

LAND USE COMMISSION
MINUTES OF MEETING

October 21, 2004

Elleair Ballroom
Maui Beach Hotel
170 Kaahumanu Avenue
Kahului, Maui, Hawaii

COMMISSIONERS PRESENT: P. Roy Catalani
Isaac Fiesta
Michael D. Formby
Lisa M. Judge
Steven Montgomery
Randall Sakumoto
Peter Yukimura

COMMISSIONERS ABSENT: Pravin Desai
Kyong-Su Im

STAFF PRESENT: Diane Erickson, Deputy Attorney General
Anthony Ching, Executive Officer
Bert Saruwatari, Staff Planner
Maxwell Rogers, Staff Planner
Sandra Matsushima, Chief Clerk
Holly Hackett, Court Reporter
Wade Lelan Kersey, Audio Technician

Chair Catalani called the meeting to order at 9:45 a.m.

ADOPTION OF MINUTES

Commissioner Fiesta moved to adopt the Land Use Commission meeting minutes of October 7, 2004 and October 8, 2004. Vice Chair Montgomery seconded the motion. Said motion was unanimously approved by voice votes.

TENTATIVE MEETING SCHEDULE

Executive Officer Anthony Ching reported the following schedule:

- The next meetings on November 4 and 5 will be held at the Maui Prince Makena Resort.
- The December 9 and 10 meetings will be held at the Hapuna Prince in Kona. We anticipate these meetings to be 2 long days and will be returning to Honolulu on Saturday.
- Our calendar will be filling out for next year as we have just received 2 additional dockets for Oahu and Maui.

LUC REIMBURSEMENT POLICY

Mr. Ching summarized the LUC reimbursement policy established on April 1, 2004, and reiterated what the petitioners are responsible for upon seeking a district boundary amendment.

Mr. Ching summarized staff's proposal for approval of the Updated LUC Reimbursement Policy dated October 21, 2004 to include the reimbursement by Petitioner for expenses related to hearing room fees and audio/visual services.

Vice Chair Montgomery's questions were regarding other examples for seeking additional relief.

After a brief discussion, there were no further questions posed by the Commission.

Vice Chair Montgomery moved to adopt the Updated LUC Reimbursement Policy dated October 21, 2004. Commissioner Fiesta seconded the motion. Said motion was unanimously approved by voice votes.

DOCKET NO. A04-754 MAUI LANI 100, LLC (Maui)

Chair Catalani stated that this was a hearing to determine whether the Land Use Commission is the appropriate accepting authority pursuant to Chapter 343, HRS; and whether an anticipated Findings of No Significant Impact Is Warranted in the subject docket for reclassifying approximately 59.6 acres of land currently in the Agricultural district into the urban district at Wailuku, Maui, Hawaii.

APPEARANCES

Blaine Kobayashi, Esq., representing Maui Lani 100, LLC
 Leiane Paci, Maui Lani 100 LLC
 Mitch Hirano, Munekiyo & Hiraga, Inc.
 Jane Lovell, Esq., represented County of Maui
 John Chang, Esq., represented State Office of Planning
 Abe Mitsuda, State Office of Planning

Mr. Kobayashi made a presentation of its case and stated that petitioner proposes to develop a 130-acre village of mixed use development, which includes commercial single- and multi-family units of which, 51% of the total number of units will be sold as affordable housing.

Mr. Kobayashi noted that petitioner believes the LUC is the accepting approving agency pursuant to HRS 343 and also believes that the project will not exceed the OEQC environment, economic, or public and social welfare, 13 categories of significance.

Chair Catalani had questions on the archeological report, cultural resources, and the prospect of encountering Hawaiian human burials in the petition area.

Mr. Kobayashi stated that they will include more information on these subjects. He commented that the archeological monitoring plan was accepted in August/September by the State's Historical Preservation Division and added that they will conduct a complete archeological study on the particular subject of burials.

