

LAND USE COMMISSION
MINUTES OF MEETING

August 9, 2007

Leiopapa A Kamehameha
4th Floor
Conference Room 405
235 So. Beretania Street
Honolulu, Hawaii

COMMISSIONERS PRESENT: Vladimir Devens
Howard Hamamoto
Duane Kanuha
Ransom Piltz
Nicholas Teves
Reuben Wong

COMMISSIONERS ABSENT: Thomas Contrades
Michael Formby
Lisa Judge

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

Presiding Officer Kanuha called the meeting to order at 10:55 a.m.

ADOPTION OF MINUTES

Commissioner Hamamoto noted that on the minutes of July 26, 2007, page 3, fourth paragraph, the words “meters and bounds” should be corrected to “metes and bounds”.

Commissioner Teves then moved to adopt the minutes of July 26 and 27, 2007. Commissioner Piltz seconded the motion. The minutes were approved by voice votes.

TENTATIVE MEETING SCHEDULE

Executive Officer Anthony Ching reported the following schedule:

- o August 23 & 24 – the LUC will meet on Lanai to conduct its motion hearing;
- o September 20 – will be a one day meeting on Maui to complete the Emmanuel Lutheran matter;
- o September 21 – the LUC will travel to Kauai for a half-day hearing on the Order to Show Cause. In addition, a site visit to the Kahili Adventist School and status report.

Mr. Ching noted that an open date has appeared on the October 18 & 19 dates. However, although the venue may have changed, the meeting dates would remain the same.

There were no questions for Mr. Ching posed by the Commission.

A06-763 KAPOLEI PROPERTY DEVELOPMENT, LLC (Oahu)

Presiding Officer Kanuha stated that this was a meeting on Docket No. A06-763 Kapolei Property Development, LLC to consider Kapolei Property Development, LLC’s Motion to Dismiss and Strike from the Record, or in the alternative, to Deny the Office of Planning’s Exceptions to Petitioner Kapolei Property Development, LLC’s proposed Findings of Fact, Conclusions of Law, and Decision and Order.

Mr. Kudo stated that at the last hearing in July, he had made a request to reserve time to argue the points raised by public witnesses on the affordable housing matter and that Chair Judge noted that he would be allowed that time. Mr. Kudo questioned whether today's schedule would accommodate that request.

Presiding Officer Kanuha noted that Mr. Kudo would be able to address that matter during his presentation period.

Both the City and County of Honolulu and the State had no questions as to the procedure for this hearing.

APPEARANCES

Benjamin Kudo, Esq., represented Petitioner

Naomi Kuwaye, Esq., represented Petitioner

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

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

Bryan Yee, Esq., represented State Office of Planning

Abe Mitsuda, State Office of Planning

Scott Derrickson, State Office of Planning

Public Witnesses

1. Kimo Kelii

Mr. Kelii stated that he was the office manager for Representative Karen Awana. Mr. Kelii read the written testimony for Representative Awana and noted her support for the project.

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

2. Maeda Timson

Ms. Timson stated that she was a 36 year resident of Kapolei and in support of the project and for its proposed 3,800 well paying jobs in the community.

There were no questions posed for Ms. Timson by the parties or the Commission.

3. Lorraine Martinez

Ms. Martinez stated that she is a Hono Kai Hale resident for the past 35 years and commented that there are more homes than jobs in the area. Ms. Martinez added that this project would bring much needed jobs in the community and noted her support for the project.

There were no questions posed for Ms. Martinez by the parties or the Commission.

4. Pat Chardon

Ms. Chardon stated that she also resides in Hono Kai Hale with her sister and noted that she was not in favor of any housing development in the industrial area. Ms. Chardon added that they already have a lot of affordable housing in their community and noted her support for this project because of the job opportunities it would offer to the Leeward community.

There were no questions posed for Ms. Chardon by the parties or the Commission.

5. Representative Maile Shimabukuro

Representative Shimabukuro noted her support of an affordable housing condition for land use permitting. Representative Shimabukuro also commented on the working homeless population along the Waianae coast.

There were no questions posed for Representative Shimabukuro by the parties or the Commission.

6. Teresa McMurdo

Ms. McMurdo stated that she was testifying on behalf of Hanalei Aipoalani who was unable to be here today. Ms. McMurdo read his testimony in support of the project.

