

LAND USE COMMISSION  
MINUTES OF MEETING

December 1, 2005

Maui Arts and Cultural Center  
Gallery Meeting Room  
One Cameron Way  
Kahului, Maui, Hawaii 96732

COMMISSIONERS PRESENT: Michael Formby  
Kyong-su Im  
Lisa Judge  
Duane Kanuha  
Steven Montgomery  
Ransom Piltz  
Randall Sakumoto

COMMISSIONERS ABSENT: Thomas Contrades

STAFF PRESENT: Diane Erickson, Deputy Attorney General  
Anthony Ching, Executive Officer  
Bert Saruwatari, Staff Planner  
Max Rogers, Staff Planner  
Sandra Matsushima, Chief Clerk  
Holly Hackett, Court Reporter  
Walter Mensching, Audio Technician

Chair Sakumoto called the meeting to order at 10:15 a.m.

ADOPTION OF MINUTES

Vice Chair Judge noted amendments to the minutes of November 17, 2005 on page 15, paragraph 8. The paragraph to read "Vice Chair Judge posed questions regarding the roadway access to the airport. She also asked Mr. Dover to explain the basic principles of new urbanism."

Also, amendments to the minutes of November 18, 2005 on page 3, paragraph 4 to read “Vice Chair Judge posed questions to determine what improvements would be necessary for the airport to operate at the maximum allowable flights.”

Amendments to page 6, paragraph 5, to read “Vice Chair Judge echoed Commissioner Formby’s support for the principles of new urbanism but suggested that an updated TIAR be conducted prior to subdivision approval to include the Hoohui intersection, the impacts on the lower Honoapiilani Highway, and the interaction of the entire West Maui region.”

Commissioner Kanuha had a few comments on the Minutes of November 18, 2005, page 3, paragraph 5, to add that “a normal conversation is 55 dnl”. Also, on page 5, paragraph 5, the paragraph should note that “Mr. Hall responded that at full build out the projected level of service would be better than C.”

Vice Chair Judge then moved to adopt the Land Use Commission meeting minutes of November 17, 2005 and November 18, 2005, as amended. Commissioner Im seconded the motion. The amended minutes of November 17, 2005 and November 18, 2005 were approved by voice votes.

#### TENTATIVE MEETING SCHEDULE

Executive Officer Anthony Ching reported that the agenda items for the January 5-6 meetings may change slightly, but the meetings will still be on Oahu. Mr. Ching noted that a workshop is being planned on the first January meetings and David Hwang, Esq., who prepared the DLNR’s Conservation Lands Handbook, is available to describe his process in producing this product. Mr. Ching added that the second January meetings will be held in Hilo and include a field trip to the McCully site and a continuation of hearings on the matter.

After a brief discussion, there were no questions posed by the Commission.

SP86-359 COUNTY OF MAUI DEPARTMENT OF PUBLIC WORKS (Maui)

Chair Sakumoto stated that this was an action meeting to consider an amendment to the special use permit to include the processing of special waste into bio-diesel and compost on approximately 10 acres of land within Phase III of the Central Maui Sanitary Landfill located within the Agricultural District at Puunene, Maui, Hawaii.

APPEARANCES

Jane Lovell, Esq., represented the County of Maui Department of Planning  
Kivette Caigoy, County of Maui Department of Planning  
Eileen Baker, County of Maui, Solid Waste Division  
John Chang, Esq., represented State Office of Planning  
Abe Mitsuda, State Office of Planning

Staff Report

1. Bert Saruwatari

Mr. Saruwatari briefly summarized the staff's report and noted the recommendations.

There were no questions posed by the parties or the Commission.

County's Witness

1. Kivette Caigoy

Ms. Caigoy stated that she is a Senior Planner with the County Planning Department and provided a brief summary of the project and the applicant's request for an amendment, which allows processing of special waste and production of bio-diesel and compost. Ms. Caigoy added that the County is in support of this request.

Ms. Lovell noted that representatives from Pacific Bio-diesel and Maui EKO Systems are also available for questions.

Mr. Chang noted that the State had no questions.

