

LAND USE COMMISSION
MEETING MINUTES

May 24, 2017 – 9:00 a.m.
Airport Conference Center
400 Rodgers Blvd. Suite 700, Room #3
(In Hawaiian Airlines Terminal Building)
Honolulu, HI 96819

COMMISSIONERS PRESENT: Edmund Aczon
Nancy Cabral
Linda Estes
Gary Okuda
Jonathan Scheuer
Dawn N. S. Chang
Arnold Wong

COMMISSIONERS EXCUSED: Aaron Mahi

STAFF PRESENT: Daniel Orodener, Executive Officer
Diane Erickson, Deputy Attorney General
Bert Saruwatari, Staff Planner
Riley Hakoda, Staff Planner/Chief Clerk

COURT REPORTER: Jean McManus

CALL TO ORDER

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

APPROVAL OF MINUTES

Chair Aczon stated that there was a typographical error regarding the dates of the minutes to be approved; and that the correct date was April 26-27, 2017. Chair Aczon, then asked if there were any corrections or additions to the April 26-27, 2017 minutes. There were none. Commissioner Chang moved to approve the minutes. Commissioner Estes seconded the motion. The minutes were approved by a voice vote (6-0- 1 abstention (Commissioner Scheuer) - 1 excused- There are currently 8 sitting members on the Commission).

TENTATIVE MEETING SCHEDULE

Executive Officer Orodenker provided the following:

- The regular tentative meeting schedule has been distributed in the handout material for the Commissioners.
- On May 31, 2017, the Commission will be on Maui to conclude matters related to the A89-649 Lanai Resorts decision and order.
- June 14, 2017 has been reserved for any furthers matters for SP09-403 Waimanalo Gulch Sanitary Landfill if needed.
- Jun 28-29, 2017, the Commission will be on Kauai for A17-802 County of Kaua`i Housing Agency
- On July 19-20, 2017, the Commission will be on Maui for A94-706 Ka Ono Ulu Ranch FEIS acceptance.
- On July 26-27, 2017, the Commission will be on Kaua`i to finish A17-802 Lima Ola, and A16-800 Island School and A16-801 UH-Kaua`i Community College.
- August 9-10, 2017 is reserved for Oahu Solar Special Permits,
- August 23-24, 2017 is reserved for A94-706 Ka Ono Ulu Ranch's Motion to Amend.
- Any questions or conflicts, please contact LUC staff.

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

SP09-403 DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU (WAIMANĀLO GULCH SANITARY LANDFILL), (O`ahu) APPEARANCES

Dana Viola, Esq. and Kathleen Kelly, Esq., represented City and County of Honolulu, Department of Environmental Services (ENV)

Calvert Chipchase, Esq. and Chris Goodin, Esq., represented Intervenors-the Ko Olina Community Association and Senator Maile Shimabukuro (KOCA)

Richard Wurdeman, Esq., represented Intervenor Hanabusa (HNB)

Ian Sandison, Esq. and Avery Matro, Esq., represented Schnitzer Steel (SCHN)

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

Rodney Funakoshi, OP

Raymond Young, Planner, City and County of Honolulu, Department of Planning and Permitting (DPP)

Chair Aczon updated the record, and described the procedures to be followed for the hearing. Mr. Yee requested clarification on the references made to ENV and DPP; and when each Party would be called upon. Chair Aczon acknowledged the request and clarified when ENV and DPP would be called upon.

There were no other comments or questions regarding the procedures.

Chair Aczon called for Public Witnesses.

PUBLIC TESTIMONY

None

PRESENTATIONS

MOVANT- INTERVENOR KOCA/SHIMABUKURO (KOCA)

Mr. Chipchase made his argument on KOCA's Motion to Deny the Application filed on December 3, 2008 and the Application filed on June 28, 2011 (Applications) and remand the Applications to the Honolulu Planning Commission for further proceedings.

Vice Chair Scheuer questioned whether the PowerPoint slides being used in the presentation were an exhibit. Mr. Chipchase replied that the PowerPoint was a "visual aid" for the benefit of the Commission.