There were no questions posed for Ms. Chardon by the parties or the Commission.

7. Steven Montgomery, Ph.D.

Dr. Montgomery stated that he was a resident of Waipahu and noted his support for the proposed project's well paying jobs. Dr. Montgomery commented on the need for affordable housing in Hawaii and noted his support for a condition of approval that required the developer to contribute affordable housing units in the area.

There were no questions posed for Dr. Montgomery by the parties or the Commission.

Presiding Officer Kanuha noted that as there were no further public witnesses, the Commission would now entertain the petitioner's motion to dismiss.

Petitioner's Presentation on the Motion to Dismiss

Ms. Kuwaye stated that the petitioner stood on the arguments contained in its motion and noted that the OP's exceptions should be dismissed for failure to comply with the LUC's instructions and its own administrative rules. Ms. Kuwaye added that should the LUC decide to not dismiss the exceptions filed by the OP, the petitioner would then reserve arguments on their exceptions until the presentation of Commissioner Teves' order.

Ms. Sunakoda stated that the City took no position on petitioner's motion to dismiss.

Mr. Yee commented that the facts are fairly straightforward and provided a chronology of the filings. Mr. Yee discussed the response deadlines by the parties and added that it is important for the Commission to hear the arguments of all the parties. Mr. Yee argued that to strike the OP's motion would mean that the Commission would not hear the valid concerns of the OP and may make it more difficult for the Commission to come to a decision on this case.

Commissioner Wong asked why the OP filing was late.

Mr. Yee stated that the argument is that OP was required to file a separate decision and order on June 15, 2007. However, the OP filed a response that was dated June 20, 2007. Mr. Yee added that rather than filing a complete findings of fact, they instead pointing out the areas of dispute in their response.

Commissioner Wong then moved that the motion to strike or dismiss the exceptions of OP be denied. The motion was seconded by Commissioner Devens.

The Commission was polled as follows:

Ayes: Wong, Devens, Hamamoto, Piltz, Teves, and Kanuha.

The motion passed with 6 yes, 3 absent.

A recess break was taken at 11:35 a.m. The meeting reconvened at 11:45 a.m.

Petitioner's Presentation

Mr. Kudo began his presentation and stated that initially, the petitioner and the City and County of Honolulu had filed a stipulated order, to which the OP had filed its exceptions. Mr. Kudo added that Commissioner Teves had subsequently filed a proposed order that the petitioner substantially agreed with.

Ms. Sunakoda stated that the City concurs with Mr. Kudo's comments and noted that the City also found it more expeditious to discuss the order prepared by Commissioner Teves.

Mr. Yee noted that the State also agreed that discussion of the order prepared by Commissioner Teves would be the appropriate and efficient way to proceed.

Mr. Kudo clarified that written testimony received by the LUC this morning from Gladys Quinto was submitted for David Arakawa, Executive Director of the Land Use Research Foundation, and was in support of the project and not in support of the imposition of an affordable housing condition.

Mr. Kudo then addressed the various statements received via public testimony by the LUC regarding affordable housing, workforce housing, and the homeless.

Ms. Kuwaye began her presentation regarding the proposed order and stated that petitioner supports the order with one exception, on page 66, condition number 17, to add the word "substantially" so as to read "Petitioner shall substantially complete build out of the Project...". Ms. Kuwaye added that in general, the decision and order conformed to the stipulated order entered into by the petitioner and the city.

Commissioner Wong posed questions regarding the \$596.6 million project development costs and wondered if they had included a 5 to 10% contingency factor. Commissioner Wong commented that if the petitioner had a contingency factor of 5% and did not use it, would it be possible to use it for LEED certification, which was estimated to cost up to 3%.

Ms. Kuwaye commented that she disagreed on the 3% cost figure as she believed that quote was at mainland costs. However, there was nothing introduced by the petitioner or documented in the record to indicate that the 3% cost figures were too low or deflated.

Commissioner Wong commented that the State Legislature has adopted LEED certification in state buildings and recalled previous testimony that although LEED certification would cost an additional 3% initially, the life savings costs would be greater. Commissioner Wong wondered if petitioner was willing to adopt any one of the four LEED certifications (i.e., LEED certification, LEED silver/gold/platinum) for this project.

Ms. Kuwaye stated that she would take no position on that matter and stood by her position that no LEED condition should be imposed in this docket.

