

LAND USE COMMISSION  
MINUTES OF MEETING

April 26, 2007

Hilton Kauai Beach Resort  
4331 Kauai Beach Drive  
Lihue, Kauai, Hawaii

COMMISSIONERS PRESENT: Thomas Contrades  
Lisa Judge  
Duane Kanuha  
Ransom Piltz  
Nicholas Teves  
Reuben Wong

COMMISSIONERS ABSENT: Michael Formby  
Kyong-su Im  
Steven Montgomery

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

Chair Judge called the meeting to order at 10:00 a.m.

ADOPTION OF MINUTES

Chair Judge noted a few corrections on the minutes of April 12, 2007. On page 2, Reimbursement Policy Update section, the last sentence in the paragraph should include the word "policy". Also on page 4, the fourth paragraph should reference "weigh station" instead of a "waste station".

Commissioner Wong moved to adopt the Land Use Commission meeting minutes of April 12 as amended and April 13, 2007. Commissioner Piltz seconded the motion. The minutes of April 12 and 13, 2007 were approved by voice votes.

#### TENTATIVE MEETING SCHEDULE

Executive Officer Anthony Ching reported that the next LUC meeting will include a field trip to the Knudsen Trust project site. Mr. Ching advised the attendees to wear appropriate clothing, (i.e. sturdy shoes and long pants) as the terrain is difficult to traverse.

The Commissioners had no questions for Mr. Ching.

#### SP05-399 KAUAI ATV, LLC (Kauai)

Chair Judge stated that this was an action meeting on SP05-399 Kauai ATV, LLC (Kauai) to receive a status report from the petitioner.

#### APPEARANCES

Walton Hong, Esq., represented Petitioner

Olie Rivera, Manager, Kauai ATV

Michael Tressler, Grove Farms

James Tagupa, Esq., Deputy Corporation Counsel, County of Kauai

Bryan Yee, Esq., represented State Office of Planning

Abe Mitsuda, State Office of Planning

#### Public Witnesses

1. Kalani Kumai Kamaka O Na Alii Hanohano

Mr. Hanohano presented a slide show of pictures taken on the project site. Mr. Hanohano stated that he is an 8<sup>th</sup> generation lineal descendant from Koloa. He noted the importance of the two historical waterfalls in the project area, his opposition to the structure built on the project site without permits, and expounded on the need to protect and preserve this sacred space.

There were no questions posed for Mr. Hanohano by the parties or the Commission.

2. David Whatmore

Mr. Whatmore stated that he is a farmer of 20 years on Kauai and noted his concern about agricultural lands being preserved for agricultural use wherever possible. Mr. Whatmore also noted his concern on public safety, including the recent deaths at waterfalls on Kauai, and the need to respect these lands.

Mr. Whatmore also read the written testimony of Jack Lundgren dated April 26, 2007 regarding his opposition to the stairway at the project site constructed as a scenic attraction for tourists. Mr. Whatmore indicated that he believed that this structure was built too close to the waterfall.

Mr. Hong questioned Mr. Whatmore's testimony regarding the deaths of three people at the waterfalls.

Mr. Whatmore clarified his understanding that these deaths did not occur at any of the waterfalls on Grove Farm property.

After a brief discussion, there were no further questions posed for Mr. Whatmore from the parties or the Commission.

3. Beryl Blaich

Ms. Blaich stated that she was testifying as a concerned individual. Ms. Blaich commented that she has read the special permit several times and did not see any language allowing construction of a structure related to the river activities. Ms. Blaich recommended that no after-the-fact permit be granted for this structure, adding that she believed the structure is in a vulnerable area, inappropriate, and in violation of the LUC special permit granted to them.

Mr. Hong posed a few questions related to public access, safety, and control issues.

After a brief discussion, there were no further questions posed for Ms. Blaich from the parties or the Commission.

A recess break was taken at 10:45 a.m. The meeting reconvened at 11:00 a.m.

### Staff's Report

1. Maxwell Rogers

Mr. Rogers provided a map orientation of the project. Mr. Rogers commented that earlier this month, Senator Hooser sent a letter to the Executive Officer which included several photos that brought to the attention of the LUC staff that a deck and stairs had been constructed which is in violation of the special permit. Mr. Rogers added that staff conducted a site visit to the subject area in the prior week and presented a short video of that site visit to the Commission.

Commissioner Contrades asked if staff had made a determination whether or not the structure was allowed as part of the special permit.

Mr. Rogers stated that the deck and stairs were not included in the applicant's representations made to the Commission as a part of the special permit.

