

LAND USE COMMISSION
MINUTES OF MEETING

January 5, 2006

Conference Room 405
Leiopapa A Kamehameha
235 So. Beretania Street
Honolulu, Hawaii

COMMISSIONERS PRESENT: Thomas Contrades
Kyong-su Im
Lisa Judge
Duane Kanuha
Steven Montgomery
Ransom Piltz
Randall Sakumoto

COMMISSIONERS ABSENT: Michael Formby

STAFF PRESENT: Anthony Ching, Executive Officer
Diane Erickson, Deputy Attorney General
Maxwell Rogers, Staff Planner
Sandra Matsushima, Chief Clerk
Holly Hackett, Court Reporter
Walter Mensching, Audio Technician

Chair Sakumoto called the meeting to order at 9:05 a.m.

ADOPTION OF MINUTES

Commissioner Piltz moved to adopt the Land Use Commission meeting minutes of December 1, 2005 and December 2, 2005. Vice Chair Montgomery seconded the motion. The minutes of December 1, 2005 and December 2, 2005 were approved by voice votes.

ANNOUNCEMENTS

Executive Officer Anthony Ching reported that on December 1, 2005, Bridge Aina Lea, LLC and Banter, Inc. filed with the LUC a Notice of Intention to Convey Property Owned by Banter, Inc. back to Bridge Aina Lea, LLC. The transfer is being completed to help facilitate the consolidation and re-subdivision of the property. Mr. Ching added that this notice was filed in compliance with condition 14 of the LUC's Amended Findings of Fact, Conclusions of Law, and Decision and Order dated July 9, 1991.

There were no questions posed by the Commission.

TENTATIVE MEETING SCHEDULE

Executive Officer Anthony Ching reported the following schedule:

- January 19 - a field trip to the McCully site is scheduled at 2:00 p.m.
- January 20 - the LUC will continue with hearings on the McCully docket.
- February 2 & 3 - Oahu action meeting. Mr. Ching noted that this may be a one-day meeting and polled the Commissioners on their preference for a Thursday or Friday meeting. Commissioner Piltz preferred a Friday meeting. The Commissioners had no objections to a one-day meeting on Friday, February 3.
- February 16 & 17 will be held on Maui for hearings on Pulelehua and Kuleana Ku`ikahi. Mr. Ching commented that there has been some difficulty obtaining meeting rooms and that the meeting dates may shift to February 15 & 16 (Wednesday & Thursday).

Mr. Ching commented that the rest of the meeting dates remain as scheduled.

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

DOCKET NO. A05-758 A CHARITABLE FOUNDATION CORPORATION (Oahu)

Chair Sakumoto stated that this was a hearing to consider the reclassification of (i) approximately 28.759 acres of land currently in the Agricultural District to the Conservation District for a State Park Reserve; and (ii) approximately 5.219 acres of land currently in the Conservation District to the Agricultural District for the development of farm dwellings with agricultural uses at Pupukea, Koolauloa and Waialua, Oahu, Hawaii.

APPEARANCES

Benjamin M. Matsubara, Esq., represented Petitioner

Curtis Tabata, Esq., represented Petitioner

David Druz, President, A Charitable Foundation Corporation

Lori Sunakoda, Esq., represented City and County of Honolulu, Department of Planning and Permitting

Raymond Sakai, City and County of Honolulu, Department of Planning and Permitting

Gregg Kinkley, Esq., represented State Office of Planning

Abe Mitsuda, State Office of Planning

Lorene Maki, State Office of Planning

PUBLIC WITNESS

1. Henry Curtis

Mr. Curtis stated that he is the Executive Director of Life of the Land, and noted his concern of the aesthetic impacts to the agricultural lands. Mr. Curtis added that if the LUC approves this application, he is requesting that the LUC place a condition restricting the construction of a phase II. Mr. Curtis noted that the applicant has had several different proposals in the past and would like the LUC to set some restrictions on preserving the view planes, Kamehameha Highway, and Waimea Valley.

Mr. Matsubara referenced petitioner's exhibit 17, letter of Mr. Druz to Mr. Curtis at Life of the Land, dated April 16, 2005 regarding ACF's commitment to protecting the environment and promoting humanitarian causes.

