

LAND USE COMMISSION HEARING

STATE OF HAWAII

Videotaped Conference

Proceedings held on February 21, 2018

Wailuku District Office

54 South High Street

Wailuku, Hawaii 96793

Commencing at 8:30 a.m.

AGENDA

I. Call to Order

II. Adoption of Minutes

III. ADOPTION OF ORDER

A15-798 Waikapu Properties LLC et al (Maui)

To consider Petition to Amend the Agricultural Land Use District Boundaries into the Rural Land Use District for certain lands situated at Waikapu, District of Wailuku, Island and County of Maui, State of Hawaii, consisting of 92.394 acres and 57.454 acres, and to Amend the Agricultural Land Use District Boundaries into the Urban Land Use District for certain lands situated at Waikapu, District of Wailuku, Island and County of Maui, State of Hawai'i, consisting of 236.326 acres, 53.775 acres, and 45.054 acres.

IV. Discussion and Action, if Appropriate

V. Adjournment

BEFORE: Jean Marie McManus, CSR #156

1 APPEARANCES:

2 COMMISSIONERS:

3 ARNOLD WONG, Chairperson (Maui)
JONATHAN SCHEUER, Vice Chair
4 LEE OHIGASHI (Maui)
DAWN N.S. CHANG
5 GARY OKUDA
AARON MAHI
6 EDMUND ACZON
NANCY CABRAL, Vice Chair (Hilo)
7 LINDA ESTES (Kauai)

8 STAFF:

9 DIANE ERICKSON, Deputy Attorney General (Maui)
10 DANIEL E. ORODENKER, Executive Officer (Maui)
RILEY K. HAKODA, Planner/Chief Clerk (Oahu)
11

12 JAMES W. GEIGER, ESQ. (Maui)
For Waikapu Properties, LLC
13

MICHAEL HOPPER, ESQ. (Maui)
14 Deputy Corporation Counsel
For County of Maui
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DAWN APUNA, ESQ. (Oahu)
16 LORENE MAKI, Planner
Office of Planning, State of Hawaii
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1 CHAIRPERSON WONG: Good morning.

2 This is the February 21st, 2018, Land Use
3 Commission meeting.

4 The first order of business is adoption of
5 the January 24th, 25th, 2018 meeting minutes. Are
6 there any corrections or comments on them? If not,
7 is there a motion to adopt minutes?

8 COMMISSIONER OHIGASHI: I move.

9 COMMISSIONER MAHI: I'll second.

10 CHAIRPERSON WONG: Commissioner Ohigashi
11 moved to adopt the minutes. A motion was -- a second
12 was made by Commissioner Mahi.

13 All in favor please say "aye". Any
14 opposed? The minutes are adopted unanimously.

15 This is an action meeting on Docket No.
16 A15-798 Waikapu Properties LLC to approve the form of
17 the order in this matter.

18 Let me update the record.

19 The Commission met via a videoconference
20 networking on Lihue, Kaua'i; Hilo, Hawaii; Honolulu,
21 Oahu and Kahului, Maui on January 25th, 2018. And
22 prior to voting, all the Commissioners affirmed that
23 they had reviewed the record and transcripts in this
24 Docket.

25 The Commission then voted on Docket No.

1 A15-798 to grant, with conditions, the Petition to
2 Amend the Agricultural Land Use District Boundaries
3 into the Rural Land Use District for certain lands
4 situated at Waikapu, District of Wailuku, Island and
5 County of Maui, State of Hawai'i, consisting of
6 92.394 acres and 57.454 acres, and to Amend Land Use
7 District Boundaries into the Urban Land Use District
8 for certain land situated at Waikapu, District of
9 Wailuku, Island and County of Maui, State of Hawai'i,
10 consisting of 236.326 acres, 53.775 acres and
11 45.054 acres.

12 Land Use Commission staff was instructed to
13 prepare a proposed Findings of Fact, Conclusions of
14 Law and Decision and Order consistent with its
15 decision for consideration, deliberation and
16 adoption.

17 On February 13, 2018, the Commission mailed
18 an agenda notice to Parties, Statewide, Kaua'i, Oahu,
19 Maui and Hawai'i mailing list.

20 Will the Parties please identify themselves
21 for the record?

22 MR. GEIGER: Good morning, Chair,
23 Commissioners, James Geiger on behalf of Petitioners.
24 With me is Petitioner's representative Michael
25 Atherton.

