

LAND USE COMMISSION  
MINUTES OF MEETING

May 4, 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  
Walter Mensching, Audio Technician

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

ADOPTION OF MINUTES

Commissioner Formby moved to adopt the minutes of April 6, April 7, and April 21, 2006. Vice Chair Montgomery seconded the motion. Said motion was approved by voice votes.

## TENTATIVE MEETING SCHEDULE

Mr. Ching reported that May 18, 2006 will be a one-day meeting on Lanai. The Knudsen Trust FEIS was not submitted on time so that item was dropped from the agenda. Meeting dates for July and August are also subject to revert back to the first and third Thursdays and Fridays.

There were no questions posed by the Commission.

## A06-764 MOLOKAI PROPERTIES LIMITED

Chair Sakumoto stated that this was an action meeting on Docket No. A06-764 Molokai Properties Limited to 1) determine whether the Land Use Commission is the appropriate accepting authority pursuant to Chapter 343, Hawai`i Revised Statutes, for the reclassification of approximately 252 acres of land currently in the Agricultural District to the Conservation District; 613 acres of land currently in the Agricultural District to the Rural District; and 10 acres of land currently in the Conservation District to the Rural District at La`au Point, Moloka`i, Hawai`i; and 2) to determine whether the proposed action may have a "significant effect" to warrant the preparation of an Environmental Impact Statement pursuant to Chapter 343, Hawai`i Revised Statutes.

## APPEARANCES

Linnell Nishioka, Esq., represented Petitioner  
Bryan Yee, Esq., represented State Office of Planning  
Abe Mitsuda, State Office of Planning

## Public Witnesses

### 1. Scarlet Ritte

Ms. Ritte stated that she understands that this was a preliminary meeting, but wanted to state her opposition in the early stage of this proposal because the people of Molokai are not in support of this project. Ms. Ritte commented that it is hard enough getting to La`au Point without any more development and believes that every little thing creates a significant effect on the island since it is only 50 miles long and 11 miles wide. Ms. Ritte added that their island is not for development and that the people want to keep it that way. Ms. Ritte believes that this rural change means that it is one-step closer to development and that the lands should remain in the conservation and agricultural districts.

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

2. Kaala Fay Camara

Ms. Camara stated that she was testifying on behalf of her *ohana* who are all from Molokai. Ms. Camara commented that the people of Molokai treasure their island values, community awareness, and expressed that the love of the *aina* is as important as education and financial success. Ms. Camara commented that it was unfortunate that this meeting was not held in Molokai, as many people would have attended. Ms. Camara added that many people have worked hard to make sure that the environmental impact studies are done thoroughly and that the County is involved in the process and understand the effects of a project such as this to their children 20 years from now.

Commissioner Kanuha entered the meeting at this time.

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

Chair Sakumoto commented that the LUC will be conducting future meetings on Molokai regarding this docket.

3. Leilani Lindsey-Kaapuni

Ms. Kaapuni stated that she has been a resident of Molokai for 16 years, recently came to work in Hilo, and still has strong ties with Molokai. She commented that she was surprised that such a meeting as important as this was not held in Molokai. Ms. Kaapuni added that the people of Molokai wish to keep the lifestyle and preserve the uniqueness of the islands and that they want the opportunity to express their concerns for the future of their island.

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

4. Joseph Kualii Camara

Mr. Camara stated that he is against this project adding that he was born and raised in Molokai. Mr. Camara commented that the Hawaiians are not for this kind of development and that they need to fight to preserve their lands, burial sites, and its resources.

Commissioners Judge and Piltz entered the meeting at this time.

Mr. Camara added that he believed that ciguatera found in fish caught in Kona waters were caused by all the near shore developments and that the people of Molokai does not want to see this happening to their island.

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

#### 5. DeGray Vanderbilt

Mr. Vanderbilt stated that he has been a Molokai resident for 30 years and initially came as a developer. Since then, he has been actively involved in planning and water issues and is the Vice Chairman of the Planning Commission on Molokai. Mr. Vanderbilt stated that he was testifying today as an individual and not as a member of the Planning Commission. He added that this document was not distributed to the Molokai Planning Commission, but sent to the Maui Planning Commission and that there were over 70 people on the list for the prep notice, but none of them were from Molokai. Mr. Vanderbilt added that he has worked on the community plan and that the people of Molokai are dedicated to keeping their island unique and sustain themselves without the tourist industry.

