room
2780 Keka`a Drive
Lahaina, Maui, Hawai`i, 96761**

COMMISSIONERS PRESENT: Chad McDonald
Ernest Matsumura
Lance Inouye
Nicholas Teves, Jr.
Ronald Heller
Sheldon Biga

COMMISSIONERS EXCUSED: Thomas Contrades
Kyle Chock
Napua Makua

STAFF PRESENT: Daniel Orodenker, Executive Officer
Bert Saruwatari, Staff Planner
Scott Derrickson, Staff Planner
Sarah Hirakami, Deputy Attorney General
Riley Hakoda, Staff Planner/Chief Clerk

COURT REPORTER: Holly Hackett

AUDIO TECHNICIAN: Walter Mensching

CALL TO ORDER

Vice Chair Heller called the meeting to order at 9:00 a.m.

ACTION

A94-706 Ka`ono`ulu Ranch (Maui)

Vice Chair Heller announced that this was a hearing and action meeting regarding Docket No. A94-706 and Movant Maui Tomorrow Foundation, Inc., South

Maui Citizens for Responsible Growth and Daniel Kanahele's Motion for Hearing, Issuance of Order to Show Cause and Other Relief (hereafter referred to as Movant's Motion) filed on May 23, 2012.

APPEARANCES

Joel Kam, Esq., represented Honua`ula Partners

Jonathan Steiner, Esq., represented Pi`ilani Promenade North LLC, Pi`ilani Promenade South LLC, and Honua`ula Partners

Jane Lovell, Esq., Deputy Corporation Counsel, represented County of Maui Planning Department (County)

Michael Hopper, Esq., Deputy Corporation Counsel, County

William Spence, Director, County

Bryan Yee, Esq., represented State Office of Planning (OP)

Jesse Souki, Director, OP

Tom Pierce, Esq., represented Maui Tomorrow Foundation, South Maui Citizens for Responsible Growth and Daniel Kanahele

Irene Bowie, Maui Tomorrow Foundation

Vice Chair Heller updated the record and explained the procedures to be followed for the proceedings. Ms. Lovell requested procedural clarification on whether witness testimony was going to be allowed other than during the public testimony phase. Discussion ensued determine whether the Parties' witnesses would be allowed to testify and if so, during what part of the proceeding it would occur. Vice Chair Heller stated that the witnesses would be restricted to the Motion that was being heard today and clarified the circumstances of what the nature of the docket proceedings were for; and how they would be conducted. There were no further questions, comments or objections to the procedures.

PUBLIC WITNESSES

1. Danny Collier-

Mr. Collier stated that he supported the proposed project and provided his perspective of how Maui needed to support its projected growth with adequate infrastructure and services.

There were no questions for Mr. Collier.

2. Perry Artates- Hawaii Operating Engineers Representative

Mr. Artates stated that he opposed the motion and described how his organization's members and the island economy would benefit from the proposed project.

Commissioner Biga asked what would happen if the proposed project moved forward and how many workers would be needed.- Mr. Artates provided his perspective of how his organization and the associated companies would perform and shared his estimate of how many workers would have employment due to the proposed project.

There were no further questions for Mr. Artates.

3. Mike Foley

Mr. Foley stated that he supported the motion to show cause and read his submitted written testimony that described why the motion should be granted.

Commissioner Biga requested clarification on what opposition to the proposed project was based on. Mr. Foley responded that he felt that the proposed project needed to be better assessed and evaluated with a different set of measures since it had been altered from when it had originally been proposed, and described the issues that he felt needed to be resolved to make a better decision on the Petition Area.

There were no further questions for Mr. Foley.

4. Renee Richardson-

Ms. Richardson submitted several pages of a petition she had circulated and stated that she supported the motion to show cause and described her reasons why.

There were no questions for Ms. Richardson.

5. Patricia Stillwell

Ms. Stillwell stated that she supported the motion and referenced her submitted written testimony during her testimony.

There were no questions for Ms. Stillwell.

6. Mike Moran-

Mr. Moran read Carla Flood's testimony supporting motion
There were no questions for Mr. Moran.