1 MR. HOPPER: Michael Hopper, Department of
2 Deputy Corporation Counsel representing the
3 Department of Planning.

4 MS. APUNA: Dawn Apuna, Deputy Attorney
5 General, on behalf of State Office of Planning.

6 CHAIRPERSON WONG: Thank you.

7 Is there anyone in the audience anywhere
8 who wishes to provide public testimony on this
9 matter? Going once, twice. Thank you.

10 The next order of business is to confirm
11 that Commissioner Aczon has reviewed the materials
12 and transcripts of the December 6 and 7, 2017, and
13 January 24th, 25th, 2018 meeting, and is prepared to
14 participate in these proceedings.

15 Commissioner Aczon.

16 COMMISSIONER ACZON: Yes, Mr. Chair, I read
17 all the materials and transcripts regarding the
18 docket, and I'm ready to proceed.

19 CHAIRPERSON WONG: Thank you, Commissioner
20 Aczon.

21 The Commission will now consider the
22 adoption of the order.

23 Commissioners, before you, for your
24 consideration, deliberation and adoption is the
25 proposed Findings of Facts, Conclusions of Law and

1 Decision and Order prepared by LUC staff as
2 instructed at the last meeting on this docket.

3 Is there any discussion? Commissioner --
4 sorry, is that Commissioner Okuda?

5 COMMISSIONER OKUDA: This is Gary Okuda.

6 Mr. Chair, and fellow Commissioners, I
7 would ask that the Decision and Order with all
8 Findings of Fact, Conclusions of Law be adopted with
9 one amendment. And the amendment that I propose
10 would be Paragraph 17 or Condition 17 found at
11 page 61. And the amendment that I would request is
12 that the following sentence be added to Condition or
13 Paragraph 17 at page 61.

14 Again, the following sentence would be
15 added to Condition 17 at page 61, and I propose
16 following, and I quote:

17 No dwelling or structure shall or may be
18 used for a residence or residential use, including
19 farm dwellings or farm working -- excuse me --
20 farm-worker housing, on the adjacent agricultural
21 lots and the applicable easement (whether termed
22 agricultural easement or conservation easement) shall
23 include this restriction.

24 And that's the end of my requested
25 amendment, which is that sentence being added to

1 Condition or Paragraph 17 at page 61.

2 The reason for that is, I believe that
3 sentence will make the condition consistent with the
4 representations of the Petitioners, which, again, I
5 would like to state, the Petitioners have submitted a
6 Petition, and followed the process, which I believe
7 is a model, or really is something that shows
8 commitment to the State, its people, and especially
9 the County of Maui, but this would also make that
10 condition consistent with Finding of Fact No. 387
11 which is found at Paragraph 46 of the proposed
12 Decision and Order.

13 So with that, I have nothing further.
14 Thank you very much.

15 CHAIRPERSON WONG: Do I have a second?
16 Commissioner Scheuer seconded?

17 VICE CHAIR SCHEUER: No.

18 CHAIRPERSON WONG: No, not a second?

19 VICE CHAIR SCHEUER: I don't think a motion
20 was made. I think a point was raised, and I have a
21 question for Commissioner Okuda about his proposed
22 language.

23 CHAIRPERSON WONG: First, there was
24 amendment. He made a motion to amend.

25 MS. ERICKSON: To adopt.

1 CHAIRPERSON WONG: To adopt with the
2 amendment?

3 COMMISSIONER OKUDA: Mr. Chair, actually I
4 believe the Commissioner is correct that I was
5 answering a question. I did not make a motion.

6 CHAIRPERSON WONG: Thank you for the
7 correction.

8 Commissioner Scheuer.

9 VICE CHAIR SCHEUER: Mr. Okuda, if I heard
10 your language correctly, you had part of your
11 proposed language referred to adjacent agricultural
12 lots?

13 COMMISSIONER OKUDA: Yes.

14 VICE CHAIR SCHEUER: And I believe that
15 that might be unclear, because that might add things
16 that you're not intending to add, because the overall
17 docket discusses adjacent agricultural lots, which
18 are not part of the Petition area. And I don't think
19 you're trying to reach outside the boundary of the
20 Petition Area and impose restrictions. I think all
21 you're trying do is say on the 800 acres of the
22 agricultural easement there shall be no residential
23 dwelling.

24 COMMISSIONER OKUDA: This is Gary Okuda.

25 Yes, that's correct. I use the term

1 "adjacent agricultural lands", because I believe in
2 the Proposed Decision and Order the properties which
3 are to be subject to what's been called either
4 agricultural easement or conservation easement also
5 describe those lands as adjacent agriculture lands.

