

LAND USE COMMISSION  
MINUTES OF MEETING

June 6, 2006

Natural Energy Laboratory of Hawai'i Authority (NELHA)  
Conference Room  
73-4460 Queen Kaahumanu Highway  
Kailua-Kona, Hawai'i

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

COMMISSIONERS ABSENT: Duane Kanuha

STAFF PRESENT: Robyn Chun, 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 9:10 a.m.

Chair Sakumoto noted that the first agenda item Docket No. A06-765 Maalaea Properties has been removed from the agenda.

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

Chair Sakumoto stated that this was an action meeting to consider the Petitioner's Motion For Reconsideration and other appropriate action, if any.

APPEARANCES

R. Ben Tsukazaki, Esq., represented Petitioner

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

Bryan Yee, Esq., represented State Office of Planning

Chair Sakumoto noted that there were no public witnesses.

Mr. Tsukazaki began his presentation and summarized the motion. Mr. Tsukazaki commented that at its meeting on May 4, 2006, the motion to approve the district boundary amendment fell short of the six votes required by law (5 ayes, 2 nays, and 1 absent). At the end of the hearing, Mr. Tsukazaki indicated that his client would petition the LUC for reconsideration on this matter. He indicated his belief that the parties had spent much time and energy in reaching a stipulation, which tried to address all the issues of the record. Mr. Tsukazaki also believed that the statements made during the Commissioner's deliberation prior to the vote may have been mistaken or that some of the legal points and points of evidence have been overlooked by Commissioners Im and Judge. Mr. Tsukazaki added that after the LUC issued its decision and order for denial, the petitioner timely filed the motion for reconsideration that is provided for under §15-15-84. Mr. Tsukazaki then explained why he believed that there may have been some oversight or misunderstanding by Commissioners Im and Judge as noted in the motion and briefly summarized his position.

Commissioner Im commented that he believed Section 205, which sets forth the powers and restrictions of the LUC, and that HAR 15-15-77 have similar language. Commissioner Im quoted that 15-15-77 clearly states that "...shall not approve an amendment of the land use district boundary unless the Commission finds upon the clear preponderance of the evidence that the proposed boundary amendment is reasonable, not violative of §205-2, §205-16, §205-17, and §205 (a)(2)." Commissioner Im further discussed provisions of §205-16, conservation districts, shoreline lands and erosion, and §205-17 conformance to the goals, objectives and policies of the Hawaii State Plan.

Commissioner Im added that he did not believe that the Commission had overlooked or misunderstood any material facts of the case. Commissioner Im

commented that the Commission has heard the matter and made its decision pursuant to Section 205 that the burden was not met by the Petitioner; that the evidence presented was not clear.

Mr. Tsukazaki commented that there is a policy that the LUC should follow and asked to circulate a copy of the statute.

Chair Sakumoto noted that the copies could be circulated and used as reference, although it is not a part of the record and the copies will be returned to Mr. Tsukazaki after he is done.

Mr. Tsukazaki referenced and discussed §205-2 districting and classification of lands; §205-2(e) characteristics of land that shall be in the conservation district; HAR 15-15-77 decision-making criteria; and §205-16 Hawaii State Plan.

Chair Sakumoto commented that the proceeding today would be that the LUC will make a determination on the motion. If the motion is granted, then the LUC would have to return to the decision and order process and that since things have changed since the last hearing, changes would need to be made to the document.

Mr. Ching clarified that the LUC would need a decision and order to be voted on, assuming that is the way the LUC would be proceeding, and that it would be a two-step process. If the motion for reconsideration is denied, then that would be the end.

Chair Sakumoto noted that regarding the decision and order, if the LUC proceeds to that point today, the updating will be basically the deliberation up to the point where the LUC took the vote on May 4, 2006, which was not reflected in the document. There will only be a slight revision and they will not revisit the entire matter.

Commissioner Im commented that he was puzzled on the Petitioner's grounds for reconsideration. Commissioner Im added that although they may have considered it with a different perspective, he believed that both Commissioner Judge and himself have not overlooked or misunderstood the evidence that had been presented.

Ms. Leithead-Todd commented that on the issue of erosion, the County has greater concerns on low-lying properties and has looked at this property as being historically used in agriculture and believed that the reclassification to agriculture was appropriate.

Commissioner Contrades asked what is the County of Hawaii's current zoning of this property.

Ms. Leithead-Todd thought that it was agricultural 20 acres.

Commissioner Im stated that he believed that the general plan is open and not agricultural.

Ms. Leithead-Todd noted that it is within the county's special management area and possibly an open designation in the general plan.

Mr. Yee highlighted the OP's position and reiterated that they have supported the petition subject to conditions as previously discussed by the parties.

After a brief discussion, Mr. Tsukazaki noted that he had nothing further to present.

Chair Sakumoto asked newly appointed Commissioner Nicholas Teves if he had the opportunity to acquaint himself with the record and the transcripts for this docket and was prepared to qualify himself as being ready to participate. Commissioner Teves replied in the affirmative.

Chair Sakumoto then asked Commissioner Contrades if he had the opportunity to acquaint himself with the transcripts of the May 4<sup>th</sup> meeting. Commissioner Contrades replied in the affirmative and added that he was ready to participate in the proceeding.

Commissioner Piltz commented on the five points given by Mr. Tsukazaki. The first regarding establishing evidence on a petition area void of resources, which he believed otherwise. Commissioner Piltz noted that this is open space and that petitioner is able to do whatever agricultural practices he wants to do and build the structures that he desires on this land. Commissioner Piltz stated that he is concerned about soil erosion. The county has not conducted an erosion survey to show whether erosion or accretion is happening along the cliff and that he believed that the 70-foot setback is not sufficient without the survey. Commissioner Piltz also noted that petitioner's argument about committing to agriculture is not a good argument as petitioner was committed to doing agriculture on his other lots, but ended up selling them. Commissioner Piltz added that the LUC takes every petition on an individual basis and its processes are thorough

Vice Chair Judge noted that after reading the motion and hearing Mr. Tsukazaki's argument, she would like to clarify her position. Vice Chair Judge stated that after hearing all the testimony and reading all the materials, she remained not convinced that the characteristics of the property compel its conversion from conservation to agricultural. In addition, the petitioner has an adequate alternative to go through the DLNR's Conservation District Use Application process to build their home and engage in their orchid operations. Vice Chair Judge added that this was the basis of her decision when voting "no" and still believes that is correct.

Vice Chair Judge then moved to deny the Motion for Reconsideration. The motion was seconded by Commissioner Piltz.

Commissioner Formby noted his position that he viewed this only as a Motion for Reconsideration and not as a revisiting of all the substantive discussions. Commissioner Formby added that although he supported the reclassification, this Motion for Reconsideration is based upon an allegation of a misunderstanding by two or more of his fellow commissioners and he will defer to their guidance as far as whether or not they believe or misunderstood something. Commissioner Formby noted that it would not be fair to use this as an opportunity to override them when they have heard all of the evidence and have deliberated in good conscience and will support them.

The Commission was polled as follows:

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

Nays: Commissioner Contrades

The motion failed with 7 ayes, 1 no, 1 absent.

The meeting adjourned at 10:30 a.m.

*(Please refer to LUC Transcript of June 6, 2006 for more details on this matter.)*