

LAND USE COMMISSION
MEETING MINUTES

July 16, 2009

Leiopapa A Kamehameha
Conference Room 405, 4th Floor
235 S. Beretania St.
Honolulu, Hawai`i

COMMISSIONERS PRESENT: Duane Kanuha
Ransom Piltz
Vladimir Devens (arrived at 9:25 a.m.)
Kyle Chock
Reuben Wong
Nicholas Teves, Jr

COMMISSIONERS ABSENT: Lisa Judge
Thomas Contrades
Normand Lezy

STAFF PRESENT: Orlando Davidson, Executive Officer
Diane Erickson, Deputy Attorney
General
Bert Saruwatari, Staff Planner
Riley Hakoda, Staff Planner

COURT REPORTER: Holly Hackett

AUDIO TECHNICIANS: Mikel Humerickhouse

CALL TO ORDER

Chair Kanuha called the meeting to order at 9:12 a.m.

ACTION

SP08-402 DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, COUNTY OF MAUI (Maui)

Chair Kanuha announced that this was an action meeting to consider a special use permit for a portion of the existing Hana Landfill and an encroachment area on approximately 20.005 acres of land within the State Land Use Agricultural District at Hana, Maui, Hawaii

APPEARANCES

Tracy Takamine, Division Chief of Solid Waste, County of Maui Department of Environmental Management
Bryan C. Yee, Esq., represented the State Office of Planning

PUBLIC TESTIMONY

There was no public testimony in this matter.

Bert Saruwatari, staff planner, provided a synopsis of the staff report, including a summary of the Special Use Permit application, the background of the Hana Landfill, and staff recommendations. There were no questions on the staff report.

Mr. Takamine stated that he did not have a formal presentation since it had been done at the February 19, 2009 meeting on Maui and requested approval of this special use permit since it was needed to obtain an operations permit with the Department of Health to continue functioning.

Mr. Yee stated that OP had no opposition to the permit.

Commissioner Piltz moved to grant the permit. Commissioner Teves seconded the motion. Commissioner Wong asked if Commissioner Piltz meant to include acceptance of the staff recommendation on the conditions. Commissioner Piltz affirmed that was his intent. Commissioner Piltz restated his motion to accept all of the staff recommendations. Commissioner Teves seconded the motion. There were no further comments or discussion on the motion.

The Commission was polled as follows:
Ayes: Commissioners Piltz, Chock, Wong, Teves and Chair Kanuha. The motion passed 5-0 with 4 excused.

The Commission went into recess at 9:22 a.m. Commissioner Devens arrived at 9:24 a.m.; Commissioner Wong recused himself at 9:22 a.m.

The Commission reconvened at 9:25 a.m. Chair Kanuha announced that Commissioner Wong had recused himself and Commissioner Devens had arrived to participate in the hearing.

CONTINUED STATUS REPORT

DR08-36 KO OLINA DEVELOPMENT, LLC

Chair Kanuha announced that this was a meeting on Docket No. DR08-36 Ko Olina Development Company to receive a status report from Petitioner and take appropriate action, if any.

APPEARANCES

Benjamin M. Matsubara, Esq., represented Petitioner

Wyeth Matsubara, Esq., represented Petitioner

Ken Williams, Petitioner

Bryan Yee, Esq., represented State Office of Planning

Abbey Mayer, State Office of Planning

Scott Derrickson, State Office of Planning

PUBLIC TESTIMONY

Warren Von Arnswaldt

Mr. Von Arnswaldt stated that it had been over three years since the Ko Olina boat ramp had been closed and that the new ramp would not be completed for another four-plus years. Mr. Von Arnswaldt related that fisherman could be denied access for seven years or more unless provisions were made for alternate facilities during the interim.

There were no questions for Mr. Von Arnswaldt.

Al Farm

Mr. Farm stated that he would be reading the testimony of Creighton Chang since Mr. Chang was unable to attend the proceedings. Mr. Farm stated that Mr. Chang represented the interests of over 200 fishermen who had interest in the construction of a new boat ramp in the marina. Mr. Chang's testimony stated the disappointment with the design decision described by Mr. Wyeth Matsubara and provided the reasons why a 2 boat ramp scheme was better than the 1 boat ramp plan.

