

LAND USE COMMISSION
MEETING MINUTES

Jade Plumeria Room
Wailea Marriott, An Outrigger Resort
3700 Wailea Alanui
Wailea, Maui, Hawaii 96753-8332

April 9, 2003

COMMISSIONERS PRESENT:

P. Roy Catalani
Bruce Coppa
Lawrence Ing
Steven Montgomery
Stanley Roehrig
Randall Sakumoto
Peter Yukimura

COMMISSIONERS ABSENT:

Pravin Desai
Isaac Fiesta

STAFF PRESENT:

Russell Suzuki, Esq., Deputy Attorney General
Anthony Ching, Executive Officer
Bert Saruwatari, Staff Planner
Caroline Lorenzo, Acting Chief Clerk
Holly Hackett, Court Reporter

Chair Ing called the meeting to order at 9:30 a.m.

ADOPTION OF MINUTES

Vice Chair Catalani moved to adopt the minutes of the March 27-28, 2003, Commission meeting. Commissioner Montgomery seconded the motion, and said motion was unanimously approved by voice votes.

TENTATIVE MEETING SCHEDULE

Executive Officer, Anthony Ching, reported that there will be a field trip on May 8-9, 2003. The Commission will visit Maui on May 8, 2003, to view the sites of the Upcountry Town Center and Maui Business Park. On May 9, 2003, the Commission will view the Kukui'ula Development project on Kauai.

Mr. Ching also reported that a new commissioner, Rae McCorkle had been appointed to serve on the Commission upon Commissioner Roehrig's departure, effective July 1, 2003.

LEGISLATION

Mr. Ching reported that the legislature was in its conference committee portion of the legislative process, and that there were no administrative proposals that the Commission would be involved with.

DR02-26 KULEANA KU'IKAHI, LLC (Maui)

Chair Ing announced that this was a hearing of the Commission on Docket No. DR02-26 Kuleana Ku'ikahi, LLC, to consider the Petition for Declaratory Order that the subdivision and development of approximately 4,500 acres of land in an agricultural district requires a district boundary amendment at Kauaula, Lanuniupoko, Olowalu, and Ukumehame, West Maui.

Chair Ing stated that it was important for the parties and the public to understand the nature of the matter before the Commission. Chair Ing indicated that the scope of the hearing was limited to the Commission determining whether the proposed subdivisions were a permissible activity as described in Chapter 205 of the Hawaii Revised Statutes.

Chair Ing noted that if the Commission found that the subdivisions were not permissible under the state law, the Commission was required to issue a declaratory order that a district boundary amendment should be obtained, and the Commission or the Maui Planning Commission would determine whether or not to grant the change in the land use district designation from agricultural to either rural or urban. Chair Ing further noted that if the land use district designation were changed from agricultural to rural or urban, conditions of approval would be determined.

APPEARANCES

Richard McCarty, Esq., representing Kuleana Ku'ikahi, LLC

Jane Lovell, Esq, Deputy Corporation Counsel, representing the County of Maui Planning Department

Greg Garneau, Esq. Deputy Corporation Counsel, representing the County of Maui Planning Department

Michael Foley, County of Maui Planning Department

John Chang, Esq., representing Land Use Division, Office of Planning

Abe Mitsuda, Land Use Division, Office of Planning

Thomas Welch, Esq., representing Kauaula Land Company, LLC

Benjamin Kudo, Esq., representing Makila Land Company

Jamie Tanabe, Esq., representing Makila Land Company

Richard Kiefer, Esq., representing Launiupoko Associates, LLC

Mr. Kudo stated that the counsels of the developers had stipulated that Makila Land Company (Makila) would start off its case, followed by Kauaula Land Company LLC (Kauaula), and then by Launiupoko Associates, LLC (Launiupoko). The parties indicated that they had no objections.

Chair Ing disclosed that he had known Peter Martin and Jim Riley for over 30 years and that he represented them over 20 years ago. He noted that Mr. Randall Endo, who is a partner with Carlsmith Ball and who represented one of the parties, joined Chair Ing's law firm on June 16, 2002, and left the law firm on October 2002. Chair Ing further disclosed that at that time, one of his partners may have briefly taken over the case; however, it was returned to the Carlsmith Ball law firm. Chair Ing indicated that he was not involved in discussions of the matter nor discussed the matter with any of the parties, and that he could be impartial to this matter. He then asked the parties if they objected to his continuance in this matter. Chair Ing also indicated that he did not have a continuing personal relationship with any of the developers. The parties indicated that they had no objections.

At this time, Commissioner Yukimura entered the proceedings at 9:40 a.m.

Bert Saruwatari, Staff Planner, oriented the Commission on the Petition Area and referenced LUC maps and photos of the field trip.

Chair Ing announced that the Commission would hear public testimonies until 10:30 a.m., and that if members of the public had already testified in a prior hearing, only new statements would be allowed. Others who hadn't testified prior to this hearing would be able to testify first. Chair Ing instructed the public that the testimonies should be kept brief and that at the end of the testimony, the parties and the Commission would be allowed to examine the witness.

