

LAND USE COMMISSION
MEETING MINUTES

November 20, 2014- 9:30 a.m.

Maui Arts & Cultural Center
One Cameron Way, Kahului, HI

COMMISSIONERS PRESENT: Chad McDonald
Arnold Wong
Edmund Aczon
Kent Hiranaga
Brandon Ahakuelo
Jonathan Scheuer
Aaron Mahi

COMMISSIONERS EXCUSED: Sandra Song
(There are currently 8 seated Commissioners)

LUC STAFF PRESENT: Daniel Orodener, Executive Officer
Diane Erickson, Deputy Attorney General
Bert Saruwatari, Staff Planner
Scott Derrickson, Staff Planner
Riley Hakoda, Staff Planner/Chief Clerk
Haunani Nagel, Secretary

COURT REPORTER: Holly Hackett

AUDIO TECHNICIAN: Hotai Zerba

CALL TO ORDER

Chair McDonald called the meeting to order at 9:30 a.m.

APPROVAL OF MINUTES

Chair McDonald asked if there were any corrections or additions to the November 12-13, 2014 minutes. There were none. Commissioner Ahakuelo moved to approve the minutes. Commissioner Wong seconded the motion. By a voice vote the minutes were unanimously approved (7-0-1 excused).

TENTATIVE MEETING SCHEDULE

Executive Officer Orodenker provided the following:

- The regular tentative meeting schedule has been distributed in the handout material for the Commissioners.
- November 21, 2014 is scheduled for A92-683 Halekua Development, continued hearing.
- December 10-11, 2014 is planned for A11-791 Kapa`a Highlands (HoKua Place), status report for SP87-364 Kahili Adventist (Knudsen Trust) and possible site visits
- January 7-8, 2015 is planned for A92-683 Halekua Development adoption of order.
- January 21-22, 2015 is planned for A89-643 McClean Honokohau Properties- (Kona)
- Above dates represent the tentative calendar of meetings and are subject to change.
- Any questions or conflicts, please contact LUC staff.

Chair McDonald inquired if the January 21-22, 2015 had been confirmed. Mr. Orodenker replied that it had not. There were no further questions and comments regarding the tentative meeting schedule.

HEARING & ACTION

SP14-404 Jas. W. Glover (Hawai`i)

Chair McDonald stated that this was a meeting on Docket No. SP14-404 Jas. W. Glover to consider a request for Special Permit for quarry and other support services and accessory uses.

APPEARANCES

Randy Vitousek, Esq., Jas. W. Glover's Representative

Mike Pearing, Operations Mgr., Jas. W. Glover

William Brillhante, Esq., Deputy Corporation Counsel, Hawaii County Planning Department (County)

Bryan Yee, Esq., Deputy Attorney General, State Office of Planning

Rodney Funakoshi, Land Use Administrator, State Office of Planning

Chair McDonald updated the record, described the procedures for the hearing and asked if there were any Public Witnesses who wished to testify. There were no questions or comments on the procedures.

PUBLIC WITNESSES

1. Clare Apana-

Ms. Apana expressed her opinion about how the Commission should hold meetings on the same island where the agenda item was located.

There were no questions for Ms. Apana.

There were no other witnesses.

PRESENTATION

Petitioner

Mr. Vitousek provided his presentation to the Commission and argued that the Special Permit could be considered despite the updated archaeological information provided by the Department of Defense; but noted that a decision to remand under the circumstances was understandable.

Commissioner Mahi requested clarification on who had been contacted regarding cultural and archaeological concerns in the Petition Area. Mr. Vitousek described the efforts that the Applicant had made to prepare its Petition for the County and LUC's consideration and what findings had been discovered.

Commissioner Aczon asked if County had any comments regarding Petitioner's testimony regarding how to deal with the DOD letter. Mr. Brillhante acknowledged that the Applicant's description of their activities and representations were accurate and responded that he had just been made aware of the DOD letter and hadn't had time to review it with the Hawai'i County Planning Department and deferred to the LUC in the matter.

Commissioner Scheuer asked if the Department of Hawaiian Home Lands (DHHL) had been included in discussions regarding the Petition Area. Mr. Brillhante replied that DHHL was usually involved with County level discussions and had probably been included in the application review process.