Mr. Chipchase provided the legal references to support his case and shared his perspective of how the Honolulu Planning Commission (PC) had failed to follow lawful procedures and the direction of the Land Use Commission Decision and Order in the this matter.

DEPARTMENT OF ENVIRONMENTAL SERVICES, C&C HONOLULU (ENV)

Ms. Viola stated that she wished to clarify ENV's position and argued that ENV had no objection to remanding the Applications but that the LUC should not deny the Applications. Ms. Viola argued that the Applications should merely be remanded to the PC to complete the record of the proceedings below by demonstrating compliance with Planning Commission Rule § 2-75 and by issuing a single consolidated Findings of Fact, Conclusions of Law and Decision and Order for the consolidated Applications.

INTERVENOR HANABUSA (HNB)

Mr. Wurdeman stated that he supported KOCA's motions without waiving his prior 2012 objections in this matter and shared his concerns over the lengthy delays incurred during the handling of the permit application and argued why the Commission should grant Mr. Chipchase's motion.

INTERVENOR SCHNITZER STEEL (SCHN)

Mr. Sandison stated that he supported ENV's argument and argued why the Applications should be remanded to the PC to allow procedural defects to be corrected and why additional LUC action such as denial could complicate matters since the complete record of the proceedings, as argued by KOCA, was not a valid, legally effective decision. Mr. Sandison also stated that the only proper disposition available to the Commission was to remand for further proceedings.

REBUTTAL

Mr. Chipchase requested that he be allowed to provide rebuttal after hearing the public comments of OP and DPP. Chair Aczon approved Mr. Chipchase's request.

PUBLIC COMMENTS

OP

Mr. Yee described OP's perspective on the issue and his perception of what the possible implications of a remand or "denial and a remand" might be. He also shared what the corresponding legal risks were for various respective actions and what jurisdictional considerations might be involved.

DPP

Mr. Young stated that he was the DPP staff planner for the landfill project and that there had been no change to DPP's position in regards to it; and described how an earlier LUC remand and denial decision (LUC Docket No. A04-398 Sphere LLC dba Pacific Aggregate) had resulted in the Planning Commission taking the position it had no jurisdiction on remand because the petition had been denied.

REBUTTAL

Mr. Chipchase described why OP's comments were important to consider and argued why a denial and remand was appropriate and how, by granting the motion, subsequent actions to advance the proper handling of the Applications could be taken.

Mr. Chipchase stated that he couldn't comment on the LUC case that DPP had mentioned, and opined on why DPP may have denied the A04-398 petition.

Chair Aczon declared a recess at 9:55 a.m. and reconvened the meeting at 10:00 a.m.

Ms. Viola requested and was granted permission to respond to DPP's comments regarding LUC Docket No. A04-498 and argued that the petition denial and remand was consistent with her argument. Ms. Viola also cited LUC Docket No. SP14-404 Jas Glover and argued that the LUC's decision to remand with no additional action such as denial could apply to the current case.

Chair Aczon asked if the Commissioners had any questions.

COMMISSIONER QUESTIONS

Commissioner Wong requested clarification from ENV on what would happen if the Applications were remanded to the PC. Ms. Viola described what processing action options would be available to the PC and what the ramifications of the different alternatives would be; and what timing and procedural considerations would be involved.

Commissioner Chang questioned whether the procedural matters could result in potential changes to the current proposed order. Ms. Viola acknowledged that the possibility to make changes existed.

Commissioner Scheuer requested clarification on how the PC could adopt the changes and what impacts the changes might have.

Mr. Chipchase described how the consolidation of the record would benefit the situation and allow for a better reconsideration of the proposed application.

Ms. Viola responded to the various concerns voiced by Commissioners Scheuer, Wong and Change and described how a remand, limited to obtaining compliance with procedural rules, would remedy the situation.

Commissioner Chang requested clarification on what discretionary powers the PC had to re-open its hearing.

