

LAND USE COMMISSION
MINUTES OF MEETING

September 20, 2007

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

COMMISSIONERS PRESENT: Thomas Contrades
Vladimir Paul Devens
Duane Kanuha
Ransom Piltz
Reuben Wong

COMMISSIONERS ABSENT: Lisa Judge
Nicholas Teves, Jr.

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

Presiding Officer Kanuha called the meeting to order at 11:40 a.m.

SP05-399 KAUAI ATV, LLC (Kauai)

Presiding Officer Kanuha stated that this was an Order to Show Cause hearing of the Land Use Commission on Docket No. SP05-399 Kauai ATV, LLC (Kauai).

APPEARANCES

Walton Hong, Esq., represented Petitioner
Marleny Cotrim, Kauai ATV
James Tagupa, Esq., Deputy Corporation Counsel, County of Kauai
Michael Laureta, County of Kauai, Department of Planning

Presiding Officer Kanuha noted that the State Office of Planning was not a party to this special permit proceeding.

Public Witness

1. Cheryl Lovell-Obatake

Ms. Lovell-Obatake stated that she is a member of the Nawiliwili Bay Watershed Council and commented on her concerns regarding the depreciation of water in the area. Ms. Lovell-Obatake recommended that an investigation be conducted that involves a cultural impact assessment because the project encompasses a large portion of property.

There were no questions posed for Ms. Lovell-Obatake by the parties or the Commission.

2. David Whatmore

Mr. Whatmore stated that he has read the transcripts of the meetings and noted that he was not aware that the LUC had made a decision to narrowly limit discussion of the OSC hearing to the stairway. Mr. Whatmore added that a lot of the other issues were brought up before this motion and believed that all issues should be wrapped up together towards a decision.

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

Petitioner's Witness

1. Marleny Cotrim

Ms. Cotrim stated that she is the manager of Kauai ATV and was presenting testimony on behalf of her father, Olegario Rivera, due to a potential language difficulty. Ms. Cotrim stated that the stairway was built initially for their tours to have a safe passage and a viewing point. Ms. Cotrim noted that they understood that they were in error in building the stairway without permits and added that this was not done maliciously. Ms. Cotrim added that they have since removed the staircase and has done everything necessary to rectify the problem. Ms. Cotrim noted that Kauai

ATV has made a commitment to their employees, who depend on the business as a source of income for 50 families.

Mr. Tagupa asked how many footings had been left in the ground.

Ms. Cotrim stated that there were approximately 2-3 footings left, which are 24 inches into the ground. Ms. Cotrim added that should the county request the removal of these footings, then Kauai ATV is willing to remove them.

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

Mr. Tagupa clarified whether the only issue for today is the offending structure and that the LUC would not consider anything other than the alleged violation.

Presiding Officer Kanuha replied that this was correct.

Mr. Tagupa noted that the county's position is that they believed that since Kauai ATV has removed the offending structure, the county had nothing further on this matter.

Commissioner Wong asked if the stairways would have violated any county ordinance and if the county was ever aware of this before the LUC.

Mr. Tagupa stated that the structure would have been a violation as a building permit would have been required. However, the county was not aware of this until it was brought to the attention of this Commission. The county could have enforced it, but took no action in this matter.

County's Witness

1. Michael Laureta

Mr. Laureta stated that he is employed at the county's Planning Department. Mr. Laureta stated that the applicant came to the department after the last LUC meeting and the county had recommended the removal of the illegal structure. Mr. Laureta noted that the county also recommended that the applicant contact the State Historical Preservation Division.

Commissioner Wong noted that the county could have issued a citation to compel the landowner to remove the stairs, then this matter would not have come before the LUC.

Mr. Laureta stated that this matter could possibly have been handled on the county level. Mr. Loreda added that the applicant could have also come in for an after the fact permit which also could have resolved the problem.

Mr. Hong posed questions related to the practice of the county upon receiving notification of a potential violation and the conducting of field inspections. Mr. Hong asked if the county was satisfied with the voluntary removal of the staircase in this matter.

Mr. Laureta replied in the affirmative.

Commissioner Contrades commented that he had attended the site visit and was satisfied with the removal of the staircase. Based upon the information that had been presented, it appeared that the un-permitted stairway has been removed. There does not appear to be any un-permitted activity and that there is insufficient evidence at this time to show that petitioner has failed to comply with the conditions imposed or the representations of the petitioner. Therefore, Commissioner Contrades moved that the Order to Show Cause hearing be dismissed. The motion was seconded by Commissioner Devens.

Commissioner Wong commented that this matter should have never come before the LUC. As the enforcing agency, the county should have had the power for the removal of the staircase.

The Commission was polled as follows:

Ayes: Contrades, Devens, Wong, Piltz, and Kanuha.

The motion passed with 5 yes, 2 absent.

A recess break was taken at 12:10 p.m. The meeting reconvened at 12:15 p.m.

SP87-364 KAHILI ADVENTIST SCHOOL (Kauai)

Presiding Officer Kanuha stated that this was a meeting on Docket No. SP87-364 Kahili Adventist School to receive a status report.