At this time, Vice Chair Roehrig entered the proceedings at 9:50 a.m.

PUBLIC WITNESSES

1. Luciene d'Naie

Ms. D'Naie distributed to the Commission copies of a map of the Petition Area and her testimony. Ms. D'Naie stated that she was the conservation coordinator/director for Maui Tomorrow, a non-profit organization, whose mission was to support responsible long-range planning policies for the Maui County area. Her concerns involved the availability of water in the area. She noted she was doing research and collating information on what was known and unknown on the current water uses and capacities. She added that she was in the process of gathering this information into a report to be submitted to the County of Maui. This report would be completed by August 2003. Ms. D'Naie noted that the stream was an important source for stream use, to service the Kuleana tenants, and for the restoration of Moku'ula. She also expressed the importance of water and how it was managed in this area. A detailed

version of Ms. D'Naie's testimony may be found in the Commission Transcripts of April 9, 2003, and may also be referenced in the copy of her testimony.

Mr. McCarty asked the witness if she had put together a draft version of the report concerning the matters to which she testified. Ms. D'Naie indicated it was to be made available upon the Petitioner's request and would be part of the report presented to the County.

Mr. McCarty referred to Petitioner's Exhibit 15, which was a draft version of the report to the County of Maui.

Mr. Kudo asked Ms. D'Naie to clarify her testimony that water was overused by the plantation. Ms. D'Naie responded that the County reports indicated that Pioneer Mill had chronic water shortages in the Olowalu/Launiupoko/Kauaula areas for their plantations and had to rely on water from Honokohau, which meant that the amount of water used for agricultural purposes exceeded the amount of water coming out of the stream.

Mr. Kudo asked the witness if she would agree that most of her testimony with regard to the sustainability of the aquifer, in-stream standards, recharge capabilities, and use of water in this region were matters that would primarily be within the jurisdiction of the Commission on Water Resource Management. She agreed that would be the case, but believed the County had a new role as well, since the Water Department had assigned itself a great deal of oversight and its functions were more integrated with the administration. She believed that the Governor and the Mayor were in negotiations with how those responsibilities will be distributed.

Vice Chair Catalani asked the witness for the position of Maui Tomorrow regarding this petition. The witness responded that its Board had not directly voted on whether it believed district boundary amendment was absolutely necessary, but stated that the Commission should do due diligence with the applicants.

Ms. D'Naie indicated that careful planning was needed to ensure that low income housing would have an available water supply to meet future needs. She also indicated that the two much needed low income housing projects referred to DHHL's and HCDCH's projects.

Vice Chair Roehrig asked the witness to respond to neighboring landowner, Bishop Estate's need for water. Ms. D'Naie indicated that there were a lot of complaints during storms that large amounts of runoff came off of their land. They had a pilot project with the Pacific Island Land Institute, which will be negotiating water with the parties of the proposed development.

Vice Chair Roehrig asked Ms. D'Naie about the Kauaula Valley area, which she had indicated was historically a valley of some significance during the old times. Ms. D'Naie responded that there were ancient legends, mele, the winds of Kauaula and was a source of a great deal of water.

Vice Chair Roehrig pointed out that the area along the stream was utilized by Hawaiian families and used for irrigation of taro and other crops. He asked the witness if she had contacted the State Water Commission for a prioritization of the utilization of water from the Kauaula Stream and the Launiupoko Aquifer. Ms. D'Naie indicated that she would be meeting with Deputy Director Lau on Friday, April 11, 2003.

2. Pua Aiu

Ms. Aiu represented the Office of Hawaiian Affairs (OHA) and distributed to the Commission a copy of her testimony. She indicated that OHA supported the petition and indicated OHA's concerns on the following issues:

- That the water code provide rights to native Hawaiians for traditional and customary practices, such as taro growing and other traditional practices; it was OHA's position that there must be an adequate analysis of the proposed water diversion and its impact upon the flow of the Kauaula Stream;
- Access rights of the Kauaula/Kuleana homeowners through the development were being denied;
- Archaeological sites in Kauaula Valley will be affected and the Kapaakai court decision held the Commission accountable for protecting historic sites;
- That the developer and the County of Maui chose to evade public review of the historic preservation plan;
- That agricultural uses on the subdivision parcels were questionable and that perhaps a boundary review was called for.

A detailed version of Ms. Aiu's testimony may be found in the Commission Transcripts of April 9, 2003, and may also be referenced in the copy of her testimony.

Mr. Kudo asked Ms. Aiu whether PASH rights applied to the undeveloped lands in the valley. Ms. Aiu responded that the PASH rights would apply to access across the former sugarcane lands.

Vice Chair Roehrig asked Ms. Aiu about OHA's position on whether the traditional and historical irrigation by the Kuleana family members living in the Kauaula Valley were irrigation PASH rights under the Waihole-Waikane case. Ms. Aiu responded that they were protected rights under the public trust doctrine.