Ms. Sunakoda stated that the City had had an opportunity to review Commissioner Teves' order and also reviewed the OP's position statement. Ms. Sunakoda added that the City would be joining orally with the petitioner's statement of position on Commissioner's Teves' order.

Mr. Yee noted that the State wanted to ensure that the findings are balanced with the record and suggested that the order should include findings such as those regarding LEED benefits. Mr. Yee reiterated his concerns that the findings proposed by the OP as it relates to the regional drainage plan, the TIAR and the DOT concerns, aircraft noise, the automatic Order to Show Cause, preservation of the sinkholes, and Kalaeloa Harbor should be included in any order adopted by the LUC.

A lunch recess was taken at 1:10 p.m. The meeting reconvened at 2:10 p.m.

Amendment of the Agenda

Presiding Officer Kanuha noted that agenda item VII - Workshop regarding LEED certification and sustainable development had been postponed to a later date. Presiding Officer Kanuha also noted that item number V, Adoption of Order would be heard after the conclusion of the Kapolei Property Development matter. Presiding Officer Kanuha then entertained a motion to amend the agenda.

Commissioner Wong moved to amend the agenda to hear item V -Adoption of Order after the conclusion of the Kapolei Property Development matter. The motion was seconded by Commissioner Piltz. The motion was approved by voice votes.

Action Meeting (continued)

Commissioner Wong posed a few questions regarding the State's major areas of concern, such as LEED certification and the regional drainage. Commissioner Wong also discussed the approval and permitting process through the other government agencies and the order to show cause provision proposed by the OP.

Presiding Officer Kanuha stated that Commissioner Teves' order had been served on the parties 8 days prior to this hearing. However, he noted that the LUC's rules provide that in computing time, 2 days is typically allowed for the mail to be received. This would require that any proposed order needs to be filed at least 9 days prior to the hearing. Presiding Officer Kanuha then asked the parties if they had any objections to waiving the 7 day rule for service of this order. There were no objections expressed by the parties to waiving the Commission's rule regarding the filing of the proposed order by Commissioner Teves.

Commissioner Teves noted that since he was under the weather at the present time, he requested that the Executive Officer, Mr. Ching, present his decision and order.

Mr. Ching presented the proposed order that was filed with the petitioner and the parties.

As provided for by §15-15-82(b), HAR, Commissioner Teves had filed his own proposed order to ensure that an order, which appropriately conformed to the LUC's decision making criteria and the facts in the record, was efficiently prepared and considered. Using the order stipulated to by the petitioner and the City and County of Honolulu, numerous technical, formatting, and amendments had been made.

Mr. Ching described the major differences between Commissioner Teves' order and that filed by the petitioner and stipulated to by the City and County of Honolulu and also addressed the comments offered by the OP to the proposed order.

Upon the conclusion of Mr. Ching's presentation of the order prepared by Commissioner Teves, Mr. Kudo noted that in light of his inability to speak and also in light of the OP's insistence on the LEED issue, the petitioner requested the opportunity to submit a post hearing brief to address the legal issues surrounding the LEED condition. Mr. Kudo also requested a continuance to allow him to recover his voice and to make his closing statement.

The City had no objection to petitioner's request for deferral.

Mr. Yee noted that the State had an objection because the issue of LEED was heard early in this matter and that if the petitioner was allowed more time for his final argument, then additional time should also be allowed for all parties. Mr. Yee added that they believed that this matter had been concluded and no further briefing or argument would be made by the parties at this time.

Presiding Officer Kanuha stated that the LUC would not permit the post filing of additional information on LEED, however, the presentation of closing arguments by all parties would be permitted. Presiding Officer Kanuha then entertained a motion to adopt Commissioner Teves' order as its own for the LUC's deliberation.

Commissioner Piltz moved to adopt Commissioner Teves' order as its own. The motion was seconded by Commissioner Devens.

Commissioner Wong commented that it appeared to only be a matter of cost for the petitioner to implement the LEED design requirement. At an additional cost of approximately 1 to 3% of building costs, it did not appear to be unreasonable. Commissioner Wong added that the State of Hawaii should be heading towards the development of LEED certified buildings. The LUC recently required the UH West Oahu petition to implement LEED certification although initially they were not implementing any LEED design. Commissioner Wong added that this petition is one of the last major developments on this island. Commissioner Wong stated that since this developer had been made aware of the LEED certification, he found it difficult to support Commissioner Teves' proposed order.

