

LAND USE COMMISSION  
MINUTES OF MEETING

March 2, 2006

Kapolei Hale  
First Floor Conference Room  
1000 Uluohia Street  
Kapolei, Hawaii

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

COMMISSIONERS ABSENT: Lisa Judge

STAFF PRESENT: Anthony Ching, Executive Officer  
Diane Erickson, Deputy Attorney General  
Bert Saruwatari, Staff Planner  
Caroline Lorenzo, Secretary  
Sandra Matsushima, Chief Clerk  
Holly Hackett, Court Reporter  
Walter Mensching, Audio Technician

Chair Sakumoto called the meeting to order at 10:10 a.m.

SP04-398 SPHERE LLC

Chair Sakumoto stated that this was an action meeting to consider a special use permit to establish a construction and demolition debris landfill on

approximately 190 acres of land within the Agricultural District at Maili, Waianae, Oahu, Hawaii. The Land Use Commission previously denied the special use permit and remanded the matter to the City and County of Honolulu Planning Commission for further proceedings to supplement the record and address the special use permit criteria.

#### APPEARANCES

Roger Moseley, Esq., represented Petitioner

Joy Higaki, represented Petitioner

Bernie Kim, represented Petitioner

Russell Okoji, represented Petitioner

Renee Furuta, represented Petitioner

Duane Pang, Esq., represented Department of Planning and Permitting

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

Bryan Yee, Esq., represented State Office of Planning

Laura Thielen, State Office of Planning

Abe Mitsuda, State Office of Planning

Colleen Hanabusa, Movant

Chair Sakumoto noted that it is only the testimony, exhibits, findings and recommendations generated during the public hearings conducted by the Planning Commission that can be considered by the LUC. Public testimony received by the LUC today is not part of the official record and cannot be considered by the LUC in its deliberations. The law provides that the LUC must take action on this item no more than 45 days after receipt of the complete record from the City and County, therefore, the LUC will take action on this docket by Saturday, March 4, 2006.

Chair Sakumoto stated that for efficiency and given the number of people signed up to provide public testimony, the LUC will be limiting testimony on this matter to no more than 3 minutes. After completion of the public testimony, the LUC will entertain motions filed by Senator Hanabusa and will provide the Movant and the parties (Sphere and City and County) ten minutes each to summarize their positions. Chair Sakumoto added that although the State Office of Planning is not a party to the proceedings, they will have the opportunity to provide 3 minutes of public testimony after the parties have made their presentation.

Commissioner Formby disclosed that upon reviewing the file, he noted that in 2003 or 2004 there were three construction companies that his law firm represents in personal injury lawsuits currently in litigation, unrelated to the landfill matters. Commissioner Formby added that he has no interest in this case other than to fulfill his obligations as a Commissioner and to do so in an impartial and objective manner. Both Mr. Moseley and Mr. Pang had no objections to Commissioner Formby continuing to participate in this matter.

Mr. Moseley asked if the parties will be allowed to question the people testifying on the public basis. Chair Sakumoto replied in the affirmative and noted that the LUC allows the parties the opportunity, if they choose to question any of the public witnesses.

Mr. Pang asked if the parties are allowed to question members of the public, and because the LUC has not yet determined if Ms. Hanabusa is a party, will she be allowed to also question the witnesses.

Chair Sakumoto commented that it was a valid point made by the City and noted that the LUC will rule on Ms. Hanabusa's Motion to Intervene first to determine whether she is a proper party to this proceeding, and then receive public testimony.

Movant Hanabusa began her presentation and stated that the LUC rules are silent on intervention and commented that the memos filed by the parties were premised on the notion that this meeting today is a continuation of the prior action proceeding. Movant Hanabusa contends that this premise is flawed. Chapter 205(6)(e) indicates that the LUC must make a decision within 45 days to approve, approve with modification, or deny. It does not permit the LUC to deny with modification. Movant Hanabusa contends that the applicant should have come before the LUC, as a new application and not a continuation. As this is not the case, the LUC is without jurisdiction to consider the current application. The LUC's rules (15-15-95 and 96) do not provide for anything other than a denial, and a new petition should have been filed by the Applicant or the Planning Commission should have conducted a new hearing and voted again to approve or deny the application.

Movant Hanabusa discussed the other motions filed and commented on the need for an environmental assessment requirement for this project because the law has changed between the first proceeding. The record came from the Planning

Commission and to initiate that record again required Sphere to file an amended application, which equates to a new proceeding.

Commissioner Formby commented that he was not a Commissioner the first time the matter was heard by the LUC, but has read the transcripts and concludes that the Commission recognized that they had three options under the HRS, to approve, approve with modification, or deny.

