

LAND USE COMMISSION
MINUTES OF MEETING

April 16, 2009

Leiopapa A Kamehameha
Conference Room 405, 4th Floor
235 S. Beretania St.
Honolulu, Hawaii

COMMISSIONERS PRESENT: Duane Kanuha
Ransom Piltz
Vladimir Devens
Lisa Judge
Normand Lezy
Kyle Chock
Reuben Wong
Nicholas Teves, Jr.

COMMISSIONERS ABSENT: Thomas Contrades

STAFF PRESENT: Orlando Davidson, Executive Officer
Diane Erickson, Deputy Attorney General
Bert Saruwatari, Staff Planner
Riley Hakoda, Staff Planner

COURT REPORTER: Holly Hackett

AUDIO TECHNICIAN: Walter Mensching

Chair Kanuha called the meeting to order at 9:39 a.m.

ADOPTION OF MINUTES

Commissioner Wong moved to adopt the minutes of March 19 and 20, 2009. Vice-Chair Piltz seconded the motion. The minutes were unanimously approved by voice votes.

TENTATIVE MEETING SCHEDULE

Executive Officer Davidson noted that the Commission's meeting on April 30, 2009, will be in Kona to consider the Bridge Aina Lea matter and will be back in Honolulu on May 1. He pointed out that this method of splitting the Commission's meetings between islands may again be necessary for the first meeting in June in order to attend to the Commission's workload. He added that the Commission's hearing on the Department of Environmental Services, City and County of Honolulu, petition will open at the new Department of Hawaiian Home Lands building on May 14, 2009. The Commission will then return to the Commission's Conference Room 405 in Honolulu on May 15 to continue the hearing on the D.R. Horton-Schuler Homes petition and to attend to other matters.

ACTION

A09-782 TROPIC LAND LLC (OAHU)

Chair Kanuha announced that this was an action meeting to determine (i) whether the Land Use Commission is the appropriate accepting authority pursuant to chapter 343, Hawaii Revised Statutes; and (ii) whether the proposed action may have a "significant effect" to warrant the preparation of an Environmental Impact Statement ("EIS") pursuant to chapter 343, Hawaii Revised Statutes ("HRS"), for the reclassification of approximately 96 acres of land currently in the Agricultural District into the Urban District at Lualualei, Waianae, Oahu, Hawaii, Tax Map Key: 8-7-09: por. 2.

APPEARANCES

Kerry Komatsubara, Esq., represented Petitioner

Arick Yanagihara, Petitioner

Randall Hara, City and County of Honolulu Department of Planning and Permitting

Bryan Yee, Esq., represented the State Office of Planning

Abbey Mayer, State Office of Planning

Scott Derrickson, State Office of Planning

Chair Kanuha announced receipt of the following documents:

1. Petition for Land Use District Boundary Amendment filed on March 18, 2009.
2. Correspondence and maps from Arick Yanagihara filed on April 9, 2009.

3. Correspondence from David K. Tanoue, Director of the Department of Planning and Permitting, filed on April 15, 2009.

Chair Kanuha then asked whether Petitioner had been informed of the Commission's policy regarding the reimbursement of hearing expenses. Mr. Komatsubara responded in the affirmative and stated that he had no objections to the policy.

Commissioner Teves disclosed that he personally knew two of the investors in Tropic Land LLC. He further stated that he presently had no financial interest with them in the proposed project nor any future financial interest with them and did not foresee a problem with his participation in this proceeding.

There were no objections to Commissioner Teves' participation in this matter.

PUBLIC WITNESSES

Cynthia Rezendes

Ms. Rezendes testified in support of the preparation of an EIS in this matter. She noted that Petitioner had committed to the community to prepare an EIS for the proposed project.

There were no questions for Ms. Rezendes.

PETITIONER

Mr. Komatsubara briefly described the proposed project. He noted that the Petition Area was presently agricultural land and fallow. He added that an EIS was required because as part of the process, Petitioner will be seeking an amendment to the Waianae Sustainable Communities Plan and he believed that such an amendment was the proper trigger mechanism. He also pointed out that Petitioner had committed to the community and the neighborhood board that they would prepare an EIS.

Mr. Yee stated that the Office of Planning had no objections.

Mr. Hara stated that the Department of Planning and Permitting had no objections.

