

LAND USE COMMISSION  
MEETING MINUTES

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

April 10, 2003

COMMISSIONERS PRESENT: P. Roy Catalani  
Bruce Coppa  
Pravin Desai  
Lawrence Ing  
Steven Montgomery  
Stanley Roehrig  
Randall Sakumoto  
Peter Yukimura

COMMISSIONERS ABSENT: 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 8:30 a.m.

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

Chair Ing announced that this was a continuation of the hearing of the Land Use Commission on Docket No. DR02-26 Kuleana Ku'ikahi, LLC, last heard on April 9, 2003, 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, Launiupoko, Olowalu, and Ukumehame, West Maui.

PUBLIC WITNESSES

1. Herb Squires

Mr. Squires stated that he was a professional television producer and presented a video made on December 17, 2002, of the homes located in Phases I and II of the Launiupoko Subdivision.

Commissioner Montgomery entered the proceedings during Mr. Squires' testimony.

Mr. Squires indicated that there were homes in the subdivisions that were worth \$1 million. He also indicated that he did not see any agricultural activities within the subdivision.

Commissioner Roehrig requested that the parties to provide the Commission with copies of the documents relating to the transfer of water rights from Pioneer Mill to the developers and any disclosures made by the sellers, to buyers of individual lots as well as disclosures made to the County at the time developers sought subdivision approval, relating to the nature of water rights, allocations, and permits.

Mr. Kudo indicated that none of the water documents had been submitted as exhibits. Chair Ing instructed Makila to submit these documents in two weeks.

2. David Minami

Mr. Minami stated that he was a Launiupoko resident living on a 2-acre lot, which had no agriculture yet. He also indicated that he currently worked with Maui Land & Pineapple Co. but would be leaving to work at West Maui Land Company with Mr. Peter Martin and his group. Mr. Minami pointed out, among other things, that on agricultural land, one needed to build a home first, that industrial agricultural was on a downward trend, and that agricultural land should stay in agriculture.

The Petitioner cross-examined the witness and asked questions regarding his experience on the homeowners' association board and the need for water.

Commissioner Sakumoto asked the witness to clarify his role as field operations supervisor for West Maui Land Company. Mr. Minami responded that he hoped to look at diversified agriculture and the opportunities it may bring to these lands.

3. Melissa Vicar

Ms. Vicar stated that she had just closed on her property, Lot 26. Ms. Vicar added that there were homeowners growing mango trees who would not realize fruit for years, and that not all of the homes were large homes. She hoped to build on her lot in Launiupoko Phase III in September/October and asked the parties whether she would be able to build on her lot.

Mr. Kiefer, who represented the seller, indicated that he did not know the answer to that question but noted that Phase III of Launiupoko was one of the developments that was within the scope of this docket.

Mr. Kudo reiterated what Mr. Kiefer stated.

Mr. Welch stated that the decision was in the hands of Mr. Foley of the County Planning Department and other departments in the County of Maui. He added that Mr. Foley had indicated that the County would require a copy of the homeowners' agricultural plans as a condition of issuing a permit to build a house to show that the house will be used in connection with the farm.

Mr. Chang indicated that the State of Hawaii had no position on this matter and was not involved in zoning, which was a County matter.

Mr. Foley indicated that it was now required that all applicants provide farming plans with all new building permits for all new agricultural subdivisions.

Vice Chair Roehrig noted that it was essential for the seller to disclose to the homeowner that it was not obligated contractually to provide agricultural water sufficient for a homeowner's use.

Ms. Vicar added that she was approached by two men of Kauaula valley and felt very threatened.

A break was taken at 9:30 a.m. The meeting reconvened at 9:40 a.m.

#### PETITIONER'S WITNESS

1. Peter Martin

Mr. Martin stated that he was the president of Makila Land Company, LLC, that owned approximately 4,500 acres of agricultural land in West Maui, which had final subdivision approval of Makila Phase I and Makila Phase II. He also indicated that he was a managing member of Kauaula Land Company LLC, which contained Puunoa Subdivision Phases I and II. He further stated that Launiupoko Associates owned 433 acres comprised of four phases, and that the subdivisions were called Mahanalua Nui. He noted that final subdivision approval of Phase IV was pending. He also stated that West Maui Land Company, LLC, was a real estate arm for the developments.