Vice Chair Judge questioned if the letter dated April 7, 2005 regarding concerns on water quality have been addressed by the applicant with respect to any NPDES permit for the project with the Water Commission.

Ms. Caigoy indicated that she did not have that answer.

Ms. Lovell noted that Eileen Baker or a representative from Pacific Bio-diesel could possibly answer that question.

There were no further questions posed by the parties or the Commission.

## 2. Elaine Baker

Ms. Baker stated that she is a civil engineer for the Solid Waste Division. Ms. Baker commented that she was able to respond to Vice Chair Judge's question related to the Commission on Water Resource Management's concern over ground water quality and stated that they have been testing the ground water since 1995 and have been monitoring and conducting quarterly testing. Ms. Baker also provided further comments on NPDES standards, storm water capacity, and the recycling of green waste, compost, and bio-diesel as a marketable product.

Mr. Chang noted that the State had no questions.

Vice Chair Montgomery raised a few questions on the recycling process of bio-diesel, prolonging the life of the landfill, and scavenging rules. Ms. Baker replied that they need to control scavenging, as it affects personal safety, and added that the County regulates the entrance site.

Vice Chair Judge commented on the new phase of the landfill and asked how that would affect the operations for the bio-diesel and compost. Ms. Baker replied that there will be no effect as their customers will use the existing entrance, while the green waste will go to the old entrances.

Commissioner Im raised questions on the issues of water quality and the bio-diesel processing. Commissioner Im noted DOH's concern regarding potential ground water contamination and their recommended approvals for this project. He asked if the County Solid Waste Division would have any problems

with that. Ms. Baker replied that they would not because they are already regulated by the DOH for the new facility.

Commissioner Piltz noted that the DOH had a problem with the membrane for the new facility and asked if this is now acceptable. Ms. Baker replied in the affirmative.

Chair Sakumoto raised questions relative to the NPDES permit and asked if this specific permit addresses the concerns expressed in the April 7, 2005 memo from the DOH. Ms. Lovell explained that the NPDES permit is based on the storm water discharges.

Ms. Baker added that they have not discharged storm water from the project site for the past 9 years, but do take sediment samples from the pond for the DOH.

Vice Chair Judge commented that when it rains, she noticed a huge pond of water on the road, as the water appears to not go into any retention basin. Ms. Baker replied that the off-site rainwater is not a landfill issue, but a County road issue.

Commissioner Im asked for clarification on the NPDES permit. Ms. Baker replied that although there is no need for the permit, they still have one in case there is an unexpected need to discharge. Ms. Baker added that they have sufficient capacity, historically retained their own water on site and that there has been no violation of groundwater or soil contamination rules. The DOH also periodically conducts an audit of the site and reviews their records.

Vice Chair Judge asked for the status of the permit from the County Council. Ms. Caigoy replied that the county conditional permit has been withdrawn and they are now working on an interim zoning permit for this project.

Chair Sakumoto commented that the landfills are heavily regulated and questioned how the DOH is regulating their site. Ms. Baker replied that the regulation of landfills are handled by the DOH under both federal and state laws and noted that they also need an operating permit.

Ms. Lovell stated that the County had no further questions.

Mr. Chang noted that the State has reviewed the application and has no objections to their request.

After a brief discussion, Vice Chair Judge moved to approve the request to amend the Special Permit and to add the additional conditions as recommended by staff and discussed. The motion was seconded by Commissioner Piltz.

The Commission was polled as follows:

Ayes: Commissioners Judge, Piltz, Formby, Im, Kanuha, Montgomery, and Sakumoto.

The motion passed with 7 ayes, 1 absent.

A recess break was taken at 11:05 a.m. The meeting reconvened at 11:20 a.m.

SP70-85 EDWIN DeLUZ TRUCKING COMPANY & GRAVEL, LLC fka  
Waikoloa Development Co. (Hawaii)

Chair Sakumoto stated that this was an action meeting to consider an amendment to Condition No. 2 of the special permit to extend the life of the permit for an additional five years from December 11, 2005 to December 11, 2010 to allow the continued operation at Quarry Site 1 located within the Agricultural District at Waikoloa, South Kohala, Hawaii.