6 But for clarity purpose, I don't see a
7 problem of deleting my reference to "adjacent
8 agricultural lands".

9 The proposed clarification is intended to
10 apply to whatever is subject to the easement, whether
11 that easement is described as an agricultural
12 easement or conservation easement.

13 CHAIRPERSON WONG: Commissioner Scheuer,
14 anything else?

15 VICE CHAIR SCHEUER: Not in response to
16 Commissioner Okuda's proposed language.

17 Mr. Chair, I'm planning to call for a
18 motion, and then have discussion on the motion.

19 CHAIRPERSON WONG: Do I have a motion with
20 the amendment proposed by Commissioner Okuda? Do I
21 have a second -- or first a motion? Do I have anyone
22 to move for this so we can start discussion,
23 Commission Okuda motion. Is there a second?

24 COMMISSIONER MAHI: Yes.

25 CHAIRPERSON WONG: Commissioner Mahi

1 seconded. Discussion?

2 Commissioner Okuda.

3 COMMISSIONER OKUDA: This is Gary Okuda.

4 Mr. Chair, I move that the Decision and
5 Order, including the Findings of Fact and Conclusions
6 of Law prepared by the staff be adopted with the
7 following amendment to Condition No. 17 found at page
8 61 of the proposed document.

9 The amendment would be to add the following
10 sentence to Condition No. 17. The addition would
11 read:

12 No dwelling or structure shall or may be
13 used for a residence or residential use, including
14 farm dwellings or farm-worker housing, on the lands
15 subject to the applicable easement (whether termed
16 agricultural easement or conservation easement) and
17 such easements shall include this restriction.

18 CHAIRPERSON WONG: Commissioner Mahi, do
19 you still want to second that?

20 COMMISSIONER MAHI: I'll still second.

21 CHAIRPERSON WONG: Thank you.

22 Now it's discussion. Is there any
23 discussion? Commissioner Cabral.

24 VICE CHAIR CABRAL: I would like to speak
25 against that motion.

1 I can appreciate the theory that was
2 represented that it's for agricultural use and not
3 for residential use, and my concern is that ag theft,
4 agricultural theft is a huge and major problem for
5 large ranching, large farming land, and it is
6 becoming more and more common over here on the Big
7 Island where we have large chunks of land to have
8 small dwellings in areas in order to help protect the
9 land from what is massive amounts of ag theft.

10 So I'm concerned, especially with the
11 detail of this saying no farm dwellings -- and I
12 understand farm dwellings are heavily abused,
13 especially on this island. And are, you know,
14 working places. But I'm concerned that what we are
15 doing is setting them up to have to either break this
16 ordinance or come back to us in the future and spend
17 that time and energy because farm theft -- and I
18 don't know, I'm not opposed to the concept of this
19 motion, but I am opposed to it being specifically so
20 limiting that it would prohibit them from protecting
21 their crops. Thank you.

22 CHAIRPERSON WONG: Commissioner Chang.

23 COMMISSIONER CHANG: I have a question for
24 Commissioner Okuda as well, similar to Commissioner
25 Cabral.

1 Is your proposed amendment, is it providing
2 a limitation greater than what the existing ordinance
3 and regulation would apply to the Conservation, this
4 Conservation or Agricultural easement. Are you
5 proposing a greater restriction than what the law
6 provides?

7 COMMISSIONER OKUDA: This is Gary Okuda.

8 What I am proposing is a provision which is
9 consistent with Finding of Fact No. 387, which is
10 found at page 46, number one.

11 Number two, what the Petitioner proposed in
12 this case was protections which are greater than what
13 is provided for by law. And I think the Petitioner
14 should be commended for that. In other words, they
15 were trying to propose something, or frankly figure
16 out a way of protecting agricultural lots from what
17 is the reality that we are seeing here, and frankly,
18 which was raised at my senate confirmation, about the
19 fact that instead of having dwellings on agricultural
20 lots, which are accessory to agricultural, you have
21 the so-called gentleman farms.

22 And I do agree with Commissioner Cabral,
23 agricultural theft is a real issue. No question
24 about it. And with the type of profit margins, small
25 profit margins sometimes, and the risk that farmers

1 take to farm, theft really can drive a farm out of
2 business.

3 The unfortunate thing is, I think we have
4 to weigh these competing interests here and look at
5 the potential harm to actually farming in general.
6 And if I can just take a moment about that.