Mr. McCarty asked the witness questions regarding ownership of the lots in the Makila, Launiupoko, and Kauaula subdivisions. He also asked the witness for information on the prior owners of the land.

Mr. Martin stated that the West Maui Land Co. prepared the by-laws with the help of Launiupoko's attorney and was involved in the formation of the homeowners' associations.

Mr. McCarty asked the witness if there were any houses on the lots. Mr. Martin responded that the only homes being built were in Phases I and II of Launiupoko, and indicated that there were agricultural activities occurring on many of the lots.

Mr. Kudo clarified that the referenced home sites were not on lots that were part of this docket, but a part of Launiupoko Phases I and II.

Vice Chair Roehrig asked if the parties could stipulate to include any testimony made in the prior proceeding as part of this record and thus considered by the Commission during decision-making.

Commissioner Coppa pointed out that there was no housing in the Petition Area, and reiterated his concern that the Commission had not heard testimony on the actual Petition Area.

Mr. McCarty asked the witness if there were homes built with no farming on the lot. Mr. Martin responded that would be true and that for any farmer, a house was built first.

Mr. McCarty then asked if Mr. Martin was involved in published advertisements that did not disclose that these lots were to be used for agricultural purposes. Mr. Martin responded that his approach was by word of mouth.

Mr. McCarty referred to the Petitioner's Exhibit No. 2 and asked Mr. Martin to explain what this exhibit represented. Mr. Martin indicated that this was an advertisement in the Maui News to find people interested in buying lots in these different subdivisions. He noted that the ad did not specify the lands were zoned agricultural.

Mr. McCarty asked the witness to identify the non-potable water systems that were in place for the Mahanalua Nui Subdivision Phase III. Mr. Martin responded that Mahanalua Nui Phase III had a dual waterline comprised of two lines: one for potable water and one 12" waterline for non-potable water originating from Launiupoko Reservoir via Launiupoko Stream. He noted that Phase I and II had to be retrofitted. Mr. Martin added that the Puunoa II subdivision had a dual water system and the improvements were completed for both Phases I and II. He noted that the non-potable water came from Kauaula Reservoir via Kauaula Stream, whereas the non-potable water for the Launiupoko large-lot subdivision originated from either Launiupoko or Kauaula Streams. The non-potable water for Launiupoko Phase II came from Launiupoko Stream and Reservoir. The non-potable water for Mahanalua Subdivision IV also came from Launiupoko Stream.

Mr. McCarty asked Mr. Martin to identify the amount of non-potable water that was available. Mr. Martin indicated that there should be no shortage of water from the two streams to do all the agriculture for this land.

Mr. Martin was asked to identify the owner of the pipes and the water system. He responded that Makila owned the pipes and water system, but they will be dedicated to the PUC regulated company called the Launiupoko Irrigation Company.

Commissioner Coppa asked Mr. Chang to explain the basis for the Office of Planning's position in this case. Mr. Chang stated that he had no knowledge on how the State arrived at its present decision.

Vice Chair Catalani noted that the State had filed its position statement on November 14, 2002. He asked the State whether its prior position on the Petition had changed. Mr. Chang responded in the affirmative.

Vice Chair Roehrig asked Mr. Martin if he was involved in the purchase of Pioneer Mill's water facilities in Kauaula Valley, and to identify with whom he had discussions regarding the purchase. He also asked Mr. Martin if there were any discussions with Pioneer Mill regarding the allocation for water. Mr. Martin responded that he was involved in the purchase of the land, and that the water came with the land. He noted that he met with Tamara Edwards of Amfac/JMB and others but did not discuss water allocation with Pioneer Mill.

Vice Chair Roehrig requested that Mr. Martin provide the Commission with a copy of the contract documents indicating that Pioneer Mill owned the water. Mr. Martin was also asked questions regarding water rights as they pertained to the homeowners. Mr. Martin stated that he believed that it would be legal to continue using the water on the lands based on historical uses.

Vice Chair Roehrig asked Mr. Martin if he objected to the use of Kauaula Stream water by the Hawaiian community in the way it was used before Captain Cook arrived to the islands. Mr. Martin indicated that he did not have a good definition of what that would entail and believed that there would be enough water for everyone.