Staff Report

1. Maxwell Rogers, Staff Planner, provided a brief summary of the staff report and clarified some minor issues regarding the area in the DEA before the Commissioners. Mr. Rogers indicated that staff recommends that the project has no significant impact and warrants the issuance of an anticipated FONSI. There were no questions by the parties and the Commission.

Ms. Lovell stated that the County believes that the LUC is the appropriate accepting authority in this matter.

Mr. Chang concurred with the County and added that the LUC is the appropriate accepting authority for the DEA and also agrees with staff's recommendation that there is no significant impact.

Chair Catalani noted that there is no public testimony for this matter.

Commissioner Judge moved that the LUC is the appropriate accepting authority and also moved that the LUC finds no significant impact based in the presentations made today. Commissioner Fiesta seconded the motion.

Vice Chair Sakumoto made a friendly amendment on the clarification of 59.6 acres to be reclassified. Commissioner Judge concurred. Commissioner Fiesta seconded the amendment. The Commission was polled as follows:

Ayes: Commissioners Judge, Fiesta, Formby, Montgomery, Sakumoto, Yukimura, and Catalani.

Nays: None

The motion passed with 7 ayes and 2 absent.

A recess break was taken at 10:20 a.m. The meeting reconvened at 10:35 a.m.

DOCKET NO. A04-746 WAIKAPU 28 INVESTMENT LLC

Chair Catalani stated that this was an action meeting to reclassify approximately 28.7 acres of land at Waikapu, Maui, Hawaii, from the currently in the Agricultural land use district to the Urban district.

APPEARANCES

Blaine Kobayashi, Esq. representing Waikapu 28 Investment LLC
Scot Nunokawa, Munekiyo & Hiraga, Inc.
Haunani Lim, Waikapu 28 Investment LLC
Jane Lovell, Esq., represented County of Maui
John Chang, Esq., represented State Office of Planning
Abe Mitsuda, State Office of Planning

Chair Catalani noted that there were no public witnesses.

Admission of Supplemental Exhibits

Mr. Kobayashi introduced and described Petitioner's Supplemental Exhibits 23 and 24. He noted that Exhibit 23 is a response from the Department of Agriculture to address Commissioner Judge's concerns at the last hearing. Exhibit 24 is the Executed Agreement with Hawaii Land and Farming. Mr. Kobayashi indicated that for Exhibit 24, the context and level of information may be deemed inappropriate to Commissioner Judge's previous request and could be withdrawn.

Commissioner Judge replied that she would like to keep Exhibit 24 on the record, as it is an important piece of information.

Mr. Kobayashi noted that negotiations for the water tank agreement with Hawaii Land and Farming was still ongoing. A final agreement is still pending.

There were no objections to the supplemental exhibits by the County and the State. Said exhibits were admitted into the record.

Vice Chair Sakumoto noted that during Mr. Kobayashi's presentation, another letter was referenced regarding the water tank and asked if it was to also be submitted as a supplemental exhibit.

Mr. Kobayashi stated that if the Commission desires, he will submit the letter from Sandra Duvauchelle of Towne Development Hawaii, Inc. as Exhibit 25. The Commission concurred. There were no objections by the County and the State. Said exhibit was admitted into the record.

Chair Catalani asked petitioner to discuss the Stipulated Decision and Order and any changes to be made.

Mr. Kobayashi stated that petitioner has worked together with the County and the State on the Stipulated Findings of Fact, Conclusions of Law, Decision and Order. Mr. Kobayashi proceeded to highlight the aspects of the stipulation.

There were no questions by the Commission.

Mr. Lovell indicated that the County has no presentation, as the County has worked closely with Mr. Kobayashi and the State on this stipulation.

Chair Catalani had questions and concerns relative to Alice Lee's testimony regarding petitioner's requirement of 10% to be set aside for affordable housing, as she would not accept cash in lieu of affordable units.

Ms. Lovell stated that it comports with her recollection of Ms. Lee's testimony.

Mr. Chang noted that they have nothing further and concurs with the stipulation, which they believe adequately covers the testimony at that hearing.