Commissioner Chock moved to have the Commission be the appropriate accepting authority pursuant to chapter 343, HRS, and require the preparation of an EIS for the proposed action. Commissioner Teves seconded the motion. There was no discussion. The Commission was polled as follows:

Ayes: Commissioners Chock, Teves, Piltz, Devens, Judge, Lezy, Wong, and Kanuha

The motion passed with 8 ayes and 1 absent.

ACTION

A08-780 DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU (OAHU)

Chair Kanuha announced that this was an action meeting to consider Ko Olina Community Association and Colleen Hanabusa's Petition for Intervention in the Department of Environmental Services, City and County of Honolulu's Petition for Land Use District Boundary Amendment.

APPEARANCES

Colleen Hanabusa, Esq., represented the Ko Olina Community Association and herself
Ken Williams, Ko Olina Community Association

Gary Y. Takeuchi, Esq., represented the Department of Environmental Services, City and County of Honolulu

Jesse K. Souki, Esq., represented the Department of Environmental Services, City and County of Honolulu

Don Kitaoka, Esq., represented the City and County of Honolulu Department of Planning and Permitting

Matthew Higashida, City and County of Honolulu Department of Planning and Permitting

Bryan C. Yee, Esq., represented the State Office of Planning
Abbey Mayer, State Office of Planning

Mary Alice Evans, State Office of Planning

Chair Kanuha announced the receipt of the following documents:

1. Petition for Intervention, Memorandum in Support of Petition, Verification, and Exhibit "A" from Colleen Hanabusa, A Limited Liability

Law Company, attorney for the Ko Olina Community Association and Colleen Hanabusa filed on April 8, 2009.

2. Petition for Intervention, Memorandum in Support of Petition; Verification from Colleen Hanabusa, A Limited Liability Law Company, attorney for Maile Shimabukuro filed on April 13, 2009.

(Chair Kanuha noted that this Petition for Intervention would not be considered by the Commission today because it was received after the April 16, 2009, agenda was filed. It will be on the Commission's May 1, 2009, agenda for consideration.)

3. Office of Planning's Statement of No Opposition to Intervenors Ko Olina Community Association, Colleen Hanabusa, and Maile Shimabukuro's Petitions for Intervention filed on April 14, 2009.
4. Department of Environmental Services, City and County of Honolulu's Memorandum in Opposition to Petitioners Ko Olina Community Association and Colleen Hanabusa's Petition for Intervention filed on April 15, 2009.

PUBLIC WITNESSES

Cynthia Rezendes

Ms. Rezendes testified in support of the Petition for Intervention. She noted that history showed that the Waimanalo Gulch Sanitary Landfill ("WGSL") has been a continuing issue within the Waianae District. As a Waianae resident who opposed further action at WGSL, she believed that it was in their best interest to have intervention in this process.

There were no questions for Ms. Rezendes.

MOVANTS

Ms. Hanabusa noted that she just received a copy of Petitioner's Memorandum in Opposition to the Petition for Intervention. From her quick review, she noted that Petitioner appeared to believe that the intervention of KOCA and herself would add nothing to the proceedings and that their interests were already represented. She stated that to the best of her knowledge, there was no other entity or person who has been permitted to intervene in these proceedings that expressed a view in opposition to

Petitioner's request to expand the WGS�. She also noted that under the criteria set forth under the boundary amendment provisions that both KOCA and herself meet the requirements. She pointed out that there were intervention by right criterion and permissive intervention criterion. She explained that the permissive intervention criterion was written in the negative such that it was only upon the finding of two specific criterion that intervention can be denied. She believed that other than that it should be freely granted. She reminded the Commission that in Docket SP87-362, she and KOCA appeared before this Commission with intervention status based upon the fact that the Planning Commission had granted them intervention. Based on the arguments in the record that they were able to present to this Commission in that proceeding, she related that the Commission was aided in modifying Petitioner's request such that the WGS� was prohibited from accepting additional waste material and be closed in accordance with an approved closure plan by November 1, 2009, or until the approved area reached its permitted capacity, whichever occurred first. She asserted that based on the record and the files therein and the Petition itself, the record clearly demonstrated that their intervention would serve the purpose set forth in the rules and assist this Commission in arriving at a decision on the proposed boundary amendment.

