

LAND USE COMMISSION  
MINUTES OF MEETING

January 20, 2006

Hilo Hawaiian Hotel  
71 Banyan Drive  
Hilo, Hawaii

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

COMMISSIONERS ABSENT: None

STAFF PRESENT: Diane Erickson, Deputy Attorney General  
Anthony Ching, Executive Officer  
Maxwell Rogers, Staff Planner  
Sandra Matsushima, Chief Clerk  
Holly Hackett, Court Reporter  
Wade Kersey, Audio Technician

Presiding Officer Judge called the meeting to order at 8:50 a.m.

ADOPTION OF MINUTES

Commissioner Piltz noted a correction to the spelling of Dr. Flecture in the January 6, 2006 minutes.

Commissioner Formby also noted an amendment to the January 6, 2006 minutes, on page 12, to replace the word “ask” with “require” and to add that “Mr. Cox also

stated that he had never launched a boat at Ko Olina or Phonecians and that he does not own a boat.”

Commissioner Piltz then moved to adopt the minutes of January 5, 2006 and the amended minutes of January 6, 2006. Vice Chair Montgomery seconded the motion. Said motion was approved by voice votes.

#### TENTATIVE MEETING SCHEDULE

Mr. Ching reported that the first February meetings will be a one-day meeting on Friday, February 3. The March 2 and 3 meetings scheduled for Oahu and Hilo may be shifted to Oahu for both dates. Mr. Ching also noted that the March 16 and 17 dates tentatively scheduled for Lanai may also change since the Lanai docket is not ready for hearings. Mr. Ching added that the upcoming calendar may have a few other changes.

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

#### A00-732 TSA CORPORATION

Presiding Officer Judge stated that this was an action meeting on Docket No. A00-732 TSA Corporation (Hawaii) to receive a report by Petitioner on its progress in complying with conditions imposed by the Commission.

#### APPEARANCES

Nathan T. Natori, Esq., represented Petitioner

Brian Nishimura, Consultant, Wilson Okamoto and Associates

Bobbie Jean Leithead-Todd, Esq., represented County of Hawaii Planning Department

Gregg Kinkley, Esq., represented State Office of Planning

Abe Mitsuda, State Office of Planning

Sallie Beavers, Ecologist, Kaloko Honokohau National Historical Park

Richard Boston, Integrated Resource Manager, Kaloko Honokohau National Historical Park

Chair Sakumoto disclosed that during the initial hearing, his law firm was involved in this project in a small way and that the parties had waived any conflict and he was allowed to participate. Chair Sakumoto added that his law firm has since become more involved in this matter and would be recusing himself from participating in these proceedings.

Mr. Natori began his presentation and stated that they have submitted the housing plan and County's Resolution in compliance with condition no. 7 and is seeking approval of the housing needs assessment and implementation plan.

PETITIONER'S WITNESS

1. Brian Nishimura

Mr. Nishimura stated that the housing plan was developed based on the criteria set forth in condition no. 7 and provided a brief summary of the housing plan.

Ms. Leithead-Todd noted that the County had no questions.

Mr. Kinkley asked for the location of the donated property and the number of units that could be provided from this parcel.

Mr. Nishimura replied that the property is located east and mauka of the project site and that it would be up to the County to determine the number of units.

Commissioner Contrades entered the meeting at this time.

Ms. Beavers noted that they had no questions for Mr. Nishimura but had a few comments regarding these lands.

Ms. Beavers stated that the 8-acres to be donated to the County are agricultural lands situated mauka of the national park. Ms. Beavers briefly explained the connection and the concerns of the National Park Service. Ms. Beavers noted that in 1978, Congress established the Kaloko National Park to preserve and perpetuate native Hawaiian activities and culture, and historical land uses within the park. She added that the park contains extensive natural resources and that the National Park Service is mandated in this situation to encourage compatible adjacent land uses and to pursue mitigative measures. Ms. Beavers added that the National Park Service urges the LUC to impose protective conditions on this docket and future dockets of lands adjacent to or near the Kaloko Honokohau National Park.

Commissioner Kanuha noted that the record for this docket indicates that the representation previously made by the Petitioner related to employment was that the project would generate 4,197 jobs yet the housing study indicates the generation of only 1,070 jobs.

Mr. Nishimura explained that the Petitioner did a study of the existing employment levels within the earlier phases of the subdivision and projected how those rates would relate to phases 3 and 4. Mr. Nishimura also noted that the various uses of the industrial park were unknown at the time, as the MCX zoning allows a wider range of commercial activities. This makes it difficult to precisely estimate how many employees would be generated by the project without knowing the final mix of businesses that would be established.

