

LAND USE COMMISSION
MEETING MINUTES

February 21, 2019

9:00 a.m.

**Maui Arts and Cultural Center, Alexa Higashi Conference Room
One Cameron Way, Kahului, Hawai'i, 96766**

COMMISSIONERS PRESENT: Edmund Aczon
Gary Okuda
Nancy Cabral
Dawn Chang
Lee Ohigashi
Aaron Mahi
Arnold Wong
Jonathan Scheuer

COMMISSIONERS EXCUSED: None
(There are currently 8 seated Commissioners)

LUC STAFF PRESENT: Daniel Orodener, Executive Officer
Patricia Ohara, Deputy Attorney General
Bert Saruwatari, Staff Planner
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 9:03 a.m. and stated that the Public Testimony portion of the meeting had ended on February 20, 2019 and that Intervenor was next to make its presentation.

CONTINUED ACTION

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

Chair Scheuer announced that this was a continued action meeting on Docket No. A94-706 Ka`ono`ulu Ranch (Maui):

APPEARANCES

Randall Sakumoto, Esq., Lisa Cataldo, Esq., and Catherine Taschner, Esq., represented Pi`ilani Promenade North LLC, and Pi`ilani Promenade South LLC, ("PP")

Curtis Tabata, Esq. represented Honua`ula Partners, LLC (“HP”)
Michael Hopper, Esq., Deputy Corporation Counsel, represented County of Maui
Planning Department (“County”)
Michele McClean, Director, County
Ann Cua, Planner, County
Dawn Takeuchi Apuna, Esq., Deputy Attorney General, for State Office of Planning
“OP”
Rodney Funakoshi, OP
Tom Pierce, Esq., represented Intervenor Maui Tomorrow Foundation, Inc., South Maui
Citizens for Responsible Growth and Daniel Kanahele
Mark Hyde, Representative, South Maui Citizens for Responsible Growth (“SMC”)

Mr. Sakumoto requested and was granted permission by Chair Scheuer to address the Commission out of order. Mr. Sakumoto recounted the events of Wednesday morning and clarified why Petitioner had included the cultural preserve area in its modified original plan in the spirit of compromise with the input obtained from its community outreach efforts and was what Petitioner had perceived as substantial compliance with the original plan.

Chair Scheuer asked if Petitioner was withdrawing the modified original plan that had been presented. Mr. Sakumoto stated that Petitioner was not withdrawing the plan and expanded on why Petitioner initially felt including the cultural preserve in the original plan was appropriate and described how, after reconsideration and due to the confusion it had caused to the Parties, Petitioner would like the Commission to consider just the original plan; and allow Petitioner to leave the modified original plan in the record. Chair Scheuer stated that he would allow the Parties to object to Petitioner’s proposal to allow the original plan with the cultural preserve included to remain in the record.

Mr. Tabata had no objections.

Mr. Hopper stated that County did not object, but needed information on what would be developed on the site and for time to review the plan.

Ms. Apuna had no objections.

Mr. Pierce stated that the proposed plan was too vague and would respond in the process of the motion to dismiss.

Chair Scheuer asked if the Commissioners had any questions.

Commissioner Chang expressed her confusion on what Petitioner was proposing and how it related to Condition 15 (Substantial Compliance); and stated that she shared County’s feelings on the proposed modified original plan and that she applauded the efforts of Petitioner to address concerns that the community had brought up.

Chair Scheuer assessed the state of the proceedings and the progress that had been made; and determined that the Commission would still be focusing on the motion to dismiss the OSC and considering whether to grant, deny or defer action on that specific motion to determine what is involved in the Petitioner's proposed plan, and set it for a hearing. Chair Scheuer then called for Intervenor to make its presentation.

Intervenors

Mr. Pierce described why the Motion for an Order to Dismiss the OSC should be denied and reviewed the timeline involved with the Petition; whether any substantial commencement had occurred; and why the initial OSC proceeding should be continued. Mr. Pierce also described the earlier events that had led to Intervenors seeking an OSC; why Phase I of the proceedings should not be re-opened; what action alternatives the Commission could take at this juncture; why Intervenors had filed a Motion to Conclude Proceedings and the reasons for Intervenor's current disconnection from Petitioner's outreach efforts. Mr. Pierce argued how any further action by Petitioner would require a stipulation from Intervenors; how difficult it would be for Petitioners to conform to its prior representations/time limits for Phase I and why granting the Motion to Dismiss the OSC would be detrimental to Intervenors.

