

LAND USE COMMISSION
MINUTES OF MEETING

September 8, 2006

Maui Prince Hotel Makena Resort
5400 Makena Alanui
Makena, Maui, Hawaii

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

COMMISSIONERS ABSENT: Nicholas Teves, Jr.

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 Judge called the meeting to order at 8:35 a.m.

A05-755 HALE MUA PROPERTIES, LLC (Maui)

APPEARANCES

Blaine Kobayashi, Esq., representing Petitioner
Sterling Kim, Hale Mua Properties
Jane Lovell, Esq., represented the County of Maui Department of Planning
Michael Foley, Director, County of Maui Department of Planning

Colleen Suyama, County of Maui Department of Planning
Bryan Yee, Esq., represented State Office of Planning
Laura Thielen, State Office of Planning
Abe Mitsuda, State Office of Planning

Mr. Kobayashi stated that their witness Mr. Daega was not available today and that petitioner does not intend to call any more witnesses at this time. Mr. Kobayashi added that as LUC staff had pointed out, there is a correction that needs to be made regarding the small notch on the property that was previously indicated as agricultural. The small notch of property had been inappropriately identified as agricultural by the petitioner and should really be in the rural district. Mr. Kobayashi also noted a correction to the acreage as another small notch of property that was previously thought to not be a part of Hale Mua's property that needs to be included in the acreage. The total amount of acreage requested to be reclassified to urban is now 232.032 acres as opposed to 232.135 acres. The rural acreage has increased to 6.149 acres as opposed to 5.918 acres.

Submission of Additional Exhibits

Mr. Kobayashi stated that the corrected metes and bounds indicating this increase, as well as a new map, will be offered as petitioner's exhibit 39. There were no objections by the county and the state.

Commissioner Im questioned how the petitioner discovered this discrepancy and if the revised property description matched the attachment to the quitclaim deed.

Mr. Kobayashi noted that the LUC staff made the interpretation and clarified that a portion of the Hale Mua property should have been designated rural instead of agricultural. Mr. Kobayashi added that the revised property description matches the metes and bounds description on the quitclaim deed.

Mr. Ching commented that the original quitclaim deed and the total petition area is not in dispute and in the course of reviewing the records within the property that was covered by the quitclaim deed, the designation of .103 acres was incorrectly designated as agricultural and should have been in the rural district. That particular acreage would not have changed the total petition area, but should be reflected as in rural designation. The petitioner is offering title to that particular acreage and reporting that they have ownership by a specific land commission award.

Commissioner Im commented that he just wanted to be sure that they were technically correct. Commissioner Im added that when a property is purchased, the exact property description is attached to the deed. If someone claims to own additional property other than what is exactly described in the deed, technically it is not accepted because they do not have that portion in the deed.

A recess break was taken at 8:50 a.m. The meeting reconvened at 9:00 a.m.

Mr. Kobayashi noted that petitioner has decided to withhold from submitting exhibit 39 at this time and will leave their case open to address Commissioner Im's point.

Chair Judge noted that the LUC will reserve the right to recall Mr. Kim to answer further concerns.

Vice Chair Montgomery commented that in relation to the title issues, the petitioner has won at the lower court level but that the dispute is now on appeal. Vice Chair Montgomery questioned how long the appeal process will take and if they considered a type of mediation.

Mr. Kobayashi stated that previous track records has shown that the Supreme Court of Appeals average time to hear appeals range anywhere from two years (being optimistic) to five years. Mr. Kobayashi added that as Mr. Leuteneker testified, there had been no posting of a supersedeas bond, which gave fee simple ownership to Hale Mua, granted that a portion of that is on appeal. Mr. Kobayashi believed that based on those facts, there was no stay and the LUC can act on this matter. Mr. Kobayashi noted that there is an option for some type of mediation and a briefing schedule has been issued by the Supreme Court and that petitioner is in the process of preparing a brief.

County's Witnesses

1. Alice Lee

Ms. Lee stated that she is the Director of Housing and Human Concerns. Ms. Lee briefly summarized her background as the director and as a former council member. Ms. Lee expounded on her department's strong support and as co-sponsor for the Hale Mua project, she discussed the 201G process. Ms. Lee reiterated her support and that of the Mayor of Maui, who also strongly favors this project.