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

Staff Report

Mr. Ching provided a brief summary of the staff's report and commented on the field trip taken on September 9, 2005 to the project site. The photos/slide show were presented to the Commission.

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

Admission of Exhibits

Mr. Matsubara described and offered petitioner's exhibit list and 20 exhibits. There were no objections by the parties or the Commission. Petitioner's exhibits 1 to 20 were admitted into evidence.

Ms. Sunakoda offered the City and County, Department of Planning and Permitting's exhibits 1 to 6. There were no objections by the parties or the Commission. Said exhibits were admitted into evidence.

Mr. Kinkley described the State of Hawaii, Office of Planning's exhibits 1 to 6. There were no objections by the parties or the Commission. Exhibits 1 to 6 were admitted into evidence.

Petitioner's Presentation

Mr. Matsubara provided a brief overview of the project and map orientation referencing Petitioner's exhibit 14.

Petitioner's Witnesses

1. David Scott Druz

Mr. Druz stated that he is employed as an investment manager and portfolio manager of pension plans. Mr. Druz added that he is also the President of ACF and a retired medical doctor with an active license in Hawaii, but no longer practices medicine. Mr. Druz provided a brief history of ACF and its directors. Mr. Druz discussed the benefits of the 501C3 charity tax ramifications and referenced petitioner's exhibit 15. Mr. Druz also discussed ACF's contributions to date, and described the Pupukea Ridge preservation project and

ACF's mission statement. Mr. Druz described a proposed condition restricting agricultural uses.

Mr. Matsubara offered petitioner's exhibit 21, the proposed condition restricting the agricultural uses. There were no objections by the parties or the Commission. Said exhibit was admitted into the record.

Ms. Sunakoda stated that the City had no questions.

Mr. Kinkley asked if ACF's mission statement was included as an exhibit. Mr. Druz replied that all he had were articles and that no mission statement was submitted.

Mr. Kinkley raised a few questions on the mission statement, the tax-exempt status, 501C3 ramifications, and any previous experience with agricultural uses.

Commissioner Im commented that he believes the process of donating the lands for a state park could have been done in a different manner yet still conform to the mission statement. He added that by keeping the lands in conservation, ACF could still accomplish the same thing. Commission Im asked Mr. Druz to explain why ACF is going thru this process.

Mr. Druz explained that going to the LUC was the last resort and that he has met with the City numerous times to resolve this. Mr. Druz noted that the problem is the perpetual easement and that he cannot have a split zone parcel that has an access easement. By taking the land out of agriculture facilitates the consolidation of the property and would save ACF approximately \$200,000 and two more years of processing time.

Commissioner Im noted that if it is ACF's mission to preserve the land, could it be possible to donate the entire portion to the state.

Mr. Druz replied that they simply did not want to donate the entire area, as it was a fiduciary decision to keep this property which enables ACF to retain more value in the property and that they were also advised by their 501C3 counsel to not donate too much of the charitable assets as the charity may need to wind down.

Commissioner Im commented that it would be helpful if ACF has some kind of documentation or letter from their 501C3 counsel and if they could provide it to the Commission.

A recess break was taken at 10:30 a.m. The meeting reconvened at 10:45 a.m.

Commissioner Im commented that the proposed condition on the agricultural use restriction appears to not do anything more than what is normally required in the LUC standard conditions. Commissioner Im also noted that these conditions run with the land.

Mr. Matsubara explained that the condition was drafted due to the concern of the Office of Planning (OP) since ACF does not have a current agricultural plan. Also, it was the intent of ACF to incorporate this condition in the LUC order and file with the Bureau of Conveyances.

Commissioner Im asked what the tax consequences are by ACF donating the conservation lands to the state. Mr. Druz replied that AFC is a charity and that there is no tax credits or money benefits.

Commissioner Im questioned that once this charity is wound down or terminated where does the remaining assets go. Mr. Druz explained that when a private foundation finally winds down, all of its assets are distributed to charitable recipients and that they have to give it all away.

Mr. Matsubara referenced petitioner's exhibit 15, the Articles of Incorporation.