Commissioner Piltz raised a few questions relative to the development of the community master plan and the environmental assessment.

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

#### 6. Claudia Rohr

Ms. Rohr stated that she is the secretary for PASH (Public Access Shoreline Hawaii). The organization's mission is to safeguard the continued existence and integrity of public access to the shoreline waters, lands, and natural resources of Hawaii. Ms. Rohr urged the people of Molokai to find a way to be heard to preserve their way of life on Molokai.

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

Ms. Nishioka began her presentation and stated that petitioner believed that the LUC is the appropriate accepting agency. Ms. Nishioka added that the Petitioner has made a choice to go straight to the EIS process and that they have attached as an exhibit,

the EISPN to initiate the process as they believed that this project may have a significant effect so as to warrant the preparation of an EIS.

Mr. Yee noted that the State had no questions.

Commissioner Formby raised a concern that the EISPN document had not been sent to the Molokai Planning Commission.

Ms. Nishioka stated that it was an oversight on their part and that a copy of the EISPN has since been sent to Molokai. Ms. Nishioka commented that they had received a call from Jane Lovell, Corporation Counsel from Maui, requesting that a copy be sent to the Molokai Planning Commission.

Chair Sakumoto commented that it would be helpful if a copy could also be made available for the people on the island at the local library.

Ms. Nishioka commented that a copy was supposed to have been sent to the library and will check to see if additional copies are needed. Ms. Nishioka added that they would provide a copy to anyone who requests for one.

Commissioner Im suggested that they could also make it available on their website.

Ms. Nishioka noted that since they already have the EISPN on CD, they could post it on the website and will follow up on that.

Commissioner Piltz commented that as an obligation to Petitioner, a copy should be sent to each member of the Molokai Planning Commission noting that something of this importance should be in their hands and to ensure that they have received it personally.

Ms. Nishioka replied in the affirmative.

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

Chair Sakumoto then asked Commissioner Kanuha if he still had a concern regarding the LUC being the approving accepting agency and if an executive session was appropriate.

Commissioner Kanuha replied that an executive session was not necessary and that he believed the LUC is the first approving agency and should accept responsibility for reviewing the EIS.

Ms. Erickson commented that part of this petition calls for the reclassification of land currently in the conservation district to the rural district and that under HRS § 343-5 (a)(2) an EA/EIS is required when petitioning to move the lands out from the conservation district.

Commissioner Kanuha then moved that the LUC accept the responsibility to review and be the accepting authority and that this project warrants the preparation of an EIS. The motion was seconded by Commissioner Piltz.

The Commission was polled as follows:

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

The motion passed with 8 ayes, 0 absent.

A recess break was taken at 11:25 a.m. The meeting reconvened at 11:40 a.m.

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

Chair Sakumoto stated that this was a continued hearing pursuant to § 15-15-63(l), Hawai'i Administrative Rules, to re-open the hearing for the limited purpose of hearing objection and/or permitting cross-examination by any party relating to the materials requested by the Commission to be submitted by the Office of Planning on January 20, 2006, which were filed on March 16, 2006.

#### APPEARANCES

R. Ben Tsukazaki, Esq., represented Petitioner  
Norman Hayashi, County of Hawaii Planning Department  
Bryan Yee, Esq., represented State Office of Planning  
Abe Mitsuda, State Office of Planning  
Lorene Maki, State Office of Planning

## Public Witness

### 1. Claudia Rohr

Ms. Rohr stated that she is the secretary for PASH (Public Access Shoreline Hawaii). Ms. Rohr added that this petition should not be approved because she believed that the project may impact the natural scenic qualities and scenic vistas along the Hilo-Hamakua heritage corridor.

Mr. Tsukazaki requested clarification on the issues regarding the scope of this hearing. Mr. Tsukazaki added that in reading Ms. Rohr's testimony it appears that it extends beyond what this hearing is about.