Movant Hanabusa replied in the affirmative and commented that in essence, denial with a remand is denial with modification. To be consistent with the language in the statute that allows the LUC to approve and approve with modification and a denial with modification is not permitted.

Commissioner Formby commented that the record from the prior hearing indicates that Commissioner Sakumoto's motion was initially a motion to deny and it was clear in the record that it was for denial.

Movant Hanabusa replied that if this is the understanding of the LUC, then this is a new proceeding. Movant Hanabusa noted that in her opinion, the Planning Commission improperly handled the matter because the matter should have been treated as a new application. Movant Hanabusa added that the LUC is without jurisdiction because they do not have the required vote of the Planning Commission to have approved the application. Movant Hanabusa commented that this is an application with procedural and jurisdictional problems, and questioned the LUC's ability to proceed.

Commissioner Formby noted his concern that the decision of the LUC was to deny and remand, but clearly denied the application. It was then sent back to the Planning Commission.

Commissioner Im concurred with Commissioner Formby and commented that the statute clearly provides three options: approve, approve with changes or deny, and when the LUC denied and remand, they basically meant denial. Commissioner Im added that regarding the motion for intervention, if this is a denial, then the intervention is moot.

Commissioner Formby noted that if it was a denial, then it falls upon the courts to make a determination because as a quasi-judicial body, the LUC has the opportunity and the responsibility to decide jurisdictional issues. Commissioner

Formby added that the issues that Movant Hanabusa has raised may still be before the LUC, such as the jurisdictional issues and due process.

### EXECUTIVE SESSION

Commissioner Im moved to go into executive session under §92-5(a)(4), Hawaii Revised Statutes, to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities. Commissioner Formby seconded the motion. Said motion was unanimously approved by voice votes.

The Commission entered into executive session at 10:45 a.m.

The open meeting reconvened at 11:05 a.m.

Chair Sakumoto reconvened the open meeting and asked Mr. Moseley if he wished to respond to the Motion to Intervene.

Mr. Moseley stated that he believes that Movant Hanabusa is not permitted to intervene in this case. Mr. Moseley cited 15-15-06(a) that states that 45 days after receipt, the LUC must approve, approve with modification or deny. Mr. Moseley also noted that the rules indicate that the petition may be remanded to the County Planning Commission for further proceedings. Mr. Moseley added that Movant Hanabusa has misdirected the LUC, as there is no case law that allows for intervention at the Land Use Commission level. The application heard was at a hearing in July, and another in November and December, but Movant Hanabusa did not file an application to intervene at that time, and has therefore forfeited her opportunity to seek to intervene in this matter.

Commissioner Formby asked if Mr. Moseley believed that this was a remand instead of a denial.

Mr. Moseley replied that he believes that it was a provisional denial and offered that the LUC could have meant an approval with a remand subject to additional information.

Commissioner Formby commented that at the previous LUC action meeting, Commissioner Sakumoto made first a motion to deny, then after another Commissioner suggested a friendly amendment, Commissioner Sakumoto

indicated that he would attach the remand as long as it was not inconsistent with his motion to deny. Commissioner Formby then asked Mr. Moseley what the applicant would have done if the LUC had simply denied the application.

Mr. Moseley stated that they would have to process a new application and receive an appropriate endorsement by the Planning Commission.

Commissioner Formby commented that in this instance, even though the LUC denied and remanded the application, there was no requisite re-vote by the Planning Commission (creating a procedural flaw), prior to the application being forwarded to the LUC.

Mr. Moseley explained that he believes it was remanded to supplement the record and to address specific issues that the LUC ordered. The Planning Commission's original vote of eight in favor of approval stood, the second vote of four to two was erroneous and it was not a reconsideration. Mr. Moseley still contends that the vote of eight in favor is the vote that controls.

Commissioner Formby commented that the second vote was procedurally flawed and did not get five votes to affirm the original vote. At that time the second vote was taken, it was the Planning Commission's belief that they had to again approve the project and was not informed that they made a mistake until later. They all believed they were voting on the application. Commissioner Formby added that the Planning Commission went back out to the community for additional information and received opposition from the public, but the Planning Commissioners did not have the opportunity to vote on the application again.

Mr. Moseley stated that the Planning Commission has acted and that their original approval of eight in favor was the controlling vote. Mr. Moseley added that any one of the Commissioners could have made a motion to reconsider, but did not. Mr. Moseley noted that a motion was made to approve again, but there were only four votes and their prior approval stood. Mr. Moseley added that he believed there was no precedent, statute, or rule that required the Planning Commission to take a second vote.

