

LAND USE COMMISSION

MEETING MINUTES

October 25, 2018 –08:00 a.m.

Courtyard by Marriott King Kamehameha's Kona Beach Hotel

75-5660 Palani Rd, Kailua Kona, HI 96740

Meeting Ballroom #1

COMMISSIONERS PRESENT: Jonathan Scheuer
Gary Okuda
Lee Ohigashi
Dawn Chang
Edmund Aczon
Nancy Cabral

COMMISSIONERS EXCUSED: Aaron Mahi
(8 Seated Commissioners) Arnold Wong

LUC STAFF PRESENT: Daniel Orodenker, Executive Officer
Randall Nishiyama, Deputy Attorney
General
Scott Derrickson, Staff Planner
Riley Hakoda, Staff Planner/Chief
Clerk

COURT REPORTER: Jean McManus

CALL TO ORDER

Chair Scheuer called the meeting to order at 8:02 a.m. and entertained a motion to adjust the agenda to hear agenda item VII- Adopt of Order for Docket No. DR 18-62 Kualoa Ranch, Inc. IAL out of order.

Commissioner Cabral moved and Commissioner Ohigashi seconded the motion to adjust the agenda. By a voice vote, the Commission unanimously (6-0-2 excused) voted to adjust the agenda.

ADOPTION OF ORDER– DR18-62 Kualoa Ranch. Inc. IAL-(Oahu)

Adopt Form of the Order for Petition for Declaratory Order to Designate Important Agricultural Lands for approximately 761.55 acres at O`ahu; Hawai`i identified by TMK (1) 4-9-002-001 (por.), 4-9-004-002 (por.), 4-9-005-001 (por.), 5-1-001-001 (por.), 5-1-001-016 (por.), 5-1-001-025, 5-1-004-001 (por.) and 5-1-007-001 (por.)

APPEARANCES

Calvert Chipchase, Esq., attorney for Petitioner Kualoa Ranch, Inc. (“KR”) (City and County of Honolulu Department of Planning and Permitting (DPP) did not appear.)

Dawn Takeuchi Apuna, Esq. for State Office of Planning (“OP”) Rodney Funakoshi, Land Use Administrator, OP

Chair Scheuer updated the record and described the procedures for the proceedings.

DISCLOSURES

There were no disclosures.

Chair Scheuer called for Public Testimony.

PUBLIC TESTIMONY

None.

Chair Scheuer asked if Petitioner had any final comments. Mr. Chipchase thanked the Commission for its efforts.

Chair Scheuer entertained a motion to adopt the order for DR18-62 Kualoa Ranch, Inc. Commissioner Cabral moved to adopt the order and commented in favor of the order. Commissioner Aczon seconded the motion.

There was no discussion.

Chair Scheuer had Mr. Orodener poll the Commission.

The Commission unanimously voted in favor of adopting the order for DR18-62 Kualoa Ranch Inc.’s IAL Petition. (6-0-2 excused).

Chair Scheuer moved on to the next agenda item

CONTINUED HEARING AND ACTION

A06-767 WAIKOLOA MAUKA LLC, (HAWAII)

Hear evidence, deliberate and take action on order to show cause issued June 4, 2018

APPEARANCES

Steven Lim Esq. represented Petitioner Waikoloa Highlands Inc. (WHI)

Valery Grigoryants, WHI (Russian-speaking WHI Representative using Interpreter)

Irina McGriff, Interpreter for WHI

Natalia Batichtcheva

Joel La Pinta, WHI

Jeff Darrow, Program Manager, County of Hawaii Planning Department (County)

Ron Kim Esq., Deputy Corporation Counsel, represented County

Dawn Takeuchi-Apuna, Esq., represented State Office of Planning (OP)

Rodney Funakoshi, Planning Program Administrator, OP

Petitioner's Witness (continued)

2. Joel LaPinta, WHI Management Team

Chair Scheuer stated that Mr. LaPinta had still not been dismissed as a witness and asked if there were any further questions for him.

There were no further questions for Mr. LaPinta.

Mr. Lim requested the Mr. Grigoryants be recalled as a witness. Chair Scheuer granted the request and reminded Mr. Grigoryants and his interpreter that they were still under oath.

1. Valery Grigoryants, (Russian-speaking WHI Representative using Interpreter Irina McGriff) recalled.

Mr. Lim requested clarification on Mr. Grigoryants' testimony regarding the financing, acquisition and sale of properties associated with the Petition Area and with funding arrangements to advance the proposed project and comply with the County affordable housing agreement.

The County and OP had no questions for Mr. Grigoryants.

Commissioners

Commissioner Okuda and Chair Scheuer requested clarification on the guarantees for the promised bank funding, what local developers had been sought to work on the proposed project; and how the required capital would be appropriated during the development phase. Mr. Grigoryants described how funding had been obtained from his brother and how committed both were to see the project through.