Vice Chair Roehrig then asked if it was OHA's position that there should reasonable access along the sides of the Kauaula Stream in order for native Hawaiian families who were exercising their irrigation rights to have reasonable access to their agricultural sites and home sites. Ms. Aiu indicated in the affirmative but did not believe the sites along the stream were affected, that they used to access their properties in the valley through the subdivision, and that access was being denied.

Mr. Foley asked Ms. Aiu about OHA's request to the County for information and if OHA received a response. Ms. Aiu responded that Don Hibbard, in his letter to the Chair of the Cultural Commission, requested that the developers provide copies of the documentation to the native Hawaiian communities so that they could have input on the proposed developments. The second letter suggested that OHA become involved. Ms. Aiu indicated that OHA did not receive any documents, but received the State Historic Preservation Division's preservation plans.

A break was taken at 10:36 a.m., and the meeting reconvened at 10:47 a.m.

Chair Ing indicated that the parties had submitted their numerous witness and exhibit lists and asked whether the parties objected to it. The parties indicated that they did not object. Makila indicated that it reserved the right to object on the grounds of relevance. The parties then stipulated that the exhibits were being admitted as authentic documents.

Chair Ing indicated that all exhibit and witness lists had been entered into the record.

Chair Ing asked that each party make a brief opening statement of its position in this matter.

Mr. McCarty stated that he represented Kuleana Ku'ikahi on this matter. He hoped to provide the Commission with evidence that the regional area that included a lot of issues were important to this matter, and that the subdivisions were inconsistent with the agricultural subdivision requirements. Mr. McCarty also hoped to address water issues and wanted the Commission to consider cultural, natural, and ocean resources in line with the decision as to whether these developments should proceed as currently proposed.

Chair Ing clarified that the Petitioner's petition asked for a declaratory order that a district boundary amendment was required. Mr. McCarty responded that it would be required if the current uses were inconsistent with an agricultural subdivision.

Ms. Lovell stated that the County of Maui had an agricultural zoning ordinance since 1998 that comported with state law and was more restrictive. She stated that the County would provide witnesses to describe the zoning ordinance's effectiveness and how the subdivision process worked in Maui. She also stated that the County opposed a district boundary amendment of these lands on the grounds that agricultural land in Maui should remain agricultural.

Mr. Chang stated that the Office of Planning had not filed a position statement, witness list, or exhibit list for this docket, and indicated that it was the state's position that it took no position and would not actively participate in these proceedings.

Mr. Kudo indicated that it had been difficult to determine what specific issues were raised by the Petitioner because of the nature of the petition and the way it was written. He

further indicated that Makila lands were in the Agricultural District and zoned agricultural under the County zoning code. Mr. Kudo expressed that there was nothing going on the property other than that infrastructure was being built to service the agricultural lots and that one farm was growing basil. He added there were no dwellings and no other structures on the individual lots which were being prepared for agricultural uses by the proposed buyers. Mr. Kudo stated that there were no factual basis to support Mr. McCarty's allegation that the current uses were violative of Chapter 205, and was unsure exactly what to present to the Commission.

Mr. Kudo indicated that the second issue regarding Kauaula Stream and the competing uses of the stream was within the purview of the State Water Commission under Chapter 174C. Mr. Kudo stated that he would provide evidence to show that nothing was going on Makila lands other than its preparation for agricultural uses. He added that he would also demonstrate that Makila did not adversely impact the exercise of traditional and customary rights for those persons residing within Kauaula Valley. Mr. Kudo further indicated that he would show that Makila will comply with all laws with regard to all archaeological matters.

Mr. Welch stated that the subdivisions complied with Chapter 205 and the agricultural use provisions. He also stated that there was no actual uses being made with Kauaula land except a lease to a greenhouse nurseryman operator. He noted that evidence will be provided to show that the lands have been encumbered by a specific and clear covenant restricting the land to those uses which were permitted by state land use laws with regard to agricultural uses. He would also provide evidence to show that the area had been comprehensively studied for archaeological and historical interests, and that agricultural preservation plans had been processed and approved by the State Historic Preservation Division of DLNR.

Mr. Kiefer stated that he will present evidence to the Commission that there was no current violation of Chapter 205 with respect to lands owned by Launiupoko and will demonstrate that Launiupoko had taken affirmative steps to assure that those lands were used for agricultural purposes compliance with Chapter 205. He will also demonstrate that the development had no impact on traditional and customary rights and was in compliance with all applicable laws regarding archaeological sites and other issues raised.

PETITIONER'S WITNESSES:

1. Keaumoku Kapu

Mr. Kapu stated that he was a resident of Kauaula valley living with three brothers, wife, three sons, and a daughter in the upper region of the valley. He indicated that his family had been living there for many generations. The land was located in the water intake area.

Mr. McCarty referred to Exhibit 31. Mr. Kapu described his home and stated that his farming practices include cultivation of taro. He stated that there was an abundance of wetland taro.

Mr. Kapu provided a background of his experience in the Hawaiian culture. He stated that he was a member of Na papa kanakaopu ko la and belonged to a council of chiefs on the Big Island. His responsibilities were to encourage young people to stay the plight and perpetuate the culture. Mr. Kapu further stated that he was a member of the royal order of Kamehameha on Maui and a member of Kuleana Ku'ikahi, and was the newly appointed cultural resources commissioner for the County of Maui.

