

LAND USE COMMISSION
STATE OF HAWAII

Hearing held on November 7, 2019
Commencing at 9:00 a.m.
Department of Transportation
650 Palapala Drive
Kahului, Maui, Hawaii 96732

AGENDA

VI. Call to Order

VII. Continued Action (if necessary) SP19-410

VIII. STATUS REPORTS

- * A04-746 Waikapu 48 Investment LLC
- * A04-748 Consolidated Baseyards LLC
- * A04-750 Spencer Homes, Inc.

IX. Adjournment

BEFORE: Jean Marie McManus, CSR #156

1 APPEARANCES:

2 JONATHAN SCHEUER, Chair
3 NANCY CABRAL, Vice Chair
4 DAWN N.S. CHANG
5 EDMUND ACZON
6 GARY OKUDA
7 LEE OHIGASHI
8 ARNOLD WONG

9 STAFF:

10 PATRICIA OHARA, ESQ.
11 Deputy Attorney General

12 DANIEL ORODENKER, Executive Officer
13 RILEY K. HAKODA, Planner/Chief Clerk

14 DAWN APUNA, ESQ.
15 Deputy Attorney General
16 For State Office of Planning

17 MICHAEL HOPPER, ESQ.
18 Deputy Corporation Counsel
19 For County of Maui

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1 CHAIRPERSON SCHEUER: Aloha, good morning.
2 The Commission will now address the status reports.

3 This is the November 7th, 2019 Land Use
4 Commission meeting.

5 The Commission will now address three
6 status records scheduled on our agenda for Docket
7 Nos. A04-746 Waikapu 408 Investments LLC, A04-748
8 Consolidated Baseyards, LLC, and A04-750 Spencer
9 Homes, Inc.

10 During the LUC's staff's routine
11 investigation into the absence of annual reports for
12 these dockets, it was discovered that all three
13 dockets had been overseen by an attorney who passed
14 away without having a successor attorney in place to
15 handle annual reporting and though the projects
16 continued towards completion by working with the
17 County, the annual reports to the LUC were not
18 submitted. LUC staff contracted the firm that the
19 attorney was affiliated with on Maui and was put in
20 touch with responsible members of the Petitioners for
21 the respective projects.

22 Our procedures for today will be very
23 brief. There's nobody in the room I believe
24 intending to testify on behalf of the of the public;
25 correct?

1 Attorney General, are we able to
2 consolidate all three matters?

3 MS. OHARA: Yes, you may.

4 CHAIRPERSON SCHEUER: How should we do
5 that?

6 MS. OHARA: Perhaps someone from staff or
7 Dan can explain the situation for each one, and you
8 can consolidate them and consider whether you want to
9 close the matter as deems appropriate if all the
10 requirements have been met, then there should be no
11 purpose in getting a report.

12 A lot of these -- one of them at least has
13 been completed from 2008.

14 CHAIRPERSON SCHEUER: Mr. Orodenger.

15 EXECUTIVE OFFICER: Pat, we have received
16 email from Petitioners explaining the situation.
17 Spencer has submitted a final report that says you
18 can consider the final report.

19 CHAIRPERSON SCHEUER: So if we receive a
20 summary of what's been received from the staff, and
21 then consolidate all three, is that process
22 acceptable for the County and Office of Planning?

23 MR. HOPPER: It's within your discretion,
24 and if your AG advises okay, we wouldn't object.

25 MS. APUNA: We wouldn't object.

1 CHAIRPERSON SCHEUER: No objections from
2 the County or the Office of Planning.

3 Good morning, can I ask what you both are
4 here for?

5 UNIDENTIFIED PERSON: I'm here interested
6 in the three projects that are on the list. Just
7 understanding what the process was going to be,
8 projects that are completely done.

9 MR. HOPPER: The person in yellow is a
10 staff planner with Maui County.

11 CHAIRPERSON SCHEUER: So then I think we're
12 going to revert to how we had planned to.

13 So the process we will go through, first,
14 any members of the public who desire to give public
15 testimony on any of these matters will be allowed
16 that testimony.