There were no questions for Mr. Farm. Mr. Davidson reminded Mr. Farm to submit the written testimony.

Commissioner Chock asked for an explanation why it would take so long to construct the new boat ramp. Mr. Wyeth Matsubara described the actions that had been taken by the Petitioner since the last hearing and explained the factors which contributed to the delay.

Mr. W. Matsubara related the first boat ramp's demolition history and described its existing condition and the permit process involved to re-open it. Commissioner Chock asked how long it would take to complete the modification and improvement at the Phoenician's boat ramp. Mr. W. Matsubara stated that whatever was on the record from his previous presentation was still accurate and that it was less than a year. Mr. W. Matsubara described planned construction for modifications to the existing ramp and stated that the estimated costs were under a million and costs for the new ramp inside the marina were estimated to be over a million for a single boat scheme.

Commissioner Devens moved to enter into Executive Session. Commissioner Piltz seconded the motion. By a show of hands, the Commission unanimously voted to enter into Executive Session at 9:46 a.m. and exited the room.

The Commission reconvened the meeting at 9:59 a.m.

Chair Kanuha asked if the Petitioner had any further presentations to make. Mr. W. Matsubara replied that the detailed time estimates had been submitted for the Commission's review and provided an update on the Petitioner's actions for a double-wide boat ramp since the last meeting. Chair Kanuha asked if the boaters were still using the Kalaeloa facility. Mr. W. Matsubara responded that they currently were.

Commissioner Piltz stated that he was not aware till recently that the design at Kalaeloa was still not completed and had been under the impression that it had been done two years ago. Commissioner Piltz stated that he believed the Petitioner should do something within the next six months to resolve the situation.

Mr. Yee stated that OP had reviewed the permitting time proposed by the Petitioner and had concluded that 12 months was a reasonable permit processing time frame for the new boat ramp and the restoration of the original boat ramp would have a similar permitting time. Mr. Yee described the conditions that were considered in arriving at the permitting time for the renovation of the old boat ramp and clarified that there were several considerations that needed to be made to be more accurate in the planning and permitting time estimates. Mr. Yee related that construction time estimates were beyond OP's area of expertise and questioned the design time for the boat ramp.

Commissioner Devens asked if the OP had been advised of any structural problems with the original boat ramp. Mr. Yee replied that there had been discussions with the Petitioner and it was undetermined if any structural problems existed and no specific information regarding structural problems had been submitted.

Commissioner Devens asked the Petitioner what provisions could be made to help accommodate the fishermen during the four year interim period. Mr. W. Matsubara stated that finding a temporary solution was very difficult due to the unique location of the Ko Olina boat ramp and finding another location was a problem. Mr. W. Matsubara stated that the time frames were estimates and the Petitioner would be attempting to complete the work as soon as possible.

Mr. W. Matsubara noted the concerns about the Phoenicians' boat ramp that Commissioner Piltz had and explained how the Petitioner had attempted to initiate repairs but reconsidered performing them after D & O compliance concerns arose; resulting in the focusing of their attention on a marina ramp instead.

Mr. W. Matsubara noted Commissioner Devens' concern and stated that the old ramp was unusable due to its location and liability concerns and the Petitioner now had other plans for the area. Mr. W. Matsubara stated that the

Kalaeloa ramp was open and though there were concerns with it, it seemed like the only solution for a temporary ramp for the area.

Commissioner Teves asked Mr. Yee if there were emergency or temporary permits which could be issued to accommodate a floating pier as depicted in the Petitioner's plan for Phoenician's till the new Ko Olina ramp could be built. Mr. Yee responded that a 4 year temporary structure could not avoid the permit process and that there were no provisions to accommodate such a request. Mr. Yee suggested methods to reduce the permit time.

Commissioner Piltz related his observations of the hazards in the Kalaeloa boat ramp area during the Commission's site visit and stated that the permitting time seemed excessive. Mr. Yee clarified that the permitting time was for the new boat ramp and not for Kalaeloa.