Commissioner Scheuer requested clarification on the Petitioner's Exhibit 46- correspondence from County of Hawai'i-Byron Fujimoto (Paragraph F, page 4). Mr. Vitousek provided his interpretation of Mr. Fujimoto's description of the Petition Area. Mr. Brillhante affirmed Mr. Vitousek's description of the Petition Area and expressed his perspective of quarrying activity in the Petition Area and how it affected the landscape.

Commissioner Scheuer requested clarification of page 7 of Petitioner's Exhibit 46 and how the reported cultural significance of the area contrasted with the remarks about the Petition Area quarrying activities having no significant impact upon it and a seeming disconnect from guidelines of the *Public Access Shoreline Hawai'i (PASH)* case. Mr. Vitousek described how land use changes and activities on the land's surface over time in neighboring and surrounding areas had impacted the Petition Area.

Commissioner Scheuer expressed his desire to make legally sound decisions and echoed Commissioner Mahi's comments regarding the need for greater Kama`aina input. Mr. Vitousek acknowledged Commissioner Scheuer's remarks and restated why he was not opposed to an LUC decision to remand this matter back to the County for resolution in order to avoid creating controversy where there shouldn't be any.

There were no further questions for Mr. Vitousek.

AGENCY COMMENTS

County

Mr. Brillhante commended the actions of the Applicant and argued the reasons why Hawaii County supported the Petition and how proceedings might move forward despite the findings mentioned in the DOD letter if County's Condition 12 of the Permit Application was observed. Mr. Brillhante confirmed that the County's proposed Conditions for the Special Permit were accurately represented in its documents.

OP

Mr. Yee stated that OP had also been unaware of the DOD letter and deferred to the LUC regarding this matter. Mr. Yee noted that OP had no objections to the Special Permit application and described how the time sensitive nature of Special Permits justified hearing them in locales other than where they were located.

Commissioner Questions

Chair McDonald stated that he also echoed Commissioner Mahi's concerns and described how disruptive the late correspondence from the Dept. of Defense (DOD) was to the proceedings.

There were no further questions or comments.

DECISION MAKING

Commissioner Wong moved to remand the Special Permit back to the County Planning Commission for further consideration. Commissioner Aczon seconded the motion. There was no discussion.

The Commission voted unanimously 7-0- with 1 excused in favor of the motion.
The Commission went into recess at 10:10 a.m. and reconvened at 10:15 a.m.

HEARING & ACTION

SP 92-380 Hawaiian Cement

Chair McDonald stated that this was a meeting on Docket No. SP 92-380 Hawaiian Cement to consider a request for Special Permit for quarrying and other support services and accessory uses.

APPEARANCES

Karlynn Fukuda, Petitioner's Representative

David Gomes, Hawaiian Cement, Applicant

Kristin Tarnstrom Esq., Deputy Corporation Counsel, Maui County Planning Department (County)

Paul Fasi, Planner, County

Bryan Yee, Esq., Deputy Attorney General, OP

Rodney Funakoshi, Land Use Administrator, OP

Chair McDonald updated the record, described the procedures for the hearing and asked if there were any Public Witnesses who wished to testify. There were no questions or comments on the procedures.

PUBLIC WITNESSES

1. Will Cambra, Walker Industries

Mr. Cambra expressed his support for the Petition.

There were no questions for Mr. Cambra.

2. Keoni Gomes, T J Gomes Trucking Company

Mr. Gomes shared his reasons for supporting the Petition.

There were no questions for Mr. Gomes.

3. Clare Apana

Ms. Apana described the difficulties she encountered while trying to obtain Special Use Permit information and shared her concerns regarding proper cultural monitoring and reporting during land excavations.

Commissioner Mahi asked Ms. Apana to identify who she had problems obtaining information from. Ms. Apana stated the entities involved.

Commissioner Mahi asked Chair McDonald who could best address her concerns.

Chair McDonald responded that perhaps OP or the Petitioner could.

There were no further questions for Ms. Apana.

4. Johanna Kamano

Ms. Kamano expressed her concerns that the Ahumoku Council System had not been contacted in regards to the Special Use Permit application; and that she felt they should be.

There were no questions for Ms. Kamano.

There were no further witnesses.