7. Mark Hyde-

Mr. Hyde read Victoria Huffman's (licensed California State Traffic Engineer) testimony regarding traffic in the Petition Area and-supporting the motion.

Commissioner Biga asked if Ms. Huffman was still a highway expert in California. Mr. Hyde responded that she was.

There were no further questions for Mr. Hyde.

8. Mary Starr Little-

Ms. Little stated that she supported the motion and described her reasons for taking that position.

There were no questions for Ms. Little.

9. Tom Blackburn Rodriguez- Piilani Promenade and Honuauia rep.

Mr. Blackburn-Rodriguez stated that he supported the proposed project and submitted approximately 500 postcards with signatures that also supported the proposed project.

There were no questions for Mr. Rodriguez.

10. Ann Cua- Maui County Planner

Ms. Cua submitted written testimony and a portion of a past transcript of the original LUC hearing for the initial district boundary amendment and described her role as the County Planner involved with the Petition Area. Ms. Cua described her experience with the proposed project and why she felt the LUC had not imposed any conditions restricting the Petition Area; and why the proposed project should be allowed since it complied with the Maui County M-1 zoning.

Questions for Ms. Cua

County

Ms. Lovell had no questions.

OP-

Mr. Yee requested clarification of Ms. Cua's recollection of the 1994 LUC meetings on the docket and the considerations that were made which resulted in the final decision and order. Discussion occurred as Ms. Lovell challenged Mr. Yee's line of questioning. Vice Chair Heller acknowledged Ms. Lovell's comment and allowed Mr. Yee's question. Ms. Cua provided her understanding of what the M-1 light industrial use zoning ordinance permitted and described her perception of various "land use" planning terms including "light industrial", "residential" and "commercial" uses. Ms. Cua also described what types of county approvals would and would not be necessary for the proposed project and whether or not opportunities for further community input was possible.

Mr. Yee had no further questions.

Movant

Mr. Pierce requested clarification on Ms. Cua's understanding of HRS Chapter 205 requirements and asked if it was her understanding that there could be a land use condition that was more restrictive than county zoning. Ms. Cua responded that it was possible.

Mr. Pierce had no further questions.

Petitioner- Honua`ula Partners LLC

Mr. Kam requested clarification on Ms. Cua's attendance and participation in the original district boundary amendment proceedings and on her recollection of the understanding that the LUC had when it granted the Petition and the considerations that were made regarding zoning issues and other restrictions for the Petition Area. Discussion ensued to determine what, if any, restrictive conditions were imposed by the decision and order. Ms. Cua stated that there were none imposed and referenced how restrictive conditions had been imposed on another nearby Petition Area (Condition 19- Maui Business Park).

Mr. Kam had no further questions.

Commissioner Questions

Commissioner Biga requested clarification on how far into the future the Community Plan projected. Ms. Cua responded that the Community Plan forecasted 20 years into the future for development in the area and described how land use would be specified in the Community Plan and how the LUC and County differed in assessing land use determinations.

Commissioner McDonald requested clarification on what plan was presented by Petitioner when it went to County zoning in 1998. Ms. Cua replied that a "light industrial subdivision" type of development was presented and that an M-1 industrial zoning designation had been sought; and clarified that it was the same plan as had been presented to the LUC. Ms. Cua also described the zoning considerations that the County made in its decision making and determination of zoning recommendations. Discussion ensued to determine what type of permitting requirements remained for the Petition Area. Ms. Cua provided her understanding that just building, grading and landscaping permits remained to be issued.

Commission Inouye requested clarification on whether Ms. Cua had the opinion that the LUC approval of a district boundary amendment was like the approving of County zoning. Ms. Cua described how the Commission would make a land use determination and how the County would make a zoning determination; and what the B1, B2, and B3 business district zonings respectively included; and how the M-1 zoning designation was consistent with the urban district.

11. William Spence-Planning Director, Maui County

Mr. Spence provided written testimony and described how Maui County zoning evolved to accommodate growth on the island and referred to the Maui comprehensive island plan to describe what the future growth of Maui might look like.

