

LAND USE COMMISSION
MEETING MINUTES

September 10, 2015 – 9:30 a.m.

West Hawaii Civic Center
74-5044 Ane Keohokalole Highway, Kailua-Kona, HI 96740

COMMISSIONERS PRESENT: Chad McDonald
Edmund Aczon
Kent Hiranaga
Arnold Wong
Nancy Cabral
Linda Estes (Arrived at 10:53 a.m.)

COMMISSIONERS EXCUSED: Aaron Mahi
Jonathan Scheuer
(There are currently 8 seated Commissioners out of 9 positions)

LUC STAFF PRESENT: Daniel Orodener, Executive Officer
Patricia Ohara, Deputy Attorney General
Scott Derrickson, Staff Planner
Riley Hakoda, Staff Planner/Chief Clerk

COURT REPORTER: Jean McManus

CALL TO ORDER

Chair Aczon called the meeting to order at 9:33 a.m.

APPROVAL OF MINUTES

Chair Aczon asked if there were any corrections or additions to the August 26, 2015 minutes. There were none. Commissioner Wong moved to approve the minutes. Commissioner McDonald seconded the motion. The minutes were unanimously approved by voice vote (5-0).

TENTATIVE MEETING SCHEDULE

Executive Officer Orodener provided the following:

- The regular tentative meeting schedule has been distributed in the handout material for the Commissioners.

- September 30, 2015 is a video conference networking Kauai, Maui, Hilo, Hawaii and Oahu on a docket to be filed asking that the LUC be the accepting authority for an EIS for Docket No. A15-799 Makila.
- HCPO Conference is scheduled for October 14-16 and there is tentatively a meeting set for October 16, 2015.
- October 22-23, 2015 meeting will be held in Honolulu at the airport.
- The November 4-5, 2015 meeting is open.
- November 18-19 meeting will be for A10-786 Olowalu asking that the LUC be the accepting authority for an FEIS and other associated Maui County matters.
- December 9-10 is planned for possible LUC Commissioner training and a site visit for the Ma`alaea Plantation 201H project.
- The January- February 2016 meetings are planned to complete hearings on the Ma`alaea Plantation docket..
- Any questions or conflicts, please contact LUC staff.

Motion to Amend the Agenda

Chair Aczon stated that Commissioner Estes' flight from Kaua`i would be delayed and entertained a motion to amend the agenda to address item VI EXECUTIVE SESSION, next, out of numerical order. Commissioner Wong moved and Commissioner McDonald seconded the motion. By a unanimous voice vote (5-0), the Commission voted to amend the stated agenda item sequence to hold an Executive Session and address item VI EXECUTIVE SESSION, next, out of numerical order.

EXECUTIVE SESSION

Chair Aczon entertained a Motion to enter into Executive Session. Commissioner Wong moved and Commissioner Cabral seconded the motion to enter Executive Session. By a unanimous voice vote (5-0), the Commission elected to enter Executive Session. The Commission entered Executive Session at 9:43 a.m and reconvened at 10:05.

Chair Aczon noted that the Commission had decided during its Executive Session to retain Executive Officer Orodener for another 3 years.

There were no additional questions or comments regarding this matter.

Chair Aczon declared a recess at 10:05 a.m. and reconvened the meeting at 10:53 a.m.

HEARING AND ACTION

A89-643 MCCLEAN HONOKOHOU PROPERTIES (HAWAI'I)

Chair Aczon announced that this was an action meeting to Consider Docket No A89-643 McClean Honokohau Properties' Motion To Release, Discharge and Delete All Conditions in the Land Use Commission's Findings of Fact, Conclusions of Law, Decision and Order, Entered April 16, 1991

APPEARANCES

Robert Smolenski, Esq. for (Petitioner) McClean Honokohau Properties ("MHP")

James McClean , MHP, Representative
David Elbogan, MHP, Representative
Amy Self, Esq., Deputy Corporation Counsel, County of Hawai`i Planning Department,
("County")
Duane Kanuha, Director, County
Bryan Yee, Esq., represented State Office of Planning (OP)
Rodney Funakoshi, Land Use Administrator, OP
Lorene Maki, Planner, OP

Chair Aczon updated the record; described the procedures for the day and asked Mr. Smolenski if he had been made aware of the LUC's reimbursement policy for meeting expenses and whether his client would comply with it. Mr. Smolenski acknowledged that he had been made aware of the policy and that his client would abide by it. There were no questions on the day's procedures

Chair Aczon asked if there were any Public Witnesses who wished to testify and called the testifiers before the Commission.