Redirect

Mr. Lim asked if Mr. Grigoryants' organization was willing to put the \$45M into an escrow account for the proposed project. Mr. Grigoryants replied that they would not and shared his reasons why.

There were no further questions for Mr. Grigoryants.

Chair Scheuer asked for County's presentation.

COUNTY

Mr. Kim stated that Petitioner had not demonstrated substantial commencement on the Petition Area and described why County took that position.

Commissioner Ohigashi asked if County would be presenting any witnesses.

Chair Scheuer declared a recess at 8:36 a.m. and reconvened the meeting at 8:46 a.m.

Mr. Kim offered Mr. Darrow as a witness for County.

1. Jeff Darrow, County of Hawai'i Planning Program Manager

Mr. Darrow described his work background and experience for the Commission and what his findings were after he had reviewed Petitioner's performance against the representations and commitments that had been made to the County in the 2008 Decision and Order.

Chair Scheuer asked if there were questions for Mr. Darrow.

Petitioner

Mr. Lim requested clarification on whether Condition 9-Affordable Housing had been fulfilled. Mr. Darrow replied that he had determined that the condition had

not been fulfilled and provided his findings and reasons for drawing that conclusion. Mr. Darrow also opined on what the County might need to do if the LUC reverted the Petition Area to its original Agriculture designation.

Mr. Kim objected to the extent of the speculations that Mr. Darrow was being asked to make. Mr. Lim replied that he was attempting to determine County's position on Affordable Housing and rephrased his questions.

OP

OP had no questions.

Commissioners

Commissioner Okuda requested clarification on County's position on whether Petitioner had satisfied terms and conditions of the 2008 Decision and Order. Mr. Darrow described how the County monitors and manages compliance with various conditions and orders and provided his understanding of what Petitioner would need to do if they failed to honor its representations and commitments.

Chair Scheuer declared a recess at 9:37 a.m. and reconvened the meeting at 9:47 a.m.

Commissioners Chang, Ohigashi, Cabral, and Chair Scheuer requested clarification on what actions had been taken by the Petitioner before and after the OSC action by the LUC ; whether there had been any detectable use or activity on the Petition Area over the recent past; what Petitioner could do if the land was reverted to Agriculture; what the County might have to do if LUC decided to revert the land; and whether plans for a proposed golf course were still active. Mr. Darrow described the minimal activity that had occurred on and around the Petition Area and stated that open space had replaced the golf course plan. Mr. Darrow also described the County ordinances and study updates that might be required if the Petition Area was reverted.

County Redirect

Mr. Kim requested clarification on the ordinance actions taken by County since 1990; what zoning deadlines had been missed by Petitioner; and details surrounding the Affordable Housing land agreement.

Redirect Questions

Mr. Lim, and Commissioners Chang and Ohigashi requested clarification on D&O Condition 9- Affordable Housing. Discussion ensued over what information County was being asked to provide.

Commissioner Ohigashi moved and Commissioner Cabral seconded a motion for an Executive Session to consult with the board's attorney over the Commission's powers, duties, privileges, immunities and liabilities. By a unanimous voice vote (6-0-2 excused) the Commission voted to enter Executive Session.

The Commission entered Executive Session at 10:31 a.m. and exited at 10:57 a.m.

Chair Scheuer reconvened the hearing at 10:57 a.m. and stated that he would leave the evidentiary portion of the hearing open and stated his expectations of the Parties.

Mr. Kim requested clarification on what type of substantiating information and documents the Commission might be seeking. Chair Scheuer allowed County to determine what it could provide to best support its position.

There were no further questions for Chair Scheuer regarding County submittals.

Mr. Lim requested clarification on sub-division, County General Plan, and timeline concerns affecting the Petitioner.

Commissioner Ohigashi requested clarification on the County amendment process and time requirements.

Chair Scheuer requested clarification on the County's zone change/amendment interface with its General Plan process.

There were no further questions for Mr. Darrow.

Chair Scheuer called for OP to make its presentation.

OP

Ms. Apuna identified the 2008 D&O's Conditions that Petitioner had failed to satisfy and described how OP had determined and decided on its Position Statement and argued why the Petition Area should be reverted.

Questions for OP

Mr. Lim requested to question Mr. Funakoshi.

Chair Scheuer declared a recess at 11:17 a.m. and reconvened the meeting at 11:21 a.m.

Chair Scheuer inquired why Mr. Lim was requesting to question Mr. Funakoshi when OP had not offered him as a witness. Commissioner Okuda requested an offer of proof from Mr. Lim regarding the need to question Mr. Funakoshi as an adverse witness. Mr. Lim stated that since it was an OSC hearing, that Mr. Funakoshi's participation would be relevant to the current proceedings and formally requested that the Commission take administrative notice of all pending proceedings before it on status reports and/or Orders to Show Cause.