PETITIONER

Mr. Souki clarified that Petitioner had opposed the intervention of KOCA and Ms. Hanabusa in Docket No. SP87-362. He noted that when the matter came up to this Commission, they did not oppose it since it had already been granted by the Planning Commission. He pointed out that this proceeding was a different matter from the previous proceeding on the special permit. He explained that the question of whether to grant intervention was a question of standing, and the standard was high. He further noted that the Movants do not have any property interest so they could not rely on that. He argued that they instead needed to show they would be directly and immediately affected by the proposed change, and they have not shown any actual or threatened injury in their Petition for Intervention. He added that the closest Movants were located across a multi-lane highway on the outskirts of the 200-acre Petition Area, and that the working face of the landfill was not in close proximity to the Movants. In addition, he noted that the Movants' property did not abut the Petition Area, and that the proposed extension of the landfill was farther away than the existing working portion of the landfill. He further argued that the KOCA's tax map keys that were provided in Movants' Exhibit "A" to their Petition for Intervention showed that all of the properties were in Zone 9, Section 1, of the tax map, and as such were not in the same tax map section of the Petition Area, which was in Zone 9, Section 2.

Mr. Souki noted that any injury that might be suffered by the Movants was speculative at best. He asserted that there was no reason to believe that expansion of the landfill would have any effect on the Movants that was traceable to the boundary amendment. He related that any interest the Movants would have as members of the general public could be addressed without admitting them as parties in the proceeding. He also noted that the Office of Planning was a party and will ensure that the strict criteria for district boundary amendments were met.

Mr. Souki reiterated that the Movants did not have a property interest in the Petition Area, did not lawfully reside in the Petition Area, and were not abutting property owners. As such, he noted that those as of right conditions would not apply in this instance, so the matter of their location relative to the landfill would not be a reason in and of itself. With respect to the provision in the Commission's rules that allow for intervention to be freely granted, he pointed out that the Commission needed to determine whether allowing the Movants intervenor status would not be admitting a party with substantially the same position of a party already admitted to the proceeding and whether the admission of the Movants would render the proceedings inefficient and unmanageable. He noted that the Movants were not clearly distinguishable from the general public, and as members of the general public, the Movants may contribute to the proceedings by providing public testimony. He added that their interests will be addressed by the Office of Planning and the Commission's review of the criteria for district boundary amendments. He further pointed out that the EIS for the landfill expansion was accepted, and that the Commission's proceedings were not the proper forum for revisiting the contents of the EIS.

Mr. Souki concluded that granting the Petition for Intervention would delay the process, render the proceedings inefficient and unmanageable, and draw on the limited funds and resources of the State. For these reasons, Petitioner requested that the Petition for Intervention be denied. However, if it was granted, Petitioner requested that KOCA and Ms. Hanabusa be entered as one party under section 15-15-52(d), HAR. He explained that because Ms. Hanabusa alleged that she owned a home in Ko Olina, she was a member of KOCA. He argued that she established no independent grounds for being considered as a separate party. With respect to Ms. Hanabusa's citation to the case of **In the Matter of the Application of Hawaiian Electric**, 81 Haw. 459 (1996), he pointed out that elected officials were allowed to participate in the PUC proceedings as intervenors as affected residents or HECO ratepayers, not solely because they were elected officials. He explained that the case demonstrated one needed to have separate grounds to become an intervenor.

Department of Planning and Permitting

Mr. Kitaoka made a distinction for the record to clarify the difference between Petitioner and the Department of Planning and Permitting because there were two arms of the City and County that were involved in this case. He explained that the Department of Environmental Services was the Petitioner in this action, while the Department of Planning and Permitting who he represented was essentially the processing agent for permit applications and the planning arm of the City and County. With that, he stated that the Department of Planning and Permitting had no position on this matter.

Office of Planning

In response to the presentations of the Movants and Petitioner, Mr. Yee clarified that the Office of Planning filed a Statement of Position opposing the district boundary amendment filed in this case. He also clarified that the Office of Planning's interests were the State's interests, not just the executive agencies but rather the larger State of Hawaii interests. The Office of Planning has never professed to represent the individual homeowner or the individual community association. With that, Mr. Yee reiterated the Office of Planning's position of no opposition to the Petition for Intervention.