APPEARANCES

Steven Lim, Esq., represented the County of Maui Department of Planning  
Kevin Balog, Operating Manager of DeLuz Trucking  
Norman Hayashi, County of Hawaii Department of Planning  
John Chang, Esq., represented State Office of Planning  
Abe Mitsuda, State Office of Planning

Chair Sakumoto noted that there were no public witnesses.

Mr. Ching noted that the caption recorded on the agenda indicates the SP70-85 docket number and the applicant and permit holder as DeLuz Trucking Company. Mr. Ching added that the caption may be in error as the LUC's prior

record indicates that other parties may have been identified instead. Mr. Ching referenced Exhibit 2, under the letterhead of Carlsmith Ball LLP, which identifies the applicant as Edwin DeLuz Trucking Company and the landowner as Waikoloa Development Company. Mr. Ching also noted that the Waikoloa Development Company's Fee Owner's Letter of Authorization providing Carlsmith Ball LLP and not Edwin DeLuz Trucking Company authorization to apply for and execute and process an amendment to the special permit. Mr. Ching stated that this creates an ambiguity and requested that the County of Hawaii and Applicant offer clarification at the appropriate time.

### Staff Report

#### 1. Maxwell Rogers

Mr. Rogers briefly summarized staff's report and provided the chronology of extensions for the life of the permit and also provided a map orientation of Maps 1 and 2.

There were no questions posed by the parties or the Commission.

Chair Sakumoto raised questions on the issues of the caption and commented that this situation was similar to a recent docket, Bridge Aina Le`a, where there was another owner of the property (Banter, Inc.) and the petitioner was asked to amend the caption to properly reflect the docket name so that the public is on notice and knows who is on the agenda.

Mr. Lim noted that in the interim, the fee owner Waikoloa Development Company sold the property to the new owner, Waikoloa Mauka, LLC, and that they have also authorized Edwin DeLuz Trucking Company and Carlsmith Ball LLP to apply for an extension of the term of the special permit and to participate in proceedings related to the special permit process.

Mr. Hayashi confirmed that consistent with its standing practices, the County Planning Department had accepted the applicant for this special permit as Edwin DeLuz Trucking Company based on the attached authorization from the previous landowner at that time (Waikoloa Development Company.). Mr. Hayashi added that the notice published by the Planning Commission had identified Edwin DeLuz Trucking Company as the applicant.

Mr. Chang noted that the State had no comments.

Commissioner Im raised questions as to the relationship between the current fee owner and Edwin DeLuz Trucking Company, and its past owners.

Commissioner Kanuha asked if the quarry site was a separate lot. Mr. Lim replied that it is a portion of a larger lot and that the metes and bounds were surveyed a long time ago and is attached to the 1970 permit.

Vice Chair Montgomery commented that this permit has been extended 5 times for 5 years each and wondered if it was permissible to approve it for a longer period to avoid the applicant having to return every 5 years to the County and State.

#### EXECUTIVE SESSION

Commissioner Im moved that the Commission enter into executive session under §92-5(a)(4) to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities. The motion was seconded by Commissioner Piltz. Said motion was unanimously approved by voice votes.

The Commission entered into executive session at 11:45 a.m.

The open meeting reconvened at 12:00 p.m.

Chair Sakumoto reconvened the open meeting and noted that there are a number of issues within the record. The LUC's decision-making rules limit the Commission to basing their decision on the record. Chair Sakumoto added that this record reflects a number of things: 1) the fact that the fee owner at the time the application was submitted is Waikoloa Development Company; 2) the attached letter from Waikoloa Development Company, as the fee owner, authorizes Carlsmith Ball LLP and not Edwin DeLuz Trucking Company; and 3) apparently between the time this record was transmitted and now, the fee owner has changed from Waikoloa Development Company to Waikoloa Mauka. However, the official record does not recognize this latest development as the letter dated November 15, 2005 is not a part of the record. The Commission also discussed the limits to which they can take judicial notice and action. Prior to its introduction today, both the County and the LUC had no idea of the change in ownership for the project site.