Commissioner Questions

Commissioners Okuda and Ohigashi requested clarification on what the standard of review was for the Motion to Dismiss; what Intervenor would do if the Motion to Dismiss was granted; more details on how the Motion to Conclude would factor into this matter; jurisdictional issues involved with this case; how lifting the current stay would affect proceedings; how the frontage road in the proposed modified original plan should be addressed; and how the failure to submit annual reports allowed harm to the public. Mr. Pierce provided additional information to clarify questions regarding the Intervenors' position on its Motions; what Intervenor would do if the Motion to Dismiss were granted; lifting the imposed stay; the frontage road issue and how the public was affected by not receiving annual reports; and restated why, for the reasons provided, the Motion to Dismiss should be denied.

Chair Scheuer declared a recess at 10:04 a.m. and reconvened the meeting at 10:14 a.m.

Mr. Pierce requested and was given permission by Chair Scheuer to refer back to Commissioner Ohigashi's questions on annual reports and provided additional details of why the absence of earlier annual reports for the public to review was detrimental. Commissioner Ohigashi requested additional clarification on Intervenors' perspective on the status of Conditions 15 and 17. Mr. Pierce described how circumstances might be different if Petitioner's activities had been known by the public via the annual

reports and how the failures to meet Condition 15 (Substantial Compliance) could have been detected and challenged sooner.

Chair Scheuer asked if Mr. Pierce was suggesting that the proceedings move to a formal hearing. Mr. Pierce responded that he was not, and that the Commission should not grant a deferral, deny the Motion to Dismiss, and address Intervenors' Motion to Conclude.

Commissioner Wong moved for an Executive Session to consult with board's attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities and liabilities regarding the legal issues involved in the proceedings and the options available to the Commission. Commissioner Ohigashi seconded the motion. Commissioner Chang stated her opposition to the motion and expressed her desire to obtain additional information from Intervenor. Chair Scheuer asked whether a delay on reacting to the motion was acceptable. Commissioners Wong and Ohigashi responded that they would allow Commissioner Chang to continue questioning Intervenor.

Commissioner Chang requested clarification on whether Intervenor was willing to delay proceedings and allow Petitioner to present its modified original plan for consideration and possible stipulation by the Parties. Mr. Pierce restated Intervenors commitment to pursue an OSC and provided his perception of what actions the Commission could consider restoring to follow an orderly process to resolve this matter.

Ms. Apuna stated that she had information to contribute and requested permission from the Chair to do so. Chair Scheuer asked the Parties whether there were any objections to hearing from OP. There were none.

Ms. Apuna shared the Hawaii Administrative Rules that provided authority for the Commission to reopen Phase I proceedings to receive additional pertinent evidence.

Chair Scheuer acknowledged Ms. Apuna's contributions and asked Mr. Pierce to restate if Intervenor objected to the stay. Mr. Pierce responded that he did.

Commissioner Cabral recognized the complexity of the proceedings and expressed her concerns for the welfare of the community and requested clarification from Mr. Pierce on who the Intervenors were, and what segments of the community they represented. Mr. Pierce described the composition of the Intervenors and the community interests they represented.

Commissioner Aczon provided his perspective on the state of the proceedings and expressed his concerns that an impasse had been reached and the stalemate needed to be resolved.

Chair Scheuer re-addressed the motion to enter Executive Session made by Commissioner Wong and seconded by Commissioner Ohigashi and defined the limits of what he would accept to continue discussion on the motion. Commissioner Chang requested additional time to seek further input from the Parties. Chair Scheuer denied her request and offered her the opportunity to vote against the motion. The Commission voted 7-1 (Chang opposed) to enter Executive Session.

The Commission entered Executive Session at 10:43 a.m. and reconvened in regular session at 11:37 a.m.

Chair Scheuer asked the Commissioners if there were further questions for Intervenors. Commissioner Chang requested permission to ask whether the other Parties were open to stipulate to Petitioner's plan.

Mr. Sakumoto stated that it would depend on what the terms of the stipulation were and what the details and content of the subject matter to be agreed upon were.

Discussion occurred on stipulation by the Parties or the Commission determining whether an evidentiary hearing would be held. Chair Scheuer clarified that the Commission would determine if an evidentiary hearing was necessary and the purpose of the questioning of the Parties was to hear their positions on the matter. Mr. Sakumoto stated that he would need time to discuss the matter with his client.