Ms. Viola provided her perspective on why the remand should be limited for the reasons she had stated. Mr. Chipchase stated that the PC could re-open the hearing to comply with PC Rule § 2-75 and described what powers he thought the PC had. Additional clarification on what grounds a remand could be made on and what possible consequences might occur in various scenarios were provided by Ms. Viola, Mr. Chipchase, Mr. Yee and Mr. Sandison.

Commissioner Scheuer expressed his concern over the extended amount of hazard exposure time and potential harm being inflicted on the community by failure to address the landfill situation in a timely fashion and requested clarification on how quickly a remand to the PC could receive the proper attention and priority it deserved.

Mr. Chipchase acknowledged the lengthy amount of time that the permit process had taken and described how he would use his efforts to resolve the matter. Ms. Viola described how ENV's suggestion to limit the remand might result in a faster decision and why ENV would prefer not to re-open the case.

Commission Okuda requested clarification on ENV's position regarding the recusal of PC Commissioner Hazama. Ms. Viola described how ENV would proceed with or without Commissioner Hazama's participation.

Commissioner Estes requested clarification on ENV's position on the LUC's role in this matter if ENV's suggested procedures were followed. Ms. Viola described how the LUC would be divested of jurisdiction under HAR 15-15-96 (a) once the Applications were remanded.

Commissioner Cabral expressed her concerns for the welfare of the community and requested clarification on how the process could be expedited. Mr. Yee offered

alternatives that the Parties might consider to reduce legal appeals or consider/agree to certain waivers during remand proceedings.

Commissioner Chang requested clarification on ENV's position on the LUC's limiting the remand. Ms. Viola described how the PC could re-open its hearing on this matter, but stated that ENV had no discretion to re-open the hearing.

Commissioner Chang requested clarification regarding the completeness of the record of the case. Mr. Chipchase described how the 2008 and 2011 records were addressed by the PC and why the PC's review of the record was faulty. Ms. Viola argued that the substantive record was complete and that procedural requirements about the record had not been met and needed correction; and why the procedural default did not justify re-opening the record. Mr. Wurdeman stated that he agreed with the need to comply with Rule § 2-75 and shared his concerns regarding due process.

Commissioner Okuda requested clarification on how ENV would proceed if a limited remand were granted. Ms. Viola described why a remand without a denial would not trigger an automatic approval and how the PC could alter its current Decision and Order without re-opening its hearings.

Commissioner Scheuer requested additional clarification to Commissioner Wong's concerns and PC Commissioner Hazama's continued participation in the proceedings. Ms. Viola and Mr. Yee expressed how they perceived the future remand proceedings would operate and shared their respective versions on this matter.

Commissioner Okuda requested clarification on the completeness of the record and what ENV's position would be in regards to Commissioner Hazama's continued participation in PC proceedings on the Applications. Ms. Viola described ENV's position on the completeness of the record and Commissioner Hazama's participation.

Commission Chang requested clarification on ENV's position on the completeness of the record. Ms. Viola described how ENV had the discretion to interpret the term "complete" record and how it applied its interpretation to the Applications record to accept it as complete.

Commissioner Cabral requested clarification on the full-capacity limit dates set for the landfill site. Ms. Viola described why various dates were used in the Applications and how updated technology and handling/disposal methods had increased the longevity and usefulness of the existing site beyond 2009; and what efforts had been made to find a new landfill location and construct a new facility.

Commissioner Wong moved for an Executive Session. Commissioner Cabral seconded the motion. Commissioner Scheuer questioned whether additional questioning would be allowed after the conclusion of the Executive Session. Chair Aczon acknowledged that questioning would resume upon reconvening from the Executive Session.

There were no further questions or comments. By voice vote, the Commission unanimously voted to enter into Executive Session. The Commission entered Executive Session at 10:56 a.m. and reconvened at 11:25 a.m.

Commissioner Scheuer requested clarification on the substance of the record and on how capacity limits and closure deadlines factored in current/future site assessment/selection; and what alternate site seeking efforts had been made. Ms. Viola described how the Special Permit land use designation was supported by the record and why the stated December 31, 2022 deadline was not rigid; and why no current efforts were under way to find and establish an alternate landfill. Mr. Yee described why the 2022 date was not supported by the PC Findings of Fact and opined how the PC would have the opportunity to supplement the record or provide proper explanation(s).