Mr. Lim noted that the applicant had just received the letter and stated that the Planning Commission effectively amended the Petition as they do not grant a permit to any particular person but specific to tax key parcel. Mr. Lim added that they entered into an agreement with Waikoloa Development Company for this time extension and in the interim, the applicant sold the property to Waikoloa Mauka.

Chair Sakumoto posed a few questions regarding the notice and public opposition, if any. Mr. Lim replied that the notices required by the Planning Commission were sent to the surrounding fee owners within 500 feet of the property and have included a total of seven parties. These notices were sent out twice; once at the filing, and the second was within the 10 days of notification from the Planning Department that the hearing was set on a particular date. Mr. Lim added that the hearing notices were captioned as Edwin DeLuz Trucking Company prior to the hearing and posted at the County Building.

Commissioner Kanuha noted that the Planning Commission approved this special permit on September 30, 2005 and asked if the approval for the extension came before the property changed hands. Mr. Lim explained that the property changed hands prior to the action and added that Waikoloa Mauka acquired the property on September 20, 2005.

Commissioner Im asked why Mr. Lim or the Petitioner did not know about the property ownership change until today. Mr. Lim replied that they knew about the change within the past week and that this all happened between August and September in a fast closing. Mr. Lim added that the Waikoloa Development Company was notified in early November and that the notice came after the transfer of the property. Mr. Lim added that he did not represent the latest purchaser in any way.

#### Petitioner's Witness

1. Kevin Balog

Mr. Balog stated that he is the operations manager for Edwin DeLuz Trucking Company. Mr. Balog discussed issues of quarry operations, restoration plan, and their agreement with Waikoloa Development Company.

Vice Chair Montgomery commented again on the possibility of extending the permit for a longer period.

Commissioner Formby commented that since there has been no opposition to the extension, he moved that the Commission extend the life of the special permit to 5 years in the name of Waikoloa Development Company, subject to the condition that the applicant provide appropriate notice to the public in the name of Waikoloa Development Company to allow the public an opportunity to respond.

Commissioner Formby also noted that the notice should be published within 30 days from the date of this approval and added that the purpose of this condition is to ensure that the applicant provides public notice that the request for the extension was in the name of Waikoloa Development Company. Also, the applicant should return to the LUC if they receive any public response. The fee simple owner to be listed in the published notice as Waikoloa Development Company and the application should be in the name of Waikoloa Development Company and not Waikoloa Mauka.

Vice Chair Judge seconded the motion and asked Commissioner Formby if his motion was to accept all of the Planning Commission's recommendations. Commissioner Formby replied in the affirmative and accepted Vice Chair Judge's friendly amendment.

Commissioner Kanuha offered a friendly amendment to condition 2 of the Planning Commission by deleting the section that reads "Quarrying operations at Site 1 shall be terminated by December 11 or prior to subdivision approval..."

Commissioner Formby commented that this is not a 5-year time limit, but a time limit based upon the subdivision approval. Commissioner Formby moved to go into executive session to discuss the LUC's legal rights with respect to the Planning Commission's approval.

Chair Sakumoto noted that under §15-15-96, the LUC has three choices; to approve; approve with modification, or deny.

## EXECUTIVE SESSION

Commissioner Formby moved that the Commission enter into executive session under §92-5(a)(4) to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities. The motion was seconded by Vice Chair Judge. Said motion was unanimously approved by voice votes.

The Commission entered into executive session at 12:30 p.m.

The open meeting reconvened at 12:35 p.m.

Commissioner Formby noted that in response to Commissioner Kanuha's friendly amendment, he understood and appreciates the intent, but this Commission is constrained by the record submitted by the County and stood by his previous motion.

Commissioner Kanuha then withdrew his proposed amendment.

A roll call vote was taken on the motion to approve the extension for 5 years with the County's recommendations and subject to public notice being given in the name of Waikoloa Development Company with a report given to the LUC with comments. That notice to be given 30 days after issuance of the LUC order.

The Commission was polled as follows:

Ayes: Commissioners Formby, Judge, Piltz, Im, Kanuha, Montgomery, and Sakumoto.

The motion passed with 7 ayes, 1 absent.

A recess break was taken at 12:40 p.m. The meeting reconvened at 1:20 p.m.

Commissioner Judge left the meeting at this time.