Commissioner Devens asked why the Petitioner did not try to make the Kalaeloa ramp area safer if liability issues were such a concern. Mr. W. Matsubara responded that their expert consultant testified that the current ramp, in its present condition was safe and operational; however, there were improvements that could be made. Commissioner Devens asked if the Petitioner would consider making the improvements during the interim period to provide the fishermen with a safe facility. Mr. W. Matsubara responded that he would review the situation and the suggested interim solution with the Petitioner.

Chair Kanuha stated that the Commission was at the stage of receiving status reports with no voting or other requirements for the docket. However, due to the length of time it had been before the Commission and the time it would take to have the new ramp permitted, constructed and operational and considering the safety issues involved; Chair Kanuha requested the Attorney General research the possibility of revisiting the declaratory ruling that the Commission issued to determine what remedies could be provided during the interim.

Commissioner Piltz stated that the Petitioner did not appear to be complying with the Declaratory Ruling from the onset and needed to be compliant rather than continue violating the ruling.

Chair Kanuha stated that since this was a status report, no further action would be taken.

Mr. Ben Matsubara offered to submit a supplemental status report to consider a “hybrid” solution while the new boat launch was constructed.

Mr. Davidson stated that the Petitioner should submit materials two weeks or 10 days prior to the August 13, 2009 meeting to allow for its circulation.

The Commission went into recess at 10:27 a.m. and reconvened at 10:49 a.m. Commissioner Wong rejoined the hearing at 10:50 a.m.

CONTINUED HEARING

A07-777 HAWAIIAN MEMORIAL LIFE PLAN, LTD. (O`AHU)

Chair Kanuha announced that this was a continued hearing to consider the reclassification of approximately 56.459 acres of land currently in the Conservation District to the Urban District at Kāne`ohe, Ko`olaupoko, O`ahu, Hawai`i, for cemetery expansion and the preservation of historic sites at TMK: 4-5-33: por. 1

APPEARANCES

William W. L. Yuen, Esq., represented Petitioner

Jay Morford, Petitioner

Scott Ezer, Petitioner

Jesse Souki, Esq., represented City and County of Honolulu Department of Planning and Permitting (entered the proceedings at 1:50 p.m.)

Mike Watkins, City and County of Honolulu Department of Planning and Permitting

Bryan C. Yee, Esq., represented the State Office of Planning

Scott Derrickson, State Office of Planning

Grant Yoshimori, represented Intervenors

Richard McCreedy, Intervenors

Juliane McCreedy, Intervenors

PUBLIC WITNESSES

DeWolfe Miller

Dr. Miller represented that he was an epidemiology professor with the University of Hawaii –John A. Burns School of Medicine and submitted copies of

a chart illustrating world human population growth through history. Dr. Miller described his academic and occupational background and expressed his concerns about population growth and the conversion of conservation lands. Dr. Miller referred to the chart on human population growth to illustrate how growth was occurring and stated that explosive population growth had occurred. Dr. Miller represented that as this larger population aged and died, the issue of burials would become a cultural and traditional issue, as well as an environmental and economic issue. Dr. Miller stated that the Petition Area had the potential to become a UNESCO site due to its historic and cultural significance and described why he felt that culture and tradition needed to change to accommodate the environment. Dr. Miller represented that he also had experience in hydrology and asked the Commission to consider the impact on groundwater that conservation area alteration might have.

There were no questions for Dr. Miller from the parties. Commissioner Piltz stated several options that would require adapting culture.

There were no further questions for Dr. Miller

INTERVENOR WITNESS

Juliane McCreedy

Chair Kanuha reminded Ms. McCreedy she was still under oath. Ms. McCreedy referred to Intervenor's Exhibit #16- Impact of Cemeteries on the Environment and Public Health and cited a passage from the article. Mr. Yuen renewed his objection from the July 25, 2009 hearing to Ms. McCreedy testifying using articles written by others and paraphrasing from them. Chair Kanuha responded that the articles had been submitted into evidence and allowed leeway for Ms. McCreedy to read from the articles.

Ms. McCreedy referred to Intervenor's Exhibit #19- Other Countries Concerns regarding cemeteries and read a passage from the article. Ms. McCreedy described her experience with the USGS and how well drilling on Kawa Stream was handled for the EIS using Intervenor's Exhibit #11. Mr. Yuen objected to the witness giving testimony on behalf of a government agency who chose not to respond to the EIS. Chair Kanuha confirmed that the exhibits being read from were the Intervenor's and allowed the reading.