Commissioner Kanuha asked if the County's Affordable Housing Policy has a housing requirement for projects such as this.

Mr. Nishimura commented that the current policy assesses industrial activities on an individual basis. Upon receiving County approval, a determining factor is whether the business will generate more than a 100 employees. They do not assess projects at the time an applicant comes in for rezoning but at the time the developer comes in for plan approval.

Commissioner Piltz commented that initially the application was for large industries as the primary economic sector, but that years later, this development is a now a secondary economic sector.

Mr. Nishimura replied in the affirmative and added that this was also their conclusion in the report.

Vice Chair Montgomery raised a few questions relative to the report from the National Park Service and discussed issues regarding the inadequacy of state and county legislation for pollutants and the status of regulations in process. Vice Chair Montgomery also asked for legal advice on whether LUC conditions would apply on the parcel of land being donated to the County for housing.

Ms. Erickson explained that an 8-acre parcel would go before the County for reclassification, not the LUC, and that conditions would have to be imposed by the County. The National Park Service would need to go before the County to request that these conditions be imposed.

Commissioner Im raised questions on the subdivision of the property and the number of acres, and commented that the 8-acre parcel to be donated is outside of the original petition area for reclassification and therefore, not subject to the jurisdiction of the LUC.

Ms. Leithead-Todd clarified that the donation of the lands to the County does not allow the County to immediately commence development, as the lands would first need to be reclassified and then rezoned. Ms. Leithead-Todd described the County's process and noted that all hearings will be publicly noticed and provides opportunity for public comment to be received.

Presiding Officer Judge noted that there were no public witnesses.

Mr. Kinkley posed questions related to the County's resolution.

Ms. Leithead-Todd explained that it is TSA's attempt to satisfy the County's housing condition and added that the County would like to have some property in this area because of its proximity to where jobs are generated. Ms. Leithead-Todd added that the County cannot adopt the conditions until they go through the hearing process and fully believes that the County is committed to protecting the Kaloko Honokohau National Park because of its unique attributes.

Commissioner Formby asked what time frame for the development of the parcel for affordable housing was the County anticipating.

Ms. Leithead-Todd commented that she could not speak for the County, but that there is a lot of pressure on the County to deliver affordable housing and a strong commitment by the Mayor and the administration to provide housing closer to the County work centers in the hope that it would alleviate cross island commuting. Ms. Leithead-Todd explained that there is some time involved in preparing the bills, ordinances, and recommendations. She added that although there are a number of factors, once the property is in County hands, she believed that the project would move expeditiously through the entitlement process.

Commissioner Formby noted his concern that the National Parks would not have intervenor status in presenting their concerns during the County's proceedings.

Ms. Leithead-Todd acknowledged that reclassification of the 8-acre parcel would not be conducted as a contested case.

Commissioner Formby added that he had a concern with the timeline of the County's permitting process. This process may not allow sufficient time for the National Park Service to submit their concerns to the County.

A recess break was taken at 9:50 a.m. The meeting reconvened at 10:00 a.m.

Ms. Beavers stated that in listening to the County's permitting process, they are encouraged and will follow through on every avenue that is available, other than just presenting public comments. Ms. Beavers added that they will work extensively with the County to protect the natural resources at the park.

Commissioner Kanuha asked if Ms. Leithead-Todd was also speaking for the County's Housing Agency, the Office of Housing and Community Development.

Ms. Leithead-Todd replied in the affirmative.

Commissioner Kanuha commented that the 8-acre parcel to be dedicated to the County is currently classified as agricultural 5, and that the County or anyone who wanted to utilize this parcel for affordable housing would be limited to one dwelling unit until the parcel is reclassified and rezoned.

Ms. Leithead-Todd explained that they have not looked at the parcel in terms of units, but the fact is that the parcel is located in the area where they want to provide rental housing.

Commissioner Kanuha commented that the LUC condition requires that Petitioner conduct the housing needs assessment and in the assessment was to provide a number of affordable units, but technically the satisfaction would be for only one unit. Commissioner Kanuha also noted that in the County's Resolution 142, the parcel is described for use as affordable housing or other public use determined by the County of Hawaii. Commissioner Kanuha asked what would happen if the County uses it for a public purpose, such as a park facility, and whether that activity met the mandates of the LUC requirement.

Ms. Leithead-Todd explained that the language gave the County flexibility and added that if affordable housing would make more sense on another identified property, then this particular parcel could possibly be used for a park or other county facility.