Presiding Officer Kanuha noted that the Chair had declined the post hearing brief request by the petitioner regarding LEED but had deferred the closing arguments for all the parties. Presiding Officer Kanuha noted that this motion would be to adopt Commissioner Teves' order for the purposes of the LUC's deliberation and to defer the adoption until a further date.

Mr. Yee stated that his recollection of the hearing was that the petitioner had, in lieu of presenting rebuttal witnesses, had already given final argument and the other parties had been denied that opportunity allowing to present closing arguments. Mr. Yee added that his objection was not to the parity of all parties to make closing statements, but that the final argument had already been made by the petitioner. The OP is objecting to petitioner making another final argument.

A recess break was taken at 2:50 p.m. The meeting reconvened at 2:58 p.m.

Commissioner Piltz stated that in the matter of adopting Commissioner Teves' order, he withdrew his motion at this time. Commissioner Devens withdrew his second.

Commissioner Wong moved that the LUC continue this matter to another time. Commissioner Piltz seconded the motion. The motion passed with a show of hands.

Deputy Attorney General Diane Erickson and Executive Officer Anthony Ching left the meeting at this time.

A recess break was taken at 3:00 p.m. The meeting reconvened at 3:08 p.m.

DR06-32 MARK J. BENNETT, AS ATTORNEY GENERAL, STATE OF HAWAII (Oahu)

Presiding Officer Kanuha stated that this was a hearing on Docket No. DR06-32 Mark J. Bennett vs. Richard W. Gushman, II, et al., for the adoption of a written order granting an Amended Motion to Dismiss the Amended Petition for Declaratory Order as decided by the Commission at its public meeting on July 13, 2007.

APPEARANCES

Brian Aburano, Esq., represented Petitioner
Katherine Leonard, Esq., represented Intervenor
David Karlen, Special Deputy Attorney General

Presiding Officer Kanuha noted that there were no public witnesses.

Presiding Officer Kanuha then polled the Commissioners who were not present at the July 13, 2007 meeting on their readiness and qualifications to deliberate on this matter. Commissioner Hamamoto and Presiding Officer Kanuha replied in the affirmative and noted that they had reviewed the record in this matter.

Mr. Aburano stated that the AG had filed their written exceptions to the order and added that to the extent that the LUC's decision seeks to replicate the law that was announced in the CARD case decision, the petitioner did not believe that the decision correctly replicates the appropriate standards. The AG had argued that this decision precludes the Commission from considering the AG's petition.

Ms. Leonard noted that they have just received the petitioner's exceptions and noted a few objections to the document. Ms. Leonard stated that their July 2 filing of revised proposed findings of fact, conclusions of law, and decision and order is consistent with the LUC's ruling on July 13, 2007 and that the Intervenor had no objections to the entry of this order.

EXECUTIVE SESSION

Commissioner Teves moved to go into executive session under §92-5(a)(4), Hawaii Revised Statutes, on questions and issues pertaining to the Commission's powers, duties, privileges, immunities and liabilities. Commissioner Piltz seconded the motion. The motion was approved by voice votes.

The Commission entered into executive session at 3:15 p.m.

The open meeting reconvened at 3:35 p.m.

Commissioner Devens had a concern regarding the timing of the response and questioned if the AG had anything else to add other than what Mr. Aburano had already presented today.

Mr. Aburano stated that the AG had been actively involved in this matter and that the order was received by the AG at 4:22 p.m. on Tuesday. The AG had been physically ill and had not had the opportunity to fully review the order. Mr. Aburano added that they did not believe that certain statements and parts of the proposed order stated what the AG believed to be the guidelines in the CARD case.

Commissioner Devens commented that he understood the AG's arguments and questioned if they had any other exceptions to present today.

Mr. Aburano indicated that they did not have anything else.

Commissioner Wong noted his concern on the timing of the document and whether the AG had received it in a timely manner in which to submit a response. Commissioner Wong questioned if there was anything in the proposed order that had caught them by surprise so that if they had more time, they would be able to come up with exceptions.

Mr. Aburano stated that the concern on timing was that the AG had been ill and that Mr. Aburano was unable to consult with the AG on his thoughts. Mr. Aburano added that he assumed that the first 6 pages of the order were the chronological events, but he had not had the time to review the order meaningfully. Mr. Aburano requested that this matter be continued for at least a couple of weeks.