Ms. McCreedy stated that much of the research to find discrepancies in the EIS was done by the Intervenor. Chair Kanuha reminded Ms. McCreedy that the EIS phase of the hearing had been completed and that the focus of the hearing was now on the Petition itself.

Mr. Yuen stated that the Commissioners should weigh these readings by considering the method that the Intervenor used to submit the articles into evidence since it was by excerpts and the Petitioner was not able to determine the accuracy of the excerpts. Mr. Yuen argued that the entire perspective of the articles could not be verified from the excerpts alone.

Ms. McCreedy completed her readings of passages from Intervenor's Exhibit #11-a letter from the USGS, page 4 of Intervenor's Exhibit #12, Intervenor's Exhibit #29, Intervenor's Exhibit # 13, Intervenor's Exhibit #15, and Intervenor's Exhibit #17. As Ms. McCreedy began to read Intervenor's Exhibit #18, Commissioner Devens stated that to expedite matters, it was not necessary to read from the submitted exhibits.

Mr. Yoshimori acknowledged Commissioner Devens' remark and stated that the following Intervenor Exhibits #22, 24, 25, 26, 21, 23, and 20 were the ones the Intervenor wanted to highlight. Commissioner Wong commented that if there were no questions for the witness, the hearing could proceed to final argument.

Mr. Yoshimori acknowledged Commissioner Wong's remark and asked Ms. McCreedy to share her family's personal concerns about the impact of the project to Kaneohe Bay. Ms. McCreedy described her experience with trying to observe the sedimentation from Kawa stream into Kaneohe Bay. Ms. McCreedy related her efforts in gathering and sharing the information to protect the watershed area.

Mr. Yuen referred to Intervenor's Exhibit #14 and asked Ms. McCreedy to read the conclusion at the bottom of the page. Ms. McCreedy stated that the final EIS had misquoted Dr. Dent and read the passage. Mr. Yuen stated that the conclusion that was reached in the study was that they found no significant effect of the use of formaldehyde. Ms. McCreedy replied that it also stated that limited studies were conducted and it had not been researched in the United States.

Mr. Yuen referred to burial practices in other countries and asked Ms. McCreedy if she was familiar with the Hawaiian Memorial practice of burials in concrete vaults. Ms. McCreedy responded that she was and stated her experience in contacting other countries.

There were no further questions from the parties for Ms. McCreedy. Chair Kanuha asked how far Kaneohe Bay was from the Petition Area. Ms. McCreedy responded that it was about a mile.

PETITIONER REBUTTAL WITNESSES

Jay Morford

Mr. Morford stated his awareness of Paradise Memorial Park and testified that to his knowledge Paradise Memorial Park was still not licensed in Hawaii. Mr. Morford testified that he had talked with the consultant to Paradise Memorial Park and had been informed that the site for the Paradise Memorial Park was difficult to develop, and that Paradise Memorial Park had no permits and was having financial problems. Mr. Morford testified that he did not expect Paradise Memorial Park to be operating any time soon.

Mr. Yuen asked Mr. Morford if he had any comments on the Outdoor Circle testimony regarding maintenance of the Petition Area. Mr. Morford described the process involved to obtain permits, access and maintain the area.

Mr. Morford thanked the SHPD and OP for their cooperation during the drafting of the Memorandum of Understanding and described how the agreement was reached. Mr. Morford related his understanding of the use of formaldehyde in his industry and stated the embalming and burial practices used by his organization.

The City had no questions. Mr. Yee asked if Paradise Memorial Park had an application for a license pending. Mr. Morford responded that he believed they had submitted an application, but that they still had not obtained one to his knowledge. Mr. Morford stated that he did not know how long the application had been pending and did not wish to discuss the financial situation of Paradise Memorial Park. Mr. Morford acknowledged that Paradise Memorial Park would need to resolve its licensing and financial issues before obtaining permits and his personal opinion was that he did not know when they would become operational.

