

LAND USE COMMISSION
MINUTES OF MEETING

March 6, 2008

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

COMMISSIONERS PRESENT: Kyle Chock
Thomas Contrades
Lisa Judge
Duane Kanuha
Normand Lezy
Ransom Piltz
Nicholas Teves
Reuben Wong

COMMISSIONERS ABSENT: Vladimir Devens

STAFF PRESENT: Diane Erickson, Deputy Attorney General
Rodney A. Maile, Interim Executive Officer
Bert Saruwatari, Staff Planner
Sandra Matsushima, Chief Clerk
Holly Hackett, Court Reporter
Walter Mensching, Audio Technician

Chair Judge called the meeting to order at 11:10 a.m.

ADOPTION OF MINUTES

Commissioner Wong moved to adopt the minutes of February 21, 2008. Commissioner Contrades seconded the motion. The minutes were approved by voice votes.

TENTATIVE MEETING SCHEDULE

Chair Judge stated that the next meeting would be held in Kona on March 19 and 20, Wednesday and Thursday, not Thursday and Friday as indicated on the schedule. In addition, the first April meetings would also be held in Kona.

Chair Judge noted a change in sequence to the agenda. The LUC would be taking the petition for intervention first. Chair Judge noted that because the Ms. Hanabusa and the Ko Olina Community Association (KOCA) were granted intervenor status at the Planning Commission level, and based on the decision in the case of *In the matter of Maha`ulepu v. the Land Use Commission (1990)*, the LUC should treat the Intervenor below as having intervenor status before the LUC. Chair Judge then entertained a motion to recognize Ms. Hanabusa and the KOCA as Intervenor in this docket, SP87-362 Department of Environmental Service, City and County of Honolulu, Waimanalo Gulch.

Commissioner Chock then moved to recognize Ms. Hanabusa and the KOCA as the Intervenor and deny the current petition for intervention. The motion was seconded by Commissioner Wong.

The Commission was polled as follows:

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

The motion passed with 8 yes, 1 absent.

DR08-35 DEPARTMENT OF ENVIRONMENTAL SERVICES (Oahu)

Chair Judge stated that this was a meeting on Docket No. DR08-35 Department of Environmental Services, City and County of Honolulu (Oahu) to consider the

Petition for Declaratory Orders and Request for hearing filed by KOCA and Colleen Hanabusa.

Chair Judge noted that this proceeding was presently not a contested case proceeding. Under the LUC's rules, namely §15-15-100, 101, and 102, the Commission had the following options: 1) to grant a petition for declaratory order; 2) to denying a petition for declaratory order; 3) to refuse to issue a declaratory order; or 4) to set the matter for hearing. Only if the Commission chooses the fourth option, to set the matter for hearing, will there be a contested case. At this time the LUC will afford the opportunity to present argument to assist the LUC in choosing one of the options.

APPEARANCES

Gary Takeuchi, Esq., represented the City and County of Honolulu, Department of Environmental Services

Eric Takamura, City and County of Honolulu, Department of Environmental Services

Colleen Hanabusa, Esq., representing herself and the KOCA as Intervenors

Ken Williams, KOCA

Chair Judge noted that at that time, there were no public witnesses for this agenda item.

Petitioner's Presentation

Ms. Hanabusa began her presentation and argued that the LUC did not have the authority to modify the Special Permit; the record before the LUC is what their decision would be based upon; and that the LUC's rules and statute requires that it be strictly construed and cannot use district boundary amendment rules for that purpose.

Mr. Takeuchi noted that the arguments raised by Ms. Hanabusa have no bases, are redundant and simply a tactic to delay the proceeding. Mr. Takeuchi stated that the grade modification has been met and requested that the LUC take official notice of the DOH approval. All necessary disclosures have been satisfied. Mr. Takeuchi added that the matter before the LUC today had not changed, had no additional impacts, and that the city was only asking for an extension at this time.

Petitioner's Rebuttal

Ms. Hanabusa referenced and discussed Chapter 205-6 (d) related to jurisdiction, the special permit's expedited process, and the contested case hearing.

Mr. Takeuchi discussed the special permit for land area greater than 15 acres subject to LUC's approval, and the contested case hearing conducted at the Planning Commission's level. Mr. Takeuchi added that he believed that the LUC is allowed to take action and requested that the LUC deny these petitions.

Commissioner Lezy raised questions regarding §15-15-95(e) modification of a special permit, and the authority of the Planning Commission.

EXECUTIVE SESSION

Commissioner Wong moved to go into executive session pursuant to § 92-5(a)(4), Hawaii Revised Statutes, to consult with the board's attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities and liabilities. Commissioner Chock seconded the motion. The motion was approved by a show of hands.

The Commission entered into executive session at 12:15 p.m.