7 The problem with gentleman farms -- I
8 believe the general studies in real estate pricing
9 bear this out -- is that where you do not have real
10 enforcement of the restrictions on agricultural
11 lands, where people are able to use good prime
12 agricultural lands for residential purposes and not
13 farming, it drives the price of agricultural lands
14 up, because it's simple price and -- you know, supply
15 and demand.

16 And so without this restriction, there is a
17 real risk, a real risk that we're going to start
18 seeing a continuation of what is taking place
19 statewide of people building MacMansions on large
20 agricultural tracks claiming there's agriculture, and
21 now the real farmer, the farmers that are really
22 trying to make a go of agriculture are simply going
23 to be priced out of the market because frankly rich
24 people are going to bid the price higher.

25 So, yes, this does create a restriction

1 which is, frankly, more of a restriction that might
2 exist in certain areas, but this is a restriction
3 that the Petitioner had proposed to protect
4 agriculture, and, frankly, this restriction was one
5 of the major reasons why I was willing to vote in
6 favor of redistricting prime agricultural lands,
7 because even though we are taking prime agricultural
8 lands out of agriculture production for this project,
9 what the Petitioner has done is basically placed a
10 guarantee on -- and represented that essentially they
11 are providing a guarantee that the other remaining
12 agricultural lands would remain agriculture.

13 So, again, the proposed amendment here is
14 simply to be consistent with Finding of Fact No. 387
15 on page 46, number one, and to be consistent with
16 representations made by the Petitioner, which are the
17 representations that led me to vote in favor of this
18 boundary amendment.

19 CHAIRPERSON WONG: Commissioner Chang.

20 COMMISSIONER CHANG: Thank you, Chair.

21 I don't -- I greatly appreciate
22 Commissioner Okuda's comments.

23 I guess for me it's a matter of process and
24 wanting to make sure that our decision stands on its
25 own, and we are not -- it is not viewed that we are

1 unilaterally, we as a Commission are doing something
2 beyond what the law provides.

3 So I would just ask what -- I support the
4 intention, and we have seen the abuse of gentlemen
5 estates.

6 So I would only ask that if the amendment
7 is to approve, that there would be a reference to, as
8 agreed to or as provided by the Petitioner, as
9 proposed by, so that it is the Petitioner who is
10 coming to us saying that they're willing to come in
11 with this restriction; it is not Land Use Commission
12 imposing that restriction on them, it is the
13 Petitioner who is coming to the Land Use Commission
14 saying we are willing to accept this limitation.

15 CHAIRPERSON WONG: Commissioner Okuda.

16 COMMISSIONER OKUDA: This is Gary Okuda.

17 I would agree with Commissioner Chang on
18 that. And my recollection was that when I asked that
19 question of the Petitioner's counsel, or the
20 Petitioner, when we were going through what might be
21 the basis of a decision, I asked whether or not that
22 was the Petitioner's position. And, you know, if I'm
23 wrong, please someone correct me on the record,
24 because I don't want this record to state or imply
25 something that's not correct, but I believe that the

1 Petitioner had stated on the record that this was
2 their intent.

3 CHAIRPERSON WONG: Let me ask the
4 Petitioner. Is that correct on Commissioner Okuda's
5 statement.

6 MR. GEIGER: This is James Geiger on behalf
7 the Petitioner. The answer is "yes". The Petitioner
8 is agreeable to a condition that the lands -- the
9 adjacent lands subject to the easement, whether it's
10 Conservation or otherwise, will not be used for
11 residential purposes.

12 CHAIRPERSON WONG: Any more discussion on
13 this amendment?

14 If not, let's vote on the amendment that --
15 Commissioner Scheuer.

16 VICE CHAIR SCHEUER: Procedurally, a single
17 motion was made not an amendment to a motion. So if
18 you voted right now, you're voting for the entire
19 order.

20 CHAIRPERSON WONG: Thank you, Commissioner
21 Scheuer, you are right.

22 Is there anything else on discussion on
23 this in front of us? Commissioner Scheuer.

24 VICE CHAIR SCHEUER: Thank you, Mr. Chair.
25 Briefly, I wanted to say two things.

1 In the context of, again, thanking the
2 Petitioner for their very significant work with the
3 community to evolve their project from their original
4 proposal over many years to what has come before us,
5 I'm personally very grateful.

6 I want to say that I place a considerable
7 amount of importance on Condition No. 27, which is
8 the catch-all condition that indicates that we are
9 relying on the overall representations of the
10 Petitioner.