Mr. Pierce requested clarification on how LUC imposed conditions could be more restrictive than County zoning. Mr. Spence stated that an LUC condition could be more restrictive than County zoning and described how

early zoning districts were determined and what factors the County zoning process considered when making zoning determinations. Mr. Spence also described how the Planning Department considered the State Zoning 205 process during its determination and what his understanding was of the County and Land Use Commission roles in the procedure.

There were no further questions for Mr. Spence.

12. Cynthia Groves-

Ms. Groves submitted written testimony and stated her reasons why she supported the motion and what her concerns were about the proposed project.

Ms. Lovell requested clarification on Ms. Groves' reference to Maui County Zoning Ordinance-Chapter 19. Ms. Groves shared her understanding of what the zoning ordinance meant and how it applied to the proposed development's history.

There were no further questions for Ms. Groves.

13. Ivan Lay

Mr. Lay shared his reasons for opposing the Motion.

There were no questions for Mr. Lay.

14. Bill Kamai

Mr. Kamai stated that he opposed the motion and expressed his reasons why.

There were no questions for Mr. Kamai.

Vice Chair Heller entertained a motion for an Executive Session.

Commissioner Biga moved and Commissioner McDonald seconded the motion for Executive Session. By a unanimous voice vote (6-0) the Commission voted to enter Executive Session.

The Commission went into Executive Session at 10:37 a.m. and reconvened at 11:15 a.m.

PRESENTATIONS

Petitioner

Mr. Kam and Mr. Steiner stated that they had no witnesses.

Movant

Mr. Pierce stated that the Movants opposed the "abuse of process" and argued why the Order to Show Cause should be granted and provided the details of his argument on behalf of the Maui Tomorrow Foundation, South Maui Citizens for Responsible Growth and Daniel Kanahale. Mr. Pierce requested that the Commission set a hearing, issue an order shortening the time for the hearing because of imminent threat of development of the Petition Area; issue an Order to Show Cause why the Petition Area should not revert to its former boundary classification because of the landowners failure to use the Petition Area consistent with the Commission's 1995 Findings of Fact, Conclusions of Law, and Decision and Order; conduct a contested case hearing on the factual and legal issues supporting the reversion of the Petition Area's classification and issue an order compelling the owners of the Petition Area to withdraw all previously filed annual reports that do not correctly represent the status of the Project and file amended annual reports with the Commission, OP and the County of Maui that accurately describe the status of the Petition Area and the Project and why the Movants felt that that the current landowners were in violation of Condition Nos. 5 and 15 of the Commission's Decision and Order.

Petitioners

Vice Chair Heller asked if the Petitioners representatives would be presenting separately. Mr. Steiner stated that Mr. Kam would be presenting for Honua`ula and that he would be presenting for the Piilani North and South entities and that he would precede Mr. Kam. There were no objections to Petitioner's proposed presentations.

Petitioner- Piilani Promenade South, LLC and Piilani Promenade North, LLC

Mr. Steiner stated that the landowners opposed the Movant's Motion and argued why the Movants had no standing to file the Motion; had failed to identify any condition of the Decision and Order or representation that had not been complied with and how Conditions 15 and 5 had not been violated. Mr. Steiner also argued how the proposed use of the Petition Area was in substantial compliance with all representations made to the Commission; and that there was no condition imposed to restrict the development to a commercial and light-industrial subdivision; and that the

Commission was made well-aware that the County's M-1 light industrial zoning allowed a variety of uses and chose not to impose a condition prohibiting uses including apartments and retail uses; and that since no development had occurred on that portion of the Petition Area owned by Honua`ula nor any permits issued to commence construction, Honua`ula contends that the Motion was not ripe and should therefore be denied.

Petitioner- Honua`ula Partners

Mr. Kam argued that the Commission should focus on the Conditions of the decision and order and how Petitioner's efforts were in compliance with them, and how the LUC had the authority to have imposed more specific, restrictive conditions if it wanted, but did not.

County

Ms. Lovell stated that Maui County opposed the Movant's Motion and argued how the Movant's allegation that Condition No. 5 of the Decision and Order had been violated was not accurate and how the Movant's had not demonstrated that the required traffic improvements would not be built or that the DOT would not require the developer to construct traffic improvements satisfactory to DOT.