Mr. Kapu noted that he had been involved as an instructor in Hawaiian cultural issues, and had traveled to Marquesas and Tahiti to learn about the rites of passage. He explained that he did workshops to educate the younger generation on Hawaiian cultural issues and continued to perpetuate genealogy. Mr. Kapu indicated that he was a member of the national interpretations of the world, which had indigenous conferences where people from all over the South Pacific and tribes attended. He indicated that the interpretation workshop discussed ongoing issues and battles in litigation of historical past, things placed in museums around the world, and concerns about the PASH rights decision.

Mr. McCarty played a videotape of the area above Mr. Kapu's home. He explained how the water from Kauaula Valley traveled and was diverted into the development area.

Mr. McCarty referred to page 3 of Exhibit 31. Mr. Kapu described the picture shown in Exhibit 31 as a two-inch drisco line that went around the property and hooked up to a hydro-plant. The two-inch pipe serviced 11 homes of his family who lived at the bottom of the valley. He noted that the pipe did not only serve the house, but also served the Palakiko's wetland taro patches. Mr. Kapu indicated that taro required cold water, and that the sun heated the water in the pipe running and rotting taro patches.

As he referred to LUC Map No. 1, Mr. Kapu indicated that his family was responsible to divide the water equally on an 11-day cycle. He indicated that on the east side of Kauaula valley, the waters would be serviced in those areas on the 11-day cycle; and that on the west side, the waters would be diverted at night to create an equilibrium for everyone to share the amount of water. Currently, the water traveled from the hydro-plant into a flume that went down a siphon pipe that ran towards Makila above Kauaula reservoir. He was unsure as to where the water went after that. He explained that the water traveled from the dam, to a pipe, to the powerhouse, to the black line, then to the Palakiko's four homes. It then continued down and supplied seven other homes at the bottom below Palakiko's home. Mr. Kapu indicated that Makila put in the black pipeline. He noted that his family recently had been having water problems. Mr. Kapu further indicated that once a month the family clean up an old cistern pipe that used to come along side the tunnel and went into a pill box or cistern. Because the pipe used to give a lot of problems, Makila installed the black pipeline, which could be a temporary or permanent use for the families.

When entering Puunoa Subdivision I and II to enter his home, Mr. Kapu stated that he was confronted about entering private property. Mr. Kapu indicated that he used the old

Makila Road to enter into his home, and believed that no agriculture was done until after the Petitioner filed a the petition for a declaratory order. Mr. Kapu stated that he had contacted County officials a number of times to obtain clarification pertaining to the cultural aspect of the area in regard to pre-contact and post-contact sites. He noted that he had been appearing before Cultural Resources Commission since 1999, to express concern about burials adjacent to the stream. He also met with officials of the Planning Department, Water Department, and Public Works and had three meetings with Mayor Kimo Apana to discuss concerns about the area. He asked the County to slow down the process, and that no issues were addressed to the Cultural Resources Commission. Ms. Lovell stated that the County objected to this testimony because it was part of a lawsuit which had been filed against the County of Maui.

Mr. McCarty stated that one of the County's position in this matter was that they were fully able to enforce the rules and that they had made efforts to get that done and had received no response.

Mr. McCarty indicated that Kuleana Ku'ikahi had one pending lawsuit against the County of Maui, and West Maui Land Company had filed quiet title actions against two of the members of Kuleana Ku'ikahi: Mr. Kapu, and the Dizons and John Aquino.

Vice Chair Roehrig questioned the Petitioner as to how these issues were relevant to these proceedings. Mr. McCarty responded that he did not believe they were, and that there was an access question in the lawsuit against the Dizons, a countersuit against quiet title action. Ms. Dizon had asserted that she had a right to continue access to that parcel and that her property was not involved in the lawsuit.

Vice Chair Roehrig's expressed concern as to why the parties involved could not resolve this issue and why it was before the Land Use Commission. Mr. McCarty stated that he and his client had made efforts and felt that they had been unsuccessful in getting this issue resolved.

Commissioner Coppa moved for an executive session to discuss the legality of this issue with the Commission's counsel and get clarification regarding the pending lawsuits amongst the parties. Vice Chair Roehrig seconded the motion, and said motion was unanimously approved by voice votes.

Before the Commission entered into the executive session, Chair Ing announced that the meeting would reconvene at 1:00 p.m., at which time public witnesses would be allowed to testify for about half an hour. The Commission would then return to Mr. Kapu's testimony.

The Commission entered into executive session at 11:30 a.m. The meeting reconvened at 1:19 p.m.

Vice Chair Catalani excused himself from the proceedings at this time.

Chair Ing reminded the public witnesses that for the next half hour, their testimony should be limited to approximately three minutes each.

