

LAND USE COMMISSION  
MINUTES OF MEETING

October 16, 2008

Haleakala Room  
Maui Prince Hotel  
Makena Resort & Golf Courses  
5400 Makena Alanui  
Makena, Maui, Hawaii

COMMISSIONERS PRESENT: Duane Kanuha  
Lisa Judge  
Normand Lezy  
Thomas Contrades  
Kyle Chock  
Reuben Wong

COMMISSIONERS ABSENT: Vladimir Devens  
Nicholas Teves, Jr.  
Ransom Piltz

STAFF PRESENT: Orlando Davidson, Executive Officer  
Diane Erickson, Deputy Attorney General  
Bert Saruwatari, Staff Planner  
Holly Hackett, Court Reporter  
Walter Mensching, Audio Technician

Chair Kanuha called the meeting to order at 10:52 a.m.

ADOPTION OF MINUTES

Commissioner Judge moved to adopt the minutes of October 2, 2008. Commissioner Chock seconded the motion. The minutes were unanimously approved by voice votes.

TENTATIVE MEETING SCHEDULE

Executive Officer Davidson reported on the following:

- A chapter 201H affordable housing petition (Kula Ridge) is anticipated to be filed with the LUC on October 31, 2008. Assuming that it is a complete filing, the Commission is required to act within 45 days. Accordingly, the Commission's hearing on the petition has been scheduled for December 3-5, 2008, to commence

and complete the entire matter, including issuing a Findings of Fact, Conclusions of Law, and Decision and Order. A prehearing on the petition with the parties is tentatively scheduled on November 3, 2008. Under this fast-track provision, the petitioner is required to file a proposed Findings of Fact, Conclusions of Law, and Decision and Order and an approved environmental assessment at the time the petition is filed. At this time, there are six commissioners that are available on December 4 and 5 and five commissioners available on December 3. The dates of December 11 or 12, 2008, on Oahu have been identified in the event there is a need to adopt the form of the Decision and Order.

#### ADOPTION OF ORDER

#### A06-770 THE SHOPOFF GROUP, L.P. (HAWAII)

Chair Kanuha announced that this was a meeting on the adoption of the Order. Chair Kanuha noted that on September 18, 2008, the Commission voted to grant the district boundary amendment petition in this matter and to adopt proposed Findings of Fact, Conclusions of Law, and Decision and Order as discussed and modified during the Commission's deliberations on July 24, 2008, and September 18, 2008. Chair Kanuha also noted that by e-mail, the County of Hawaii informed the Executive Officer that they will not be attending the meeting.

#### APPEARANCES

Benjamin Kudo, Esq., represented Petitioner  
Naomi Kuwaye, Esq., represented Petitioner  
Bryan Yee, Esq., represented State Office of Planning  
Abbey Seth Mayer, State Office of Planning

#### PUBLIC WITNESSES

There were no public witnesses on this matter.

Commissioner Judge moved to adopt the Findings of Fact, Conclusions of Law, and Decision and Order. Commissioner Lezy seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Judge, Lezy, Chock, Contrades, Wong, and Kanuha.  
The motion passed with 6 ayes and 3 excused.

Following the vote, Mr. Kudo asked for clarification on Condition Number 7 pertaining to the provision of affordable housing. Commissioner Lezy moved to go into executive session to consult with the Commission's attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities. Commissioner Chock seconded the motion.

The Commission exited the meeting at 11:03 a.m. and entered executive session immediately thereafter.

The meeting reconvened at 11:06 a.m.

Chair Kanuha determined that at this point in the proceeding, Petitioner may elect to file a motion with the Commission to clarify Condition Number 7.

The Commission went into recess at 11:07 a.m. The meeting reconvened at 11:11 a.m.

### CONTINUED HEARING

#### A07-772 A&B PROPERTIES, INC. (Maui)

Chair Kanuha announced that this was a continued hearing on Docket No. A07-772 A&B Properties, Inc., to consider the reclassification of approximately 94.352 acres of land currently in the Agricultural District to the Urban District at Waiakoa, Maui, for single and multi-family residential units and commercial services at TMK Nos. 3-8-04: por. 2, por. 22, and por. 30.