17 At the conclusion of each, I'll seek
18 comments and review the Petitioner's emails regarding
19 compliance with conditions or representations for
20 each Decision and Order that have been met and
21 whether any concerns about the docket's status in
22 this matter have been adequately addressed, and if
23 any further meetings on this matter are needed.

24 The Commission will then consider the
25 status report from each respective Petitioner.

1 The Chair will also call on County of Maui
2 and Office of Planning for comments.

3 Is that procedure clear on what we are
4 going to do?

5 The first status report A Lis on Docket No.
6 A04-746 Waikapu 48 LLP.

7 Mr. Nunokawa has advised the Commission he
8 is unable to appear and has submitted written status
9 report and request.

10 Let me update the record in this docket.

11 On October 30th, 2019, the Commission
12 mailed and emailed the November 6th and 7th meeting
13 agenda notice to Statewide, email and Maui mailing
14 lists.

15 On November 5th, the Commission received
16 email from Scott Nunokawa, Managing Member of Wailuku
17 408 Investment LLC, updating the Commission on the
18 status of this project.

19 Mr. Nunokawa was on the mainland and
20 reported he would not be able to appear before us,
21 but would review their archived files to provide
22 evidence of compliance with LUC Conditions at a later
23 date, and would be filing a motion to close out the
24 file.

25 Is there anybody wishing to give public

1 testimony on this matter? Seeing none.

2 Petitioner's Managing Member Scott Nunokawa
3 has submitted a written status to the Commission to
4 review and consider as his presentation. That's been
5 made available on our website as well.

6 Are there any questions or comments from
7 the County on this matter?

8 MR. HOPPER: No.

9 Just in general I don't know if you would
10 require motions to sort of delete conditions or
11 release conditions, or if this is a sufficient
12 process.

13 I think on sort of your own motion you can
14 decide that if there is evidence that they're in
15 compliance with the conditions. I'm not sure what
16 happens in the record, if there is a release that
17 gets recorded or whatever else. Those are general
18 questions and are within your procedures.

19 I don't -- I think the County was aware of
20 these dockets and didn't have comments for me to
21 provide you on problems with proceeding that way. So
22 that's the only comment I think I have for all three
23 items.

24 CHAIRPERSON SCHEUER: Thank you.

25 Mr. Orodenker, do you want to share a

1 little bit about the process that the Commission
2 might go through?

3 EXECUTIVE OFFICER: I should start off by
4 saying our rules don't cover what to do when our
5 projects are completed in this type of situation. I
6 think that -- keep in mind when our rules were
7 drafted in the '70s and '80s they weren't thinking of
8 where we are now.

9 Obviously, when a project has been
10 completed, there has been substantial commencement
11 and we don't have jurisdiction over commencement at
12 this point.

13 One of the things we can do is work with
14 the Petitioners to get certification from the County
15 that all the conditions have been met, or the various
16 agencies that all of the conditions have been met,
17 then we can issue a letter to the Petitioner saying
18 we don't have any more jurisdiction on this matter,
19 as far as we are concerned the docket is closed.

20 Absent some form of formal motion, I think
21 that's the best way to go.

22 CHAIRPERSON SCHEUER: What about the
23 removal of or notice on title?

24 EXECUTIVE OFFICER: Those would be subject
25 to whatever the title companies were going to require

1 for release.

2 MR. HOPPER: Essentially the Commission is
3 saying we no longer need annual report for this, but
4 the conditions will remain. But if someone wants to,
5 for whatever reasons, remove from title they have to
6 file a motion and have them --

7 EXECUTIVE OFFICER: If you want to do it
8 all at once, someone would have to file a motion with
9 us for removal of the conditions from title.

10 The other way that it could be handled is
11 that we can pass that issue over to the County,
12 because you have enforcement at this point anyway.

13 MR. HOPPER: We would have enforcement, but
14 actually, if no one is asking for that now, I
15 shouldn't -- maybe just for now, if the Commission
16 takes that action, the conditions will still be in
17 compliance on the title of the land.