PRESENTATION

Petitioner

Ms. Fukuda provided her presentation to the Commission and argued why the Special Permit should be granted. Ms. Fukuda stated that the Special Permit did not involve any sand mining operations that might be of concern to Ms. Apana.

Commissioner Mahi requested that Ms. Fukuda provide clarification on Ms. Kamano's concerns regarding including the Ahumoku Council in the permitting process. Ms. Fukuda stated that they were aware of the Ahumoku Council but had not formally appeared before them, and that she would make arrangements with Ms. Kamano to open communications with them in the future.

AGENCY COMMENTS

County

Ms. Tarnstrom expressed the reasons why Maui County supported the Petition.

OP

Mr. Yee stated that OP was in support of the Petition and shared the reasons why OP took that position.

Commissioner Questions

Commissioner Scheuer requested clarification from Maui County- Exhibit 2 on the water issues involved with the application. Ms. Tarnstrom deferred to Mr. Fasi, who deferred to Petitioner's Representative, Ms. Fukuda to address. Ms. Fukuda stated that the proposed permitted use would not require any additional water.

Commissioner Aczon requested clarification on whether the County had received the December 10, 2007 water dam map. Mr. Fasi confirmed that he had received it.

There were no further questions.

DECISION MAKING

Commissioner Hiranaga moved to grant the request for proposed amendments to Special Permit SP92-380 with the conditions imposed by the County, subject to clarification by the LUC; to amend County Condition 1 to have the Permit expire in 2032; to delete Condition 16 and replace it with a new Condition 16- "that prior to commencement of operations on quarry site "C", that the applicant submit an archaeological survey to the State Historic Preservation Division (SHPD) and comply with any comments received"; and add Condition 17- "that operations be confined within the area designated site "C"". Commissioner Scheuer seconded the motion.

There was no discussion.

The Commission voted unanimously 7-0- with 1 excused in favor of the motion.

The Commission went into recess at 10:38 a.m. and reconvened at 10:49 a.m.

HEARING & ACTION

DR14-51 Maui Lani Neighbors, Inc.

Chair McDonald stated that this was a meeting on Docket No. DR14-51 Maui Lani Neighbors, Inc. to consider a request for declaratory order that the Sports Complex uses proposed by the State of Hawaii Department of Land and Natural Resources violate Conditions 5, 8, 16, 21, and 24 of the Decision and Order in LUC Docket No. A10-789 A&B Properties, Inc., updated the record and noted that this was not an evidentiary or contested case hearing.

APPEARANCES

Tom Pierce, Esq., Maui Lani Neighbors Inc.'s Representative

Will Spence, Director, Maui County Planning Department (County)

Erin Tarnstrom, Esq. , Deputy Corporation Counsel, County

Amanda Weston, Esq., Department of Land & Natural Resources (DLNR)
Representative

Bryan Yee, Esq. , Deputy Attorney General, OP

Rodney Funakoshi, Land Use Administrator, OP

Benjamin Matsubara, Esq., and Curtis Tabata, Esq., A&B Properties, Inc.'s
Representative (A&B)

DISCLOSURES

Commissioner Scheuer disclosed that during past employment with the Office of Hawaiian Affairs, he had worked with Mr. Pierce on obtaining a conservation

easement. Chair McDonald asked if there were any objections to Commissioner Scheuer's continued participation in the proceedings. There were none.

Chair McDonald updated the record, described the procedures for the hearing and asked if there were any Public Witnesses who wished to testify. There were no questions or comments on the procedures.

PUBLIC WITNESSES

1. Neil Sorensen

Mr. Sorensen submitted written testimony and shared his reasons for supporting the request for a declaratory order.

There were no questions for Mr. Sorensen.

2. Erin Potter

Ms. Potter expressed why she felt the DLNR's actions were improper.

There were no questions for Ms. Potter.

3. Lucienne de Naie

Ms. de Naie described how she had tracked development of the Petition Area and why she supported the Petition.

There were no questions for Ms. de Naie.

4. Clare Apana

Ms. Apana described why she was frustrated in her efforts as a cultural practitioner to protect the land and its cultural sites from grading and grubbing.

Commissioner Mahi asked if the Maui Burial Council had been contacted during her preservation efforts. Ms. Apana responded that they had not been and shared her perspective of why no action had been taken by that organization.