Ms. Lovell also argued how Condition 15 of the Decision and Order did not prohibit the use of the Petition Area for affordable apartment units and commercial shopping center purposes; and how the representations made to the Commission were not inconsistent, and that the County Council did not amend the M-1 zoning ordinance.

Ms. Lovell stated that the Maui Planning Commission recommended a condition that would have limited the commercial uses of the development but elected to impose a condition requiring Petitioner to only "...use its best efforts in attracting traditional light industrial uses and shall consider locating these on the perimeter and focus non-industrial uses on the major traffic corridors."; and did not impose any condition limiting the use of the Petition Area. Ms. Lovell argued that Movants failed to demonstrate that the conditions of the Decision and Order had been violated, and that the Petition Area was not being used in a manner contrary to the Decision and Order and that the more appropriate way to address Movant's concerns was the Declaratory Order provision under Hawaii Administrative Rules subchapter 14.

OP

Mr. Yee stated that OP supported Movant's Motion and recommended that an Order to Show Cause be issued with a subsequent hearing on the matter; and that OP did not take any position as to whether the Petition Area should be reverted to its previous classification at this time.

Mr. Yee described why OP felt that a Motion to Amend filing was a more appropriate action since it would allow the re-examination of impact concerns of the proposed project and why the County's decisions were not being challenged but rather the State's; and referred to HAR 15-15-49 and summarized how it would apply to the proceedings.

Mr. Yee also argued how the absence of a light industrial component to the proposed project made substantial compliance to representations made to the LUC and documented in the original decision and order questionable; and that the current Petitioners failed to comply with the representation that a commercial and light industrial subdivision would be developed on the Petition Area as required by Condition 15; and that the proposed structures were not disclosed during the Commission's original proceedings; and that no attempt had been made to file a Motion to Amend the Decision and Order to reflect the current proposed development as had occurred with other land use changes in other dockets.

Rebuttal

Movant

Mr. Pierce described how the infrastructure promised by the Petitioner for the proposed project would avert public review and Condition 5 of the original decision and order; as well as the proper associated agencies if the motion to show cause were not granted; and that possible needed conditions could not then be included. Mr. Pierce also described how the Movants agreed with portions of OP's presentation and how the original findings of fact had specific references to "light industrial use" which required further review of the new proposed project and public input.

The Commission went into recess at 12:30 p.m. and reconvened at 1:10 p.m.

Petitioner- Piilani Promenade North LLC and Piilani Promenade South LLC

Mr. Steiner argued that Petitioners did not perceive that they had violated the decision and order's conditions and why there was no need to file for an amendment; and how Ms. Cua had described how the other uses of the Petition Area would be "market driven". Mr. Steiner added that what had been represented to the LUC in the original Petition had been accurate and consistent; and that there were no condition violations; and that the Commission should deny the motion.

Intervenor- Honua`ula

Mr. Kam also argued that there had been no violations of the original decision and order and described how the Petitioner had complied with its representations and disputed OP's position regarding the current landowner's need to comply with representations that had been made in the original Petition and Mr. Pierce's statement about post-decision outcomes since County and other State agencies approvals and permits needed to be satisfied to ensure that the conditions imposed by the LUC's decision and order were followed.

County

Ms. Lovell argued how the County and the sitting Commissioners for the original decision and order had interpreted the presented information from the proceedings in similar fashion and determined "substantial compliance" requirements; and why the motion for the order to show cause should be denied.

OP

Mr. Yee argued how the representations made by Petitioner had to be balanced when determining "substantial compliance" and described how the Lanai water case's situation differed from this docket and how the decision and order in the original Petition spoke for itself and why a review and another hearing on the Petition was needed.

Commissioner Questions

Commissioner McDonald asked if an Environmental Assessment had been performed for the development plan for the Petition Area. Mr. Kam shared his understanding of the environmental work that had been done in the Petition Area and nearby projects and stated that he would need to check on whether the Wailea project

encompassed the affordable housing area to answer Commissioner McDonald's question. Mr. Steiner described the Environmental Assessments that he was aware of that had been conducted in the area and stated that he did not have all the details for the area.