### APPEARANCES

Benjamin M. Matsubara, Esq., represented Petitioner

Curtis Tabata, Esq., represented Petitioner

Dan Yasui, Petitioner

Grant Chun, Petitioner

Jane Lovell, Esq., represented County of Maui Department of Planning

Michael Hopper, Esq., represented County of Maui Department of Planning

Ann Cua, County of Maui Department of Planning

Bryan Yee, Esq., represented State Office of Planning

Abbey Seth Mayer, State Office of Planning

Debra Mendes, State Office of Planning

### PUBLIC WITNESSES

There were no public witnesses in this matter.

### STATE OFFICE OF PLANNING'S PRESENTATION

Mr. Mayer presented OP's testimony on this matter. Mr. Mayer stated that his office supported the Petition with conditions. He noted that OP's support was based on the provision of affordable and reasonable market priced homes in the Kihei area; the Petition Area's proximity to the existing State Land Use Urban District, existing residential areas, utility infrastructure, and social services; and the Petition Area's location within the proposed urban growth boundary.

Mr. Mayer then identified the major issues of the project. He noted that the development will require a new water source and storage facility. Petitioner also will be required to implement traffic improvements and mitigation measures as recommended by the Traffic Impact Analysis Report and to obtain State Department of Transportation (DOT) approval. He also pointed out that Petitioner will be required to agree on a fair-share contribution agreement with the State Department of Education.

Mr. Mayer next discussed OP's proposed Condition Numbers 19 and 20. He noted that Condition Number 19 would allow the Commission and the parties to reevaluate the impacts and the merits of the proposed development if it was not completed within the ten-year specified period of time. He added that this condition will provide Petitioner with ample time to complete its entitlement process while also provide a measure of respect to the County's process. He explained that should the proposed urban growth boundaries change, and if Petitioner was ultimately unable to complete the entitlement process, this condition would enable the parties to act to revert the district classification and bring it back into compatibility with County plans. He pointed out that Condition Number 20 should give the County of Maui a measure of comfort that the integrity of its process can be preserved in spite of a district boundary change. He explained that the condition would also save the Commission and the parties from what commonly took several years of status reports and motions to arrive at a point of issuing an Order to Show Cause. He noted that it was of State benefit to stop the practice of the commoditization of entitlements and the uplift of value in properties that developers get through entitlements.

Finally, Mr. Mayer discussed OP's amended energy condition. He noted that the Department of Business, Economic Development, and Tourism (DBEDT) launched the Hawaii Clean Energy Initiative, a broad-based, comprehensive policy that will look at alternative energy sources and ways to integrate large percentages of alternate energy into the grid and seek regulatory changes within the Public Utilities Commission and the business models and structures of utility companies. It was the belief of DBEDT's Energy Division and OP that having LEED for homes as an option was essential in moving toward energy conservation.

Mr. Mayer stated that in this Petition, DBEDT energy analysts continued to seek mandatory LEED silver for the market homes or LEED certified for the affordable homes. He explained that OP took note of the concerns of the petitioners, the counties, and the Commission over the last several dockets and attempted to rectify some of the problematic issues of mandatory LEED by asking for the design and building of one model home on the market side to meet at a minimum LEED silver and one model home on the affordable side to meet at a minimum LEED certified or higher. He noted that there were several benefits to this condition, including that the model home on either side was not required to go through the certification process. He explained that under this condition, the market would determine whether homes were built to LEED standards or not, with buyers given the choice to buy a LEED home. He further described that this will have ripple effects in that designers, architects, and contractors

will get familiar with the LEED system and be able to offer it to their future clients. He highlighted the testimony of the DBEDT energy analyst regarding the benefits of a LEED home. Mr. Mayer concluded his testimony by noting that this condition was the most balanced and equitable compromise for energy and resource consumption and reduction for this Petition.