PUBLIC WITNESSES

1. Dr. Jeff Zimpfer, National Park Service (NPS) (submitted written testimony)

Dr. Zimpfer summarized his written testimony and described why the NPS felt that Conditions 1, 3, 6 and 12 from the original Decision and Order should be retained and what possible impacts removal of these Conditions might have on the National Park.

The Parties had no questions.

Commissioner Hiranaga asked what Dr. Zimpfer thought about the written testimony provided by Cheryl Palish PE, Belt Collins, regarding surface water runoff. Dr. Zimper stated that he could not respond to questioning on whether surface water runoff was impacting the ocean and emphasized that his testimony was focused on why Conditions 1, 3, 6 and 12 should be retained.

Commissioner Wong requested clarification how anchialine ponds in the area were fed, how the aquifer in the region was replenished and how these bodies of water interacted. Dr. Zimpfer provided his perception of how the anchialine ponds received their water supply through the natural processes of rainfall and proximity to the ocean and how the regional aquifers could be impacted by various factors.

There were no further questions for Dr. Zimpfer.

2. Janice Palma-Glennie, Kona Kai Ea Chapter- Surfrider Foundation

Ms. Palma-Glennie described her organization's opposition to the Petition and shared why the Conditions 3, 6, and 12 should not be removed.

The Parties had no questions.

Commissioner Wong requested clarification on what Conditions Ms. Palma-Glennie wanted to have retained or removed. Ms. Palma-Glennie replied that she had not reviewed the Petition in detail but was most concerned with retaining those Conditions which were protective of water and view plane issues.

There were no further questions for Ms. Palma-Glennie.

Chair Aczon asked if there were any other public witnesses. There were none.

PRESENTATION OF EXHIBITS

Petitioner

Mr. Smolenski offered Petitioner's Exhibits #1-22 for the record. There were no objections to accepting Petitioner's exhibits. Chair Aczon admitted Mr. Smolenski's exhibits.

County

Ms. Self stated that the County had no exhibits.

OP

Mr. Yee offered OP's Exhibits #1-9 which were attached to its response for the record. There were no objections to accepting OP's exhibits. Chair Aczon admitted OP's exhibits.

Chair Aczon asked Mr. Smolenski to begin his argument. Mr. Smolenski commented that he would like the Commission to take notice of a stipulation that he had filed prior to the start of the meeting noting that the Parties had agreed to the deletion of Conditions 4, 5, 7, 9, 10 and 14 and would like to have the stipulation entered into the record.

Chair Aczon asked if the Commission had any questions regarding the filed stipulation. Commissioner Hiranaga asked if it was possible to address the stipulated Conditions 4, 5, 7, 9, 10 and 14 first due to the time constraints facing the Commission instead of in the listed numerical ordered sequence of the Decision and Order.

Chair Aczon asked if the Parties had any objections to addressing the stipulated Conditions first. There were no objections by the Parties.

Mr. Smolenski stated that Petitioner's Exhibit 22 listed the Conditions to assist in identifying them and described why Condition 4 had been stipulated to by the Parties.

Mr. Smolenski stated that he would like to have Mr. McClean and Mr. Elbogan sworn in as witnesses to respond to his questions during his presentation. Discussion occurred to clarify how questioning of the witnesses could be done to better serve the intent of the hearing.

PETITIONER'S WITNESSES

1. James McClean

Mr. McClean described how the Petitioner had made improvements to the Petition Area's infrastructure and had complied or would comply with the requirements set forth in the stipulated Conditions.

Questions:

County and OP had no questions.

Commissioners

Commissioner Wong requested clarification on Petitioner's ownership plans and anticipated compliance with Condition 14. Mr. McClean stated that there were no immediate plans to sell the property.

Commissioner Wong expressed his concerns about how future heirs would steward the Petition Area. Mr. McClean described how past property sales or leases by the landowners had honored the LUC imposed Conditions. Mr. McClean also described how the LUC Conditions were observed and shared what his commitment was to ensuring that the observance of the conditions continue into the future.

Commissioner Estes requested clarification on what the importance of Condition 14 was. Mr. Smolenski replied that annual reports had been filed to keep the Commission informed on the ownership status of the Petition Area and other relevant information; and provided details on what the intent for filing the Petition was; and how compliance with imposed County zoning ordinances had affected their decision making in making their filing.

Commissioner Cabral requested clarification on the timing of the Petition filing, what the intention of the Petitioner was, what the ultimate vision for the Petition Area was, and what preparations were in place to facilitate achieving future plans.

Mr. Smolenski offered his second witness, Dave Elbogan to address future plans for the Petition Area.

2. Dave Elbogan

Mr. Elbogan provided additional details of how Petitioner had conducted operations within the Petition Area and had complied with the Conditions of the 1991 Decision and Order. Mr. Elbogan shared what plans the Petitioner had for the Petition Area and how future development might proceed. There were no questions for Mr. Elbogan.