Commissioner Im commented that when the LUC denied the application and remanded the matter to the County, it is stated as denied first, then remand, and in a regular judicial system, to deny and remand means that the lower court is to rule on it again. Commissioner Im added that he believed that the intent of the

LUC was to deny first, and that the denial and remand was for the parties to go back and try to gather more information to file it properly again.

Mr. Moseley stated that he believed that deny and remand refers to further proceedings, not about filing a new application. Mr. Moseley added that the LUC order indicates that the LUC may consider the special use permit upon receipt of the complete record of the Planning Commission's proceeding within one year of the date of the order. Mr. Moseley added that he believed that it was not a complete denial.

Commissioner Im stated that logically, it is either approved or not approved. When you want to modify and impose certain conditions in the future because there is not enough information, that is clear, but when you deny there is nothing to modify.

Commissioner Piltz commented that this Commission remanded the application back to the Planning Commission and they discussed the three main points, but did not have a positive vote. Commissioner Piltz asked if the Planning Commission had voted on the new information and materials.

Mr. Moseley commented that the Planning Commission directed that the new material be transmitted to the LUC and the only vote taken was to transmit the record back to this Commission. The eight votes in favor was still the controlling vote in terms of their approval or denial on this matter.

Commissioner Piltz asked if the vote that was taken a vote on a declaratory ruling.

Mr. Moseley replied in the affirmative.

Commissioner Piltz commented that he disagreed with that because the original vote did not include the new information that is coming back to the LUC.

Mr. Moseley commented that the vote by the Planning Commission was that the application be granted. That was the petition for declaratory ruling. Mr. Moseley added that the Planning Commission may have applied its rules inappropriately relating to voting on approval or denial on its July 13, 2000 vote, however, he still believes the applicant's special use permit is still valid. The full record of all proceedings was transmitted to the LUC, remanded back to the Planning Commission to gather more information, then returned to the LUC. Mr.

Moseley noted that at any time, a Planning Commissioner could have made a motion to reconsider, but did not.

Commissioner Formby commented that he has read the transcript of the Planning Commission meeting and it appeared that everyone was confused by the procedure and that there was a lot of uncertainty at the Planning Commission level. Commissioner Formby asked if Mr. Moseley agreed that the power of this Commission cannot be greater than the enabling legislation, the statutory legislation.

Mr. Moseley stated that there are times when enabling legislation is silent and believes that the LUC, in its rule, addressed that.

Commissioner Formby commented that the statutes say that the Commission shall act to approve, approve with modification or deny the petition. A paragraph under 15-15-96(a) says that "Upon determination by the Commission the petition may be remanded to the County Planning Commission for further proceedings." That does not say "also" but "may" be remanded. Commissioner Formby added that the law is subject to interpretation and an interpretation by the Commission may be different from that of Mr. Moseley and/or Movant Hanabusa's.

Mr. Moseley noted that the LUC actually interpreted the law and applied it. They denied the petition and remanded it.

Commissioner Formby asked what would happen if that Commission interpreted the law wrong, made a mistake, and now this Commission wants to correct it. Commissioner Formby asked if they could do that?

Mr. Moseley replied in the affirmative.

Commissioner Contrades asked Mr. Moseley to repeat what the actual language said about the LUC's remand to the Planning Commission.

Mr. Moseley stated that the last sentence said "Accordingly, the LUC may consider the special use permit upon receipt of the complete record of the Planning Commission's proceedings on the remand within one year of the date of this decision and order."



Commissioner Contrades commented that the actual word is “may consider” and that he understood this to mean that the LUC may or may not consider any materials submitted by the Planning Commission. Commissioner Contrades added that there was a denial and that now all this information has come back and it is up to this Commission to determine whether or not to consider it again. If any Commissioner doesn’t want to consider it, they don’t have to.

Mr. Pang stated that this discussion is specifically on the Motion to Intervene and the City opposes the motion. Mr. Pang commented that Movant Hanabusa has cited 1990 71 Haw 332 which she indicated was intervention in the LUC proceeding for special permit, but in that particular case, the intervention occurred at the Kauai County Planning Commission level. This case also reiterates that the LUC views the special use permit proceedings based on the record developed by the Planning Commission, so intervention takes place at the Planning Commission level. Mr. Pang also noted that LUC rules 15-15-95(d) says that parties shall comply with all rules of practice and procedure of the County Planning Commission, so practice and procedure would also include intervention.