Mr. Matsubara asked Mr. Mayer whether OP was involved in any legislative initiatives to provide incentives for home builders or developers who go “green” regarding their projects. Mr. Mayer stated that there will be a legislative packet of proposals submitted by DBEDT for the coming legislative session. Upon additional questioning, Mr. Mayer stated that OP has not worked on county initiatives regarding this issue. He clarified that OP worked with DBEDT’s Energy Division and collaborated with them on the type of proposals that will be coming out of the Hawaii Clean Energy Initiative in the future. He added that the Energy Division was the spearheading entity as far as working with the counties on energy-related matters.

Upon questioning by Ms. Lovell, Mr. Mayer confirmed that he had spoken to the Planning Director about the County’s position on this docket but could not remember whether that conversation took place before or after the amended position statement of OP was filed. He acknowledged that one of the County’s concerns was having a parcel urbanized by the Commission while continuing to be designated County Agriculture and be outside of the urban growth boundaries. Mr. Meyer was then asked how he interpreted Act 26 which amended the Commission’s decision-making criteria to include the county general plan and plans adopted pursuant to the general plan. He stated that while he recognized the need and importance of yielding to the County’s general plans, he did not believe that the Act mandated it as such.

Upon additional questioning by Ms. Lovell, Mr. Mayer confirmed his office’s support of urban growth boundaries as a planning tool and acknowledged that such boundaries have been effectively used in other jurisdictions. She then inquired as to whether OP agreed with the County’s position that to redesignate lands in a way that was currently inconsistent with the Kihei Community Plan while the County was updating its plan was detrimental to that overall process. He stated that he was unclear as to what that detriment was in that the County will have at least three opportunities to prevent the entitlement process from proceeding at subdivision, zoning, and at the community plan amendment stage.

Ms. Lovell commented that OP’s proposed conditions regarding the infrastructure deadline and the automatic Order to Show Cause related to infrastructure as opposed to whether the property was located in part or in whole within the adopted urban growth boundaries. Upon questioning, Mr. Meyer affirmed that OP would probably support a condition requiring an automatic Order to Show Cause proceeding if the urban growth boundaries were adopted in such a way that part or all of the project fell outside the boundaries. He explained that proposed Condition Numbers 19 and 20 were, in this case, the most appropriate to address the concerns of the County and the State.

Upon further questioning by Ms. Lovell, Mr. Meyer acknowledged that he considered a situation whereby a developer completes the infrastructure in compliance with the condition while a portion of his project falls outside the urban growth boundaries. However, he did not see how that scenario was possible given that the County has several layers of approvals to make prior to the infrastructure being completed. He noted that infrastructure was very costly and that once the infrastructure was completed, OP was fairly certain that the houses will be built. He did not think that any developer would commence on major infrastructure projects without full entitlements for a project.

Ms. Lovell continued questioning Mr. Mayer on OP's proposed conditions. He confirmed that he discussed the infrastructure condition with the Planning Director but could not recall having a discussion on a condition that would have allowed either automatic reversion or at least an automatic Order to Show Cause should a portion or all of the project fall outside the adopted urban growth boundaries.

Commissioner Lezy asked Mr. Meyer whether in considering the proposed energy conservation condition, he had any specific discussions with Petitioner. Mr. Meyer responded that they had several conversations all through the process. He noted that the main objection of Petitioner to the model home option was that Petitioner still considered it a mandate. The cost of the model homes was also a concern. Commissioner Lezy pointed out that in crafting Decision and Orders, he wanted to ensure that there would not be surplus conditions or surplus language. He contemplated whether it would be feasible for this project where all of the housing units are built in advance of sales to have a model home option that met LEED requirements if the homes could not be retrofitted. When asked if those were issues that he discussed with Petitioner, Mr. Meyer stated that he was under the impression that design offerings would be made available to prospective buyers in this case.

Commissioner Judge asked Mr. Meyer to clarify the structure of the model home proposal. He noted that the thought was that there would be a body of designs offered to buyers and one of those design choices would be the LEED home. He stated that they would be looking for at least one option per buyer to choose LEED. He also clarified that the home would be designed and built to meet LEED standards but not necessarily go through the certification process.