Vice Chair Judge asked if Mr. Druz resides in Nevada or Hawaii. Mr. Druz replied that his main house is in Hawaii and also has a condo in Nevada. Mr. Druz added that Nevada was chosen as a state to incorporate the charity there as advised and recommended by their 501C3 attorney.

Vice Chair Judge raised questions on petitioner's exhibit 16, the property purchased in 2003, and the how the property fits into ACF's purposes and mission statement.

Mr. Matsubara provided copies of the mission statement and offered it into evidence as petitioner's exhibit 22. There were no objections by the parties or the Commission. Said exhibit was admitted into evidence.

Vice Chair Judge raised a few questions relative to the previous proposal of a spiritual center, discussions with the state for the donation of the lands for the state park, and the guidance of the original three members from the board of directors.

Vice Chair Montgomery posed questions relative to meetings with the Outdoor Circle and Northshore neighborhood board outlining a plan, a CDUA process with the DLNR, and the \$200,000 cost savings plus 2-year timeframe.

Commissioner Kanuha raised questions on the proposed road that ACF needs to construct in order to turn the existing conservation district area over to the state. Commissioner Kanuha also asked what is the restriction for conveying the parcel in its current configuration.

Vice Chair Judge had a few questions on the easement and its width.

Mr. Druz explained that the easement is 14 feet wide and not a physical roadway that leads to the *heiau* and is overgrown with weeds. Mr. Druz also discussed the trail system on the property and noted that ACF did not want to just donate the lower part of the property since access to the trail system covers both properties and this is the only way to donate the lands according to DPP's restriction on access.

Commissioner Kanuha raised questions regarding the tax map keys, and commented on the reconfiguration to consolidate portions of separate TMKs that are currently existing in the agricultural district, and to reconfigure the conservation land so that ACF will have agricultural lands on the mauka end of the property. Commissioner Kanuha asked about the origin of the trails and if they were historical or constructed by the ACF.

Mr. Druz replied that the trails are not historical but believes that they existed possibly from the cattle days. Mr. Druz added that they have not constructed them but have maintained the trails.

Vice Chair Judge asked if Mr. Druz was a resident of the Pupukea Ridge area. Mr. Druz replied in the affirmative.

Chair Sakumoto referenced petitioner's exhibit 16 Charitable Contributions and noticed that the Pupukea Ridge Preservation project is listed and asked if Mr. Druz could explain the donation on that line item.

Mr. Druz explained that those numbers show ACF's contributions, mainly donations, and that these are moneys that are disbursed and the numbers on this specific line were received by their attorney and held in some type of account that is assets to be donated still in progress. Mr. Druz added that this is not the full amount of what was spent on this project and that over a period of years until the property is finally donated, this money would have gone to the project and donation side like a holding account. Mr. Druz also noted that the \$961,000 spent has now exceeded over a million dollars and that figure included purchasing the property, consultant fees, and for the processing expenses of donating the land.

Chair Sakumoto also had a few questions on petitioner's exhibit 14 and the CDUA process, feasibility studies, and source of water for agricultural activities.

Chair Sakumoto posed questions on the future maintenance of the trail system. Mr. Druz acknowledged that they are aware of the limited money for maintenance at state parks and added that they are committed and will continue to maintain the trails and agree to pay to keep the maintenance of these trails.

Chair Sakumoto also had a few questions on the easement and access to the park. Mr. Druz explained that ACF has written arrangements with the adjoining land owner to continue to lease the access to the trails until such time the state parks opens it up to the community. He added that it would not be a problem for people to access the park thru ACF's parcel. Mr. Druz noted that they will provide a copy of the lease agreement.

Chair Sakumoto commented that the archeologist mentioned that there was no significant homes or dwellings in this area and asked if there was a possibility that this park had some significance to the *heiau*. Mr. Druz noted that it was his understanding that this area was all a part of the same *ahupua`a*.

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

2. Rodney Funakoshi

Mr. Funakoshi stated that he is the project planner from Wilson Okamoto Corporation. Mr. Funakoshi was qualified as an expert in land entitlements from the previous hearing. His written testimony was admitted as petitioner's exhibit 20. Mr. Funakoshi briefly summarized his report and discussed the preparation and plan of the environmental assessment.