Chair Sakumoto noted that the LUC will allow her to testify as a public witness, as long as it is relevant to this docket. Chair Sakumoto added that while the LUC will hear the public testimony, it will not be a part of the formal record.

Ms. Rohr continued with her public testimony and discussed HAR 15-15-17 of the LUC's rules in respect to the decision making criteria and section 14.8.1 of the Hawaii County General Plan, which addresses land use open space designation.

Mr. Tsukazaki commented that it would be difficult to be an advocate for a party in the hearing when there is so much information in the public testimony that has the potential of raising concerns in the LUC. Mr. Tsukazaki added that he believed a lot of what Ms. Rohr has said would be prejudicial to the Petitioner and asked for the opportunity to address it in his closing argument.

Chair Sakumoto noted that as long as he stayed on the record, his closing arguments could be shaped as he saw fit.

Both the County and the State had no questions or comments for the public witness.

## Admission of Additional Exhibits

Mr. Yee described the documents filed with the LUC as an email from Sam Lemmo to Abe Mitsuda containing information requested by the LUC related to approved CDUPs along the North and South Hilo coastline. Mr. Yee then offered the document as OP's exhibit next in order. There were no objections by the parties or the Commission. Said exhibit was admitted into the record.

## State's Witness

### 1. Sam Lemmo

Mr. Lemmo discussed the two CDUPs, which have been approved and noted that one permit was still in progress and referenced the GIS map area.

Mr. Tsukazaki noted that Petitioner had no questions.

Mr. Hayashi raised a few questions on the 80-foot setback.

Mr. Lemmo stated that they arrived at the 80-foot setback through a recommendation from Dr. Fletcher on a pending CDUA project with a similar environment, such as high bluffs, similar types of weathering soils, ocean conditions, and similar vegetation.

Vice Chair Judge posed questions on the two approved and one pending CDUPs and asked if any permits have gone through the process and been denied in the past.

Mr. Lemmo stated that he could not find any applications that have been denied. He added that they prepare a report and make recommendations to the Land Board for approval. Mr. Lemmo commented that for this pending application, they are recommending approval since the applicant has cooperated with their suggestions and the applicant has done a good job of mitigating potential impacts.

Commissioner Kanuha asked if this petitioner had come in for a conservation district permit would the OCCL conduct an analysis similar to the pending application that Mr. Lemmo has referenced.

Mr. Lemmo replied in the affirmative and added that they would do exactly what they did for the (pending) Johnson case and would apply the same practices.

Commissioner Kanuha asked if it was still Mr. Lemmo's position that this petition not be converted from the conservation to the agricultural districts.

Mr. Lemmo replied in the affirmative.



Commissioner Kanuha commented that being familiar with the site, the two CDUP approvals were primarily in agricultural use sometime before the conservation district was overlaid on them and asked Mr. Lemmo if this was correct.

Mr. Lemmo replied that he believed that was correct and added that they were in agricultural use and believed that the conservation zoning occurred in 1964.

Mr. Yee asked if a person builds a house on conservation district, does there need to be some agricultural activities on the parcel.

Mr. Lemmo replied that there is no requirement to farm land as a condition of approval

Commissioner Im posed questions on the type of farm activities allowed in the conservation district and the amount of agricultural lands in the area where agricultural activities can be performed along the coastline.

Mr. Lemmo stated that the agricultural activities that would be allowed depends on what is being proposed. Some activities can be harmful to the land (piggeries, chicken farms, etc.) however, the OCCL typically supports applications for agricultural use subject to a management plan. Mr. Lemmo added that they had just approved such an application last year. A big landowner was allowed to grow ornamental plants in the conservation area.

Chair Sakumoto posed questions relative to the analysis done by Dr. Fletcher and the formula for the 80-foot setback.

Mr. Lemmo clarified that the 80-foot setback was not based on a formula, but was estimated in lieu of doing a formal analysis. Without having a coastal geologist looking at the property you would want to put it back further than the minimum county requirement of 40-feet. Mr. Lemmo added that he would explain to the Land Board and they would either agree or not agree if this distance was an acceptable finding. The 80-feet threshold had been used in a similar project. Typically, erosion becomes a reality. This 80-foot setback will still give the petitioner the ability to build a residence and believed that it is a reasonable setback.