Mr. Tabata stated that he would like the opportunity to discuss the issue with co-counsel and requested a chance to respond to some of Intervenors legal arguments and if allowed to respond, to make objections on the record to identify the areas of the legal arguments that HP was objecting to.

County and OP had no objections to the hearing process that Commissioner Chang was suggesting.

Mr. Pierce stated that, at the request of his clients, he would like to clarify Intervenors position and stated that they were open to seeking a resolution process that would include robust community input, transparency, and adhering to land use law. Mr. Pierce provided additional information about Intervenors community efforts and

how, despite their work, there was a failure to arrive at an outcome acceptable to Intervenors.

Chair Scheuer inquired where Intervenor stood on an evidentiary hearing on the Motion to Dismiss. Mr. Pierce responded that he would need to check with his clients.

Commissioner Cabral thanked Mr. Pierce for providing the additional details about the community interests and outreach span that were being represented.

Chair Scheuer stated that he would allow final comments from the Parties on the Motion to Dismiss before the Commission began its deliberations.

FINAL COMMENTS

PP

Ms. Cataldo argued how Intervenors' interpretation on the standard of review issue was incorrect and how the Commission could not be relieved of the 365-day rule.

HP

Mr. Tabata argued why the 365-day rule applied and provided his interpretation on what the Commission vote requirements for the Motion to Dismiss; and stated that HP joined in PP's statute of limitations argument.

County

Mr. Hopper stated that County stood on its position and argued that it was consistent with the 1995 Decision and Order.

OP

Ms. Apuna provided OP's interpretation on how the 365-day rule applied to the Commission and that the Commission had not yet determined "substantial commencement" to trigger the rule.

Intervenors

Mr. Pierce summarized the events that had occurred since proceedings on the Petition began and detailed the issues that arose after the Commission had issued the OSC for the Petition Area; and argued that the Commission should be wary to preserve Intervenors' interests while considering its future actions.

Chair Scheuer provided his perspective of the proceedings and sought the pleasure of the Commission.

Deliberations

Commissioner Ohigashi moved that this matter be set for an evidentiary hearing to hear the issues presented for the Motion to Dismiss. Commissioner Wong seconded the motion.

Commissioner Ohigashi spoke on the Motion and described what he hoped it would accomplish. Commissioner Okuda stated that he was in favor of the Motion and shared his reasons for supporting it.

There were no further comments on the Motion. Chair Scheuer had Mr. Orodener poll the Commission.

The Commission voted unanimously (8-0) on the Motion.

Commissioner Ohigashi stated that he would like to make another motion. Chair Scheuer acknowledged his request.

Commissioner Ohigashi moved that the Commission grant authority to the Chair to convene a Settlement Conference on the Motion to Dismiss; that the Parties stipulate to allow the Chair to continue to preside over subsequent proceedings on the Motion to Dismiss and that the Chair be authorized to set the details for the evidentiary hearing. Commissioner Cabral seconded the Motion.

Chair Scheuer called for discussion on the Motion.

Commissioner Chang described how this Motion differed from the first motion and requested clarification on it.

Commissioner Ohigashi replied that participation in the Settlement Conference would not be mandatory as with the evidentiary hearing, and that the Motion would provide the authority to schedule and conduct such a Settlement Conference; and to schedule the evidentiary hearings if no Settlement Conference materialized.

Commissioner Okuda requested clarification on whether the participation for the Parties for any Settlement Conference would be voluntary; if the Chair would be authorized to serve as a facilitator; and that the conference participants would waive objecting to the Chair continuing to participate in subsequent hearings on this docket. Commissioner Ohigashi acknowledged that participation was voluntary and that the Motion was to provide for properly conducting the conference, if one was held, and the evidentiary hearing. Commissioner Okuda stated his support for the Motion.

Commissioner Cabral described why she seconded the Motion and shared her hopes that the settlement conference could be productive.

Commissioner Chang expressed her hopes that there would be a timely scheduling and handling of this matter and echoed Commissioner Cabral's sentiments for a productive conference.

Chair Scheuer stated his willingness to participate in the Settlement Conference.

There were no further comments on the Motion. Chair Scheuer had Mr. Orodener poll the Commission.

The Commission voted unanimously (8-0) on the Motion.

Chair Scheuer stated that the two Motions on the Motion to Dismiss that the Commission had just voted on would require suspending the hearing of the two remaining agenda motion items since they were dependent upon the outcome on whether the Motion to Dismiss was grant or denied. After suspending the hearing of the remaining agenda business, Chair Scheuer adjourned the meeting at 12:11 p.m.