Chair Scheuer declared a recess at 11:26 a.m. and reconvened the meeting at 11:28 a.m.

Chair Scheuer stated that he was not going to act on Mr. Lim's request since he had earlier announced that the evidentiary portion of the hearing would remain open and clarified his expectation of the Parties during this period.

Ms. Apuna stated that she was finished with her presentation and reserved time for her closing argument.

Commissioner Okuda requested that the Commission request briefings on a list of items that he felt was necessary to consider during the remainder of proceedings and stated them for the record.

Commissioner Aczon asked if the Commission would have an opportunity to question OP. Chair Scheuer responded that the evidentiary portion of the hearing was still open and closing arguments still had to be done.

Commissioner Ohigashi requested an additional briefing be supplied to the Commission regarding what County ordinances and statutes guide its actions if a reversion does or does not occur.

Discussion continued on what briefings the Commission might be interested in obtaining. Commissioner Chang requested briefings on the standards of review for Conditions 2 and 3. Commissioner Aczon asked to have his earlier question disregarded; and Mr. Lim requested clarification on his request to have Mr. Funakoshi appear as a witness and argued his concerns about due process and why he felt Mr. Funakoshi's testimony was needed.

Commissioner Okuda requested clarification on what entity might be violating Petitioner's right to due process. Mr. Lim identified the Commission as the entity. Chair Scheuer restated his earlier response to Mr. Lim and stressed that closing arguments had not be conducted yet, that the evidentiary portion of the proceedings

was still open, and that he had not decided on Mr. Funakoshi's appearance as a witness.

Chair Scheuer noted that he expected the Parties to refer to the transcripts and address Commissioners Okuda, Chang and Ohigashi's concerns and noted that Commissioner Okuda's briefings request was for:

1. A brief on what constituted "substantial commencement of the use of the land", as that phrase is used in the Bridge Aina Le'a case (including specifically at 339 Pacific 3rd at 710), and what is the definition of the word, "use", as that word is used in the phrase that Commissioner Okuda quoted
2. A brief on the issue of if the Land Use Commission finds that the Petitioner has not substantially commenced the use of the land in accordance with its representations, what is the legal standard the Land Use Commission must apply and follow before it can order the land reverted to its prior classification.
3. A brief on legal authority (statute, rule or case law) on the issue of whether the documents executed by and between the Petitioner and the County of Hawaii relative to the affordable housing condition or component is evidence of, quote, "substantial commencement of the use of the land,"; and a presentation of legal authority about whether or not internal management issues of the Petitioner are relevant to matters involving this proceeding (as the term "relevant" or "relevance" is defined in Rule 401 of the Hawai'i Rules of Evidence).

Commissioner Ohigashi's briefing request was for:

1. A brief on what statutes and ordinances guide the process going forward if reversion occurs; and if reversion does not occur, all moving towards a project going forward that would be substantially like the one before the Commission.

Commissioner Chang's briefings request was for:

1. A brief, on what the standard of review is for Condition No. 2 -Completion of Project and Condition No. 3.- Reversion on Failure to Complete the Project; and whether Bridge Aina Lea even applies to this Decision and Order.

Chair Scheuer noted that the next meeting date would be November 28, 2018 and requested an additional briefing from Mr. Lim regarding why Mr. Funakoshi's witness testimony was so critical and whether he was the appropriate OP representative in this matter; and that all briefings be filed by November 19, 2018.

Mr. Lim commented that due to health and travel reasons, Mr. Grigoryants might not be able to attend future hearings. Chair Scheuer noted Mr. Lim's comment.

Chair Scheuer reminded County of his request for information on whether the County affordable housing requirement had been met. Discussion ensued to clarify what Chair Scheuer's expectations were.

Chair Scheuer stated that all briefings requested by the Commissioners were due by November 19, 2018, including the additional briefing for County affordable housing requirement.

Commissioner Cabral requested that Petitioner provide clarification on whether an explanation for the discrepancies in Petitioner's Exhibits 5 and 28. Chair Scheuer noted that Mr. Lim needed to include the explanations in his submittals.

Commissioner Cabral moved for an Executive Session to confer with board's attorney. Commissioner Ohigashi seconded the motion.

Chair Scheuer clarified the status of the proceedings and clarified how he planned to end the proceedings after the Executive Session to allow the Parties to formally exit without delay.

There were no comments or questions and the Parties unanimously concurred and complied with Chair Scheuer's proposal.

There was no discussion on the motion for Executive Session and by unanimous voice vote (6-0-2 excused), the Commission voted to enter Executive Session.

The Commission entered Executive Session at 11:52 a.m. and exited at 12:01 p.m.

The Commission reconvened and with no further business adjourned at 12:01 p.m.