Commissioner Chock questioned Mr. Meyer as to OP's thoughts in terms of the difference in standard between the LEED requirement for affordable vs. market homes. Mr. Meyer related that they did some outside research with architectural and design firms, and on the certified end, it was most likely a 1 to 2 percent price increase. OP believed that this increase was reachable for the affordable homes especially in light of the mandatory solar bill. With this bill in place, he remarked that it might not even be that much of a price increase for LEED certified. At the same time, OP recognized that there was an exponential savings in energy, water, and landfill space from certified to silver, but they also understood how difficult it was to maintain a positive margin on affordable housing.

Upon further questioning by Commissioner Chock, Mr. Meyer pointed out that for a LEED certified market home, the price increase would be the same. Commissioner Chock then asked him about certification. Mr. Meyer clarified that the decision on whether to certify the home would be up to the buyer. OP was simply asking that the model homes and the eventual homes that get built be designed and built to meet the standard. He did not think that even called for being registered with U.S. Green Building. Commissioner Chock noted that a lot of projects that go in for a certain level of certification do not necessarily meet that certification at the end of the process, and therefore do not acquire any energy savings. Mr. Meyer responded that the projects might get the energy savings but lose points on a landscaping or a light fixture issue. He noted that they might get part of the way, and the thought was a part of the way was better than none of the way.

Commissioner Chock then asked Mr. Meyer how he envisioned the actual sale of the project. Mr. Meyer responded that there would be a selection of model homes built that prospective buyers could examine, and that one of those offerings would be the LEED home. Commissioner Chock explained that he wanted to be clear on OP's direction in this matter and the Commission's role thereto. Mr. Meyer responded that OP was taking one development and one petition at a time. He acknowledged that while it may be comforting to have one position or one policy on this matter, it was not workable given the wide variety of petitions and developments.

Commissioner Wong left the meeting at 12:05 p.m.

Finally, Commissioner Chock asked Mr. Meyer to restate OP's position on the issue of the urban growth boundaries given the County's concerns. Mr. Meyer noted that the County had previously missed deadlines on the completion of the General Plan update. He further pointed out that Petitioner held up submitting the Petition to the Commission for two years while waiting for the completion of the update. He added that although OP believed that this was a good project, they wanted to respect the County's process and therefore crafted the infrastructure deadline and automatic Order to Show Cause conditions. He explained that these two time-based conditions should give the County the ability to get through its process and complete the entitlement process. He noted that if Petitioner failed to get through that process, it gave all the parties the ability to come back to the Commission and bring the Petition Area back into consistency with what the County plans say at the time.

Chair Kanuha questioned Mr. Meyer as to whether OP was taking the recommendations of the various consulting agencies and advancing their recommendations or whether OP was taking the recommendations and consolidating them. Mr. Meyer noted that there were certain conditions or issues for which one department might have more say over another. He pointed out, for example, that they typically deferred to DOT on traffic-related conditions, while there may be several agencies that chime in on the issue of water. With respect to the energy conditions, he explained that there has been a genuine effort to listen to what the Commission,

the petitioners, and the county councils have been saying to find a middle ground that was feasible for everyone and which addresses the energy and resource concerns of the State.

Chair Kanuha stated that as a mandatory party in these proceedings, he thought that the position of OP should reflect the priorities of the State. Chair Kanuha added that the Commission was looking for OP to indicate the priorities of the State so that the Commission can consider that in its decision-making.

Commissioner Wong entered the proceedings at 12:10 p.m.

Commissioner Wong questioned Mr. Meyer as to how enforcement would take place. Mr. Meyer stated that he assumed that OP would be able to check whether a LEED-based design was being offered. In referencing OP's proposed condition on the automatic Order to Show Cause, Commissioner Wong questioned why OP could not file a motion for an Order to Show Cause rather than imposing that obligation on the Commission staff. Commissioner Wong also questioned whether OP would be able to enforce this condition. Mr. Meyer responded in the affirmative insofar as the Order to Show Cause was concerned. He added that in the Bridge Aina Lea and Ko Olina boat ramp cases, it took over two years of status reports, motions, and community vigor. In terms of Commission staff time, he suggested that the provision for an automatic Order to Show Cause provided an easier route for the Commission to issue an Order to Show Cause than the current process. He noted that it would not prevent a party from asking the Commission to issue an Order to Show Cause but in deference to the County planning process, the provision served the further purpose of assisting the County to preserve the integrity of its planning process. He added if the urban growth boundaries changed and the rest of the entitlements were not obtained, the Petition Area can be reverted without years of effort on the part of the parties.