DR04-30 KULEANA KU`IKAHI LLC (Maui)

Chair Sakumoto stated that this was an action meeting on DR04-30 Kuleana Ku`ikahi LLC (Maui) to consider the Exceptions to the Hearings officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed by the petitioner, intervenors, and the County of Maui.

APPEARANCES

Richard McCarty, Esq., represented Kuleana Ku`ikahi, LLC

Blaine Kobayashi, Esq., represented Intervenor R. Charles Bergsen, et al

James Geiger, Esq., represented Intervenor Kauaula Land Company

Paul Horikawa, Esq., represented Intervenor Jason and Concetta Cuevas

Jane Lovell, Deputy Corporation Counsel, represented County of Maui, Dept. of Planning

John Chang, Deputy Attorney General, represented State Office of Planning

Laura Thielen, Director, State Office of Planning

Abe Mitsuda, State Office of Planning

Mr. Ching noted a few typos on the caption and footnotes to the order issued on November 25, 2005.

Chair Sakumoto apologized for any confusion created by the typos and correction and asked if the parties had any objections. The parties had no objections.

Chair Sakumoto noted that there were no public witnesses.

Mr. McCarty began his presentation on behalf of Kuleana Ku`ikahi LLC, whose members are mostly families that live in the valley. Mr. McCarty briefly described the history of the DR and discussed issues of agricultural lands used for luxury homes and what defines a farm dwelling.

Ms. Lovell began her presentation and also described the history of this proceeding. Ms. Lovell added that the hearing officer concluded that leaving the land fallow did not violate state law, ruling correctly that there are permissible uses in the state agricultural lands, however, she believed that the hearing officer acted beyond her scope by issuing findings on the County's enforcement. Ms. Lovell added that the LUC order setting the matter for hearing specifically indicated that the enforcement matter would only take place upon an affirmative finding on issue number 1, if the current and proposed uses violated applicable

state laws in agricultural lands. As there was no such finding, she believes that the hearing officer exceeded the authority granted to her by this Commission. Ms. Lovell also noted that at the opening of the hearings, the hearing officer announced that they would be excluding any exhibits related to the County's enforcement efforts and only admitted into evidence the exhibits related to issue number 1. Ms. Lovell further noted that they believed that the hearing officer levied inappropriate criticism to the County of Maui in describing her interpretation of 205(a)(4). Ms. Lovell requested that the Commission strike those portions of the hearing officer's findings addressed in the County's exceptions and in the final sentence of the decision and order.

Chair Sakumoto asked if the County had been allowed to make a record on the issue of enforcement. Ms. Lovell replied they had been given the opportunity and added that the language in the LUC order specified that the hearing was to be held to determine whether the present and proposed uses conforms with state law, and only if a respective finding was made could the hearing consider issue number 5. Ms. Lovell explained that until the hearing officer struck down the motion made by one of the parties on the bifurcation, the County did not know when they would be permitted to put in their witnesses and exhibits on the subject of enforcement. Therefore, although the County had proactively submitted a number of exhibits pertaining to the County's enforcement specific to these subdivisions, these items were either not accepted by the hearing officer or the County withdrew them.

Commissioner Formby raised a few questions with respect to the bifurcation. Ms. Lovell explained again that the whole proceeding was supposed to be limited to issues 1 and 5. Ms. Lovell added that the County did not put on its case or introduce its exhibits since the matter did not get to issue number 5.

After a brief discussion, there were no further questions posed by the Commission.

Mr. Chang noted that the State takes no position at this time regarding the proper procedure for additional dwellings on the property. Mr. Chang added that the last sentence should remain in, as far as this case is concerned, as the issue may not be ripe. Mr. Chang agreed with the description provided by the County's Corporation Counsel that the hearing was confined to deciding issue number 1 and issue number 5 would only be heard if the hearing officer found that there was an improper use under Chapter 205. Mr. Chang added that he believed that there were some evidence presented at the hearing as to what a

person would have to do to get their permits and that requirement for a farm plan and building permits were discussed.

A recess break was taken at 2:05 p.m. The meeting reconvened at 2:20 p.m.