There were no further questions posed for Mr. Rogers by the parties or the Commission.

### Petitioner's Witness

1. Olie Rivera

Mr. Rivera stated that he is the manager of Kauai ATV and familiar with the 2006 annual status report submitted to the LUC in December 2006. Mr. Rivera noted that the staircase and observation deck was constructed by Kauai ATV last July. After 40 plus days of rain, the stairway was constructed and used as part of the waterfall tours as a safety measure. Trash and sanitary efforts are policed for littering and dumping; smoking is also not allowed on the tours. Mr. Rivera added that they are willing to resolve this matter with applications for additional permits, if needed.

Mr. Tagupa posed questions regarding the construction date, county building permit inquiries, height, and cost of the structure.

Mr. Rivera stated that the construction began in July 2006 and that it was his decision to build the stairway due to the heavy rains. Mr. Rivera reported that the construction cost was approximately \$5,000-6,000 in materials with no labor cost, as the structure was built by Mr. Rivera and his brother. Mr. Rivera described the structure as having three landings with cement posts and supports, no grading or cutting into the hillside was done during construction. Mr. Rivera stated that he did not inquire with the county building department nor believed that he needed a permit for this type of structure. Mr. Rivera added that the tourists are at this particular site for approximately 10 minutes then they proceed on to the next stop.

Mr. Yee raised questions in reference to communication between the applicant and the county's planning department, and applying for permits, if needed.

Mr. Rivera stated that he had no discussions with the county department and was waiting for the LUC's decision to apply for a permit, if needed.

Commissioner Piltz raised a few questions regarding the cost and the number of hours to construct the stairway. Commissioner Piltz commented that anything built over \$1000 requires a permit and asked if they had applied for a permit.

Mr. Rivera stated that they did not apply for a permit and noted that the cost was \$5000 and it took them about a month to construct.

Commissioner Contrades had questions and concerns related to digging, tree trimming, plant clearing, etc. upon construction of the structure.

Mr. Rivera noted that the only digging during construction was for the cement footings and that they built around the large Banyan tree so it was not trimmed. The other trees in the area (mountain apples and mango trees) were also not trimmed. Mr. Rivera added that he asked Grove Farms for permission and they agreed that he could perform that work.

Commissioner Kanuha asked if there was a notation of the stairway construction in the annual report submitted to the LUC in December 2006.

Mr. Hong stated that there was no indication of the structure since Mr. Rivera did not think it was a possible violation until he was informed approximately two weeks ago. Mr. Hong added that Mr. Rivera did not believe that he had needed to report it to anyone.

Commissioner Piltz commented that since this is a commercial venture, a licensed contractor should have been hired on work that exceeded \$5,000.

Chair Judge asked for the county's position and role in enforcing the existing conditions of the approval

Mr. Tagupa stated that the county did not have a position at this time and that he had not had a chance to speak with the Planning Director. Mr. Tagupa added that in regards to enforcement, he would need to defer to the Planning Director for their determination whether or not this would require the issuance of permits and the type of permits that this particular structure would require.

### EXECUTIVE SESSION

Commissioner Kanuha 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 Contrades seconded the motion. The motion was approved by voice votes.

The Commission entered into executive session at 11:40 a.m.

The open meeting reconvened at 12:00 p.m.

Commissioner Teves commented that he had concerns related to public safety, especially since the applicant indicated that he did not use a licensed contractor, but built the stairway himself. Commissioner Teves asked the county what efforts they would undertake for public safety in this matter.

Mr. Tagupa stated that the county had a concern regarding public safety and would ask the applicant for a plan. Mr. Tagupa noted that it was too early for the county to say whether it was structurally sound or not, but if the structure is clearly unsafe, then they would ask the applicant to not use the stairway. Mr. Tagupa added that after this meeting, the county would meet with the Planning Director on options regarding the stairway.

Commissioner Kanuha asked as to the levels of liability coverage that the county had, in this case, should there be an accident involving this structure, the lack of appropriate liability coverage could prove costly to the county.

Mr. Tagupa stated that he was not prepared to answer this question, although they could suggest that the applicant volunteer not to use the structure.

Commissioner Contrades moved that the LUC set an Order to Show Cause hearing to show why this permit should not be revoked because of the violations described today. The motion was seconded by Commissioner Teves.

The Commission was polled as follows:

Ayes: Contrades, Teves, Wong, Piltz, Kanuha, and Judge.

The motion passed with 6 yes, 3 absent

Mr. Ching noted that the LUC would return to Kauai next week, after that time, the earliest open date for Kauai would be the second meetings in June.