Commissioner Judge clarified that her understanding on the matter was that the county in which the project was located has the responsibility to enforce the conditions and the Commission's Orders. She noted that the Commission's annual reporting requirement provided the staff with the ability to red flag any potential issues regarding compliance and to contact the counties and OP as appropriate.

The Commission went into recess at 12:18 p.m. The meeting reconvened at 1:35 p.m.

At this time, the parties provided their closing arguments.

## CLOSING ARGUMENTS

### PETITIONER

Mr. Matsubara noted that Petitioner believed the project was appropriate for the Petition Area and both OP and the County of Maui Planning Department agreed that from a planning perspective, the project and its location satisfied the general principles relating to urban



designation. He pointed out that although the County Planning Department recommended against the approval of the project, their position was based primarily upon process as opposed to planning principles. Petitioner's concern was that the General Plan update process will not be completed until the end of 2010 or early 2011. Mr. Matsubara noted that the Planning Department included the Petition Area in the urban growth boundaries and in the preliminary draft of the Maui Island Plan, the project was described as contributing to meeting the housing needs of Maui residents due to its strong potential for providing affordable housing and proximity to job centers within the Wailuku-Kahului and Kihei-Makena community plan regions.

Mr. Matsubara additionally noted that Petitioner will still have to go to the County if they were not done with their General Plan update process and obtain amendments to the development plan and zoning changes. Petitioner intended to work with OP to come up with a proposed decision and order and conditions where the conditions were satisfactory to both parties. He pointed out that Petitioner has had good faith discussions with OP in regard to its proposed energy condition but the parties were too far apart to reach a compromise. Petitioner's primary disagreement stemmed from the fact that OP was taking the LEED certification program, a voluntary initiative, and making it a mandatory condition. He cited the operational difficulties with the condition. He also noted that the condition came up after the Petition was filed. He thought it unfair for OP to come in at this point and recommend such a condition especially on a project that has a 40 percent workforce housing proviso. He was concerned that imposition of the LEED requirements were being sought at an early stage which may change during the interim period between seeking entitlements from the State and the County and the actual construction of the homes. He thought that the forum in which the issue should be addressed should be similar to the legislature or city council so that the requirements were uniform and were applicable to everyone. Petitioner's contention was that the LEED requirements should be voluntary and market driven.

Mr. Matsubara pointed out that the other condition in which they would not reach agreement on concerned the automatic Order to Show Cause. He noted that the Commission currently has the power to issue an Order to Show Cause as did any other party including OP. He thought that the condition limited the Commission rather than helped it.

## COUNTY OF MAUI

In her closing argument, Ms. Lovell pointed to Act 26 which amended §205-17, HRS. She reiterated that until they knew where the urban growth boundaries were going to be, they were very concerned with the redesignation of land. Their concern was that urbanized land will be located outside of the urban growth boundaries, which will, in turn, put pressure on the County to revise the boundaries to a configuration that was not what the County needed.

Contrary to Petitioner's closing argument, Ms. Lovell noted that the process was part and parcel of planning principles. She pointed out that the statutory scheme in HRS and in

chapter 205 did not divorce process from principle as they were all part of the same thing. For this reason, she noted that the County could not support the project at this time. She added that the County was concerned about the condition relating to LEED because by State law, the responsibility of enforcement fell to the counties. If there were conditions relating to building to LEED standards but no LEED certification was required, she noted that it will then fall to a County building inspector to determine whether a building has been built to LEED standards. She explained that this presented difficulty in terms of training inspectors and may amount to an unfunded mandate. She also pointed to the County's concerns regarding the infrastructure deadline condition, and questioned whether tying a condition to infrastructure was appropriate. If the Commission was inclined to consider a condition of this type, she suggested that it would make more sense to approach it directly so as to tie any reclassification or reassessment of the project to the planning process itself and to the adopted urban growth boundaries.