A lunch recess was taken at 11:55 a.m. The meeting reconvened at 1:10 p.m.

Mr. Matsubara offered petitioner's exhibit 23, the agreement on the perpetual easement to the record. Mr. Matsubara noted that this agreement has since expired and will offer this into evidence as petitioner's exhibit 23, and will update this lease to reflect that there is access to the neighboring property. There were no objections by the parties or the Commission. Said exhibit was admitted into evidence.

Mr. Funakoshi continued with his testimony and explained the process of the DPP's subdivision split zone property.

Ms. Sunakoda noted that the City had no questions.

Mr. Kinkley raised a few questions relative to petitioner's exhibit 20, the potential agricultural development on the remaining agricultural lands with minimal effects on the community, the maximum scenario, and the subdivision consolidation that limits up to four farm dwellings.

Mr. Funakoshi explained that the area is strictly regulated in wastewater and disposal, which limits one system per lot. He added that upon subdivision consolidation, petitioner will have two separate systems and that one septic system could serve two homes. That is how they came to the potential four dwellings.

Commissioner Im referenced petitioner's exhibit 14 and posed a few questions related to the possibility to further subdivide the property in the future.

Vice Chair Judge posed questions related to hydrology and ground water in the no pass zone in the final EA, the underground injection control line, and a letter from DOH regarding the two septic systems. Mr. Funakoshi noted that the DOH letter is in petitioner's exhibit 12.

Commissioner Kanuha raised questions regarding redistricting, permitting, and zone changes.

Chair Sakumoto had questions regarding the established sub zones and its process, and referenced the letter dated July 12, 2004 in petitioner's exhibit 12 regarding the need for a CDUP.

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

3. Bruce Plasch

Dr. Plasch's written testimony was submitted as petitioner's exhibit 19. Dr. Plasch briefly described his educational and professional background in analysis, probability, statistics, finance, professional career on land use issues and issues on agricultural versus urbanization, job creation, and tax revenues. Dr. Plasch was qualified as an expert in economics. There were no objections by the parties or the Commission.

Dr. Plasch stated that he addressed suitability of the 5.2 acres for agricultural use based upon his observations. Dr. Plasch addressed two issues: 1) soil ratings and quality categorized adequate for agricultural uses; and 2) the large amount of rainfall. Dr. Plasch added that he recommends low elevation crops and country lifestyle crops, since raising cattle is a possibility but the land is not large enough to support a ranch.

Ms. Sunakoda noted that the City had no questions.

Mr. Kinkley had a few questions regarding the acreage levels at a C rating and irrigation water.

Commissioner Kanuha asked if the lands were ever used for agriculture. Dr. Plasch noted that it was used for pineapple and that any lands used for pineapple was previously considered prime.

Commissioner Piltz commented that previously, either Life of the Land or Sierra Club came in and seeded the lands with Ironwood trees.

Commission Im asked if Dr. Plash had any previous discussions with petitioner on their intentions for the land reclassification from conservation to agricultural. Dr. Plasch replied that he has only worked with Mr. Funakoshi and had no discussions with the petitioner.

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

4. Janice Marsters

Dr. Marsters' written testimony was submitted as petitioner's exhibit 18.

Dr. Marsters briefly summarized her educational and professional background and stated that she is a principle at Masa Fujioka and Associates and specializes in geo-technical and environmental consultation. Dr. Marsters added that she is the current president on the Council of Engineers. Dr. Marsters was qualified as an expert in the field of environmental assessment. There were no objections by the parties or the Commission.

Dr. Marsters briefly summarized her testimony on the EA of the property and discussed the steps that are laid out by the ASTM, site history, maps, aerial photos, regulatory records, DOH and EPA reports, site geology, site visits on all the trials and perimeter of the property. Dr. Marsters also noted her observations and concluded that no evidence of current or past land uses that would constitute a Recognized Environmental Condition and no evidence of past pesticide use on the subject property. Dr. Marsters also discussed issues of ground water contamination, agricultural use history, and pesticide use.