18 CHAIRPERSON SCHEUER: Commissioner Chang.

19 COMMISSIONER CHANG: If I may, I think it
20 would be prudent on our part to have some formal
21 recordation or release of the conditions because the
22 title company will pick it up as a continued
23 encumbrance.

24 EXECUTIVE OFFICER: We can't release
25 without a motion and showing good cause technically.

1 So the best we can do without a rule change is issue
2 a letter saying that.

3 CHAIRPERSON SCHEUER: Commissioner Cabral.

4 VICE CHAIR CABRAL: Since I deal in real
5 estate and in properties, this comes up a lot in my
6 real world and these property owners somehow get in
7 touch with me because I manage the property or
8 involved with it early on, and they're always in
9 panic because they're trying to change ownership.

10 That is the length of us doing anything --
11 would never accommodate what they would need and that
12 would be an unfortunate situation for everyone.

13 So I really recommend that maybe we try and
14 have the Land Use staff come up with some kind of
15 recommended letter, you know, that goes back to the
16 developer, the Petitioner, their attorney, whoever,
17 and says from what we understand having dealt with
18 the County, you're complete. We recommend you do the
19 following.

20 And tell them what to do so we can deal
21 with it in some kind of timely matter. Otherwise,
22 it's going to come back to us at some point, but it's
23 always been in some disarray or panic at some time.

24 CHAIRPERSON SCHEUER: Commissioner
25 Ohigashi.

1 COMMISSIONER OHIGASHI: The way I read Mr.
2 Nunokawa's letter, he would be submitting directly to
3 our staff specific statements as to whether or not
4 it's been -- as to whether or not the permit
5 conditions have been met and the project has been
6 essentially completed.

7 Therefore, I think that we can just set
8 this matter as a separate agenda item at a further
9 date to receive those reports, final reports and just
10 act upon them at that time.

11 CHAIRPERSON SCHEUER: Thank you,
12 Commissioner Ohigashi, for the recommendation.

13 Mr. Hopper, you wanted to say something
14 more?

15 MR. HOPPER: In other cases the County
16 deals with this because we have County -- the County
17 does deal with the situation occasionally because we
18 do record conditions on properties, and so we
19 generally have a release document that's actually
20 filed. So if you look on time, someone will see
21 release of conditions was mailed.

22 Just as a suggestion, any procedure that is
23 in compliance with your rules is fine. If the County
24 is going to continue to be an enforcement agency,
25 just curious if there is still encumbrances, so if

1 property is sold, individual lots will have
2 conditions on title, fine. In the future someone may
3 want to have that released.

4 CHAIRPERSON SCHEUER: Thank you, Mr.
5 Hopper.

6 Is there any further questions for the
7 County?

8 I would observe, just not speaking
9 specifically about this docket, but occasionally we
10 will put in conditions that would actually continue
11 to run with the development even after the vast
12 majority of the conditions have been satisfied, so
13 that it really will needs, on some level, be case by
14 case based on conditions placed on the docket.

15 Commissioner Chang.

16 COMMISSIONER CHANG: On the actual
17 conditions there is a process, just Condition No. 19
18 release of conditions, but it's made upon motion. So
19 it's incumbent upon the Applicant or Petitioner to
20 file a motion. So it is in there but that appears to
21 be the process that we've laid out.

22 CHAIRPERSON SCHEUER: And we can discuss
23 this more when we go into deliberation on this
24 matter.

25 Is there anything from the Office of

1 Planning?

2 MS. APUNA: No comments.

3 CHAIRPERSON SCHEUER: So, Commissioners,
4 are there any further comments or questions on this
5 matter? This is a status report. We are not
6 required to take action, but we may.

7 COMMISSIONER OHIGASHI: My recommendation
8 was that we don't take action, that we just get their
9 offering for updated status report; and if they're
10 requesting a release, our staff would be able to
11 guide them to filing the proper motion.