The open meeting reconvened at 1:15 p.m.

A recess break was taken at 1:15 p.m. The meeting reconvened at 2:10 p.m.

Chair Judge reconvened the meeting and entertained a motion that the LUC take the petition for declaratory orders and request for hearing under advisement at this time.

Commissioner Contrades then moved to take the declaratory orders and request for hearing under advisement. The motion was seconded by Commissioner Piltz.

The Commission was polled as follows:

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

The motion passed with 8 yes, 1 absent.

SP87-362 DEPT. OF ENVIRONMENTAL SERVICES, CITY & COUNTY OF HONOLULU – WAIMANALO GULCH (Oahu)

Chair Judge stated that this was a meeting on Docket No. SP87-362 Department of Environmental Services, City & County of Honolulu (Oahu) to consider the Amendment to Special Use Permit File No. 86/SUP-5 to Extend Deadline Requiring Cessation of Waste Acceptance at Waimanalo Gulch Sanitary Landfill (WGSL) Tax Map Key 9-2-3: Por. 72 and Por. 73, Honouliuli, Ewa, Oahu.

APPEARANCES

Gary Takeuchi, Esq., represented the City and County of Honolulu, Department of Environmental Services

Eric Takamura, City and County of Honolulu, Department of Environmental Services

Colleen Hanabusa, Esq., representing herself and the KOCA as Intervenors

Ken Williams, KOCA

Public Witnesses

1. Ralph Harris

Mr. Harris previously submitted his written testimony and stated that he represented himself as an individual homeowner and also represented the 280 members of the Koolina Association. Mr. Harris noted his objection to the extension request.

Mr. Takeuchi stated that he had no questions. However, as noted at the previous meeting, the LUC makes its decision on the record below.

2. Mike Nelson

Mr. Nelson stated that he was the Vice President of Koolina Resort and noted his objections to the extension.

Mr. Takeuchi noted his standing objection.

3. Israel Qalo

Mr. Qalo commented that he had previously submitted his written testimony. Mr. Qalo stated that he is the Supervisor of the Koolina Aloha Team and discussed his opposition to the extension of the landfill.

Mr. Takeuchi noted his standing objection and reiterated that the matters before the LUC should be decided upon the record below and that anything else was irrelevant.

4. Greg Nichols

Mr. Nichols stated that he was the Director of Koolina Golf Club and commented on his objections to the extension of the special permit.

Mr. Takeuchi noted his standing objection.

5. Pele Toomata

Mr. Toomata stated that he was a Kai Homes resident and commented on his objections to the extension and discussed the efforts of his neighbors in keeping the area clean.

Mr. Takeuchi noted his standing objection.

6. Russell Duong

Mr. Duong stated that he was an employee of Koolina and noted his concerns regarding the odor and the trucks not following safety rules.

Mr. Takeuchi noted his standing objection.

Chair Judge commented that there were no other public witnesses.

Chair Judge stated that due to the time sensitive nature of the proceedings and that the Commission had read all the motions for this matter, she entertained a motion to take the issues of the motion to dismiss and official notice under advisement.

Commissioner Contrades then moved to take the motions under advisement. The motion was seconded by Commissioner Teves.

The Commission was polled as follows:

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

The motion passed with 8 yes, 1 absent.

Chair Judge noted that the LUC would now hear from the parties regarding the amendment to the special permit.

Petitioner's Presentation

Mr. Takeuchi began his presentation and provided a brief summary of the special permit's history. Mr. Takeuchi briefly discussed a future expansion request, but noted that this matter was not before the LUC today, rather the request for an extension of time on the special permit, which had been approved by the city's Department of Planning and Permitting and the Planning Commission.

Ms. Hanabusa raised concerns related to capacity in the ash mono fill, and the notice of violations. Ms. Hanabusa discussed Chapter 205-6 HRS, and §15-15-95 and 96 HAR, and continued to reiterate their opposition to the extension and future expansion.

Mr. Takeuchi urged the LUC to look at the record, as he believed that some of the arguments made today by the intervenor were not in the record before them. Mr. Takeuchi added that the record would show that the Planning Commission had a firm basis and approved the application based on the record.

Ms. Hanabusa continued to discuss issues of stability at the landfill, the berms mandated by the DOH, and the capacity limits.

A recess break was taken at 3:00 p.m. The meeting reconvened at 3:15 p.m.

Commissioner Wong raised questions to Mr. Takeuchi regarding the May 2008 deadline and questioned what the city's administration or council would do if this extension was denied.

Mr. Takeuchi stated that the city would be forced to accept waste in violation of the permit and would need to seek emergency authority, as there is no other landfill permitted to accept this waste on the island of Oahu. Mr. Takeuchi added that the city is attempting to solicit bids to ship some of the waste and that the procurement had begun.