Staff Report

1. Maxwell Rogers, Staff Planner, provided a brief summary of the staff report and described staff's recommended findings to the stipulation.

Mr. Kobayashi discussed the affordable housing issue and Ms. Lee's testimony from the transcript of July 23, 2004.

After a brief discussion, Vice Chair Sakumoto recommend that the stipulation be revised to include that 10% of the units be sold as affordable. Mr. Kobayashi had no objections to the revision.

Mr. Kobayashi discussed the petitioner's concerns of the ohana unit suggestions.

Mr. Rogers also noted a staff amendment to change the word “figure” to the word “limit” indicating that the Department of Water Supply is close to allocating its limits of 800,000 gallons per day. There were no objections by the parties.

Mr. Ching discussed the issues and the suggested language of the stipulated order with the parties.

A recess break was taken at 11:15 a.m. The meeting reconvened at 11:30 a.m.

After further discussion on the issues and basis of the stipulation, the amendments and the procedural matters, the parties had no further comments.

Mr. Ching proceeded to facilitate the LUC’s complete review of the stipulated Findings of Fact, Conclusions of Law and Decision and Order with the amendments and conditions offered by staff and the Commission.

After a discussion, Commissioner Judge moved to accept the stipulated findings of fact, conclusions of Law and decision and order as deliberated with the amendments made by the parties, staff, and the individual commissioners. Commissioner Fiesta seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Judge, Fiesta, Formby, Montgomery, Sakumoto, Yukimura, and Catalani.

Nays: None

The motion passed with 7 ayes and 2 absent.

A lunch break was taken at 12:00 p.m. The meeting reconvened at 1:35 p.m.

DOCKET NO. DR 04-30 KULEANA KU`IKAHI

Chair Catalani stated that this was an action meeting to consider a petition for Declaratory Order received on July 22, 2004, involving lands at Puehuehuiki, Paho, Polanui, Lahaina, Maui, Hawaii.

On October 6, 2004, the Commission received Petition to Intervene and Request for Contested Case; and affidavit of Jason Cuevas.

On October 8, 2004, the Commission received Intervenors’ Petition to Intervene in Kuleana Ku`ikahi LLC’s Petition for Declaratory Order filed July 22, 2004; Exhibits A through Y.

On October 14, 2004, the Commission received Kauaula Land Company LLC's Petition to Intervene and Request for Hearing; Exhibit A; and Response and Opposition to Petition for Declaratory Order; Exhibits "KA" to "KF".

APPEARANCES

Richard McCarty, Esq. representing Petitioner
Jane Lovell, Esq., represented County of Maui
John Chang, Esq., represented State Office of Planning
Abe Mitsuda, State Office of Planning

Chair Catalani explained that this petition for declaratory order does not seek reclassification. The declaratory order procedure allows the petitioner to ask the LUC questions. There are three options for the Commission to consider; 1) issuing the order; 2) denying the request; and 3) setting the matter for hearing. Chair Catalani then explained the procedure for this docket.

There were no questions by the parties.

Commissioner Judge stated that this petitioner is claiming that their scope of interest includes the lands of Ukumahame, in which her husband's family has a financial interest. In order to avoid any improprieties, she recused herself from the proceedings. Commissioner Judge left the meeting at 1:45 p.m.

Mr. McCarty had no objections to the proceedings and presented its case.

Vice Chair Sakumoto had questions and concerns relative to the mailings, the list of names of the lot owners, and the issues appropriate for a contested case hearing.

Commissioner Formby's questions were in reference to the alleged violation of county ordinances and county jurisdiction.

Chair Catalani had questions regarding the alleged violations, the county's enforcement, jurisdiction, and State Land Use laws.

Vice Chair Sakumoto's questions and concerns were relative to issues of jurisdiction to rule on direct violations of county laws on agricultural lands. He recommended that the LUC limit discussion only to state laws and regulations. Vice Chair Sakumoto commented that not all of the facts are before us to make the ruling and that this matter should be set for hearing.