Mr. Yee posed questions related to potential impacts and what would qualify as a substantial change to the application, the resolution allowing residential uses, the 19 large lots for agricultural purposes rather than residential uses, and referenced the minutes of July 27, and the testimony of the County's Planning Department.

Commissioner Kanuha commented that the affordable housing component represents only 12% of the entire project area because only 29 acres out of the 238 acres will be set aside for affordable housing. Commissioner Kanuha asked how Ms. Lee could have supported this project.

Ms. Lee stated that they see a project that will provide affordable housing like no other project with selling prices at \$175,000, \$205,700 and \$260,900 that is unheard of in Maui County and in the State of Hawaii. Ms. Lee added that the 19 large lots have a restriction on further subdivision development and will provide open spaces and that the entire area will not be built out. Ms. Lee noted that as far as use on the remaining lands, they have no problems with that, adding that they are very supportive of this project because of the product it will produce.

Commissioner Kanuha questioned if the LUC decides to not reclassify the 19-large lot portion, would that situation be considered a significant deviation from the 201G application.

Ms. Lee stated that it would need to be decided upon by the corporation council.

Commissioner Kanuha noted that earlier testimony indicated that the 201G process through the state would have required a pro forma or more detailed financial information, versus the process followed by the County of Maui.

Ms. Lee stated that they only assist with the processing of the county's application and that the ultimate deciding body is the county council. Ms. Lee added that as a general rule, they would not ask for a pro forma as they are familiar with the applicant and his track record as a developer.

Vice Chair Montgomery asked if the county council would consider a change in the affordable home lot sizes to 8,000 square feet a major change.

Ms. Lee stated that changing the sizes of the affordable lots would be considered a substantive change and would certainly require re-designed infrastructure, re-pricing, and they would not be in favor of introducing that kind of change to the project at this point.

Vice Chair Formby asked if the council was aware that the petitioner sought to reclassify the entire project as urban at the time of the 201G application.

Ms. Lee replied in the affirmative and noted that the EA was filed with the LUC the previous year, then council acted upon the project, and now the petition has returned to the LUC for hearing and their decision.

Vice Chair Formby questioned if Ms. Lee's department, as co-sponsors of the 201G project, had any questions regarding title.

Ms. Lee stated that they had several meetings with the committee members of the council regarding the issue of title. Ms. Lee noted that their corporation counsel's opinion was that any proceedings regarding title, which are currently moving forward in the court system, should not preempt the 201G process.

Commissioner Piltz raised a few questions relative to other affordable housing projects in the area to come on line, and the size of those lots.

Commissioner Im posed questions regarding the council's resolution and the unilateral agreement, and asked if this agreement could be amended without affecting the affordable housing component.

Ms. Lee stated that these are two separate issues. The purpose of the unilateral agreement was to provide clarification for the 201G application. Significant changes to the unilateral agreement would need approval from the council. Ms. Lee added that this agreement runs with the land so it affects the entire project.

Chair Judge referenced page 3 of the unilateral agreement that states "...written release by the County of Maui." Chair Judge asked if this approval would be from the county council or the county's administrative department.

Ms. Lee stated that any significant change made to the 201G project needs to go back to the county council for approval. Ms. Lee added that the unilateral agreement will need written release from the Director of Housing and Human Concerns and hopefully, in the future, this person will refer back to the county council, as this unilateral agreement repeats what was in the record. Ms. Lee noted that it is possible that a county administrator could seek to release this unilateral agreement without going to the council.

Chair Judge posed a few questions regarding an agreement, if any, on the phasing or timing for occupancy of the affordable and market homes.

Ms. Lee stated that the occupancy requirement of the 201G is concurrent occupancy on a one-to-one basis; one affordable to one market.

Chair Judge questioned if Ms. Lee was in support of petitioner's offer to donate land for a possible school site in lieu of paying a fair share contribution, and asked how this would affect the 201G.