There were no further questions for Ms. Apana.

5. Mary Spencer (submitted and read written testimony of Amy Kimura-Koch)

Ms. Kimura-Koch's testimony was against the construction of a sports complex.

There were no questions.

6. Laura Amerio

Ms. Amerio submitted written testimony and expressed her opposition to the proposed sports complex.

There were no questions for Ms. Amerio.

7. Dave Jorgensen

Mr. Jorgensen stated his support for the proposed sports complex and described why the LUC should consider the community's need for open fields.

There were no questions for Mr. Jorgensen.

8. Harley Manner

Mr. Manner submitted written testimony and expressed his opposition to the proposed sports complex.

There were no questions for Mr. Manner.

9. Jared Schmitz (submitted and read written testimony of Mark Hoening)

Mr. Schmitz stated that he would be reading the testimony of area homeowner Mark Hoening and also echoed Mr. Hoening's comments in opposition to the proposed sports complex.

There were no questions.

10. Sarita Velada

Ms. Velada submitted written testimony and expressed her opposition to the proposed sports complex.

There were no questions for Ms. Velada.

11. M. Pualani Kamaunu Basbas

Ms. Basbas stated that she was making a complaint and shared her concerns about site grading and grubbing practices and shared her objection to the proposed project.

There were no questions for Ms. Basbas.

12. Kaniloa Kamaunu

Mr. Kaumanu shared his concerns about *iwi* (human remains) and possible violations of the law that could be occurring.

There were no questions for Mr. Kamaunu.

13. Holden Gannon

Mr. Gannon submitted written testimony and expressed his opposition to DLNR's actions.

There were no questions for Mr. Gannon.

14. Taschia Wright

Ms. Wright described why she opposed the DLNR's actions.

There were no questions for Ms. Wright.

There were no further Public Witnesses.

The Commission went into recess at 11:44 a.m. and reconvened at 12:35 p.m.

Chair McDonald stated that it was the intention of the LUC to complete proceedings on this matter on this hearing date. However, if more time was necessary, proceedings would continue on December 10, 2014.

PRESENTATION

Petitioner

Mr. Pierce agreed that the plan for continuing proceedings if necessary was feasible and provided his presentation to the Commission; and argued why the request for a declaratory order should be granted.

Commissioner Wong requested clarification on why Mr. Pierce had filed a Motion for Reconsideration with the Court and what might happen if the LUC decided to hold an evidentiary hearing. Mr. Pierce described why he opted to take the actions he did to oppose DLNR's efforts and how he would react to the Court's response to his Motion for Reconsideration. Commissioner Wong shared his concerns of how issues of dual jurisdictions of authority might be involved. Mr. Pierce described how he would prefer that the Commission focus on the request for a declaratory order and how he would deal with the various outcomes resulting from his filing actions after the LUC had made its decision.

Commissioner Scheuer requested further clarification on what relief was being sought from the LUC. Mr. Pierce described his expectations of the LUC in more detail and why he had decided to file the request for a declaratory order.

Commissioner Wong requested clarification on how the Public Testimony presented to the LUC supported his Petition. Mr. Pierce provided his perspective of how certain testimony pertained to the request for a declaratory order regarding the five conditions in the Decision and Order that were cited in his Petition.

Commissioner Wong had legal questions to pose to the Commission's deputy attorney general and moved for an Executive Session. Commissioner Ahakuelo seconded the motion. By a unanimous voice vote (7-0-1 excused), the Commission voted to enter into Executive Session.

The Commission entered Executive Session at 1:12 p.m. and reconvened at 1:25 p.m.

Chair McDonald asked if the Commissioners had any further questions for Mr. Pierce. There were none.

AGENCY COMMENTS

County

Ms. Tarnstrom deferred to the State to make its presentation first.

DLNR

Ms. Weston described the DLNR's position and argued that DLNR had been legally compliant in its actions and why it was pursuing the development of the proposed sports complex. Ms. Weston also stated that DLNR was in favor of an evidentiary hearing on this matter if necessary.

There were no questions for Ms. Weston.

OP

Mr. Yee stated that OP was in support of having an evidentiary hearing and shared the reasons why OP took that position. Mr. Yee also described what type of preparation, kinds of considerations, and information needs would be involved if the LUC decided to schedule an evidentiary hearing.