PUBLIC WITNESSES (continued)

3. Kristi Buen

Ms. Buen stated that she was a resident of Waihee, Maui, and an office manager for Cherokee Construction in Lahaina. She indicated that she was interested in building a home in Launiupoko and was grateful for her home and space to cultivate the land and grow a small garden of vegetables. She testified that it was incorrect to refer to the subdivision as “gentlemen estates” and for families living there to be accused of inappropriately living on the land. She also indicated that the majority of these homes were conservatively constructed, and that some of the houses on the land were not deemed agriculturally fit for growing any plants. For that reason, topsoil was brought in so that families could grow fruits and vegetables for sale or to feed their families. There were no questions by the parties nor by the Commission.

4. Joy Neizman

Ms. Neizman stated that she was a resident of Lahaina. She indicated that she wanted to live in Launiupoko and was in favor of Phase IV in Launiupoko to be approved. She further indicated that it was a dream to live in a spacious area, grow a vegetable garden, raise plants, and live far away from neighbors. There were no questions by the parties and the Commission.

5. Greg Howarth

Mr. Howarth stated that he was a resident at Launiupoko and a professional diver. He indicated that he was one of the first buyers in Phase I and was currently growing 18 different types of banana trees. He discussed some of his farm plan with the County before doing any planting, but did not file a farm plan with the homeowners’ association. He was unsure of the stipulation for filing a farm plan with the homeowners’ association. Mr. Howarth further testified that there were misconceptions as to what was going on in the subdivision, and that living in Hawaii was expensive and the ability to own agricultural land offsets some of those expenses. He further added that there was a great deal of agriculture being undertaken but not in large scale. He noted that most people built their homes first, then prepare it for agricultural growth. He added that it took time to grow agricultural products and to make dreams a reality. There were no questions by the parties and the Commission.

6. Debbie Arakaki

Ms. Arakaki stated that she represented the Mahanalua Nui subdivision and was present on behalf of the Homeowners Association. She indicated that the Board felt that the Commission should allow the last two phases of the subdivision to be built as planned with a district boundary amendment, and to maintain its maintenance fees added into its budget as

projected. She also indicated that majority of the homeowners were working families who were primarily from the west side of Maui finishing up their homes and tending to their families and family activities while at the same time trying to plan and plant their properties. She testified that it was premature to judge the subdivision on its agricultural profitability, and that the Board respectfully asked that the Commission decline this petition.

Mr. McCarty asked the witness if she had an agricultural lot at her house. She responded that she had a nonpotable water system and knew that she would have to pay for the water eventually. She explained that the developers had not charged the homeowners but were waiting until the system was up and ready for the subdivision.

Mr. Welch asked the witness if the Association had taken steps to enforce the requirement of to have the homeowners file a farm plan with the Association. Ms. Arakaki responded that the Association had not taken steps to enforce the filing of a farm plan requirement with the Association because the Association was relatively new and was concerned with the overall startup items. She noted that the matter would be discussed at the next homeowners' association meeting.

7. JoAnn Johnson

Ms. Johnson stated that she was a member of the County Council of Maui, and was testifying as a fiduciary officer of Maui County. She explained that her testimony before the Commission was as the chair of the Parks and Agricultural Committee. She added that as the chair, she was testifying in support of agriculture and the preservation of agriculture and in support of Hawaii Revised Statutes, Chapter 205.

Ms. Johnson expressed that one of the areas being missed in these proceedings was the segmentation of the properties that had taken place. She referred to and distributed a colored map to the Commission. She indicated that having three different attorneys representing three different limited liability corporations was a problem, and noted that these subdivisions should be looked at as one area and one agricultural use.

Ms. Johnson indicated that the key to the survival of agricultural was the actual cost of the land. Ms. Johnson noted that agricultural land assessments went up 48%. Her contention was that those values reflected what was actually happening on agricultural land, which were being used for purposes other than agricultural. She testified that these were primarily very exclusive homes. She noted, however, that there were some modest homes. She believed that the increase in assessment was driving existing farming operations out of business.

Ms. Johnson noted that the services on agricultural land were very limited in scope, and that the cost for community services needed to be considered by the County of Maui as well as the State of Hawaii.

Ms. Johnson noted that the lands should be used for agricultural purposes to support the farming community and the Hawaiian community.

Chair Ing indicated that Ms. Johnson submitted 17 pages of concerns and comments to the Commission in November of 1999.

Vice Chair Roehrig questioned the witness regarding the investigation of water and the competing interest of water from the Launiupoko aquifer. Ms. Johnson indicated that the subject had not come up to the Park and Agricultural Committee; however, she stated that she received information focused on the more central Iao aquifer and the threat of designation, and looked extensively at the water issues and the availability. It was her understanding that the Villages of Leiali'i was on the verge of being resolved, so that project plus the Hawaiian Homes project were in need of water. She indicated that there should be discussion by the community with all the parties informed to ensure there was water for the people who were moving into these subdivisions.

Vice Chair Roehrig asked Ms. Johnson if she had done any investigation to find out whether there was ever going to be nonpotable water pumped from the Kauaula stream into this petition area. Ms. Johnson indicated that because of the Waiahole decision and the fact that water was public trust, she had issues with certain permits being issued. Her concern was that some of the permits issued may cause a problem when people began to access the potable system. Her greatest concern was that there would not be enough water to service everyone.