Mr. Morford stated that securing the Cultural Preserve would be part of the Preservation Plan and the Petitioner would be required to do a Preservation Plan if there was a reclassification of the Petition Area. He stated that this may also be true with partial approval and an LUC condition to that effect.

Mr. Yoshimori asked if unknown cultural practices which were occurring on the site would later become part of the Preservation Plan. Mr. Morford replied that this would be resolved between the practitioners and the people responsible for the design of the Preservation Plan.

There were no further questions for Mr. Morford.

Scott Ezer

Mr. Ezer stated his awareness of Intervenor's Witness Lianne Ching participation in the Petition's activities and described the communication that had occurred between them during the draft EIS process.

Mr. Ezer described his experience during the application process and confirmed the timing of Hawaii Memorial Life Plan's application for an amendment to the Koolaupoko SCP as described in Mr. Watkin's testimony. Mr. Ezer provided his planning background and experience in working with five year SCP plan review projects and described how he perceived Hawaii Memorial Park would be able to accommodate future demand on its land holdings while abiding to DPP and other agency requirements.

Mr. Ezer stated that Mr. Watkins had estimated that the approval for an amendment for the Koolaupoko SCP could take two and a half years and it was possible that it could go longer than that since SCP projects he was aware of were taking more than 2 years and these projects had not reached the Planning Commission. Mr. Ezer confirmed that the application process started with the DPP and then moved to the Planning Commission and then to the City Council for approval, with public hearing scheduled at the Planning Commission and City Council levels.

Mr. Ezer defined his understanding of the term "watershed" as it pertained to the Petition Area and stated the reasons why he believed development of the Petition Area would not adversely affect groundwater and Kawa Stream. Mr. Ezer provided his perception of what occurred to water as it

moved through the petition area and described the provisions for reducing TMDLs.

Mr. Souki referred to the Hawaii Memorial Park Cemetery Expansion Petition for Land Use District Boundary Amendment and asked Mr. Ezer to confirm that it was the document that he had been working with and that he was familiar with its contents. Mr. Ezer affirmed that it was a document that he was familiar with and read from page 4, Section 7(F).

Mr. Ezer stated that he was not saying that the Project was consistent with the SCP and his comments should not be construed to say that an amendment was not required even if the urban growth boundary does not change- the expansion area would still have to be amended to fall within the category of major parks, golf courses and cemeteries. Mr. Ezer stated that the application had been submitted in April, 2009.

Mr. Yee asked if there were value to a clean and flowing Kawa Stream. Mr. Ezer stated that there was a high value to the Kawa Stream watershed and represented that the expansion area did not drain directly into Kawa Stream. Mr. Ezer stated his understanding of how the water retention systems would function to protect the Petition Area.

Mr. Yoshimori asked if Ms. Ching had been contacted by Cultural Surveys Hawaii in regards to the revised archaeological inventory survey. Mr. Ezer stated that Ms. Ching was not one of the parties that were sent a letter.

Commissioner Piltz asked if the drainage system depicted in the EIS was designed for a 10 year storm. Mr. Ezer affirmed that the EIS showed a 10 year storm design and that sheet flow of water in the Petition Area should be no more than it was at the current time after construction. Mr. Ezer represented that the Petitioner had made a commitment to build a drainage system designed for a 50 year storm to the community at Neighborhood Boards, the Land Use Commission, to the Office of Planning and to the County. Mr. Ezer stated that retention ponds had been situated in the Petition area.

There were no other questions for Mr. Ezer.

CLOSING STATEMENTS

Mr. Yuen referred to the LUC decision-making standards of the LUC rules and stated the considerations that the Commission should make in its deliberations and the reasons why the Commission should decide favorably on the Petition.

Commissioner Teves excused himself at 12:06 p.m. and returned at 12:10 p.m.