Commissioner Chock posed questions regarding the numerous fines the operator had received for violations.

Mr. Takeuchi noted that previous management at the facility was not acceptable and that they have since complied with all of the violations. The current position of the city is that the problems have been addressed and they are moving forward. Mr. Takeuchi added that it is a well run facility and poses no public health and safety problems.

Commissioner Lezy raised questions regarding the extension request, the LUC's 2003 order, the city council's selection of a new site, the proposed expansion, specific conditions that the landfill would close in five years, the proposed third boiler at H-Power, and the city's position to reduce waste, recycling, and utilizing alternative technologies.

Petitioner's Witness

1. Eric Takamura

Mr. Takamura stated that he was the Director of the Department of Environmental Services (DES), City and County of Honolulu.

Ms. Hanabusa stated that she was not objecting to the testimony of Mr. Takamura. However, the LUC was bound by its rules to only consider the testimony that was on the record below from the Planning Commission.

Mr. Takamura stated that they have a 25-year solid management waste plan and have looked at all the technologies available. Mr. Takamura discussed the waste to energy program, island community recycling program, and the tonnage of MSW and other waste.

Chair Judge noted that in the record, there was a letter from the Mayor regarding the recycling program in four neighborhoods and wondered if this was an island wide program.

Mr. Takamura noted that presently it is not island wide. The city has been working towards neighborhood recycling programs. Mr. Takamura discussed a pilot study in Mililani and Hawaii Kai.

Chair Judge commented that she understood that the intention of the DES was to return to the LUC in the future for an expansion of another 92 acres. Chair Judge wondered if the city was intending to seek an amendment, a new special permit, or a district boundary amendment for this 92 acre expansion.

Mr. Takeuchi stated that the request would be an amendment to the current special permit to increase the footprint so that the upper part of the gulch could be developed into the remainder of the landfill.

Vice Chair Kanuha posed questions related to condition number 12 of the LUC's 2003 order regarding restrictions from accepting any additional waste material and closure of the landfill in accordance with an approved closure plan within the five-year extension.

Commissioner Wong raised questions regarding the city council's support of the extension and proposed expansion.

Commissioner Chock wondered if the city was confident on the ability to move forward on condition number 18, to use alternative technologies to provide a comprehensive waste stream management program that includes H-Power, plasma arc, plasma gasification, and recycling technologies.

Commissioner Piltz asked for clarification on the amount of ash mono fill that goes to the landfill from the H-Power plant.

Mr. Takamura stated that approximately 90,000 to 95,000 tons of ash mono fill and another 90,000 tons of residue goes to the landfill per year; a total of 180,000 tons. Mr. Takamura further discussed the need to control the waste flow and the possibility of shipping some of the waste.

A recess break was taken at 4:25 p.m. The meeting reconvened at 4:40 p.m.

Chair Judge noted that the LUC would go into deliberation on the record before them.

EXECUTIVE SESSION

Commissioner Lezy moved to go into executive session pursuant to § 92-5(a)(4), Hawaii Revised Statutes, to consult with the board's attorney 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 a show of hands.

The Commission entered into executive session at 4:45 p.m.

The open meeting reconvened at 5:45 p.m.

Chair Judge entertained a motion to the Request for Official Notice filed by the DES, City and County of Honolulu.

Commissioner Lezy moved to deny the applicant's Request for Official Notice. The denial be based on the fact that the evidence cited in the request was not a part of the record in front of the Planning Commission and that the substance did not meet the requirements of §15-15-63(k), HAR. The motion was seconded by Commissioner Chock.

The Commission was polled as follows:

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

The motion passed with 8 yes, 1 absent.

Chair Judge entertained a motion to deny the Motion to Dismiss filed on February 15, 2008 by Ms. Hanabusa and the KOCA. The denial be based on the fact that the approval of the DOH was not a precondition based upon the language of the condition and the LUC has the authority to modify their orders including the right to approve time extension and the LUC's interpretation of §15-15-95(e), HAR.

Vice Chair Kanuha moved to deny the Motion to Dismiss. The motion was seconded by Commissioner Piltz.

The Commission was polled as follows:

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

The motion passed with 8 yes, 1 absent.

Chair Judge entertained a motion to the Amendment to the Special Use Permit in Docket No. SP87-362 Department of Environmental Services, City & County of Honolulu – Waimanalo Gulch.

Commissioner Teves moved to approve the amendment and grant the extension for two-years. The motion was seconded by Commissioner Contrades.

Commissioner Lezy commented that he could not agree with the motion as framed. Commissioner Lezy noted that his personal belief was that the application for amendment should be denied because the prior order was clear that the extension was granted with the understanding that the permit would expire in five years and during that time frame, the DES was to arrange to reduce the waste stream going to the landfill. Commissioner Lezy added that he did not believe that the DES showed a good faith effort to comply with these conditions.