Commissioner Coppa asked Mr. Martin to clarify his intentions when he called certain individuals regarding the State's position in this matter. Mr. Martin stated that his intent was to explain to the Office of Planning that the statements made in the Petition were untrue in the hope of changing the State's position on the matter. Commissioner Coppa then asked Mr. Martin if he had discussed the water issue with the Hawaiian community and conveyed to them that water would be available. Mr. Martin stated that he had met with them off and on for two years and had agreements on water. He did not believe that there was a conflict with the water issue but a conflict with other issues.

A recess break was taken at 11:00 a.m. The meeting reconvened at 11:15 a.m.

Chair Ing indicated that the hearing would resume for an hour, then break for lunch. Chair Ing noted that after lunch, the meeting would run until 3:30, and then adjourn for the day.

Commissioner Coppa excused himself from the proceedings.

PETITIONER'S WITNESS (continued)

1. Peter Martin

Vice Chair Roehrig asked Mr. Martin to identify the type of written notice that was disclosed to the buyers about the nature of the agricultural PASH water rights. Mr. Martin responded that PASH rights and water rights were disclosed. Vice Chair Roehrig indicated that he had not seen any documents disclosing PASH and water rights from any of the parties in these proceedings. Mr. Martin stated that he needed to look at the documents to verify if information on PASH and water rights were disclosed to the buyers because he was unsure.

Mr. Welch indicated that the Petitioner's Exhibit 29 included some of the pages from the Puunoa CC&Rs, and that this was Kauaula's disclosure. Mr. Kiefer stated that he had not seen any disclosures with respect to the Mahanalua Nui subdivision. Vice Chair Roehrig then requested that the parties provide these documents.

Mr. Kudo indicated that he had a disclosure document from Makila that was given to buyers. Mr. Kudo noted that the disclosure stated "There is no guarantee that the nonpotable water through the stream ditch system will be permanent such that lot owners may need to use potable water for irrigation and agricultural purposes."

Vice Chair Roehrig indicated that the Commission wanted to determine whether or not these developments were agricultural subdivisions by looking at how they were documented.

Vice Chair Roehrig suggested that the parties discuss and agree on a water allocation.

Commissioner Sakumoto agreed that the parties should come to an agreement, but noted that the Commission had not heard the entire case by the Petitioner and from the other parties. He also stated that as long as the Commission was not committed to take any action, he supported the idea of the parties settling.

Commissioner Montgomery stated that he was impressed by the statements of goodwill. He noted that the world was never improved by taking something from one group and giving it to another.

Vice Chair Catalani asked Mr. Martin to identify his vision for this community. Mr. Martin responded that he envisioned a community of small farms.

Vice Chair Catalani then asked Mr. Martin to identify what West Maui Land Company was doing to accommodate the development of those plans and to make it a reality. Mr. Martin indicated that he had met with the other homebuyers.

Vice Chair Catalani asked Mr. Martin how he foresaw issues of homeowner's noncompliance with agricultural use requirements being resolved. Mr. Martin indicated that the homeowners or neighbors could enforce the CC&Rs.

Mr. McCarty asked Mr. Martin to clarify when he first had potable water. Mr. Martin indicated that there was an existing well used for sugarcane operation, and further indicated that Mr. Tom Nance was present to explain how the existing well was converted to a potable well. He added that non-potable water was available sometime in the past year, and that some homes were built prior to having non-potable water available.

A lunch break was taken at 12:05 p.m. The meeting reconvened at 1:15 p.m.

#### COUNTY'S WITNESS

1. Mike Foley, County of Maui Planning Department

Mr. Foley stated that he had been the Director of Planning for the County of Maui since January 2, 2003, and had 25 years of experience as a planning director for various other agencies and 10 years experience as an environmental consultant.

Mr. Foley explained how Maui County planned to implement Chapter 205. Mr. Foley indicated that the agricultural zoning district in Chapter 19 of the zoning ordinance of the County code was intended to implement state law and the County general and community plans. He noted that the agricultural district zoning was in compliance with the State regulations with two notable exceptions: 1) the minimum lot size in the county of Maui was two acres; and 2) there was a sliding scale which further restricted the amount of land that could be subdivided. Mr. Foley further indicated that the initial steps to ensure that agricultural subdivisions complied with the Maui ordinance included a County requirement that a subdivision agreement be signed and recorded (See County's Exhibit 3) stating that the land would be used for agricultural purposes and a farming plan prepared by the property owner of the lot and recorded with the State Bureau of Conveyances that illustrated how the property would be used for agricultural purposes.