12 CHAIRPERSON SCHEUER: For release?

13 COMMISSIONER OHIGASHI: For release.
14 Because, you know, this area I kind of remember it, I
15 think it's fully developed, is that right? And
16 nobody has asked for a release until now. And I
17 agree with the Chair, because I forgot the project
18 name in Kona that I think you're recused from anyway,
19 but we still have conditions that are being brought
20 up to this day. So I think that staff will be more
21 able to review those conditions and determine what
22 has been met and what is necessary.

23 CHAIRPERSON SCHEUER: Commissioners, other
24 thoughts or comments? Are we fine with the
25 recommendation from Commissioner Ohigashi to have a

1 status report, then the direct staff to work with, or
2 the staff will work with the Petitioner for the
3 Petitioner to file an appropriate motion before us?

4 COMMISSIONER CHANG: Should they ask for --
5 because I think pursuant to the condition, I don't
6 think the Commission can unilaterally make a motion.
7 Looks like they have to make the motion.

8 COMMISSIONER OKUDA: Even if conditions
9 remain on title and even if some of those conditions
10 might look onerous just on its face, my experience
11 has been that that doesn't necessarily stop a
12 closing, because it depends what the title company's
13 underwriters are looking for, and they view things on
14 a case by case basis.

15 And I've seen transactions close even where
16 you would think at first blush a motion should be
17 filed, because the underwriters receives sufficient
18 information to satisfy the underwriter that the title
19 insurance company is really not going to face risk or
20 additional risk in closing the transaction.

21 So I agree, since a lot of this is these
22 things are on a case by case basis, and I agree with
23 the comments that we have to be careful to not
24 inadvertently release important conditions that were
25 intended to run with the land.

1 We should, number one, leave it to the
2 discretion of the staff to give guidance to whoever
3 inquires, but there should be a set procedure if
4 there will be a release of a condition in more cases
5 than not.

6 I think it should be done by some kind of
7 motion so there is something clearly on the record.
8 But I agree with the suggestion that Mr. Ohigashi has
9 made.

10 CHAIRPERSON SCHEUER: Thank you,
11 Commissioner Okuda.

12 Commissioner Ohigashi.

13 COMMISSIONER OHIGASHI: I'm just happy to
14 hear Gary Okuda agree twice in a row.

15 CHAIRPERSON SCHEUER: Is there anything
16 further on this docket?

17 A04-748 CONSOLIDATED BASEYARDS LLC

18 If not, our next status report A04-748,
19 Consolidated Baseyards LLC.

20 We still have the County and Office of
21 Planning with us. Let me update the record.

22 On October 30th, 2019, the Commission
23 mailed and emailed the November 6-7, 2019 LUC meeting
24 agenda notice to the Statewide, email and Maui
25 mailing lists.

1 On November 6 the Commission received
2 written correspondence from the Petitioner's
3 representative providing status report and notice of
4 nonappearance, and that the Petitioner's entity no
5 longer exists.

6 Is there anybody wishing to give public
7 testimony on this docket? Seeing none.

8 No one is here on behalf -- no one else is
9 here on behalf of the Petitioner.

10 I will note that he was in the room briefly
11 yesterday, I think checking to see what the status
12 was of our progress on the agenda.

13 So the Petitioner has not appeared. Are
14 there comments on the report from the County?

15 MR. HOPPER: Just the same as in the last
16 docket. We acknowledge that there may be some
17 conditions in some of these that were intended to
18 permanently run with the land. That's all.

19 CHAIRPERSON SCHEUER: Thank you, Mr.
20 Hopper. Any questions for the County?

21 Office of Planning.

22 MS. APUNA: No comment.

23 CHAIRPERSON SCHEUER: Commissioners, any
24 questions?

25 Commissioner Ohigashi.

1 COMMISSIONER OHIGASHI: And, again, if the
2 entity is not there and nobody seems to be interested
3 in filing a motion to remove conditions, I think they
4 should be informed, or at least if there is a
5 representative that we can inform by letter that
6 these conditions are on the property, that they will
7 remain on the property until such time that you
8 intend to remove them. And I don't know if there's a
9 formal closing of any docket being done, because I'm
10 not familiar with any closing that any kind of case
11 can technically exist, because I've seen them revised
12 many times.