Chair Catalani concurred and added that the Commission only has a partial record and it is hard to make a decision today.

After a brief discussion, Vice Chair Sakumoto moved that the Commission accept as an initial question for declaratory ruling, the Petitioner's first question as to whether the current and proposed uses listed in his petition are in conformity with and direct violation to state laws in agricultural subdivisions. Commissioner Formby seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Sakumoto, Formby, Fiesta, Montgomery, Yukimura, and Catalani.

Nays: None

The motion passed with 6 ayes, 1 abstain, and 2 absent.

Chair Catalani proceeded with question 2 regarding adequate potable water and agricultural zoning requirements.

Mr. McCarty presented its case pertaining to the compliance of agricultural zoning requirements and the land use laws.

Commissioner Formby's questions and concerns were relative to the issues of the Commission's jurisdiction on general obligations that disputes the County's jurisdiction.

Commissioner Fiesta questioned if the water system was a private, county or state system. Mr. McCarty replied that it is a private system regulated by the State of Hawaii.

After a brief discussion, Commissioner Formby moved that the second issue raised by the Petitioner regarding the adequacy of the water be dismissed for lack of the Land Use Commission's jurisdiction. Vice Chair Sakumoto seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Formby, Sakumoto, Fiesta, Montgomery, Yukimura, and Catalani.

Nays: None

The motion passed with 6 ayes, 1 abstain, and 2 absent.

Chair Catalani proceeded with the third issue regarding the source of non-potable water to support farming activities.

Mr. McCarty presented its case and expounded on the need for support from the Commission to protect the watersheds and ensure that the families of the valley have their traditional uses of the water.

Commissioner Formby had questions and concerns in reference to the Commission's authority without jurisdiction and other commissions who may have the jurisdiction over this matter.

Vice Chair Montgomery's questions were relative to the water code.

Vice Chair Sakumoto's questions and concerns were in reference to the distinction between the DBA versus the DR proceedings, where the level of fact finding and decision making criteria for DBA are much greater than for the DR process.

Chair Catalani added that once the DBA is filed and a request for a conceptual plan is put forward, the Commission becomes involved and the decision making rules under 15-15-77 is then referenced for a DBA.

After a brief discussion, Commissioner Formby moved that Petitioner's contention number 3 regarding impacts to the Kaua`ula Stream be dismissed for lack of jurisdiction. Commissioner Yukimura seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Formby, Yukimura, Fiesta, Montgomery, Sakumoto, and Catalani.

Nays: None

The motion passed with 6 ayes, 1 abstain, and 2 absent.

Vice Chair Sakumoto noted that he is in support of Commissioner Formby's motion because in the Hawaii Supreme Court case of *Horne v. Kumulii*,¹⁰ Hawaii 174 (1895) it has not been overruled since and remains a controlling precedent for the use of Kaua`ula Stream. Unless there is an action by the Water Commission or a subsequent commission, this is the law for use of that stream.

Chair Catalani proceeded with the fourth issue regarding the uses in the subdivision and governing traditional access rights.

Mr. McCarty presented its case and noted that this discussion is similar to the previous discussion.

There were no further questions by the Commission.

Vice Chair Sakumoto moved that issue number 4 is outside the scope of the Land Use Commission's authority based on the same grounds as discussed on issue number 3. Commissioner Formby seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Sakumoto, Formby, Fiesta, Montgomery, Yukimura, and Catalani.

Nays: None

The motion passed with 6 ayes, 1 abstain, and 2 absent.

Chair Catalani proceeded with the fifth issue regarding the County of Maui.

Mr. McCarty presented its case and noted that the County is charged to enforce its restrictions and regulations on the specific uses on agricultural lands. He added that multiple requests were made to the County to issue citations for these violations, but their requests have not been answered.

Vice Chair Montgomery's questions were relative to why Petitioner believes the County has failed to perform their duties and asked if the petitioner had sought relief from another agency or ombudsman in the administrative branches.