Vice Chair Roehrig asked Ms. Johnson for her opinion on what should be done about these issues. She indicated that the rights of the new homeowners should be taken care as should the PASH rights of the Hawaiian community who lived in Kauaula Valley. She indicated that if it was determined that the existing uses and the plans for this area were inconsistent with the intent of HRS Chapter 205, there would be no legal basis to continue development in that area.

Vice Chair Roehrig noted that people who bought houses were victims just as much as the other people and somewhere along the line, the system broke down. Ms. Johnson indicated that any guidance that could help establish baseline data, set up parameters for development of the area, and establish what was in compliance with HRS chapter 205, and what was not would be extremely helpful.

Vice Chair Roehrig referred to Petitioner's Exhibit 29, which stated that the declarant (Kauaula Land Company LLC) at its option may develop a nonpotable water distribution system for irrigation and other nonpotable uses in Declarant's discretion, and asked if that gave the buyer any right to agricultural water. Ms. Johnson responded in the negative.

Mr. Kudo clarified that most developers did not provide nonpotable water sources to buyers for the reason that surface was protected under the public trust, and not owned by any private individual. He noted that it was held in public trust subject to reasonable regulation by

the State of Hawaii. Mr. Kudo added that developers could not promise or create a right in something that they had no ownership interest.

Mr. Kudo addressed the issue as to why they were using the water from Kauaula stream. He indicated that Pioneer Mill, from whom Makila purchased the land, had certain abilities to use the water from Kauaula stream. When the water code was adopted, it provided that existing users could file for a declaration of use. He explained that this did not vest rights in the users to continue the use, but it did give them assurance that the users were being recognized by the Water Commission as existing uses. Those declarations were filed by Pioneer Mill and were conveyed over to Makila. Mr. Kudo further indicated that the water code provided that as long as the use continued in agricultural, there was no change. In addition, he noted that the area had not been designated by the Water Commission as a water management area. Therefore, he continued, it did not come within the jurisdiction of the Water Commission other than for disputes or issues relating to legal rights to water.

Vice Chair Roehrig expressed that in due course, there will be interpretations of the laws and that he did not agree with Mr. Kudo's interpretation.

Chair Ing asked the parties for confirmation that the Commission had those exhibits and declaration of assignments. Mr. Kudo responded that because of the vagueness of the issues, Makila did not intend on producing those documents and felt that it was in the purview of the Water Commission.

Commissioner Yukimura asked for Ms. Johnson's comments on Maui County's restrictive ordinances to ensure that agricultural lands stayed in agriculture and that the people who lived on agricultural lands farmed it, and whether the County was capable of enforcing these ordinances. Ms. Johnson responded that she felt that the larger subdivisions were not being protected and that they were being subdivided.

8. Alvin Pelayo

Mr. Pelayo stated that he was a resident of Kuimana, and that he was in favor of the project, which gave a chance and the opportunity for the community to purchase these lands. He also indicated that he had waited for the Hawaiian homestead lots for a long time but had not heard anything. He was interested in growing taro, sweet potatoes, and ulu on the land and would like a home to pass on to his family. He testified that the land should be kept agricultural, and that water was the key to everything. There were no questions by the parties and the Commissioners.

9. Sam Ahia

Mr. Ahia stated that he was a resident of Lahaina for 20 years and had been living in the Kauaula subdivision. He indicated that this situation was perfect for him and his family. He had children on the mainland, and there was room for his children to live on the property to

continue the ohana concept. He looked at Launiupoko as a dream opportunity for him and his family. There were no questions by the parties and the Commissioners.

A break was taken at 2:27 p.m., and the meeting reconvened at 2:45 p.m.

PETITIONER'S WITNESSES (continued)

1. Keaumoku Kapu

Chair Ing had indicated that prior to the executive session, there was an objection made by the County in regard to Mr. Kapu's testimony. He asked the County to repeat its objection.

Ms. Lovell indicated that there was a lawsuit pending between some of the same parties present in this proceeding, and that a copy of the First Amendment Complaint was provided with the County of Maui's final exhibits to the Commission and to all of the parties. The complaint was entitled "Kuleana Ku'ikahi LLC vs. County of Maui."22222 Ms. Lovell indicated that it involved the subject matter that the witness was about to get into and felt compelled to interrupt the testimony to bring it to the Commission's attention. She further indicated that at one of the prehearings held, one of the issues raised for the parties to consider and to provide information to the Commission was on whether there was any pending litigation or threatened litigation that would impact these proceedings. Therefore, she indicated that the County of Maui wanted to bring this issue to the Commission's attention and also matters part of the lawsuit not be inquired in this proceedings.

Mr. McCarty restated his objection to the objection. Mr. McCarty indicated that one of the issues raised in this proceeding was whether or not the County could administer its own affairs with respect to these subdivision issues. Mr. McCarty indicated that he had evidence that he would offer to show that the Petitioner had engaged in a series of contacts with the County requesting that they look into these matters. He added that the evidence would show that there had been no response and no activity by the County as requested.