APPEARANCES

Mark Valencia, Esq. represented Petitioner

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

Michael Laureta, county of Kauai, Department of Planning

Bryan Yee, Esq., represented State Office of Planning

Abe Mitsuda, State Office of Planning

Mr. Lyle Ishida stated that he was appearing today on behalf of Mr. Tom, who represents the owners of the property, the Knudsen Trust.

Presiding Officer Kanuha stated that although Mr. Ishida was representing Mr. Tom, Mr. Tom or his client was not a party to this proceeding.

Public Witness

1. Steve Kiyono

Mr. Kiyono stated that he was the District Engineer of the State's DOT Highways on Kauai. Mr. Kiyono stated that he was representing the agency and noted their concerns regarding the conditions imposed at the time of the approval for this docket that were not fulfilled. Mr. Kiyono noted their concerns regarding the left turn lanes, acceleration and deceleration lanes, runoff onto the highway, and the ponding of water in a depression along the shoulder, makai of the school's roadway entrance, that creates a safety hazard.

Mr. Valencia stated that the petitioner is requesting a continuance since many of the petitioner's employers were recently hired and lacked any historical background. Mr. Valencia had no questions for Mr. Kiyono.

Mr. Tagupa stated that the county had no questions for the petitioner.

Mr. Yee wondered if these issues were ever raised with the owners of the property.

Mr. Kiyono stated that the concern of the runoff has been brought to their attention.

Commissioner Wong posed questions regarding the landowner and/or the state's jurisdiction to prevent the runoff onto the highway, and the left turn movements that create a depression from vehicles turning to access the school's roadway.

Commissioner Wong commented that rather than have the LUC correct these concerns, why could or could not the DOT enforce these improprieties.

Mr. Kiyono stated that the essence of his testimony was that the conditions have not been fulfilled and that it was the LUC who had imposed these conditions.

Commissioner Piltz commented that the D&O was passed in 1987 and stated that there should be some improvements made. Commissioner Piltz questioned if the issues that were described were the matters that the DOT wants to see addressed.

Mr. Kiyono replied in the affirmative and added that all they are asking for is that the petitioner do what they were compelled to do by the Commission's order.

Presiding Officer Kanuha asked whether the improvements to the interior roadway and the highway were done at the time of the approval, would the DOT have these problems as seen today.

Mr. Kiyono replied that the concerns would have been alleviated. Mr. Kiyono added that the depression is at a level where it constitutes a public health and safety hazard. Remediation would be to fill that hole with proper backfill material. The depressions have deteriorated and progressively worn over time. This situation is caused by vehicles going around other vehicles who are waiting to turn left onto the property rather than from runoff and/or drainage issues related to the access road.

Commissioner Wong posed questions related to the depression and wondered if this problem should be resolved by the government or the private landowner.

Mr. Kiyono stated that it usually is the landowner's responsibility to resolve the problem and it is handled through the land use process. It is highly unlikely for the DOT to improve a private roadway. Mr. Kiyono added that the essence of his

testimony was that the petitioner came before the LUC to ask for an approval and in the normal course of action, the LUC asked for reviews. As a part of the review process, the DOT had made some recommendations. Today, the DOT is asking that the petitioner comply with these conditions of approval.

Commissioner Devens questioned whether there were any short term remedies discussed with the land owners or the school to address these safety problems.

Mr. Kiyono stated that they had met with the owner's trustee who had assured him that they would do what they need to do with their lands.

Petitioner's Presentation

Mr. Valencia requested that the status report be continued to another meeting due to a large turnover with the school and with the Hawaii Seventh Day Adventist. They have a new principal, park manager, and superintendent of education. Mr. Valencia noted that the school and the landowner are in active litigation and asked that the LUC be sensitive to the matter and also allow the time needed to consult with the county and the DOT because the petitioner had not been aware of these complaints.

Mr. Tagupa stated that the county had no objections to the continuance.

Mr. Yee commented that although the applicant has not complied to the conditions of their permit, the state had no objections for a continuance.

A recess break was taken at 12:50 p.m. The meeting reconvened at 12:55 p.m.

Presiding Officer Kanuha asked the length of time that the petitioner was requesting for continuance.

Mr. Valencia stated that the person with the most institutional knowledge is on the mainland receiving medical treatment and would return at the end of next month. Mr. Valencia added that they would be ready in November.

Presiding Officer Kanuha commented that based on that timeframe, he was inclined to grant the continuance.

Commissioner Wong asked whether the issues raised today by the DOT were items of discussion in the lawsuit.

Mr. Valencia commented that the roadway was not a subject of litigation, however, the failure of the school to comply with the conditions of the special permit is a basis of termination for the lease. That issue is on appeal.

Commissioner Contrades commented that the LUC approved this docket with conditions at the request of the County's Planning Commission. Commissioner Contrades stated that these issues were before the county and should have gone to the county, not before the LUC. Commissioner Contrades then moved to grant the request of the petitioner and continue the status report on the island of Kauai.

Presiding Officer Kanuha noted that there is no motion needed and granted a continuance until November of this year.

The meeting adjourned at 1:00 p.m.

(Please refer to LUC Transcript of September 20, 2007 for more details on this matter.)