Mr. Geiger began his presentation and noted that a number of items to be addressed by him had already been addressed by other counsel. Mr. Geiger reiterated that the enforcement issues had come up before any testimony was received and the hearing officer had clearly ruled that she wanted to first admit the parties' exhibits. She also indicated that they were only dealing with the first issue at this hearing and would not be dealing with the enforcement issues. Mr. Geiger read citations from the transcripts to support his recollection of the hearing.

Commissioner Formby raised questions related to the motion, if any, that had been made to bifurcate. Mr. Geiger replied that there was no formal motion offered, but that exhibits by the parties had been offered and rejected by the hearing officer since it dealt with enforcement.

Commissioner Im had a few questions and concerns relative to the hearing officer's proposed order, page 4, item 10, and had a brief discussion regarding current and future uses. Commission Im added that he agreed with the hearing officer's ruling and that this matter is not ripe at this time.

After a discussion, there were no further questions posed by the Commission.

Mr. Kobayashi began his presentation and stated that he agrees with most of the comments that Ms. Lovell and Mr. Geiger have raised in their arguments. Mr. Kobayashi added that he also agrees with Ms. Lovell and Mr. Geiger in that they all believe that the last sentence should be stricken because basically if it is left in, the Commission would have defeated the purpose of having the hearing officer determine whether the current and proposed uses violates state law.

There were no questions posed by the Commissioners.

Mr. Horikawa began his presentation and reiterated similar issues to what Mr. Geiger and Ms. Lovell has addressed. Mr. Horikawa noted that Petitioner Kuleana Ku`ikahi has not filed any exceptions to the findings nor has objected to

the hearing officer's report. Mr. Horikawa added that his client also objected to the last sentence in the order proposed by the hearing officer.

Commissioner Formby commented that he understood that Mr. McCarty has already filed his client's exceptions by filing an alternative proposed findings of fact, conclusions of law that proposed additional and alternative findings to the hearing officer's order. Commissioner Formby added that he interprets this as objections by the Petitioner to the hearing officer's order.

Commissioner Im raised a few questions and discussed at what point this commission or the court needs to interpret this section of the statute as to what is permissible on agricultural lands; whether the current use or intended use is in compliance or not; and if it doesn't comply with the law then it's enforcement. Commissioner Im added that he believes the last sentence indicates that until landowners obtain building permits, it's not ripe for decision.

After a discussion, Chair Sakumoto noted that the Commission will enter into its deliberations. Chair Sakumoto commented that the Commission needs time to fully review the transcripts and report. Chair Sakumoto instructed staff to make available to all the Commissioners, with the exception of Vice Chair Judge who has recused herself, the transcripts and to prepare a staff report for the next hearing on this matter.

Commissioner Formby commented that he agreed with Chair Sakumoto and would like an opportunity to fully review the transcripts and noted that time is warranted in this matter.

A recess break was taken at 3:20 p.m. The meeting reconvened at 3:30 p.m.

#### SP05-399 KAUAI ATV (Kauai)

Chair Sakumoto stated that this was an action meeting on SP05-399 Kauai ATV, LLC (Kauai) to adopt the order approving Special Permit.

Chair Sakumoto also stated that the Commission had received communication from both the Petitioner Kauai ATV and the County of Kauai indicating that they would not be appearing due to the nature of the proceedings.

Chair Sakumoto noted that there were no public witnesses.

APPEARANCES

John Chang, Esq., represented State Office of Planning

Laura Thielen, Director, State Office of Planning

Abe Mitsuda, State Office of Planning

Staff Report

1. Maxwell Rogers

Mr. Rogers provided a brief summary of the action taken by the Commission at its November 4, 2005 meeting on Kauai.

There were no questions posed by the Commission.

Commissioner Formby moved to adopt the Order Approving Special Permit as recommended and discussed. The motion was seconded by Commissioner Piltz.

The Commission was polled as follows:

Ayes: Commissioners Formby, Piltz, Im, Kanuha, Montgomery, and Sakumoto.

The motion passed with 6 ayes, 2 absent.

The meeting adjourned at 3:35 p.m.

*(Please refer to LUC Transcript of December 1, 2005 for more details on this matter.)*