#### STATE OFFICE OF PLANNING

Mr. Yee noted Petitioner's agreement with OP's proposed conditions with the exception of the conditions regarding LEED, the infrastructure deadline, and the automatic Order to Show Cause. He noted that although Petitioner has not objected to the infrastructure deadline condition, OP regarded these deadlines as very important. He stated that having a reasonable time period in which the infrastructure must be completed would prevent landowners from resting on their entitlements for excessive amounts of time, reduce the likelihood of entitlement trading, and allow for proper planning. He also noted that properties that obtain their entitlements but remain undeveloped created significant planning challenges as this has a direct impact on when the associated infrastructure will be built.

Mr. Yee pointed out that the automatic Order to Show Cause condition gave Petitioner a certain amount of time to obtain County approval. If the County did not include this Petition within its future urban growth boundaries and did not give approval to Petitioner to complete the infrastructure within 10 years, he argued that Petitioner will either lose the reclassification or will come back to the Commission before the expiration of the 10-year time period and ask for an extension or Petitioner will need to justify to the Commission why the Petition Area should not be reclassified back to the Agricultural District. He added that by setting a possible time limit on the reclassification, the Commission will implicitly acknowledge the County's role in land use and ensure that the State classification did not continue indefinitely if the County eventually decided to deny Petitioner's request for development. Mr. Yee acknowledged the County's suggestion that there be a separate Order to Show Cause linked to their General Plan development. While not necessarily opposed to the condition, he believed that it should be supplemental to rather than a substitute for OP's proposed automatic Order to Show Cause for infrastructure construction.

Mr. Yee also noted that in the view of OP an automatic Order to Show Cause condition was clearly authorized by statute. He requested that if the Commission believed OP was legally

incorrect and the Commission was not authorized to impose such condition, the Commission should make a specific finding and make it clear in its conclusions of law. Mr. Yee pointed out that in an appropriate case, OP would like to be given the opportunity to take the legal question up on appeal.

Mr. Yee asserted that an automatic Order to Show Cause provision in the Bridge Aina Lea case would have made the numerous status conferences unnecessary because the petitioner would have known the outcome for failing to construct in a timely manner. He noted that the value of this provision was not that it will be carried out but that it will never need to be carried out. Finally, Mr. Yee contended that a specific condition would clearly avoid even the assertion of zoning estoppel or collateral estoppel arguments that were raised in the Kuilima case.

With respect to LEED, Mr. Yee pointed out that none of Petitioner's assertions regarding its impracticality to this project were contained in the testimony or in the record. He also noted that while Petitioner argued that OP's proposed condition has come too late, Petitioner also argued that it was too early to impose such a condition. He maintained that this was arguably true for every single condition that will come before the Commission as there will always be a point at which a petitioner was proceeding with its plans and making assumptions. He argued that the only opportunity for OP to question a petitioner's plans and assumptions was at the Commission's proceedings. Mr. Yee also addressed Petitioner's argument that OP presented the Commission with different conditions on this matter. He acknowledged that although it was true, OP was simply reacting to the concerns of the Commission, the counties, and the petitioners, and have come up with reduced requirements in an effort to reach a middle ground in regard to energy conservation.

With respect to Petitioner's argument about the mandatory nature of LEED, Mr. Yee pointed out that Petitioner was simply opposed to regulation. He explained that there was a legitimate reason why one did not rely simply on market forces because energy and natural resource conservation has an effect on more than just the individual homebuyer or developer. He maintained that the impact was on the State as a whole, and therefore the State has a legitimate interest to impose reasonable requirements so that the impact of home construction did not unduly impact the rest of the State.

Mr. Yee further pointed out that OP changed its proposed condition from a requirement for LEED to a requirement for a LEED choice. He noted that the market will decide if this cost-effective and environmentally friendly choice was successful, but the market cannot make that decision if the consumers were not first given the opportunity to choose LEED.