Mr. Kudo indicated that during the break, he was able to obtain clarification of any pending litigation and indicated that there were some actions involving parties or members of the Petitioner. Makila filed two quiet title actions; one was in regard to Land Court Award #6507, which is mauka of Mr. Kapu's property. Mr. Kapu was not named as a defendant on that action but later joined and intervened in that proceeding to become a party. The other action was filed to quiet title Land Commission Award #6528 Apanas 1 through 5, which is on Makila Phase 2 property. Mr. Kudo indicated that none of the members of the Petitioner were named as party defendants, and that subsequent to filing the action, the Dizons and Aquinos intervened as parties to those proceedings. There were also several TROs filed and issued against Mr. Aquino and Mr. Kapu. There were two TROs issued against Mr. Kapu, and one against Mr. Aquino for the destruction of property belonging to Makila and denying workers access to clean the water system and repair the roadways leading up to the water system of Kauaula Stream.

Mr. McCarty indicated that there was a situation where there was an order that required the Kapus to cooperate with Makila when they cleared the water gates; however, no heavy equipment was to be used. On one occasion, Makila came up with a piece of heavy equipment without any notice, and the Historic Preservation Division notified Makila that there should be no heavy equipment, so Mr. Kapu stood out and prevented them from going into the road. That matter was cleared.

Vice Chair Roehrig asked counsel for the County to clarify its objection. Ms. Lovell indicated that the County was not objecting on the grounds of any kind of attorney-client privilege, but to the fact that the Commission's rules had one of the issues to consider any pending or threatened litigation which impacted the proceedings.

Chair Ing denied the objection and continued with the witness' testimony.

Commissioner Sakumoto asked the Petitioner to clarify the order that the Commission was requested to issue. Mr. McCarty stated that he was asking the Commission to issue a declaratory order stating that the current uses and proposed uses were inconsistent with the rules and regulations and laws concerning agricultural subdivisions.

Vice Chair Roehrig then asked Mr. McCarty what relief they were seeking from the Commission with respect to the irrigation rights of the Kuleana homeowners and the other Hawaiian family groups in the Kauaula Valley versus the 4500 acres of development, and further what was the relationship between those rights and this development. Mr. McCarty indicated that these Kuleana homeowners were entitled to first count of the water and if there was insufficient water, there could not be agricultural use for those additional properties.

Mr. Kapu stated that 47 cultural sites had been identified, and about 119 sites were totally destroyed in Launiupoko. In Kauaula, only two or three precontact sites were identified. Mr. Kapu further stated that in the Puunoa Subdivision II, there once was an abundance of sites in the area. He added that some of the gravest concerns after discussion with neighbors were water, access rights, and the archaeological sites. He believed that some sites were destroyed because of grading permits that were issued.

Mr. Kapu pointed out on the aerial map, the abundance of sites alongside the Kauaula river, and stated that there wasn't an extensive survey done in these areas. Mr. Kapu also pointed out sites on the subdivisions of cultural significance. Mr. Kudo asked for clarification, and Mr. Kapu stated that there were 47 sites within the area.

Vice Chair Roehrig asked the Petitioner to address the issue regarding the scope of these proceedings if there was nonpotable waterlines that ran across the subdivision. Mr. McCarty responded that the Commission can make its decision with respect to the areas that they feel were appropriate to this proceeding that would affect the others yet to be seen. Contention with respect to water was that these could not be agricultural subdivisions if there wasn't sufficient water to service them. That may affect others who were not part of these proceedings.

Commissioner Coppa stated that he appreciated the history that had been presented thus far before the Commission but felt that what was not being discussed was the Petition Area.

Mr. McCarty questioned the witness regarding other people's testimonies. Mr. Kudo raised an objection to this line of questions. Chair Ing sustained the objection.

A break was taken at 3:39 p.m., and the meeting reconvened at 3:57 p.m.

The County of Maui and the State indicated that they had no questions for this witness.

Mr. Kudo reiterated that it had been problematic to prepare for this case because of the vagueness of the issue presented in the petition and the memorandum which amended the petition. Mr. Kudo indicated that there were issues that had come up in the testimony of Mr. Kapu, and this was the first time that he had heard about them. One issue was the blocking of access to the Kapu's residence by this development; the second issue concerned runoff to the ocean from construction on Makila's property. He indicated that these were issues never raised before. Mr. Kudo asked for the Commission's indulgence to address and rebut those issues. In addition, Mr. Kudo indicated that the third new issue dealt with the disagreement Mr. Kapu has had with Makila in regard to the water resources.

Mr. Kudo asked Mr. Kapu to clarify his earlier statements regarding access. Mr. Kapu clarified that below Kauaula reservoir, Makila had put up two gates. He relayed that about a year and a half ago, there was a fire at the Palakiko residence. He needed to cross over the stream, so he used the old road that came across from the top where he lived. He noted that he tried to put out the fire; however, there was no water in the waterlines. He stated that when Makila drilled the well, Makila had put up gates to deny the Kapus access in or out.