11 Some of the language, if I was to want to
12 wordsmith, some of the language in the Decision and
13 Order. Particularly the conditions, I think are sort
14 of vague. You're going to do water conservation
15 measures. There's not a lot of specificity. There's
16 not a lot of measure in that particular condition,
17 but in your presentation to us there was a huge
18 amount of detail of what you were trying to do. And
19 that's really what my vote is based on are those
20 overall representations, including the specifics that
21 are included in the existing conditions that are
22 before us.

23 The second thing I want to say, and I just
24 want to acknowledge, is that it's really great to
25 have a great proposal in front of us, but I also just

1 want to note for some people on Maui and so people
2 around Hawai'i, it's still a heavy decision. We feel
3 good about it. We feel good that this is a great
4 project that's going forward. But this is a one-way
5 door. Acres will be converted forever to
6 nonagricultural use. So we do so, or at least I do
7 so, with really an acknowledgment of the significance
8 of the decision we're making today for the future of
9 Maui, at the same time that we thank you for the good
10 work that you've done. Thank you, Chair.

11 CHAIRPERSON WONG: Thank you. Any other
12 discussion on the motion with the amendment?

13 So no more discussion. It has been moved
14 by --

15 VICE CHAIR CABRAL: I would like to be able
16 to vote on the amendment separate from the main
17 motion. Can that be separated?

18 CHAIRPERSON WONG: Not at this time, sorry,
19 Commissioner Cabral. So it's all in one.

20 VICE CHAIR CABRAL: Okay, thank you.

21 CHAIRPERSON WONG: So any other discussion?

22 It has been moved by Commissioner Okuda
23 with the amendment, and seconded by Commissioner Mahi
24 to approve the form of the order with the amendment.
25 So, Mr. Orodenker, can you please poll the

Commissioners?

EXECUTIVE OFFICER: Thank you, Mr. Chair.
Once again the motion is to adopt the order as
amended by Commissioner Okuda.

Commissioner Okuda?

COMMISSIONER OKUDA: Yes.

EXECUTIVE OFFICER: Commissioner Mahi?

COMMISSIONER MAHI: Aye.

EXECUTIVE OFFICER: Commissioner Aczon?

COMMISSIONER ACZON: Yes.

EXECUTIVE OFFICER: Commissioner Scheuer?

VICE CHAIR SCHEUER: Aye.

EXECUTIVE OFFICER: Commissioner Cabral?

VICE CHAIR CABRAL: Aye.

EXECUTIVE OFFICER: Commissioner Ohigashi?

COMMISSIONER OHIGASHI: Aye.

EXECUTIVE OFFICER: Commissioner Estes?

COMMISSIONER ESTES: Aye.

EXECUTIVE OFFICER: Commissioner Chang?

COMMISSIONER CHANG: Aye.

EXECUTIVE OFFICER: Chair Wong?

CHAIRPERSON WONG: Aye.

EXECUTIVE OFFICER: Thank you.

Mr. Chair, the motion passes unanimously.

CHAIRPERSON WONG: We have one more agenda

1 item. Mr. Orodenger, do you have anything to state?

2 EXECUTIVE OFFICER: We don't have anything
3 to report at this time, Mr. Chair.

4 CHAIRPERSON WONG: Thank you. Any other
5 business that needs to be attended to? If not, I
6 declare this meeting adjourned.

7 Wait, wait, wait. Commissioner Okuda.

8 COMMISSIONER OKUDA: This is Gary Okuda. I
9 just want to state one more thing for the record.
10 And even though James Geiger in many prior cases has
11 been on the other side with respect to our law firm,
12 I would like to just state for the record that the
13 way he's handled this proceeding just increases even
14 the big respect I had for him before.

15 I think he's a credit to the practice, and
16 I really thank him for his work in this case.

17 MR. GEIGER: Thank you.

18 CHAIRPERSON WONG: Thank you. Is there any
19 other statement? If not, this meeting is adjourned.
20 Thank you.

21 (The proceedings adjourned at 9:00 o'clock
22 a.m.)

23

24

25

CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on February 21, 2018, at 8:30 a.m., the proceedings contained herein was taken down by me in machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct copy of the proceedings had in the foregoing matter.

I further certify that I am not of counsel for any of the parties hereto, nor in any way interested in the outcome of the cause named in this caption.

Dated this 21st day of February, 2018, in Honolulu, Hawaii.

/s/ Jean Marie McManus
JEAN MARIE McMANUS, CSR #156