Discussion occurred on procedural matters before decision making by the Commission. Commissioner Hiranaga expressed that a motion might be in order. Mr. Yee noted that OP stood by the stipulation and described the reasons why OP was in agreement with it; and what Exhibits had been filed to support the removal of the stipulated Conditions. Mr. Smolenski noted his agreement with OP's assessment that there had been substantial development in the Petition Area to warrant the removal of Condition 14.

Ms. Self added that County also stood by the stipulation and described the measures that were in place to ensure that the spirit of most of the stipulated Conditions were captured in the County's zoning ordinances.

Commissioner Wong requested clarification of what increments were included in or affected by Petitioner's motion. Mr. Smolenski used a Petition Area map to identify Increment I and stated that only Increment I was included in the Petition.

Chair Aczon asked if Commissioner Hiranaga was prepared to make a motion regarding the stipulation to delete Conditions 4, 5, 7, 9, 10, and 14. Commissioner Hiranaga deferred to Commissioner Cabral to make a motion.

Commissioner Cabral requested clarification on what Increment I included and how much development had occurred within it. Mr. Smolenski and Mr. Elbogan referred to the Petition Area map and confirmed the development that had occurred within Increment I.

Commissioner Cabral moved to release Conditions 4, 5, 7, 9, and 10 and that other Conditions remain in force till evidence has been provided to allow the Commission to decide upon them. Commissioner Estes seconded the motion. Chair Aczon confirmed that Commissioner Cabral's motion only included Conditions 4, 5, 7, 9 and 10. Commissioner Cabral acknowledged that the stated Conditions to be released were correct.

Discussion on the Motion

Commissioner Hiranaga requested additional clarification of the motion for the benefit of the Commission. Commissioner Cabral amended her motion to only release Conditions 4, 5, 7, 9, and 10 in Increment I. Chair Aczon commented that the Commission would still need to address the remainder of the Conditions. Commissioner Estes seconded the amended motion.

Discussion ensued to clarify the procedural status and content of Commissioner Cabral's motion. Commissioner Wong expressed that it was his understanding that the current amended motion before the Commission only pertained to the release of Conditions 4, 5, 7, 9, and 10 in Increment I. The Commission concurred with Commissioner Wong's understanding.

There was no further discussion.

The Commission unanimously voted to release Conditions 4, 5, 7, 9, and 10. (6-0)

Chair Aczon called on Mr. Smolenski to continue his argument starting with Condition 1.

Condition 1 argument

Mr. Smolenski stated that Petitioner would no longer be seeking the release of Condition 1 and provided the details of that decision.

Condition 2 argument

Mr. Smolenski offered Mr. McClean to provide information to the Commission on how Petitioner attempted to satisfy Condition 2. Mr. McClean referred to Petitioner's Exhibit 18 and described the improvements that had been made over the years to construct and improve the roadways in the Petition Area and its surroundings.

Mr. McClean also described future roadway development plans and Petitioner's obligations and commitments to the County. Mr. Smolenski also contributed his understanding of what other future actions would be taken by Petitioner to acquire the necessary County approvals and permits to achieve these future goals.

Commissioner Cabral requested clarification on the development phasing and linkage of the roadway system. Mr. McClean described his development and connection plans.

Commissioner Wong requested clarification from the County on what County and State jurisdictions were involved for roadways in the Petition Area. Ms. Self responded that she had been advised that there were no State roadways involved in the Petition Area. Mr. McClean provided his understanding of which roads were County and stated that the Parkway was the only State roadway.

Commissioner Wong requested clarification on what provisions were in place for road dedications in the future. Ms. Self responded that the County sub-division code addressed the issue of roadway dedications. Mr. Smolenski shared his understanding of how portions of the private roadways would be dedicated and stated that Petitioner was requesting release from this Condition since it felt that substantial compliance had been achieved. Ms. Self added how the County Council processed roadway dedications and stated that it was unlikely that the County would deny the dedication of a properly constructed road.

Commissioner Wong requested clarification on what role DOT had in the development of the Petition Area. Mr. Yee described how the Petitioner and DOT had dealt with the "pro rata share" issue and what construction and other improvements were involved; and why OP wanted Condition 2 to remain in force.

Condition 3

Mr. Smolenski referred to Cheryl Palish's written testimony that addressed the drainage and water quality issues of the Petition Area and argued why Condition 3 should be released. Mr. Smolenski also offered Mr. Elbogan and Mr. McClean to describe the efforts Petitioner had made to be compliant with Condition 3. Mr. Elbogan described the site drainage plan for the Petition Area and the drywell and injection well features that were used to meet Department of Health standards. Mr. McClean shared his observations and findings of how well the drainage plan worked during recent heavy rains.