Ms. Lovell asked Mr. Foley to identify how the County of Maui would ensure that the county ordinance was complied with. Mr. Foley further stated that two letters were sent out to Mr. Martin regarding Makila Plantation Phase 2 (Exhibit 5) and Mahanalua Nui II and Puunoa II (Exhibit 6), and that both letters requested that more information be submitted to the County with respect to how these subdivisions related to one another, how they were going to be used for agriculture, how the roads and water system were related, and how they were going to be used for agriculture in compliance with both State and County law. Mr. Foley indicated that he had received information in response to these letters, but the process was not yet completed. He further commented that until the department was satisfied that the issues raised had been met, no final approval of the subdivisions would be granted. He noted that final approval was granted by the Director of Public Works, and that the Planning Director was required to

indicate whether or not the subdivisions complied with the general and the community plans. Mr. Foley added that before someone could get a building permit, he or she must submit a farming plan.

Mr. Foley was asked by Ms. Lovell regarding to comment on those who had plans for agriculture but had not been able to implement it. Mr. Foley indicated that he recognized that the lot owners would initially build a house, bring in top soil, and design and create an irrigation system before there was physical evidence that farming existed.

Ms. Lovell then asked Mr. Foley to comment on the issue of subsequent permits. Mr. Foley indicated that the County would check if there was actual agriculture on the property, and then decide whether or not the County would issue a second permit. He explained that if no agriculture had occurred, the owner would not get a second permit.

Mr. McCarty asked Mr. Foley to identify the consequences in the event a lot owner did not have any agricultural activities on the property. Mr. Foley indicated that the County's goal was to seek compliance, and that they would inform the lot owner by letter regarding non-compliance and possible fines.

Chair Ing asked the parties to clarify Mr. Foley's statement that the majority of the land was to be used for agricultural purposes.

Mr. Kiefer indicated that the statement could be found in the County zoning ordinance, section 19.04.040, which defined a farm as a lot on which the majority of the land was used for and the predominant activity was agricultural and/or agricultural land conservation.

Commissioner Desai asked Mr. Foley if there should be strong CC&Rs built into the subdivision so that there was certain policing by the Association as to compliance.

Commissioner Sakumoto raised questions regarding water issues. Mr. Foley recommended that the State Water Commission answer those questions.

Vice Chair Catalani asked Mr. Foley whether the County would undertake enforcement actions in the event the lot owners did not implement their approved farming plan. Mr. Foley indicated that the County would ask for evidence of farming and seek compliance. He noted that the County's overall goal was to seek compliance with the County Ordinance and the general and community plans.

Vice Chair Roehrig asked Mr. Foley whether the County had a priority plan for the competing uses of agricultural non-potable water in West Maui. Mr. Foley responded in the negative. Vice Chair Roehrig then asked Mr. Foley to clarify why the County had not adopted a priority plan as the Supreme Court of the State of Hawaii mandated in 2000. Mr. Foley noted that there was a study being done by the USGS to determine the availability of water and



understood that the priority issue would be related to the results of that study. However, he stated that it was not an issue that the Planning Department had been involved with.

Vice Chair Roehrig expressed concern about the County's role in creating a priority list as to who obtained water and who did not. Mr. Foley responded that water issues were within the State's jurisdiction. Ms. Lovell added that these issues were being worked out between the County and the State. She noted that there were plans to inventory the amount of water supply. Vice Chair Roehrig commented that the County should make a decision for the overall County.

Chair Ing asked questions regarding the farm plan. Mr. Foley noted that it would be the County Planning Department that would review the farm plan. He noted that if the farm plan was complete, it could be approved in a matter of hours and would not delay the issuance of a building permit.

Chair Ing announced that the Commission would be continuing its hearing on this docket on June 5-6, 2003, on Maui, and encouraged the parties to provide a report to the Commission on the parties' effort to reach agreement on the issues 10 days prior to the meeting.

(Refer to the Commission's transcripts for more details on this matter.)

The meeting adjourned at 2:30 p.m.