Commissioner Kanuha asked what types of agricultural uses are permitted within the conservation district and if the OCCL would still recommend an 80-foot setback even if the petitioner has previously cleared and landscaped the land for farm related activities.

Mr. Lemmo stated that they have allowed typical farming activities and do not have too many requests for agricultural uses. Generally, they believe that agriculture could become a reasonable use if appropriate mitigation measures are established. Mr. Lemmo added that the OCCL would still look at that as a reasonable condition of development, whether it is structural, or not involving a structure. If the request was to conduct agricultural activities, irrigations lines, etc. and everything is discretionary and up to a certain point you would want to maintain a nice buffer that could have some agricultural use.

#### Admission of Additional Exhibits

Mr. Tsukazaki described and offered three exhibits. Two of the exhibits were a series of maps already on the record, and the third exhibit was a county depiction of the state land use district of this region. There were no objections by the parties. Petitioner's exhibits 10, 11, and 12 were admitted into the record.

A lunch break was taken at 12:55 p.m. The meeting reconvened at 2:10 p.m.

Chair Sakumoto noted that the LUC hoped to take action today because the 365 day time period ends on June 9. The LUC may not have another opportunity to return to Hilo and it would be ideal to accomplish this today, as the flight schedule would allow the LUC only another 2 hours.

Mr. Tsukazaki proceeded with his presentation and described the Petitioner's new exhibits numbers 10, 11, and 12. Exhibit 10 is an overview of the land use district conservation district as it extends from Hilo town up through Honokaa and beyond. Exhibit 11 is the LUC maps. Exhibit 12 map is produced by the County through their website showing the layout of the conservation district.

Mr. Hayashi clarified that for exhibit 12, although these are maps on the County's GIS system, they should be used for planning purposes only and are not site specific. The maps were drawn with data supplied from the State Office of Planning.

Mr. Yee noted that the State had no comments.

Chair Sakumoto then declared the record closed and proceeded with Mr. Tsukazaki's closing argument.

Mr. Tsukazaki began his closing argument and noted that the parties have reached a stipulation. Mr. Tsukazaki concluded that this petition has satisfied the requirements of Chapter 205 and requested that the LUC approve this reclassification on the terms of the stipulation.

Commissioner Formby asked if it was anywhere in the record that Petitioner agreed to a partial 40-foot buffer.

Mr. Tsukazaki replied that it was not in the record but that petitioner is willing to agree to a 40-foot conservation buffer along the makai side of the property and a 30-foot setback along the mauka side.

Commissioner Im commented that the standard is for a clear preponderance of evidence and that it was difficult for him given the lack of information on the shoreline areas and cliff erosion. Commissioner Im then posed a few questions relating to the conservation designation of the area and the County general plan.

Commissioner Im added that he was having concerns dealing with the fact that the LUC did not have that information and the petitioner's land could still be used substantially for the same purpose without the reclassification. Commissioner Im noted that he appreciates the fact that the petitioner is a seasoned farmer, but that his concern was that the evidence presented does not support a reclassification on this property, in this coastline, and that it may set a precedence.

Commissioner Kanuha asked if Petitioner was in agreement with the OP's proposed amendment regarding a 70-foot setback.

Mr. Tsukazaki replied in the affirmative and added that there would be an adjustment and extra survey work done to provide the LUC with the metes and bounds of the area of land to be retained in the conservation district.

Chair Sakumoto commented that the condition on the LUC's redline version is different from that of the OP's proposed condition as discussed with Commissioner Kanuha. Chair Sakumoto added that staff's concern was that the determination of 70-foot or the 80-foot was not supported by any scientific study and that the condition needs to have some type of rationale or analysis.

Mr. Tsukazaki stated that they acknowledge the reasons staff drafted that language, however, they have reached a point of agreement with the parties. Mr. Tsukazaki added that through Mr. Lemmo's testimony, everyone understood that a soil

erosion study would be the vehicle for determining an appropriate setback for this property.