Following the parties' closing arguments, Chair Kanuha declared the evidentiary portion of this proceeding to be completed. Chair Kanuha directed the parties to draft their individual findings of fact, conclusions of law, and decision and order based upon the record in this docket and serve the same upon the Commission and the parties. Chair Kanuha asked Mr. Matsubara whether it was his intention to pursue a compilation of either a partial or fully

stipulated order. Mr. Matsubara responded that Petitioner will make every effort to work with the County and the State to come up with as much agreement as they can. Chair Kanuha asked Ms. Lovell whether the County supported Petitioner's efforts to pursue a partial or fully stipulated order. Ms. Lovell noted that they will work as they always did with Petitioner and OP although in this particular case that may be a challenge as they were diametrically opposed on one basic issue. Nonetheless, she noted that they may agree on some things. Mr. Yee also confirmed OP's willingness to support Petitioner's efforts in this regard.

Given the willingness of the parties to pursue a partial or fully stipulated order, Chair Kanuha directed the parties to file their proposal with the Commission no later than the close of business on November 21, 2008. Where there was only a partial stipulation, the objecting party shall serve upon the other parties any comment or objection no later than the close of business on December 5, 2008. Any responses to the objections must be filed no later than the close of business on December 12, 2008.

Ms. Lovell requested that the County be allowed to meet these deadlines by electronic service and filing to be followed up by mailing. Chair Kanuha noted that the Commission's rules did not provide for that, but that in light of the County's request, the Commission will consider it. Upon consultation with the Commission's attorney, Chair Kanuha stated that it was a procedural rule that the Commission will elect to waive on the County's behalf.

The Commission went into recess at 2:16 p.m. The meeting reconvened at 2:21 p.m.

## ACTION

### REVIEW OF PROPOSED ADMINISTRATIVE RULES

Chair Kanuha announced that this was a meeting on the Land Use Commission's proposed administrative rules.

Executive Officer Davidson reminded the Commission that at the recent Oahu meeting, the Commission discussed dividing the adoption process for its administrative rules into two parts. The first part would be an effort to identify all operational, non-controversial, process-type rules which would be sent out when the Commission was comfortable. The second part would involve the IAL rules and other more controversial and complex rules that would require more public input and more Commission time at the outset. He stated that staff was seeking the Commission's approval to take the first set of operational rules for additional Executive Branch review, public hearing, and back to the Commission for eventual adoption.

Deputy Attorney General Erickson suggested that subsection A of §15-15-34 on page 25 of the draft rules be deleted as it merely restated the intent and purpose of chapter 205 and was therefore unnecessary. In reference to §15-15-38 on page 27, she asked the Commission whether they would consider permitting pleadings to be submitted double-sided and/or single-spaced.

Chair Kanuha asked whether the draft rules would require review and approval by the Governor's office before being distributed for public hearing. Mr. Davidson confirmed Chair Kanuha's understanding of the process and added that the rules might also require review by the Small Business Regulatory Review Board within DBEDT and the Department of Budget and Finance. Chair Kanuha then questioned the extent of the Commission's latitude to modify the rules after comments are received during the public hearings. Mr. Davidson stated that his understanding on the matter was that changes that have evolved out of public testimony can be addressed and included in the rules that were adopted. He noted, however, that there was a requirement of a second public hearing prior to Commission action if the changes became so substantial.

Commissioner Wong noted that the current Commission rules regarding the format of pleadings were consistent with the circuit court rules, and therefore suggested that the Commission keep its current requirement for single-sided and double-spaced documents. Commissioner Wong then moved to approve the draft rules for submission to the Governor's office to start the process. Commissioner Contrades seconded the motion. The Commission was polled as follows:

Ayes: Commissioners Wong, Contrades, Chock, Judge, Lezy, and Kanuha.  
The motion passed with 6 ayes and 3 excused.

## DISCUSSION

Chair Kanuha announced that this was a meeting to discuss Act 233 (SLH 2008), Important Agricultural Lands Administrative Rules.