Commissioner Wong then moved to continue this matter to a later available date.

The motion failed for a lack of a second to the motion.

Commissioner Devens referenced page 7, paragraphs 3A and B of the order. Commissioner Devens noted that it is the heart of the order and questioned whether it did not accurately reflect what the LUC had voted on.

Mr. Aburano did agree that the proposed order accurately reflected the substance of the Commission's decision.

Commissioner Devens then moved to adopt the order as presented. The motion was seconded by Commissioner Teves.

The Commission was polled as follows:

Ayes: Devens, Teves, Hamamoto, Piltz, Wong, and Kanuha.

The motion passed with 6 yes, 3 absent.

A recess break was taken at 3:40 p.m. The meeting reconvened at 3:50 p.m.

Deputy Attorney General Diane Erickson and Executive Officer Anthony Ching returned to the meeting at this time.

A87-617 BRIDGE AINA LE`A (Hawaii)

Presiding Officer Kanuha stated that this was a meeting on Docket No. A87-616 Bridge Aina Le`a to receive a status report.

APPEARANCES

Barney Bays, Esq., represented Petitioner

Mike Carroll, Esq., represented Petitioner

Ivan Torigoe, Esq., represented County of Hawaii Planning Department

Bryan Yee, Esq., represented State Office of Planning

Abe Mitsuda, State Office of Planning

Commissioner Devens made a disclosure that his firm was involved in litigation about 5 to 7 years ago with Mr. Paoa (CEO of Aina Le`a) being the opposite party in the matter. The matter was fully resolved and Commissioner Devens stated that this would not affect his ability to be fair and impartial in this matter. The parties had no objections to Commissioner Devens' continued participation.

Presiding Officer Kanuha noted that there were no public witnesses.

Mr. Bays began his presentation and stated that petitioner had filed their annual report with the LUC on July 9, 2007 and briefly reviewed the progress of the project since their January 2007 report. Mr. Bays also discussed petitioner's search for a joint venture partner.

Mr. Bays stated that Aina Le`a is in the process of developing a master planned community with 385 affordable housing units to be completed in Phase 1 of the Villages of Aina Le`a. Mr. Bays described the mass grading on portions of the development site and the permitting process from the state DOH and county public works. Mr. Bays noted that in summary, Aina Le`a has done everything possible and Goodfellow Brothers are ready to mobilize as soon as the mass grading permits have been issued.

Mr. Torigoe stated that both the county planning and housing agencies have been consulted and had no questions at this time.

Mr. Yee posed questions related to the construction of the affordable housing to meet the 2010 occupancy deadline, the contribution of lands to the DOE for educational facilities, and the DOT's fair share transportation improvements.

Commissioner Wong questioned the timeline to secure a development partner for this project.

Mr. Bays stated that DW holds a complicated written option agreement and by October 30, Bridge would know whether DW is a joint venture partner or not. Mr. Bays added that if DW fails as a joint venture partner, then Bridge would try to locate another partner. However, until they are successful, Bridge would continue to fund the Aina Le`a development as it has been in the past. If need to, Bridge could fund the project to full completion of Phase I.

Commissioner Piltz posed questions regarding the affordable housing construction schedule for 2008, and the timeline for the electrical and sewage system.

Commissioner Wong questioned whether the petitioner had contemplated any type of renewable energy such as LEED certification in their conceptual planning stage or given consideration for having the project to go “green”.

Mr. Bays replied in the affirmative. Mr. Bays added that they would provide an equally detailed status report next year as part of their annual report to the LUC.

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

Presiding Officer Kanuha entertained a motion to amend the agenda to meet in executive session to consider a personnel matter.

EXECUTIVE SESSION

Commissioner Piltz moved to go into executive session pursuant to § 92-5(a)(2), Hawaii Revised Statutes, to consult with the board’s attorney on questions and issues pertaining to the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy would be involved; provided that if the individual concerned requests an open meeting, an open meeting shall be held. The motion was seconded by Commissioner Teves.

The Commission entered into executive session at 4:25 p.m.

The open meeting reconvened at 4:40 p.m.

The meeting adjourned at 4:40 p.m.

(Please refer to LUC Transcript of August 9, 2007 for more details on this matter.)