Mr. Hayashi stated that the County supports the petition for reclassification.

Mr. Yee stated that their concerns are related to precedence and the 70- versus 80-foot setback.

Commissioner Im asked what rationale OP has for supporting this petition when similar uses can be done under the conservation district and that there are so many other lands that could be used for agricultural purposes that are readily available.

Mr. Yee stated that it meets the standard for land reclassification to change it to agricultural.

Commissioner Im asked if there was a general policy that the OP has about reclassifying conservation land to agricultural, urban, or rural, to protect the conservation lands.

Mr. Yee believed that it was built in the rules.

Commissioner Formby raised a few questions related to the 70-foot setback and the topography of the other property.

Mr. Yee stated that they had not gotten the facts on that particular case but that Mr. Lemmo has testified that it was similar to this one. Mr. Yee added that they did not ask Mr. Lemmo to support OP's position on this matter and that Mr. Lemmo did not take a position.

Commissioner Formby recalled that there was no plans described by the petitioner of any intended agricultural uses on the other two lots. Commissioner Formby added that in the stipulation, the parties have agreed that there would be no building commenced until agricultural uses occurred since there is no intended uses on the other two lots.

Mr. Yee stated that he believed it was for a family purpose, and would defer to petitioner, as he had not been in attendance at the prior hearing.

Commissioner Piltz had a concern on condition 14, Notice of Change of Ownership Interest. Commissioner Piltz commented that for this matter, conservation is appropriate classification.

A recess break was taken at 3:30 p.m. The meeting reconvened at 3:45 p.m.

Commissioner Kanuha noted similarity to the A Charitable Foundation docket (Oahu) that OP had supported. OP denied a portion due to lack of an agricultural plan. However, in this case there is a connection to agricultural use. Commissioner Kanuha asked what is the burden of proof for agricultural use on the remaining two lots

Mr. Yee commented that the OP is confident that petitioner is a bona fide farmer.

Mr. Tsukazaki added that the record shows that petitioner is a greenhouse farmer, and the other two lots would be similar to his present expertise.

Chair Sakumoto then read the opening statement for the action portion of the agenda.

Chair Sakumoto polled the Commissioners to confirm that each member had reviewed the record and/or received copies of the transcripts of these proceedings and were prepared to deliberate on the subject. All commissioners replied in the affirmative.

Mr. Ching reported on the suggested amendments to the decision and order. Mr. Ching discussed findings of fact 37 to redefine description of the project, findings of fact 38 to clarify greenhouse, findings of fact 40 to add a new sentence, findings of fact 50 to describe realities of conservation district, new findings 52, 57, 58, and 59, findings of fact 72 amended, new finding 74, and findings of fact 85 to add a new sentence, findings of fact 124, and findings of fact 141 that summarizes the maximum build out not anticipated to impact medical services.

Mr. Ching also noted that conclusions of law 1 was not supported by the record, and discussed new conditions 2, 4, 5, 7, 8, 9, and 10.

Commissioner Kanuha noted that staff has indicated that there is no support for the establishment of a structural setback.

Vice Chair Judge commented that her concern was in listening to all the evidence over the course of this docket and the argument of why the petition should not be in

conservation, it was still not clear to her as to why it should be reclassified to agriculture.

After a discussion, the LUC incorporated the stipulation and OP's documents.

Chair Sakumoto then polled the Commissioners as to whether they should revise a new condition number 10 entitled Erosion. Chair Sakumoto noted that this was not a vote on the actual petition but whether the LUC should include condition number 10 in the document.

The Commission was polled as follows:

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

The LUC continued to discuss and clarify the language of the new condition number 10.

After a discussion, Commissioner Formby moved to grant in part and deny in part the petition for reclassification as discussed and edited and amended today. The motion was seconded by Commissioner Kanuha.

The Commission was polled as follows:

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

Nays: Judge, Im

The motion failed with 5 ayes, 2 noes, 2 absent.

The meeting adjourned at 5:10 p.m.

*(Please refer to LUC Transcript of May 4, 2006 for more details on this matter.)*