Chair Sakumoto noted that the Office of Planning is not a party to a special permit proceeding, but if the other parties do not object, they will be allowed to comment.

Commissioner Kanuha asked the City if the Planning Commission would treat intervention differently on a remand versus an initial petition.

Mr. Pang replied that although he was not the attorney for the Planning Commission, there was a July 13, 2005 public hearing upon the remand. He believed that their rules require intervention 14 days after publication of the public hearing notice. If you complied within the 14 days, the intervention would have been timely enough.

Commissioner Kanuha asked if whether or not this application was a continued application because of the remand or was it treated as a new application because of the denial by the LUC.

Mr. Pang stated that he was unsure as to what the Planning Commission would rule, but that their rules specifically says once the notice goes out, you have 14 days to intervene. Their rules do not distinguish between an original application or a remand.

Commissioner Kanuha asked if the Planning Commission treated this as a continued application or as a new application.

Mr. Pang reiterated that he was not the attorney for the Planning Commission, but upon his review of the reports, he believed that it was a continued matter.

Chair Sakumoto asked the parties if they have any objections to the presentation of comments by the Office of Planning related to the Motion to Intervene.

Mr. Pang stated their objection noting that if the LUC allows a non-party to argue on the motion, then they may have to allow other non-parties to also argue on the motion.

Chair Sakumoto commented that it was a point well taken and that the LUC will give the Office of Planning the opportunity to testify during the public testimony period.

Movant Hanabusa stated that contrary to what they have been told, construction of administrative rules for statutory authority is very clear in Hawaii and that one cannot exceed what the statute allows. In this case, if there was an error in that order, it is not in the public interest to compound that error by continuing on this process. Under the LUC rules, the LUC has only three specific actions to take. A denial is a denial, which would mean that the applicant needs to wait a year. The decision was made on August 12, 2004 and the application, which should have been considered a new application, was filed in April, 2005. Therefore, it violates the rules as to when that application could be filed. Movant Hanabusa added that this proceeding, based upon what the Planning Commission did, is placing this Commission without jurisdiction and therefore, this Commission should not proceed any further.

Movant Hanabusa requested that this Commission deny this petition or decline to consider it, or end these proceedings and have the Applicant begin new proceedings as the law requires. To compound a procedural error does not make it right. Movant Hanabusa noted that either the intervention is timely or more importantly, the LUC is without jurisdiction to hear this any further.

Commissioner Formby commented that regarding the Motion to Intervene, he believed that none of the issues discussed transcends that particular motion and

as far as intervention goes, it is not appropriate at this time. Commissioner Formby then moved to deny the petition to intervene.

Commissioner Kanuha stated that if in fact the Commission does not have jurisdiction, then the matter of the intervention would be moot.

Commissioner Formby accepted that as a friendly amendment and moved that the LUC dismiss this petition for lack of jurisdiction. Commissioner Formby added that this is not an easy motion to make, but believed that if they will err, they should err on the side of protecting due process. If this matter would have been treated differently at the Planning Commission level as a denial, which the transcripts in this case reflects it was, then the LUC does not have jurisdiction to hear this matter today.

Vice Chair Montgomery seconded the motion and added that he supports this motion because it is clear that a full year has not transpired between the first appearance before this Commission and it is important that they follow this rule.

The Commission was polled as follows:

Ayes: Commissioners Formby, Montgomery, Contrades, Im, Kanuha, Piltz, and Sakumoto.

The motion passed with 7 ayes, 1 absent.

Chair Sakumoto noted that from a procedural standpoint, the other motions filed are now moot so they will be deemed denied. Chair Sakumoto added that they will allow public testimony but everyone needs to understand that the LUC has just dismissed this matter. Chair Sakumoto called for a recess and informed the public that the LUC will remain to hear any public testimony, if desired.

Mr. Moseley stated that the Applicant strenuously objects to hearing public testimony and added that the LUC has just determined that they have no jurisdiction and no ability to take public testimony at this time.

Chair Sakumoto noted that as an agenda item, the LUC is obliged to do that.

Mr. Pang stated that the City also objects since the LUC has ruled that they have no jurisdiction on this matter and cannot take any further testimony since the matter is gone.

Chair Sakumoto stated that the LUC will hear any public testimony, although because they have dismissed the matter, it is not a part of the record. It is an agenda item and the LUC has an obligation to do that.

A recess break was taken at 12:00 p.m. Upon reconvening and calling for public testimony, no individual registered a desire to provide public testimony. There was no one left desiring to provide public testimony at this time. The meeting was then adjourned.

*(Please refer to LUC Transcript of March 2, 2006 for more details on this matter.)*