13 However, I think for that purpose, so long
14 as the conditions are on, that is incentive enough
15 for any petitioner to come and make a motion to try
16 and remove them. So I think we just would defer this
17 until we move on.

18 CHAIRPERSON SCHEUER: Thank you,
19 Commissioner Ohigashi.

20 Further comments on this docket? If not,
21 no action will be taken. And I think the staff has
22 the inclination of the Commission to be in touch with
23 the Petitioner.

24 A04-750 SPENCER HOMES, INC. (Maui)

25 Our final status report A04-750 Spencer

1 Homes Inc. (Maui).

2 Petitioner's representative, Doug Spencer,
3 submitted a written status report via email from the
4 continent and will not be appearing.

5 This email was made available for the
6 Commission, County and OP to review and consider.

7 This email was made a part of the record.

8 To update the record, the Commission mailed
9 and emailed the agenda meeting notice for this
10 meeting to the Statewide, email and Maui mailing
11 lists.

12 Is there anybody in the public wishing to
13 testify on this agenda item?

14 If not, the Petitioner has provided a
15 written status report and requested that the
16 Commission close this file.

17 Are there comments from the Commissioners
18 at this point before we hear from the County and OP,
19 or questions for our staff?

20 Commissioner Chang.

21 COMMISSIONER CHANG: I would just echo
22 Commissioner Ohigashi's previous recommendations on
23 the other two, is that I don't think we should leave
24 it up to the staff to work with the Petitioner as to
25 filing a motion rather than us taking any action.

1 CHAIRPERSON SCHEUER: Thank you. Building
2 on Commissioner's Chang question, Mr. Orodenker, is
3 the email request that we close this matter a
4 sufficient basis for a motion, or do we need more
5 from the Petitioner?

6 EXECUTIVE OFFICER: We would need to
7 contact the Petitioner. Staff will contact the
8 Petitioner and tell us what the actual status of the
9 situation is and work with the Petitioner to close
10 out, if that's what their desire is, for lack of a
11 better word for disposition.

12 CHAIRPERSON SCHEUER: Thank you, Mr.
13 Orodenker.

14 Mr. Ohigashi.

15 COMMISSIONER OHIGASHI: It would appear
16 that from the email that they don't have any
17 financial interest in the property, however, they're
18 still named parties. So if any individual landowner
19 has a problem in conveying title, it would appear
20 that they bear the responsibility of removing it. So
21 I think that's the proper method.

22 However, they should be informed that the
23 conditions still stand and they bear the burden of
24 trying to remove it.

25 CHAIRPERSON SCHEUER: Are we ready to move

1 on to the County? County.

2 MR. HOPPER: Same comments as before. I do
3 believe that, yeah, there is not necessarily
4 impediment to title with Land Use Commission
5 condition. I think there is lots of property in
6 large subdivisions that have LUC conditions on them,
7 Kealani, my house still has them there.

8 CHAIRPERSON SCHEUER: Motion to enforce --

9 MR. HOPPER: You're going to make me build
10 a park? Only you.

11 I think in general, you know, that's
12 something that you'll see and, you know, I don't know
13 if the Commission has the power in its own motion to
14 bring this -- better to have a landowner in cases
15 where the landowner may have transferred ownership,
16 might get more complicated, but whatever process
17 feels appropriate, and if it does look like these
18 docket conditions, or at least annual report
19 conditions can be released, that's something that
20 seems to make sense to do, if the effort to look into
21 these was to clean up the docket.