Commissioner Wong asked Mr. Yee how he perceived the Petitioner's action of filing a Motion for Reconsideration with the Court and how any decision resulting from that filing might impact an evidentiary hearing. Mr. Yee shared his opinion on the events that might occur depending on what the Court ruled.

Commissioner Wong requested clarification on how different government agencies could rule against other government agencies. Mr. Yee responded that it happened frequently and provided instances where a government agency had ruled against another; and described how the rulings could be appealed.

Commissioner Wong requested clarification on what might occur if the LUC found the DLNR in violation of the conditions imposed on the Petition Area. Mr. Yee responded that the LUC could make whatever decision it needed to as an independent agency.

Chair McDonald requested clarification why the State would be open to an evidentiary hearing after DLNR had testified that it was legally compliant in its actions. Mr. Yee responded that OP was not coordinating with DLNR to establish a State position. Mr. Yee also described how OP and DLNR had operated independently during proceedings on this matter in Court and before the LUC.

Chair McDonald asked if County had any comments.

County

Ms. Tarnstrom stated that Mr. Will Spence, Director, Maui County Planning Department was present and that County also supported having an evidentiary hearing on this matter. Ms. Tarnstrom described the events that occurred during the Court proceedings on the five LUC conditions that contributed to involving the LUC and how the LUC's participation might help the Court. Ms. Tarnstrom also argued that the Public Testimony demonstrated how important an issue this was to the community and why an evidentiary hearing was justified.

Commissioner Wong requested clarification on whether Petitioner had filed anything with the County. Ms. Tarnstrom responded that there had been several filings made with various county agencies, but that no actions had been taken yet with the exception of the LUC's hearing, and that no progress had occurred on the other filings.

Commissioner Wong requested clarification on how the County would respond if the LUC found that there had been violations to the LUC Conditions. Ms. Tarnstrom shared her perception of how County would handle violations to ensure proper compliance for each violation; and described the various actions that Petitioner had taken to advance its position in this case.

A&B

Mr. Matsubara described A&B's interests in this matter. Mr. Matsubara stated that he had filed a Motion to Intervene and requested that A&B be allowed to participate in the evidentiary hearing if the LUC decided to schedule one.

There were no questions for Mr. Matsubara.

Commissioner Questions

Commissioner Scheuer requested clarification on the urgency of this issue and how rapidly a resolution was needed. Mr. Pierce affirmed Mr. Yee's assessment of the circumstances and described how he perceived action to resolve this situation could occur. Commissioner Scheuer voiced how the LUC process might not be rapid enough to satisfy the time constraints that confronted the Maui Lani Neighbor Inc.'s interests. Mr. Pierce described how he hoped the LUC might be able to move forward.

There were no further questions or comments.

DECISION MAKING

Chair McDonald described the Commission's obligations under HAR §15-15-100.

Commissioner Wong stated his concerns regarding pending litigation in this case. Chair McDonald agreed with Commissioner Wong that the pending litigation issue was worrisome and read the portion of the Court's order that stated that "nothing in this Court's order shall require that the LUC to determine if a violation had occurred or the procedure to be used in making such a finding." Chair McDonald restated how the Court proceedings were a concern.

Commissioner Hiranaga referred to HAR §15-15-100 and moved that the DR14-51 Request for Declaratory Order be denied, and if there was a second, that he would cite subsection (a)(1)(C) of the rule. Commissioner Wong seconded the motion. Commissioner Hiranaga cited HAR §15-15-100(a)(1)(C) as the reason for his motion and read it into the record.

Discussion

Commissioner Scheuer stated that he was inclined to vote for the motion and expressed why he believed that an evidentiary hearing would be a disservice to those involved.

Commissioner Aczon stated that he also was concerned with the pending litigation and not knowing how the Court would rule; and about how the active construction work being performed to develop the Petition Area could be completed before the LUC could complete its decision making. Commissioner Aczon stated that he would be supporting the motion.

There was no further discussion.

The Commission voted unanimously 7-0- with 1 excused in favor of the motion.

Chair McDonald stated that the Commission would resume its hearing in Honolulu on November 21, 2014 and declared a recess.

The Commission went into recess at 2:00 p.m.