Commissioner Im asked if there were situations in the past where land was dedicated but not classified as urban.

Ms. Leithead-Todd noted that she believed that the County has received lands in the past and have worked with the developers to reclassify the lands for development.

Commissioner Im posed questions on the location of the TSA property, the County sewer line, and individual sewage treatment systems.

After a brief discussion, Commissioner Piltz commented that he believes the Petitioner has fulfilled their obligation to the LUC and that this matter should move forward with the County.

Mr. Mitsuda noted that the State is satisfied with the Petitioner's report and supports the County in this matter.

Ms. Beavers added that housing units are also a concern because of the pollution and surface runoff from the homes, wastewater, and the need for enhanced individual systems to remove the nutrients before they run downhill.

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

Commissioner Piltz moved to approve Petitioner's status report and the housing needs report and County's Resolution 142. The motion was seconded by Commissioner Formby.

The Commission was polled as follows:

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

The motion passed with 7 ayes, 1 recused.

A recess break was taken at 10:15 a.m. The meeting reconvened at 10:30 a.m.

#### A05-757 JAMES W. McCULLY and FRANCINE M. McCULLY

Chair Sakumoto stated that this was a continued hearing on Docket No. A05-757 James W. McCully and Francine M. McCully to consider the reclassification of approximately 4.6 acres of land currently in the Conservation District to the Agricultural District at Wailea, South Hilo, Island of Hawaii, to consolidate and re-subdivide the three (3) existing legal lots of record and the contiguous former railroad right of way into three (3) lots in order to provide a more useful lot configuration.

## APPEARANCES

R. Ben Tsukazaki, Esq., represented Petitioner

James W. McCully, Petitioner

Bobbie Jean Leithead-Todd, Esq., represented County of Hawaii Planning Department

Gregg Kinkley, Esq., represented State Office of Planning

Abe Mitsuda, State Office of Planning

Lorene Maki, State Office of Planning

## Public Witness

### 1. William Sakai

Dr. Sakai stated that he is a professor of horticulture at UH Hilo and testified in support of Jim McCully adding that he has known Mr. McCully since the 70s or 80's when he first attended the university studying Orchidology. Mr. Sakai commented that today, Mr. McCully is a well-known breeder of *Oncidium* orchids in the world.

Ms. Leithead-Todd posed questions relative to the breeders and the competition of the orchid industry in Hawaii.

Mr. Kinkley posed a few questions regarding what the best conditions for growing orchids might be, and the maximum amount of space needed for raising orchids.

Vice Chair Montgomery asked if the salt spray on the coastal side of the island would create any advantages or disadvantages in breeding orchids.

Mr. Sakai replied that it would not since the orchids are cultivated in greenhouses. Mr. Sakai added that orchids are a very good industry for Hawaii because you could support a family on just 10,000 square feet of greenhouse space.

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

Mr. Tsukazaki commented that he has just been served with copies of written public testimony that were not signed. He noted his objection to these letters being considered as public testimony submitted by people who do not identify themselves. Mr. Tsukazaki cited HAR 15-15-10(b) and 15-15-3.



Chair Sakumoto stated that Mr. Tsukazaki's objections were noted and commented that HRS §92-3 mandates that boards, including commissions, shall afford all interested parties an opportunity to submit data, views or arguments in writing on any agenda item. Chair Sakumoto added that in this particular instance "persons" are not defined and noted that Mr. Tsukazaki's objection is well taken and that the LUC will give appropriate weight to materials submitted to the Commission that are not signed.

#### State's Witness

1. Sam Lemmo

Chair Sakumoto noted that Mr. Lemmo was previously sworn in and still under oath. Chair Sakumoto asked if Mr. Lemmo had anything to add or to change any part of his previous testimony based on the fact that he has now visited the property.

Mr. Lemmo stated that he did not have anything to add or detract from his previous testimony, but noted a clarification that the DLNR does have a concern about the bluffs, beaches, and all types of coastal geological areas.

Commissioner Piltz asked Mr. Lemmo what his thoughts were after visiting the site, on erosion and the lands below the bluffs, the vegetation that petitioner has planted to further prevent the cliffs from falling into the ocean, and the rate of erosion per year.