Commissioner Questions –Condition 3

Chair Aczon asked if the Commission had any questions.

Commissioner Wong requested clarification on the design features for retention and detention of water. Mr. McClean and Mr. Elbogan shared their knowledge of what had been installed in the Petition Area.

Commissioner Hiranaga asked what protocol for questioning would be used for the proceedings. Chair Aczon stated that questions would be asked of the Petitioner now and he would provide an opportunity for the Parties to ask questions later.

Commissioner Hiranaga requested clarification on the terminology and definition of “drywells” and “injection wells” and what design standards they were built to. Mr. Elbogan and Mr. McClean provided their understanding of what the terms meant, how each feature worked, where they were located and their observations of how both types of wells performed their function.

Commissioner McDonald requested clarification on the design features and permitting considerations made in constructing the drainage system and whether any post-construction best management practices were in effect. Mr. Elbogan described the permitting requirements involved with the Department and Health and stated that there were no maintenance, testing or reporting requirements imposed upon Petitioner. Commissioner McDonald shared his concerns about releasing Condition 3 but noted how enforcement would be difficult under the circumstances.

Mr. Smolenski stated that he would not be requesting the release of Condition 12 after further discussions with the Dr. Zimpfer. Commissioner McDonald asked if OP might help clarify some of the points that had been brought up.

Commissioner Cabral requested clarification on her concerns about releasing Conditions 3, 6, and 12 before Increment II was completed. Mr. Smolenski argued that the County could provide enforcement and referred to Petitioner’s Exhibit 6 to demonstrate the language that would provide the County’s jurisdictional power.

Commissioner Wong asked if there were sewer or cesspool facilities installed in the Petition Area and how the regional aquifer was being protected. Mr. Elbogan responded that neither facilities were being used since they are wastewater features and not stormwater features; and described how systems were installed to comply with Condition 6. Commissioner Wong expressed interest in hearing from OP.

Chair Aczon commented that OP would have an opportunity to respond later and reaffirmed that Mr. Smolenski had withdrawn his request for the release of Condition 1. Mr. Smolenski agreed that release of Condition 1 would not be requested and that Petitioner would continue to work with County to satisfy that Condition.

Chair Aczon stated that County and OP would be given time to provide their argument for Conditions 2 and 3. Mr. Smolenski commented that Condition 12 would not be requested for release and argued that its retention allowed for the removal of Conditions 2 and 3. Chair Aczon noted Mr. Smolenski’s comment.

Ms. Self stated that County had stipulated to Conditions 4, 5, 7, 9, 10 and 14 and noted that Petitioner had stated that Conditions 1 and 12 would retained; and offered Mr. Kanuha as a witness.

1. Director Kanuha

Mr. Kanuha stated that County would like for Condition 2 to be retained and shared County's reasons why. Mr Kanuha described how development and rezoning had impacted the Petition Area and voiced how Condition 2 provided the linkage between the County rezoning conditions and the 1991 LUC Decision and Order.

Ms. Self commented that County did not have opposition to the release of Conditions 3, 6, 8, 11, and 13, and described the circumstances involved with releasing Condition 16.

Commissioner Hiranaga noted that only Conditions 2 and 3 were currently being discussed and stated that he needed to excuse himself from the proceedings.

Commissioner Hiranaga departed the hearing at 12:35 p.m.

Mr. Kanuha described how the County determined its position and explained the difficulties with forecasting the impacts of Condition removal over the span of time involved since the development of this Petition Area had taken a long time.

Commissioner Cabral requested clarification on whether the County could incrementally determine whether Conditions should be released on roadways or not. Mr. Kanuha replied that though such incremental release was a good idea, Condition 2 was the only linkage to ensure compliance throughout all increments.

Mr. Smolenski asked whether reference to LUC Conditions in an ordinance might impact release of County Conditions. Mr. Kanuha responded that he did not think so.

Ms. Self had nothing further to present.

OP

Mr. Yee summarized the circumstances when a motion to amend could be granted. (i.e. Completion, change of circumstance, reconsideration) and described why OP opposed the release of Condition 2 and 3.

Chair Aczon asked if Mr. Smolenski had any rebuttal. Discussion ensued to determine how the remainder of the proceedings would be handled. Mr. Smolenski opted to resume his rebuttal when the Commission was able to reschedule the remainder of the hearing. Discussion ensued on when the next meeting would be. Mr. Orodener stated that LUC staff would advise the Parties.

Mr. Smolenski thanked the Commission and Parties for their time.

Chair Aczon adjourned the meeting at 12:53 p.m. and commented that the next hearing would also require that the Commission provide meals for a “working lunch” due to the remote locale of the meeting facility.