Mr. Kudo asked Mr. Kapu to clarify his earlier statements that the alternate route was gated and blocked. Mr. Kapu affirmed his response. Mr. Kudo further asked the witness if he was asserting that he had access rights over Makila's property in the form of an alternate route. Mr. Kapu responded that he had access rights pertaining to the rights for his family to practice, Section 7-1, Native Tenant Rights, HRS.

Mr. Kudo indicated that Section 7-1, Hawaii Revised, pertained to gathering rights. Mr. Kapu stated that the gathering rights also included egress and ingress rights to gather, and that right also acted as a safety measure. Mr. Kudo clarified that Section 7-1 did not address alternate routes or routes for emergency purposes. He noted that it was an access right for the purpose of gathering.

Mr. Kudo asked from where Mr. Kapu obtained Land Commission Award #4878 Apana, Juan to Olala. Mr. Kapu indicated that it was passed down from family to family. Mr. Kudo asked from where the deed was obtained. Mr. McCarty objected to the question. Mr. Kudo

indicated that he was trying to establish Mr. Kapu's right to be on the property. He explained that if Mr. Kapu had access rights, then it proved Mr. Kapu was legitimately on the property; otherwise, the issue of access became moot.

Vice Chair Roehrig expressed concern that the door to title issues may open with this line of questioning. Vice Chair Roehrig further noted that there were a number of quiet title actions pending along the stream, and if Mr. Kudo was concerned with how much title Makila had or did not have, it would allow the Hawaiian community who claimed rights to these lands to rebut whatever Mr. Kudo had stated. Mr. Kudo indicated that he raised this point because the issue had come up with regard to access rights to these properties.

Vice Chair Roehrig indicated that the issue of title was a very passionate issue for the people involved in the valley and indicated that the Commission will not test the title of all of the different people in these proceedings.

Chair Ing asked that Mr. Kudo leave this subject alone.

Mr. Kudo asked Mr. Kapu to clarify the dispute over the water system and the issue concerning the black pipe. Mr. Kapu indicated that the black pipe was to supply water to his families. He mentioned that he had made a suggestion to Makila to run the pipe under the tunnel where the original old pipe was located. He noted that Makila stated that they did not have enough pipe to do this. Mr. Kapu stated that he had a meeting with Mr. Martin and Mr. Tremble to address that problem, but it had not yet been resolved. Mr. Kapu further indicated that he was never informed that the pipe was a temporary fix but that it was a direct hookup to the pump house to provide the families a lot of water, , and that the pipe would be permanent.

Mr. Kudo asked Mr. Kapu to clarify the location of the pohaku. Mr. Kapu pointed it out on the map and indicated that it was on Makila road. Mr. Kudo also then asked Mr. Kapu to clarify the location of the two heiau that Mr. Kapu mentioned earlier in his testimony. Mr. Kapu pointed out on the map that it was located alongside the stream.

Mr. Welch asked Mr. Kapu to confirm whether there were any swimming pools or dwellings on Puunoa I subdivision currently being built. Mr. Kapu answered in the negative but indicated that Puunoa II had a huge greenhouse.

Chair Ing indicated that he recalled a tragic flooding incident in the late 60s/early 70s where a family attempted to cross the stream. Chair Ing noted that this tragedy came to mind when the witness made a statement about finding a safe passage and could not use the old Kauaula road. In that case, the plantation feared liability and tried to find another access route for the families up there.

Vice Chair Roehrig asked the witness whether the diversion of water from Kauaula Stream by these developers affected the Kapu's irrigation PASH rights, assuming that they

existed. Mr. Kapu responded in the affirmative. He explained that it affected the indigenous fauna and species above the dam.

Vice Chair Roehrig asked Mr. Kapu for his opinion as to what was a fair way to portion or allocate the water between his agricultural use along the stream versus the nonpotable water if the new buyers in the 4,500 acres also wanted to do farming. Mr. Kapu responded that the equilibrium of everything had to do with life itself, and that the development was detrimental to everyone's lives. Mr. Kapu added that there were two water systems, one in Launiupoko and one in Kauaula Valley. While he did not know the yield coming from these valleys, he noted that Launiupoko Stream alone supplied water to these subdivisions as much as the yield could handle. Mr. Kapu stated that they had Kuleana rights to the water and that their rights were not being addressed.

Vice Chair Roehrig noted that this was an issue that the developers should work out so that the different agricultural nonpotable water uses in this region were balanced and that they could live in peace. Mr. Kapu indicated that it would be very helpful for him and his family to come to a consensus.

Vice Chair Roehrig suggested that the developers and the Petitioner discuss and come to an agreement while the Land Use Commission still had jurisdiction over this matter.

Mr. Kapu pointed out that the development was not the problem. He stated that it was the developers who were the problem and believed that the developers were not helping the families and had no respect for the kupuna.

Chair Ing indicated that the meeting would reconvene on April 10, 2003, at 8:30 a.m. The Commission would hear public testimonies in the first part of the meeting. Thereafter, Mr. McCarty was to provide a short summary of the scope and length of the witness' testimony before he began his direct.

The meeting was adjourned at 4:49 p.m.