A lunch recess was taken at 12:10 p.m. The meeting reconvened at 1:35 p.m.

#### DR07-34 BIG ISLAND COUNTRY CLUB HOMES, LLC (Hawaii)

Chair Judge stated that this was an action meeting to consider the Petition for Declaratory Order regarding the extent to which Chapter 343, Hawai'i Revised Statutes, is applicable to the Petition for Land Use District Boundary Amendment in Docket No. A05-762/Big Island Country Club Homes, LLC.

#### APPEARANCES

R. Ben Tsukazaki, Esq., represented Petitioner

Bobbie-Jean Leithead-Todd, Esq., represented County of Hawaii Planning Department

Bryan Yee, Esq., represented State Office of Planning

Abe Mitsuda, State Office of Planning

Chair Judge noted that there were no public witnesses.

Mr. Tsukazaki began his presentation and noted his beliefs in clarifying the language of Chapter 343. Mr. Tsukazaki then read Big Island Country Club Homes' chronology of entitlements.

Ms. Leithead-Todd noted the county's concern regarding subdivision approvals, noting that if it was the position of the state that the county imposed improvements (i.e. re-striping for left-turn lanes) that even when you have existing zoning, it would require an EIS. This would affect many subdivisions.

Mr. Yee noted that the state had five comments: 1) To accept the correction; the petitioner originally intended to build an agricultural subdivision; 2) the OP supports the clarification of the question and had no opposition to a decision whether Chapter 343 applies or not; 3) the OP would defer to the LUC whether Chapter 343 applies; 4) the OP wanted to ensure that the DOT's decision would not be overruled; and 5) the state believes that the LUC is the appropriate forum to resolve this matter. The LUC is simply addressing whether the petitioner needs the EIS.

Commissioner Kanuha questioned when an agency like the DOT makes a determination that an EA is required, who needs to do the EA, the agency or the applicant. Commissioner Kanuha commented that it was his recollection that the agency who makes the call prepares the EA.

Mr. Yee stated that the practice of preparing the EA for petitions that come before the LUC or other agencies are usually done by the applicant.

Chair Judge asked if the county had specifically indicated that an EA was not required for this project.

Ms. Leithead-Todd stated that she was not aware of this and was not involved in this matter until the rezoning occurred. Ms. Leithead-Todd added that it was her recollection that there was no discussion of an EA, as it was basically rezoning from Ag5 to Ag1 and there wasn't a trigger.

Chair Judge posed questions related to the changes in density, if any, and the potential increases in roadway improvements and traffic.

Mr. Tsukazaki continued to discuss the series of permits needed and the construction of a driveway connection road that was built approximately 10 to 13 years ago, and correspondence from the DOT perceived to be an exemption letter.

## EXECUTIVE SESSION



Commissioner Wong 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 Piltz seconded the motion. The motion was approved by a show of hands.

The Commission entered into executive session at 2:45 p.m.

The open meeting reconvened at 3:00 p.m.

Commissioner Piltz moved that the LUC follow Chapter 343-5, HRS and require that an EA is prepared in this matter. The motion was seconded by Commissioner Teves.

Chair Judge noted that in the absence of a ruling from the county or a letter of exemption from the DOT, given the case law, she supports this motion.

The Commission was polled as follows:

Ayes: Piltz, Teves, Wong, Contrades, and Judge.

Nays: Kanuha

The motion passed with 5 yes, 1 no, and 3 absent

Chair Judge noted that the LUC was not ruling on any matter under the jurisdiction of the DOT.

Ms. Leithead-Todd asked if the LUC would be the reviewing agency.

Chair Judge replied in the affirmative.

#### UPDATE TO THE LUC REIMBURSEMENT POLICY

Mr. Ching noted the proposed changes to the Commission's policy. He proposed that the new policy covered proceedings, which included, but were not limited to: Chapter 343 proceedings; prehearing motions; post-hearing action; and reimbursement for both court reporter and audio-visual equipment and services that include appearance fee and other service related costs.

Commissioner Contrades left the meeting at this time.

Commissioner Wong moved to approve the reimbursement policy update as proposed by staff. The motion was seconded by Commissioner Teves.

The Commission was polled as follows:

Ayes: Wong, Teves, Kanuha, Piltz, and Judge.

The motion passed with 5 yes, and 3 absent

A recess break was taken at 3:15 p.m. The meeting reconvened at 3:25 p.m.

#### A05-761 ERIC A. KNUDSEN TRUST

Chair Judge stated that this was a continued hearing to consider the reclassification of approximately 127.490 acres of land currently in the Agricultural District to the Urban District at Poipu, Koloa, Kauai for residential, bicycle and pedestrian path, and archaeological preserve uses.