Commissioner Scheuer also requested additional clarification on whether updates to the current record had been made. Ms. Viola responded that the more recent efforts since the evidentiary portion of the record had been closed were not included in the record, but had been reported to the LUC in the annual and mandated ENV status reports to the Commission. Commissioner Scheuer asked if ENV would expect the LUC to include the updated information included in the update reports in its review of the matter. Ms. Viola acknowledged that the Commission should but that the Parties

did not access or use the updated information since the close of the evidentiary proceedings.

Mr. Wurdeman commented that the current questions being asked of ENV were similar to the questions asked of ENV in 2009, and despite the passing of the 7-year deadline that had been mentioned in the 2009 proceedings, there has been no effort to seek and establish an alternative landfill site.

Commissioner Chang requested clarification on what other kind of comments might be made on the PC proposed Decision and Order and what KOCA and the ENV would use to justify a motion to re-open the PC hearing. Mr. Chipchase provided his recollection of the PC proceedings regarding re-opening the hearings and shared the details of what elements he might include to support his motion.

There were no further questions.

Chair Aczon called for the pleasure of the Commission.

Commissioner Wong moved to approve in part and deny in part the Motion to Deny and Remand filed by the Ko Olina Community Association and Maile Shimabukuro, and stated that he felt the matter could not be both denied and remanded, since if the matter was denied, based upon HRS §§205-6, 205-19, and 91-14, it could only be appealed. Also, accordingly, the matter should be remanded to the Planning Commission for further proceedings in accordance with HAR §15-15-96(a) to address the following:

- (1) clarify whether the Planning Commission followed Section 2-75 of the Rules of the Planning Commission in issuing its Findings of Fact, Conclusions of Law, and Decision and Order;
- (2) clarify the basis of the Planning Commission's proposed additional Condition No. 3, which specifies a December 31, 2022, date by which the Applicant is to identify an alternative site that will be used upon the WGS� reaching its capacity and the implications it has on the closure date of the WGS� to use and all waste and the subsequent commencement of operations at the alternative landfill site;

- (3) clarify whether the record needs to include updated information on the operation of the WGSL, the landfill site selection process, and the waste diversion efforts of the City and County of Honolulu;
- (4) assuming the Planning Commission eventually approves the matter, clarify the effective date of the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order; and
- (5) clarify whether the Planning Commission is ruling on both the 2008 Application and the 2011 Application in its Findings of Fact, Conclusions of Law, and Decision and Order.

Commissioner Wong further stated that his motion was based on review of the Motion to Deny and Remand, the oral and written arguments of the parties, and the record in this matter, including the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order; and with respect to KOCA/Shimabukuro's argument in their Motion to Deny and Remand that the participation of the Planning Commission Chair, including voting on the matter, violated their right to due process, he believed that this issue was not within the jurisdiction of the LUC, and was therefore denied as a basis for the remand.

Commissioner Cabral seconded the motion.

Discussion on the Motion

Commissioner Chang urged to Parties to seek timely action from the PC to expedite a resolution to the situation.

Commissioner Okuda stated his reasons for supporting the motion.

Commissioner Scheuer stated that he echoed Commissioner Okuda's reasons for support and commented on the urgency of the matter.

Commissioner Cabral stated that she shared the same sentiments about the need for urgent action and responsible handling of this matter in the interest of caring for the community.

There were no further comments. Chair Aczon requested Mr. Orodener to poll the Commission. The Commission unanimously (7-0- 1 excused) voted in favor of the motion.

Chair Aczon stated that with the Agenda item #1 remand granted, the remaining Agenda items #2 and #3 were moot; and that the next Agenda item #4 was an Executive Session. Commissioner Cabral moved and Commissioner Wong seconded the motion to enter into Executive Session.

The Commission entered into Executive Session at 11:50 a.m. and reconvened at 12:03 p.m.

Chair Aczon stated that since there was no further business to address, there would be no meeting on May 25 2017 and declared the meeting adjourned at 12:03 p.m.