Commissioner McDonald asked Mr. Yee if OP was aware of any EA having been done for the Petition Area. Mr. Yee responded that OP was not aware of any EA being performed in the original Petition Area. Ms. Lovell added that she thought that the reason why no EIS was that there had been no trigger and described the factors that she thought existed that made the EIS unnecessary. Discussion ensued to determine whether or not enough consideration had been given to the use of State lands/facilities. Ms. Lovell described how the original Petition Area had been assessed and why it did not trigger the EIS after the assessment; and how Chapter 343 requirements at the time of the Petition approval till the present might apply.

Mr. Kam provided his understanding of how more recent Supreme Court decisions on other LUC dockets and law changes regarding EIS requirements might be related to the questioning about EIS triggers. Mr. Yee added that the time period where the legal requirements changed for EISs was in 2006. Commissioner McDonald had no further questions.

Commissioner Biga requested clarification from Mr. Steiner on why the annual reports had not been consistently filed with the Commission. Mr. Steiner replied that his understanding was that an annual report had been filed in 2011 and in years prior also; and that the current year's report was being withheld pending the results of this proceeding.

Commissioner Biga asked if he should re-direct his question to Mr. Kam, and Mr. Steiner provided additional information on what annual reports had been filed to satisfy Commissioner Biga's question.

Commissioner Inouye asked if Mr. Steiner had a record of the 2005-2009 annual reports. Mr. Steiner responded that he could not give a definitive answer on the annual reports; and that the current landowners did not own the property during that time period. Mr. Steiner described the changes of ownership that occurred since the original Petition had been granted and stated that the current landowners took possession of the Petition Area in September, 2010.

Commissioner Inouye requested clarification on what date the 2012 annual report needed to be submitted by and noted that it should have been submitted by the Petition anniversary date that had occurred earlier in 2012. Mr. Steiner responded that he was not aware of the requirement.

Commissioner Inouye requested clarification on the status of the Movant's appeal before Maui County on this matter. Mr. Steiner responded that the County filed a motion to dismiss the appeal for lack of jurisdiction and that the Motion had been granted and the order submitted by the County was accepted. Commissioner Inouye had no further questions.

Vice Chair Heller requested clarification from Mr. Kam and Mr. Steiner on what was going on in the Petition Area for their respective landowners. Mr. Kam replied that nothing was happening at the current time and there was no established time frame of when development activity for the affordable homes should occur on the Honua`ula portion of the Petition Area. Mr. Steiner stated that his understanding was that grading permits had been issued to the Pi`ilani Promenade entities's remaining portions of the Petition Area and that equipment had been staged on it and that best management practices were in place and activity was ready to start once it was determined to be permissible to do so.

Vice Chair Heller requested clarification on Condition 5 and the frontage road requirement for the Petition Area. Mr. Steiner shared his understanding of how the frontage road would be addressed and applied to the current proposed project.

Commissioner Inouye acknowledged and thanked the Parties for their efforts and described the considerations that he had made regarding Condition 15 while deciding to make a motion to grant the Motion for an Order to Show Cause. Commissioner Biga seconded the motion .

Discussion on the Motion

Commission Biga commented that he felt that there were a lot of questions that needed to be answered and urged the Parties to settle this matter quickly.

Vice Chair Heller described how the decision being made by the Commission specifically was to decide whether or not to grant an Order to Show Cause to take the

next procedural step for a hearing to decide whether or not the Conditions of the Decision and Order were being complied with.

There was no further discussion.

The Commission voted as follows:

Yeas: Commissioners Inouye, Biga, Matsumura, Teves, McDonald and Vice Chair Heller.

Nays: None

The Motion passed 6-0 with 3 excused.

Vice Chair Heller asked if there were any questions or comments for the Commission before it adjourned. Mr. Steiner requested that the Commission move expeditiously on this matter. Vice Chair Heller advised him to contact staff regarding scheduling and assured him that it was the Commission's intention to address and resolve this matter as soon as possible.

There being no further business, the Commission adjourned at 1:45 p.m.