Executive Officer Davidson passed out Part 10 of Act 233 and two fact sheets, which were generated by the Department of Agriculture. He noted that the purpose of putting this item on the agenda was to begin the discussion of the Commission's responsibilities relative to passing administrative rules to implement the provisions of Act 233, which was the Important Agricultural Land (IAL) bill that was enacted by the Legislature this past session.

Mr. Davidson pointed out that Act 183 enacted into law in 2005 set up both a land use and incentive package dealing with IAL. It called for the counties to proceed with the identification of IAL. He pointed out that the counties have been slow to commence IAL mapping partly because they viewed it as an unfunded mandate. The Act also created an opportunity for landowners on their own to come to the Commission via declaratory ruling and have land designated IAL based on certain criteria. There was a provision in that law that essentially tied its effectiveness with the passage of an incentive package. He noted that it was Act 233 that, among other things, created that incentive package. With the incentives in place, he pointed out that the existing law was fully operational and within the next six months, it was anticipated that the Commission will receive requests for declaratory ruling from landowners to

declare a portion of their lands IAL. He noted that this can happen without any changes to the Commission's rules. He added that what was so controversial last session in Act 233 was the added incentive that gave landowners the opportunity through the declaratory ruling process and in conjunction with a declaratory ruling seeking IAL to also urbanize up to 15 percent of the total land requested. He pointed out that it was this provision that required rules.

Upon questioning by Commissioner Judge, Mr. Davidson clarified that the requests for declaratory rulings that were anticipated to be filed with the Commission in the next several months involved identifying IAL, and not the urbanization of up to 15 percent of a landowner's land.

Commissioner Wong asked whether the declaratory order provision to urbanize land was different from the current district boundary amendment process. Mr. Davidson responded that it was different because there were provisions in Act 233 that excluded a landowner from following the normal district boundary amendment process. Commissioner Wong questioned why a declaratory order petition could not be filed as a district boundary amendment petition in the absence of having the appropriate rules. Mr. Davidson noted the concern was that the Commission would be operating in direct conflict with Act 233. Commissioner Wong pointed out that Act 233 stated that a landowner did not have to file its request to urbanize lands as a district boundary amendment petition. He noted that the Act did not say a landowner shall not file the request pursuant to the district boundary amendment process. Mr. Davidson acknowledged Commissioner Wong's distinction and noted that his comments raised issues that will be addressed in the rules. Commissioner Wong did not believe that the Commission should be on record as an agency unable to process matters covered by the Act simply because it has not been able to adopt rules. He thought that it was the Commission's job to let the public know that there was a vehicle to urbanize lands pursuant to Act 233.

Deputy Attorney General Erickson pointed out that under Act 233, if an individual was entitled to use the declaratory ruling process, the individual would not be subject to many of the requirements that were typically present under the district boundary amendment process. She noted, for example, that the timeframe was much shorter under the declaratory ruling process.

Commissioner Wong questioned how the Commission could promulgate rules that made it more stringent on the public if that was not what the Legislature wanted by passing Act 233. Mr. Davidson acknowledged Commissioner Wong's comments. Chair Kanuha noted that there was a provision in the Act whereby the urbanization of lands would require the prior authorization of the Legislature. Ms. Erickson clarified that under the Act, legislative approval would be required if one wanted to get land undesignated from IAL.

Commissioner Wong commented that the Legislature has spoken with respect to Acts 183 and 233 and if there was anyone who filed a petition for declaratory order, the Commission should accept it and proceed with whatever rules the Commission has.

Mr. Davidson noted that the plan was to keep this matter as a discussion item over into the Commission's November 6 and 7, 2008, meeting on Oahu, to hear from the public and to proceed accordingly.

Commissioner Judge asked what the Commission was seeking to get in terms of public testimony. Mr. Davidson responded that the public hearings will afford people with an opportunity at the beginning of the process to raise any issues or concerns they have with the rules or ideas they have on how to proceed.

Mr. Davidson clarified that the matter would be noticed on the agenda as a discussion item.

The meeting was adjourned at 2:50 p.m.

*(Please refer to the LUC Transcript of October 16, 2008 for more details on this matter.)*