Vice Chair Sakumoto noted that whether it is appropriate or not for the Commission to make a ruling on this issue is subject to the finding in the affirmative on issue number 1.

Chair Catalani concurred with Vice Chair Sakumoto and added that the hearing body would first need to answer in the affirmative to question number 1 before making a decision on number 5.

After a brief discussion, Commissioner Formby moved to accept for hearing issue number 5 only upon a positive finding by the Commission with respect to issue number 1. Vice Chair Sakumoto seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Formby, Sakumoto, Fiesta, Montgomery, Yukimura, and Catalani.

Nays: None

The motion passed with 6 ayes, 1 abstain, and 2 absent.

Chair Catalani proceeded with issue number 6 referencing that the proposed development will affect the natural flow of the Kaua`ula Stream and adversely impact the ecosystem.

Mr. McCarty presented its case and indicated that the proposed developments will be affecting lands that have spiritual, cultural, and historical values.

Chair Catalani noted Vice Chair Sakumoto's earlier reference of *Horner v. Kumuliili*, 10 Hawaii 174 (1895) and asked why Petitioner believes this case is not the law of the land for this area.

Mr. McCarty stated that he agrees with Chair Catalani and Vice Chair Sakumoto, but believes that this law of the land is not being followed and obeyed by the people living there.

Vice Chair Sakumoto had questions and concerns on the allegation that the developers and landowners are interrupting the flow of the Kaua`ula Stream and if Petitioner could list the names of the developers and/or landowners.

Commissioner Formby questioned if the allegation of the Kaua`ula Stream interruption has been brought before the Commission on Water Management. Mr. McCarty replied in the negative.

After a brief discussion, Vice Chair Sakumoto moved that question number 6 is outside of the jurisdiction of the Land Use Commission for this Declaratory Order proceeding. Commissioner Formby seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Sakumoto, Formby, Fiesta, Montgomery, Yukimura, and Catalani.

Nays: None

The motion passed with 6 ayes, 1 abstain, and 2 absent.

A recess break was taken at 2:55 p.m. The meeting reconvened at 3:15 p.m.

Chair Catalani reconvened the meeting and proceeded with discussion of the seventh issue regarding the streambed.

Mr. McCarty stated that he had nothing further to discuss.

Commissioner Formby's questions and concerns were relative to why Petitioner believes that these lands meet the criteria for conservation lands.

Vice Chair Sakumoto moved to deny petitioner's request and not consider issue number 7 for the jurisdiction of the Land Use Commission at this time. Commissioner Formby seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Sakumoto, Formby, Fiesta, Montgomery, Yukimura, and Catalani.

Nays: None

The motion passed with 6 ayes, 1 abstain, and 2 absent.

Chair Catalani proceeded with the consideration of the motions of Mr. Geiger, Mr. Kobayashi, and Mr. Horikawa. Chair Catalani added that because these items are not formally on the agenda, the Commission will need a motion to amend the agenda to adjudicate these motions.

Commissioner Fiesta moved to amend the agenda. Commissioner Sakumoto seconded the motion. The motion was approved by voice votes.

APPEARANCES

Blaine Kobayashi, Esq., representing R. Charles Bergson, et al
Paul Horikawa, Esq., representing Jason Cuevas and Concetta Cuevas
James W. Geiger, Esq., representing Kauaula Land Company, LLC

Chair Catalani proceeded by asking the three counsels representing their clients as intervenors, if they had any objections should there be a contested case hearing on issue numbers 1 and 5 as accepted by this Commission.

Mr. McCarty stated that he had no objections to the argument.

Mr. Kobayashi, Mr. Horikawa, and Mr. Geiger had no objections.

Vice Chair Sakumoto moved to grant the three petitions for intervention and the request for contested case hearing. Commissioner Formby seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Sakumoto, Formby, Fiesta, Montgomery, Yukimura, and Catalani.

Nays: None

The motion passed with 6 ayes, 1 abstain, and 2 absent.