Commissioner Chock concurred with Commissioner Lezy and noted that based on the record before the LUC, he could not support the two-year extension.

Vice Chair Kanuha noted that he found it troublesome that by the granting of this extension, it would basically allow more time for the EIS process for the sole purpose of completing the EIS application to perpetuate this landfill.

Commissioner Wong noted that he also shared some of the same concerns as the fellow commissioners. However, there is a need to be practical and to also recognize the health, welfare, and safety of the people. Should this request be denied, there is no place for the waste to go. Commissioner Wong urged the commissioners to approve a one-year extension and have the city demonstrate a true bono fide effort to do something about the solid waste.

Commissioner Piltz commented that to extend the permit for another two years without a solid plan for the future was difficult for him to support. Commissioner Piltz

noted that he could support the one-year extension, as suggested by Commissioner Wong.

Chair Judge echoed on the sentiments of the commissioners and suggested a few conditions. 1) The LUC will not accept any further amendments to the Special Permit and will not grant any further time extensions. 2) Within one year, the DES will submit to the LUC an approved closure plan for the Waimanalo Gulch sanitary landfill.

Vice Chair Kanuha had a few concerns related to the proposed expansion of 92 acres as an amendment to this special permit and wondered what the default procedure would be should the city not amend this permit.

Chair Judge noted that the city could apply for a new special permit or it may be more appropriate to go through the district boundary amendment process.

Vice Chair Kanuha commented that he would generally support home rule or government rule at the lowest levels. However, this particular project has grown to the extent that it is way more than the intent of what the special permit was designed for. This situation is of such a concern that it is clearly into the areas of public health, safety, and welfare issues.

EXECUTIVE SESSION

Commissioner Wong moved to go into executive session pursuant to § 92-5(a)(4), Hawaii Revised Statutes, to consult with the board's attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities and liabilities. Commissioner Chock seconded the motion. The motion was approved by a show of hands.

The Commission entered into executive session at 6:05 p.m.

The open meeting reconvened at 6:25 p.m.

Chair Judge clarified the friendly amendment of the two conditions to the motion.

Commissioner Lezy reiterated that as noted in his prior position, he believed that the appropriate course of action today is to deny the application in its entirety.

Commissioner Lezy added that he did not believe that the motion as it stands addresses the representations and the promises that the applicant made in the prior order in 2003. He encouraged his fellow commissioners to reconsider this motion.

Commissioner Wong noted that to grant a two-year extension would be merely to defer the matter for another two years and that the LUC would be faced with the same issue again; yet to deny it would be a draconian action. Commissioner Wong suggested that the LUC extend for one year to allow the city more time to collectively decide what it would do and to see whether there is any political will by the administration and by the city council.

Commissioner Teves noted that it was his intension to vote on his initial motion and if it fails, then Commissioner Wong could make a new motion based on his one year proposal.

Chair Judge offered a friendly amendment to Commissioner Teves' motion that the DES will submit to the LUC an approved closure plan for the Waimanalo Gulch Sanitary Landfill (WGSL). The DES must also obtain approval of its pending grade modification request for the WGSL from the State's Department of Health.

Commissioner Teves replied in the affirmative to accept the friendly amendment to his motion.

Commissioner Contrades seconded the motion as amended.

The Commission was polled as follows:

Ayes: Teves, Contrades, Judge, and Piltz.

Nays: Chock, Lezy, Kanuha, and Wong.

The motion failed with 4 yes, 4 no, and 1 absent.

Commissioner Wong then moved to adopt the Planning Commission's recommendation with a one year extension. The date to be changed from May 10, 2010 to May 1, 2009.

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

Commissioner Lezy moved to deny the application to amend the special permit. The motion was seconded by Commissioner Chock.

Commissioner Wong stated that this is a draconian action that places the amount of solid waste on the streets and is a public health and safety concern. He urged his fellow commissioners to not grant this motion.

Commissioner Teves commented that if the LUC approves this motion, they were not punishing the city, but rather the people of Oahu. Commissioner Teves added that this was not fair to the people.

The Commission was polled as follows:

Ayes: Chock, Lezy, and Kanuha.

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

The motion failed with 3 yes, 5 no, and 1 absent.

A recess break was taken at 6:35 p.m. The meeting reconvened at 6:45 p.m.

Chair Judge noted that due to the time of day and the status of its deliberations, the LUC would recess till tomorrow morning and take a fresh start. Chair Judge also noted that the LUC would not be meeting in the 2nd Floor conference room as indicated on the agenda, but would continue to meet in the 4th Floor conference room.

The meeting was at recess at 6:45 p.m.

(Please refer to LUC Transcript of March 6, 2008 for more details on this matter.)