Mr. Souki stated that the City opposed the Petition since it was not consistent with the Koolaupoko Sustainable Communities Plan and referred to Exhibit #6 –the Ordinance which adopted the Koolaupoko Sustainable Communities Plan, under Section 24-65-4 (c). Mr. Souki described the intent of the Ordinance and explained the reasons why this issue was before the Land Use Commission. Mr. Souki referenced Section 15-15-77(4) of the Commission's rules, which require that the LUC give consideration to the General Plan and Community Plan where the Project was located, and Act 26, Session Laws of Hawaii 2008, which codified this requirement into state law. Mr. Souki stated that HRS section 205-4 (h) required proposed boundaries consistent with the Commission's decision-making criteria and requested that the Petition be denied. Mr. Souki stated that if the Commission were inclined to grant the petition, it should impose a condition which would require that the Petitioner get an amendment to the SCP prior to the application for other land use permits with the City including but not limited to, grading or building permits.

Mr. Yee stated OP's position was to grant in part and deny in part the Petition. Mr. Yee described the reasoning and methodology used to establish the OP position and related how OP was attempting to seek a balance to all the different issues involved in this Petition by dividing the Petition Area. Mr. Yee stated that the cultural preserve was a special place and explained the historical significance of what the Petition Area contained. He related that SHPD would not oppose development of the Petition Area if mitigation measures were made, and that security of the area was an issue due to potential damage from other activities on site. Mr. Yee stated how he perceived the LUC could impose conditions to create the cultural preserve and develop a plan to secure the area with a partial granting and partial denying of the Petition.

Mr. Yoshimori argued that the Petitioner had tried to portray the Project as a community service, that the additional plots were necessary and that the development would benefit the community, when really the Project was for increasing profits for the Petitioner at the expense of Hawaii's limited

conservation land. Mr. Yoshimori acknowledged that both the Petitioner and Community had put a lot of time and effort into this Project and stated that the Intervenor did not feel that the proposed Project was a good use of the land and that the Petitioner should not be awarded partial approval on the basis that they had been cooperative and persistent. Mr. Yoshimori represented that there was huge community opposition to this Project as evidenced by the petitions submitted into evidence, resolutions of opposition from the Kailua and Kaneohe Neighborhood Boards, testimony from elected officials, written letters of testimony against the development submitted to the final EIS, and numerous other letters and requests to the LUC to deny the Petition.

Mr. Yoshimori stated that there were many other cemetery plots that were available on Oahu and described the amount of plots available on the island. Mr. Yoshimori expressed concern over unanswered questions regarding pollution and runoff into Kawa Stream which had not been addressed by government agencies which could have adverse effects. Mr. Yoshimori represented that the Petition Area had the qualities of conservation land as described by HRS 205-2(e). He stated that according to the final EIS, 17% of the Petition Area was in the conservation area limited subzone which was covered by HAR 13-5-12.

Mr. Yoshimori stated that the EIS acknowledged rock fall hazards in the area and referenced State's Exhibit #12 to illustrate his assertion. Mr. Yoshimori referred to the LUC decision making criteria and stated that the Petition should be denied due to non-conformance to the City and County and State Plans. Mr. Yoshimori argued that approving the Petition would conflict with the Supreme Court decision in *Ka Pa'akai O Ka 'Aina vs. LUC* and stated reasons why the Petition did not meet the requirements established by the Supreme Court decision.

There was no rebuttal, questions or comments.

Chair Kanuha declared the evidentiary portion of the hearing completed subject to the receipt of follow-up reports and answers that had been requested during the course of the hearing. Chair Kanuha directed that the parties draft their individual Findings of Fact, Conclusions of Law, and Decision and Order based upon the record of this docket and serve the same upon each other and the Commission no later than the close of business on August 24, 2009. All comments or objections to the parties' respective proposals should be served upon the other party no later than the close of business on September 4, 2009, and any responses to the objections must be filed no later than the close of

business on September 11, 2009. All parties were encouraged to contact LUC staff early in the process to ensure that technical and non-substantive formatting protocols observed by the Commission were adhered to.

Mr. Yee asked if the August 24, 2009 deadline of the draft D&O would apply if the parties were unable to reach a partial stipulation. Chair Kanuha indicated that it would.

Mr. Souki advised the Commission that the City intended to submit a few findings and one conclusion (just their condition) and would not be preparing an entire proposal.

Chair Kanuha thanked the parties for their participation and adjourned the meeting at 12:33 p.m.

(For more details on this matter, see LUC transcript of July 16, 2009)