Chair Catalani recognized the County and the State of Hawaii and asked if they sought status as a party to this proceeding.

Ms. Lovell indicated that they are entitled to participate in proceedings where the lands are within the County and has no objections to the intervention of the three petitions.

Mr. Chang noted that once the case is set for hearing, the Office of Planning is also a party to the hearing and has no objections to the intervenors' request.

Vice Chair Sakumoto moved to accept the Office of Planning and the County as parties to the contested case hearing. Commissioner Formby seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Sakumoto, Formby, Fiesta, Montgomery, Yukimura, and Catalani.

Nays: None

The motion passed with 6 ayes, 1 abstain, and 2 absent.

PUBLIC TESTIONY

1. Brian Cuevas (Mr. Cuevas signed up but subsequently declined to testify.)
2. David Byars (Mr. Byars also stated that he wishes not to testify at this time.)

Vice Chair Sakumoto suggested that the Commission consider the appointment of a hearing officer to take in testimony and provide a recommendation to the Commission, given the number of parties involved and the number of likely witnesses who will testify.

The Commission then discussed the general procedures for appointing a hearing officer.

Ms. Erickson noted that the hearing officer will take the information and make a recommendation. The Commission will take the recommendation and the parties will have a chance to argue. The Commission then makes the final decision.

Commissioner Montgomery's questions were in relation to a precedent for this type of structure by other commissions, and the cost to hire a hearing officer.

Chair Catalani discussed the relative benefit of the costs versus the travel costs for the Commission. Chair Catalani indicated that he felt there might be significant benefit to the hearing officer format.

Mr. Ching stated that costs for the Commission and staff to travel to Maui versus a concentrated period of traveling time for a hearing officer may yield savings.

Vice Chair Sakumoto noted that this docket has been ongoing for a while with various parties involved in these proceedings. He added that the parties deserve a quicker time to resolve this issue and to bring closure.

Chair Catalani concurred with Vice Chair Sakumoto and added that due to the number of parties involved and for the parties' interest, this case is appropriate for a hearing officer.

Commissioner Fiesta agreed with Chair Catalani and Vice Chair Sakumoto and noted that due to the length of time spent on this docket, the Commission should bring it to closure soon.

Vice Chair Sakumoto moved that the Commission appoint a hearing officer to develop a record in accordance with appropriate administrative rules and take testimony in this manner and propose a Findings of Fact, Conclusions of Law, and Decision and Order for the Commission to consider. Commissioner Fiesta seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Sakumoto, Fiesta, Formby, Montgomery, Yukimura, and Catalani.

Nays: None

The motion passed with 6 ayes, 1 abstain, and 2 absent.

Chair Catalani welcomed any suggestions for the selection of a hearing officer.

Vice Chair Montgomery noted that this being a historical approach, the Commission should consult with former Executive Officer Ester Uyeda and other agencies like the Water Resource Commission for recommendations.

Commissioner Formby suggested that the hearing officer should be from Maui County given the location of the parties.

Chair Catalani asked Mr. Ching for an opinion on developing procedures and for the selection of a hearing officer.

Mr. Ching noted that staff could make some recommendations for the process, and suggested that 2 or 3 members of this Commission could serve on a sub-committee for selection and ultimately present a recommended list before the Commission, as the selection for the hearing officer should be voted on by the full Commission.

Chair Catalani appointed Commissioners Sakumoto, Montgomery, and Formby to develop recommendations for the hearing officer to be discussed at the LUC's November 18th meeting.

Mr. Ching noted that if the Commission appoints a hearing officer on November 18, we would need to properly notice the hearing and conduct a prehearing. The hearing officer's work would begin sometime in January or February, depending on the publication of notice. The prehearing conference could occur in early December.

Chair Catalani noted that this item will be on the November 18th agenda.

After a brief discussion, the meeting adjourned 4:00 p.m.

(Please refer to the Land Use Commission transcript of October 21, 2004 for additional details on all of the above matters.)