Ms. Sunakoda stated that the City had no questions.

Mr. Kinkley raised a few questions relative to the study of hydrogeology and ground water resources, hydro-geological aquifers, and the trail use with respect to the environment.

Vice Chair Judge posed a few questions regarding the potential contamination of the drinking water supply by agricultural use.

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

A recess break was taken at 2:00 p.m. The meeting reconvened at 2:20 p.m.

5. Martha Yent

Ms. Yent stated that she is an archeologist and is the Manager of DLNR's State Parks Division. Ms. Yent noted that she is familiar with ACF's proposal and plan to donate approximately 79 acres to the State for a park reserve. Ms. Yent added that although they do not have funds available for the maintenance of the park reserve, they are in favor of receiving the donation of the parklands.

Ms. Sunakoda noted that the City had no questions.

Mr. Kinkley raised a few questions related to the responsibilities of receiving this parcel for a state park reserve, the financial support for maintenance, keeping the easement open, and discussions on creating buffers around the *heiau*.

Commissioner Kanuha raised questions relative to other parks in the state's program, staff and funding issues, and asked whether or not it would make any difference on the donation of property classified as agricultural or conservation. Ms. Yent replied that they have accepted different lands with different zoning.

Vice Chair Judge asked if they concurred with the petitioner's configuration, as referenced in exhibit 14. Ms. Yent added that the state would concur that it is a good configuration for people to enable the trail system and the topography of the lands. Ms. Yent added that they have never really conducted studies on this property and that everything is conceptual at this time.

Commissioner Piltz commented that there currently is a horseback tour operation in the area and asked if it was in the state's future plan to keep that operation and have them lease it from the state. Ms. Yent replied that the state does not presently have any horse concessions in their parks and have not made any decisions but may consider it for this property. Ms. Yent added that once the transfer is made, the horse operations would need to come up with a concession amount to the state.

Chair Sakumoto asked Ms. Yent to explain the state park reserve. Ms. Yent noted that state funds are not available at this time and that is why it is called a reserve. The state will not receive funds until the property actually transfers to them. Ms. Yent added that they anticipated that the division could maintain the park and trails as they exist today, but they do not have the staffing and will need to consider options, privatization on the maintenance and operations, and currently had put out an RFP for the infrastructure and operational needs for the park.

Chair Sakumoto also asked if there is any concern regarding the easement. Ms. Yent stated that they need to open up dialogue with the adjacent landowner regarding the easement, as the easement to the *heiau* has legal issues that they are currently trying to resolve. Also, there are a couple of landowners with intersecting easements. Ms. Yent added that presently the existing easement is fine and does not impact any subdivision, contains a small parking lot with approximately 8 parking stalls in the *heiau* area, and could possibly move this parking lot to another area for more stalls, but that is just conceptual at this time. Ms. Yent noted that access issues are the main concern and that the overgrown easement needs to be cleared out and maintained. Ms. Yent added that people who are coming to hike would not find it to be detrimental for them to walk that extra distance if need to.

Commissioner Im commented that if there is a slight chance of not being able to access the new state park via the easement, then some kind of condemnation needs to be done. Commissioner Im asked if the state has discussed with the petitioner whether the access could be obtained thru ACF's agricultural property if the other easement is not usable in the future. Ms. Yent replied that they have not had that type of discussion with the petitioner.

Commissioner Kanuha referenced petitioner's exhibit 14 and noted the area outlined in red that is the separate parcel by itself. Commissioner Kanuha asked if the state parks division would take that part of the parcel if it was offered to them. Ms. Yent replied in the affirmative and noted that it still meets the idea of preserving the corridors, close proximity to the *heiau*, and all they may need to do is to alter the trail system.

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

Ms. Sunakoda noted that the City had no witnesses and will rest on the written testimony submitted by the DPP. Ms. Sunakoda added that pursuant to an informal discussion with Mr. Kinkley, he indicated a desire to pose questions on DPP or its personnel who would have the knowledge on this matter. Ms. Sunakoda stated that it is unclear on the precise substance and asked that the Commission limit the scope of questions to the written testimony of the DPP as submitted.