Mr. Lemmo stated that he has not changed his testimony from the past hearing. Mr. Lemmo added that he noticed some erosion at the north side that was very evident and appeared unstable. Mr. Lemmo noted that the Hawaii Coastal Hazard Mitigation Guidebook does not contain a lot of information on bluff erosion because it is difficult to gage. Mr. Lemmo added that the vegetation along the shoreline is not going to make a difference because there is the undercut and gravity will cause the upper part to fail. Mr. Lemmo noted that when you have a lot of water coming from the mauka area and the top gets saturated with the combination of undercutting, you could have erosion problems. Mr. Lemmo also noted that the rate of erosion in this area indicated a couple of inches per year according to the 1977 MacDonald Abbott report.

Vice Chair Judge asked what are the allowable uses in the conservation district and for the description of the CDUA process.

Mr. Lemmo described the CDUA process and stated that if you have a legal lot of record and it is greater than 10,000 square feet in size, located in a subzone that single family residences are identified in, then you can apply for a permit to build a house or farm dwelling. Mr. Lemmo noted that he believed this particular parcel is currently resource subzone and that Mr. McCully could possibly apply for a permit to build a house and do farming. Mr. Lemmo added that they would process this application and would require an environmental assessment, shoreline certification, and possibly an erosion analysis depending on the location of the proposed facility.

Vice Chair Judge noted that the Petitioner desires to build a home and orchid operation greenhouse facility and asked if that would be something that is allowed in the permit.

Mr. Lemmo replied in the affirmative and added that agriculture is an identified use, commercial agriculture, and single-family uses in that subzone are all permitted.

Vice Chair Judge asked what the size restrictions were in place at the DLNR for the residential and commercial facilities.

Mr. Lemmo stated that the maximum allowable area for development under the conservation district for a home would be 5,000 square feet, and includes the garage, swimming pools and other developed features and accessories. Mr. Lemmo added that there is no restriction on the size of agricultural buildings and they do not have any standards for agriculture in the rules. Essentially, one could propose anything and it would be up to the DLNR's discretion to approve it or not.

Commissioner Formby posed questions regarding setbacks on the conservation lands, such as along the Hamakua Coast, and if that consideration is part of the CDUA process. Commissioner Formby also asked where does the setback begin when established along the bluffs.

Mr. Lemmo explained that it is a major consideration in the process for any coastal property. Mr. Lemmo added that when measuring setbacks, the first step is developing a certified shoreline and the setback would then be based from that shoreline.

Commissioner Formby asked if Mr. Lemmo had any knowledge or statistics that could be provided to the LUC regarding the number of existing CDUA permitted properties in the conservation lands along the Hamakua Coast.

Mr. Lemmo replied in the affirmative and noted that this information could be compiled and submitted.

Commissioner Kanuha commented that the property has been grassed and landscaped, both along the shoreline and the boundaries of the various parcels, and asked if that would have required a permit.

Mr. Lemmo replied that based on what he has seen at the site, it would have required a permit from them as they have landscaping as a defined use.

Commissioner Kanuha asked for a definition of the different levels of permitting.

Mr. Lemmo explained that the major permit is issued by the Board of Land and Natural Resources and requires a comprehensive process of a full blown review and environmental documents. The administrative permit is a departmental permit that involves certain levels of landscaping work and is approved by the Chairman. Also, certain levels of agriculture for one-acre parcels or less can be approved under the departmental permit. The site plan permit is issued from Mr. Lemmo's office for minor landscaping issues.

Commissioner Kanuha asked what type of permit would the Petitioner need to construct a greenhouse facility and a farm dwelling.

Mr. Lemmo noted that application would probably be processed as a board permit because of the residence. All single family residential uses would be a board permit under their rules and subject to Land Board approval. If there was just the greenhouse, then potentially it could be processed under a lesser permit structure.

Commissioner Piltz asked about the required setback on building the residence and if the setback would start from the top of the *pali*.

Mr. Lemmo stated that they do not have a required shoreline setback and that their practice has been to require an erosion analysis to determine the erosion rate, then base the setback on that information.

Commissioner Kanuha asked if the Petitioner needed a permit to reconfigure the property lines, consolidate and re-subdivide.

Mr. Lemmo replied in the affirmative adding that if you have 3 legal lots of record and the 3 lots are developable, then you may apply for a departmental permit to reconfigure the lines.

Commissioner Kanuha asked if the rules would allow for someone to slightly exceed the 5,000 square foot maximum for a residential dwelling.

Mr. Lemmo replied that it is clear in their rules that 5,000 square feet is the maximum size of house allowed and they would not accept an application that exceeds that amount.

Commissioner Im asked if the 5,000 square feet maximum was for the land area only, and as an example, a 2-story home that totals 10,000 square feet, but covers 3,000 square feet of land area.