#### APPEARANCES

Walton Hong, Esq., represented Petitioner

Kimi Yuen, PBR Hawaii

James Tagupa, Esq., represented County of Kauai Planning Department

Dale Cua, county of Kauai Planning Department

Bryan Yee, Esq., represented State of Hawai`i Office of Planning

Lorene Maki, State of Hawaii Office of Planning

Abe Mitsuda, State of Hawaii Office of Planning

Sherry Broder, Esq., represented Intervenor OHA

Chair Judge noted that Commissioner Im has not been present at any of the hearings on this docket and has recused himself. Commissioner Im had indicated that his firm provides services to OHA and did not believe it appropriate for him to participate on this docket.

#### Public Witness

1. Elaine Dunbar

Ms. Dunbar objects to the project and complained of excessive dynamite blasting in the area. She believed this entire area should be classified Conservation to ensure its perpetual protection. The site is historical with documented lava tubes and artifacts are constantly being discovered.

Mr. Hong asked if Ms. Dunbar knew which person(s) were doing the blasting. Ms. Dunbar stated that Ms. Hayes would provide the specifics.

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

2. Terrie Hayes

Ms. Hayes stated that she spoke with someone at Goodfellow Brothers who was doing some waterline work in the area, but not on the project site. Ms. Hayes noted her concern for the area lava tubes, the Waita Reservoir and the lack of open spaces in the Poipu area.

Ms. Hayes read the written testimony of Leslie Pool, member of Hui Malama Kaneiolomana requesting that the area be preserved in perpetuity and that ownership issues should be thoroughly investigated.

Mr. Hong raised a few questions regarding the dynamite blasting, and asked if Ms. Hayes had taken the opportunity to comment on the FEIS.

After a brief discussion the parties and the Commission had no further questions for Ms. Hayes.

3. Ken Taylor

Mr. Taylor stated that he has not lived on Kauai for very long, but has been involved in the planning process and has found the history of development activities interesting. Mr. Taylor discussed the resolution that the Kauai Council approved on April 25, 2007. Mr. Taylor commented that the young people deserve the opportunity to have some idea of the past history on all the islands and that these sites should be preserved and possibly restored. Mr. Taylor hoped that the LUC would make the right decision for the people of the future.

There were no questions posed for Mr. Taylor by the parties or the Commission.

### Admission of new exhibits

Ms. Broder introduced and offered the Kauai County Council's resolution as OHA exhibit 12. There were no objections by the parties. OHA's exhibit 12 was admitted to the record

Ms. Broder noted that copies will be provided to the parties and the Commission by next week.

### Petitioner's Presentation

Mr. Hong reiterated that next week's project site visit would be hot and sunny and reminded the attendees to wear appropriate clothing, sunscreen and to bring water.

### Petitioner's Witness (cross-examination)

#### 1. Hal Hammett

Mr. Tagupa posed questions regarding the archeologists in the fields, the fencing as an interim protection measure, buffer zones, the remapping of the sites using GPS, data recovery field work, the draft long term preservation plan, and the timeline for completion of the entire process.

Commissioner Contrades returned to the meeting at this time.

Mr. Tagupa continued with his questions regarding the 50-foot buffers near significant burial sites, setbacks for irrigation, the appropriate setback for the buildings and landscaping, and the theft of moss rocks.

Mr. Yee posed questions as to the GPS mapping of the archaeological sites, completing the site descriptions for data recovery, and upgrading the descriptions and maps.

A recess break was taken at 4:35 p.m. The meeting reconvened at 4:50 p.m.

Mr. Yee continued to pose questions and referenced the final EIS, exhibit D, page 25 regarding the sites dedicated as preserved, the 1991 report, length of the data recovery, and the proposed timeline to complete work on the project.

Ms. Broder posed questions related to the C-shaped sites designated for preservation and referenced page 79 of the final EIS. Ms. Broder also posed questions about numbered sites that contained *auwai*, burial mounds, and temporary habitats that were proposed to be studied, data recovered, and then demolished. Ms. Broder asked if any of these sites would be reconsidered for preservation and included in the National Historical Register. Ms. Broder also discussed the definitions for cultural significance in categories A, B, C, D, and E.

After some discussion, Chair Judge noted that the LUC would continue with the cross-examination of Dr. Hammett by Ms. Broder at tomorrow's meeting beginning at 8:30 a.m.

The meeting was at recess at 6:30 p.m.

*(Please refer to LUC Transcript of April 26, 2007 for more details on this matter.)*