Mr. Kinkley stated that they will waive that request and will proceed with the State's witness.

State's Witness

1. Laura Thielen

Ms. Thielen stated that she is the Director of the State's Office of Planning (OP) and summarized her testimony regarding this petition. Ms. Thielen noted that the OP has submitted testimony in partial support of the petition and stated that the OP recommends the approval of 24.227 acres and 4.532 acres to be reclassified from agricultural to conservation for the donation to the state's park reserve. She added that OP also recommends that the 5.219 acres be denied reclassification from conservation to agricultural because of no agricultural use plan at this time and of no agricultural farming history by the petitioner.

Mr. Matsubara asked why OP recommends that the property is appropriate for low-density residential use, even though the petitioner has no desire in developing for residential uses. Ms. Thielen replied that the community is currently designated for low density residential uses.

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

A recess break was taken at 3:15 p.m. The meeting reconvened at 3:30 p.m.

Chair Sakumoto noted that Commissioner Im had a few more questions for Dr. Druz.

Commissioner Im commented on the agricultural use language restriction that Mr. Matsubara has provided and asked if it would be possible to use that

restriction on all of petitioner's agricultural property rather than just petitioner's Area B.

Mr. Druz noted that in regards to restricting further subdivisions of the property, they are willing to agree to it and want to see this happen. He added that ACF made a vow to the community that these parcels would not be further subdivided and will also place restrictions on the deed to that effect.

Commissioner Kanuha asked why ACF did not want to just leave the land in conservation.

Mr. Druz explained that the approximate costs would be \$200,000 and two more years to complete the process. Mr. Druz added that the reason they are asking for the 5.2 acres reclassified into agricultural is because any time a parcel is created it must have legal access, and also for the extra time and money to extend the municipal access road.

Commissioner Im commented that there is a difference between putting the road in and an access easement and believes that having an access easement would be sufficient. Commissioner Im questioned if the County had any comments on this matter.

Ms. Sunakoda noted that a representative of DPP was not available and added that she was not involved in the previous discussions between Petitioner and counsel. Ms. Sunakoda commented that Mr. Druz is correct that there has been many discussions and options explored, but that at this time, she was not able to provide any additional information other than to defer to what the Petitioner has stated on the record. Ms. Sunakoda offered to place a call to the division chief of the DPP if requested.

Mr. Druz added that they do not believe that the DPP has taken an unreasonable position as they have explained to ACF how to make it happen and have been very cooperative.

Chair Sakumoto noted that the Commission would appreciate it if Ms. Sunakoda would call for more information for the record relating to whether or not the physical access is required.

Ms. Sunakoda clarified that her understanding of the question is whether DPP is requiring an easement and noted that discussions were never made on

whether or not they would really need to extend the road as that option was not discussed with the DPP.

A recess break was taken at 4:00 p.m. The meeting reconvened at 4:20 p.m.

Ms. Sunakoda stated that she has spoken to the division head of the DPP and that the department's position is that the department does not approve situations of easements, therefore a road right of way would be required.

Commissioner Kanuha asked if the property was conveyed to the state for public purposes and that agency went in for subdivision approval, would the government agency be held to the same standards as the private sector. Ms. Sunakoda replied that they would not as there is some leeway to that scenario.

After a brief discussion, Chair Sakumoto read the post hearing instructions and noted that the evidentiary portion of the hearings will be closed. He asked that the parties draft individual findings of facts based upon the record in this docket, served to the parties by February 10, 2006. Deadline to file responses to the LUC is close of business on February 17, 2006. Chair Sakumoto added that if any of the parties decide to stipulate, they are encouraged to do so. Any proposed orders received by February 17, 2006 will be considered at the LUC's March 2 meeting on Oahu.

Mr. Matsubara commented on a housekeeping item. Petitioner's exhibit 23 (lease agreement) was submitted but the information was outdated and asked if they could submit an updated lease agreement as exhibit 23a in the future. Chair Sakumoto stated that petitioner's exhibit 23a would be accepted upon its submittal.

The meeting adjourned at 4:45 p.m.

(Please refer to LUC Transcript of January 5, 2006 for more details on this matter.)