Ms. Lee stated that there was discussion about the overcrowding of Waihe'e School but the discussion of an actual school site and setting lands aside for a school at Hale Mua was an administrative agreement between the Mayor and the petitioner. Ms. Lee added that donating a school site may not significantly affect the 201G, but that the petitioner would need to return to the council if an agreement is confirmed with the DOE.

Chair Judge asked if Ms. Lee was aware of the title issues and referenced the committee minutes dated April 23, 2005 regarding the petitioner obtaining clear title prior to final subdivision approval.

Ms. Lee stated that it was her understanding that the court ruled in favor of the petitioner and that the corporation counsel's opinion indicated that even with the pending appeal, this should not preclude the applicant from moving forward in the 201G process. Ms. Lee added that the applicant will need to have clear title by the time he files for final county subdivision approval.

Mr. Yee had a few follow up questions regarding the distinction between urban and residential uses, rural classification for residential use, and classification that allows for residential uses, but might be considered a substantial deviation to the 201G approval.

A recess break was taken at 10:15 a.m. The meeting reconvened at 10:25 a.m.

Mr. Yee posed a few questions regarding previous projects' buy back periods, affordable housing agreements, and provisions for eligibility.

Vice Chair Formby asked if Ms. Lee's department reviews the type of construction materials used for affordable housing.

Ms. Lee stated that they do not get involved in the review of any type of construction materials.

Commissioner Im posed questions related to the council resolution, potential commercial or light industrial uses, and ohana units on the 19 large lot parcels.

Ms. Lovell asked if the 201G approval changes the underlying zoning of the property.

Ms. Lee stated that it does not change the underlying zoning of the property and it exempts the applicant from certain standards and requirements of that underlying zoning.

After a brief discussion, there were no further questions for Mr. Lee.

2. George Tengan

Mr. Tengan stated that he is the Director of Maui County's Department of Water Supply. Mr. Tengan commented that he is familiar with the Hale Mua project and that his department has commented on the project, as referenced in exhibit 15, the final EA.

Mr. Tengan noted that as of July 21, 2003, the department no longer assures developers that water would be available upon completion of their projects. This was done to put the developer on notice that they could proceed at their own risk, but that the DWS would not assure them that water would be available upon completion of their projects and that the developer would possibly need to develop their own resources. Mr. Tengan continued to discuss issues of water commitments, water wells and proposed surface treatment water plants. Mr. Tengan added that it was his understanding that for Hale Mua, one home would be built on each lot. If water is available at the time the meter applications are filed, the DWS would provide water from the public water system for that use, and added that non-potable water would be used for agricultural uses.

Mr. Kobayashi referenced a March 24, 2005 letter from the DWS. Mr. Tengan was then given the opportunity to review this letter.

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

Admission of Additional Exhibits

Mr. Kobayashi described and introduced the March 24, 2005 letter from the DWS and offered this as petitioner's exhibit 40. There were no objections by the parties. Said exhibit was admitted into the record.

Mr. Kobayashi referenced the March 24, 2005 letter and raised questions regarding the amount of dwelling units on the 19 large lots.

Mr. Yee posed questions regarding the 10.9 million gallons a day of additional water that was described by Mr. Tengan as possibly being available in the future; a combination of surface water and water from the Iao aquifer, and other sources.

Commissioner Wong questioned if there was any reason why this petition should be denied solely on the basis due to the lack of water.

Mr. Tengan stated that it was not his call to make that decision and added that as stated in their comment letters, water may be available now and it is up to the developer to proceed with his project and take that risk.

Commissioner Piltz raised a few questions relative to the possible increase in pumpage to 2 million gallons per day, rise in chloride levels from too much pumping from one point, the Kehalani required improvements, and the storage tank for fire protection

Vice Chair Formby referenced the letter dated December 2, 2004 from Munekiyo and Hiraga regarding a one million dollar commitment from petitioner. Vice Chair Formby questioned how they have calculated that need.

Mr. Tengan stated that they have not had any ongoing discussions regarding that particular subject and that the DWS has not reached any agreement with the petitioner.

Vice Chair Formby asked if the county could define how the potable versus non-potable water had become an issue specifically for the 19 large lots.