22 CHAIRPERSON SCHEUER: Other questions for
23 the County?

24 Do I have a second on my motion to enforce?

25 COMMISSIONER WONG: Second.

1 COMMISSIONER OHIGASHI: The Chair cannot
2 make motions.

3 VICE CHAIR CABRAL: Procedurally safe --

4 CHAIRPERSON SCHEUER: Office of Planning?

5 MS. APUNA: No comments.

6 CHAIRPERSON SCHEUER: Commissioners, what
7 is your pleasure?

8 COMMISSIONER OHIGASHI: Just not take
9 action.

10 COMMISSIONER CHANG: Can I just ask Mr.
11 Orodenker, is staff going to be looking at all of the
12 pending matters? I just don't want us to be
13 criticized for picking and choosing.

14 EXECUTIVE OFFICER: We are looking at
15 everything.

16 COMMISSIONER CHANG: Very good.

17 COMMISSIONER OHIGASHI: Would it be
18 required to place these future type of actions on the
19 agenda?

20 EXECUTIVE OFFICER: It depends on the
21 situation. This was the first time we came across
22 this type of a situation.

23 COMMISSIONER OHIGASHI: Usually you would
24 receive a final report? Just asking.

25 EXECUTIVE OFFICER: A number of different

1 things that are happening. Some developers over the
2 years, as soon as they're done with the project and
3 moved on, they will file a motion, a change in
4 ownership and/or Motion to Dismiss conditions, to
5 alleviate the conditions.

6 This is part of what we have been doing to
7 try and clean up our records. This is why it's
8 starting to come before the Commissioners. Our hope
9 is to develop a system whereby we don't have to bring
10 every matter to every one of these to the
11 Commissioners, whereby we can work with the
12 landowners to come to some resolution, issue some
13 kind of letter that resolves whatever issues that
14 they have with regard to both title and releasing
15 them from further obligation.

16 We have situations where the project is
17 100 percent built out, and technically the developer
18 who was the petitioner doesn't even have an interest
19 in the property any more other than the fact that it
20 got some obligations to the people they sold to that
21 might hold them on the hook for something.

22 So basically this is a work in progress.
23 We have got to figure out a system that works for
24 both petitioners and for the Land Use Commission on
25 how to basically take these things off the book.

1 We will give them all to the County, that
2 sounds fair.

3 CHAIRPERSON SCHEUER: Commissioner Okuda.

4 COMMISSIONER OKUDA: Chair, I would view
5 what the staff is doing in this regard simply as an
6 accommodation or trying to have responsive government
7 to the community. At least for me, I would like to
8 make a statement that I don't believe these actions
9 should be considered to create an independent duty on
10 behalf of the State of Hawai'i or any of the Counties
11 or Land Use Commission or it's staff to have to
12 basically independently have a duty to follow up with
13 landowners.

14 If there's conditions that a landowner
15 believes should be released, it's the landowner's
16 responsibility to bring the appropriate motion if an
17 a motion is required, or to take the appropriate
18 action to get a clear release of conditions, or to do
19 whatever is necessary regarding entitlement.

20 So in my view, this is simply an
21 accommodation to try to help people in business,
22 landowners, to do things efficiently, but it doesn't
23 create an independent duty upon any government
24 agency. That's just my statement.

25 CHAIRPERSON SCHEUER: Thank you,

1 Commissioner Okuda.

2 Is there anything further on this agenda
3 item? If not we have made it through all our agenda
4 items.

5 Any further business for this Commission to
6 consider? If not, I will ask that our next meetings
7 on November 20th and 21st will be in remote locations
8 and have heavy agendas, and ask that, Mr. Orodener,
9 LUC staff can make necessary arrangements for our
10 working lunch.

11 EXECUTIVE OFFICER: Well, given the way
12 this Commission eats --

13 CHAIRPERSON SCHEUER: I'll take that to be
14 a yes.

15 EXECUTIVE OFFICER: Yes.

16 CHAIRPERSON SCHEUER: That being said,
17 there is no further business and this meeting is
18 adjourned.

19 (The proceedings adjourned at 9:20 a.m.)
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CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on November 7, 2019, at 9:00 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 7th day of November, 2019, in Honolulu, Hawaii.

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