Mr. Lemmo stated that the 5,000 square feet represents the maximum actual living floor area. You could build a 2-story home and have 2,500 square feet on each floor. He added that it's not a footprint, but the maximum actual floor living area provided by law.

Commissioner Im asked if Mr. Lemmo had any knowledge of erosion in the bluffs within that area in the past 20 to 30 years and if so, to what extent was the erosion a cause for concern.

Mr. Lemmo replied that he did not have that information or any personal knowledge of bluff erosion or failure in that area.

Chair Sakumoto asked if the 5,000 square feet of improved areas included amenities as swimming pools, garages, etc. Mr. Lemmo replied in the affirmative.

Chair Sakumoto asked if generally, under the CDUA process, an erosion analysis is required and also what is required of an applicant in the CDUA process.

Mr. Lemmo explained that it depends on the situation and if they think that it is a potentially hazardous situation, then the DLNR will ask for a detailed erosion analysis. He added that a lot of professional opinions go into making these decisions and that they do not have definitive standards of when to ask for an erosion analysis and for under what circumstances.

Chair Sakumoto commented that Mr. Lemmo has now personally seen the McCully site and asked for his opinion on this property.

Mr. Lemmo stated that ideally he would like to see some historical analysis done and determine if there is any evidence of historical bluff failure based on photographs to have that information evaluated by a coastal engineering company.

Chair Sakumoto commented that previously Mr. Lemmo's office took the position that this petition should be denied or at a minimum, granted only a portion of the property leaving a buffer in the conservation district. Chair Sakumoto asked Mr. Lemmo if that was still their position.

Mr. Lemmo replied in the affirmative and noted that having seen the property, he has not changed his position.

Mr. Kinkley asked if petitioner planned a residential building and a greenhouse situated 80 feet mauka of the bluff, would the DLNR recommend a hazard assessment.

Mr. Lemmo replied that they would probably ask for a professional opinion based on the site visit.

A lunch break was taken at 11:40 a.m. The meeting reconvened at 1:10 p.m.

Mr. Tsukazaki raised a few questions on permissible uses in each subzone and the amount of time it takes to process a departmental permit and the timelines of a board permit. Mr. Tsukazaki referred to HAR §13-5-24 Identified land uses in the resource subzone, and §13-5-23 Identified land uses in the limited subzone.

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

#### PETITIONER'S WITNESS

1. James McCully

Mr. McCully briefly discussed the initial clearing of abandoned sugar cane on his property, his greenhouse operation, his ability to generating income yields of approximately \$15 to \$50 per square foot per year. Mr. McCully added that he intends to develop some form of greenhouse agriculture on the other two lots in the future.

Ms. Leithead-Todd had a few questions on setback requirements at the Kaumana orchid operation, the County's tax structure for real property taxes on the 4 separate legal lots of record, and the County's incentive for agriculture uses to lower real property taxes. Ms. Leithead-Todd asked if Mr. McCully would accept some type of condition for agricultural uses on the property as a financial incentive. Mr. McCully replied in the affirmative.

Mr. Kinkley raised questions on hazardous mitigation and setback problems with the bluff and asked if Mr. McCully has personally witnessed any problems.

Mr. McCully stated that they had an episode where a Eucalyptus tree fell over, causing a significant amount of erosion, but has never experienced a landslide or slippage into the ocean. Mr. McCully noted that the tree was sitting directly on the bluff. Mr. McCully added that he would come to an agreement or arrangement with the DLNR on possible uses and a setback.

Chair Sakumoto asked if Mr. McCully was familiar with the agricultural dedication petition for real property taxes.

Mr. McCully stated that he was familiar, but has never filed one because being an active farmer, he already receives an agricultural tax rate. Mr. McCully added that he would consider that as a measure of security and a sense of obligation or commitment.

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

A recess break was taken at 2:15 p.m. The meeting reconvened at 2:25 p.m.

Chair Sakumoto declared the evidentiary portion of the proceeding to be completed and instructed the parties to draft their individual findings of fact, conclusions of law, and decision and order based upon the record in this docket.

Mr. Tsukazaki noted that since the record would be kept open for receiving information from the DLNR, he requested to reserve the right to address an issue, if any, from that submittal. Chair Sakumoto replied in the affirmative.

Chair Sakumoto noted that the parties have agreed to pursue a partial or fully stipulated order. Chair Sakumoto directed the parties to file their proposal no later than March 1, 2006 to be considered at the next scheduled meeting on the island of Hawaii.

The meeting adjourned at 2:25 p.m.

*(Please refer to LUC Transcript of January 20, 2006 for more details on this matter.)*