Mr. Tengan stated that potable water would be water that meets the Safe Drinking Water Act as enacted and adopted by the EPA as primary and secondary standards, and administered by the state's DOH Drinking Water Branch. Mr. Tengan

added that a developer will be approved for water when they come in with their meter applications.

Commissioner Im had a few questions regarding the location of the 500,000 gallon storage tank, and potable and non-potable water uses.

Chair Judge raised questions relative to non-potable water uses on the 19 large lots, and a type of policy or requirement when hooking up to the DWS system informing owners that they are restricted from using potable water for non-potable or irrigation uses.

After a brief discussion, there were no further questions for Mr. Tengan.

A lunch break was taken at 12:00 p.m. The meeting reconvened at 1:15 p.m. Commissioners Contrades and Kanuha were not in attendance at this time.

2. Mike Miyamoto

Mr. Miyamoto stated that he is the Deputy Director of the Department of Public Works and Environmental Management. Mr. Miyamoto briefly described his education and background in civil engineering. Mr. Miyamoto discussed the drainage plan, runoff mitigation, grass swales, and the two options for wastewater.

Commissioners Kanuha and Contrades entered the meeting at this time

Mr. Miyamoto also discussed the Imi Kala extension and referenced petitioner's exhibit 26.

Commissioner Im raised questions regarding petitioner's concept of the sewage lines being owned by the homeowners association with the obligation to maintain and do appropriate repairs.

Chair Judge posed questions in reference to petitioner's exhibit 26, the 12 inch main that would be in the county right-of-way, requirements of the building code, construction methods for these dwelling units, proposed school site impacts, and the requirement that the Imi Kala bridge be built before occupancy of any housing units.

After a brief discussion, there were no further questions for Mr. Miyamoto.

EXECUTIVE SESSION

Commissioner Formby moved to go into executive session under §92-5(a)(4), Hawaii Revised Statutes, to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities. Commissioner Piltz seconded the motion. The motion was unanimously approved by a show of hand votes.

The Commission entered into executive session at 1:55 p.m.

The open meeting reconvened at 2:55 p.m.

Commissioners Kanuha and Contrades left the meeting at this time

3. Michael Foley

Mr. Foley stated that he is the Planning Director for the County of Maui and has 41 years of experience in the field of planning. Mr. Foley briefly summarized his written testimony, and referenced the county's exhibit 2. Mr. Foley stated that the county strongly supports the affordable housing component in the Hale Mua application and agrees with Ms. Lee that this project is an extraordinary project because of the low prices and the large number of affordable units offered. Mr. Foley also discussed issues of the 201G process, the Wailuku and Kahului Community Plan, drainage, water and sewer, the proposed school site, and ohana units.

Mr. Kobayashi referenced county's exhibit 2, page 7 of Mr. Foley's written testimony, and posed questions related to the 19 large lots and agricultural uses.

Mr. Yee referenced the county's exhibit 1, the county resolution, and posed a few questions regarding the final plans and specs, and deviations that would require the corporation counsel's determination. Mr. Yee also had questions regarding the 19 large lots status as agricultural zoned, and the number of current agricultural uses in the area.

Commissioner Piltz referenced county's exhibit 1 and raised questions regarding the curbs, gutters, and sidewalks at the subdivision, the interior streets, and traffic calming devices.

After a brief discussion, there were no further questions for Mr. Foley.

Chair Judge commented that some of the Commissioners still have serious concerns related to title and the land commission awards within the petition area. The LUC is not the proper forum to determine title, but have received advice from their counsel that a certified copy of the summary judgment in the quiet title action is not something that the LUC can take judicial notice of as evidence of title since the matter is still in dispute. Due to the ongoing appeal and according to §15-15-50(5) HAR, if petitioner is not the fee simple owner of the property, the petitioner is to provide written authorization of the fee owner to file the petition. Therefore, the petitioner is requested to provide written consent from the parties appealing the Circuit Court's Summary Judgment. In addition, the LUC requests that the petitioner submit written clarification as to the land commission awards which are the subject in the appeal in relation to the petition area.

Mr. Kobayashi stated that petitioner had no further questions.

The meeting was adjourned at 3:25 p.m.

(Please refer to LUC Transcript of September 8, 2006 for more details on this matter.)