MOVANTS' REBUTTAL

Ms. Hanabusa clarified that the provision that allows for the right to intervene to be freely granted was based on section 205-4(e)(4), HRS. She noted that in terms of statutory construction, all statutes were given the plain meaning, especially if it was unambiguous. She did not find this provision ambiguous in any way. She pointed out that as the attorney in the HECO case, she represented that the elected officials were permitted intervention in their official capacity because that was exactly the basis upon which she made the motion for intervention. She also corrected Petitioner's statement that they did not oppose Movants' intervention in Docket No. SP87-362 when the matter came up before this Commission. She noted that Petitioner did oppose the intervention, and that the Commission ruled the matter moot because Movants had already been granted intervention before the Planning Commission. She further pointed to the obvious proximity of the landfill to Ko Olina Resort, and the fact that those that work and live there were clearly adversely affected by what may go on in Waimanalo Gulch, especially with the proposed 15-year expansion.

Commissioner Wong asked Ms. Hanabusa to address the request by Petitioner that KOCA and Ms. Hanabusa be entered as one party in the proceeding if intervention were to be granted. Ms. Hanabusa responded that if the concern was that their intervention would make the proceeding unmanageable, it was her intent to be the attorney for all the Movants.

Vice-Chair Devens questioned Ms. Hanabusa whether she sought to intervene in her individual, personal capacity. She replied that she was seeking to intervene in all of the capacities listed in the Petition for Intervention. She explained that when the Planning Commission permitted intervention in regard to the issue of the special permit for the WGSL, they determined that her intervention status was granted based on the fact that she was also an elected official. She noted that was why she listed everything; she did not know which one the Commission wanted to hang their hat on.

Vice-Chair Devens moved to grant the Petition for Intervention. Commissioner Chock seconded the motion. Commissioner Lezy offered a friendly amendment to the motion. He noted that as the Movants indicated, there was no opposition to the proviso that Ms. Hanabusa and KOCA join for purposes of the intervention. Based on the Commission's recent decisions regarding similar intervention requests that were proposed and dealt with in that manner, he suggested that the motion be amended with the proviso that KOCA be identified as the intervenor with Ms. Hanabusa as the counsel of record. Vice-Chair Devens stated that he had no problem with that amendment but sought clarification on the offered amendment. He noted, these parties were separate entities and that he had no problem with the Movants presenting their cases at the same time. However, he pointed out that they were separate parties and may have different positions and should be treated as separate entities during these proceedings. He reiterated that he had no objection with the proposed amendment to streamline the proceedings for purposes of judicial economy.

Chair Kanuha recalled the Commission's action on the intervention requests in Docket No. A07-777/Hawaiian Memorial Life Plan, Ltd. He noted in that case, the Commission granted intervenor status to all of the individuals named in the Petition for Intervention with the stipulation that they would have only one representative before the Commission. Vice-Chair Devens responded that he had no objection to that course of action if that was what was being proposed in this docket. Ms. Hanabusa also stated that she had no objection. She explained that without separate party status for herself, she would be barred from taking the matter up on appeal if KOCA, as the only representative, decided not to go forward. She added that she had no problem with the streamlining. She also clarified that she would be representing Ms. Shimabukuro, who

would not be presenting anything separate from the other Movants, in the event Ms. Shimabukuro is granted intervenor status.

Following Ms. Hanabusa's comments, Commissioner Lezy agreed with Vice-Chair Devens that there should be separate parties but with a single representative.

Vice-Chair Devens stated that he had no objection to amending his motion to allow intervention by KOCA and Ms. Hanabusa, with Ms. Hanabusa representing KOCA and her capacities before this Commission. Commissioner Chock seconded the friendly amendment.

There was no further discussion.

The Commission was polled as follows:

Ayes: Commissioners Devens, Chock, Teves, Piltz, Lezy, Wong, Judge, and Kanuha.

The amended motion passed with 8 ayes and 1 absent.

Executive Officer Davidson announced that a prehearing has been scheduled on this docket for April 21, 2009, at 2:00 p.m. in Conference Room 405. He suggested that without prejudging the Commission's action on her Petition for Intervention, Ms. Shimabukuro may want to attend the prehearing. He added that since the hearing will commence on May 14, 2009, he will provide the parties with deadlines for exhibits and witnesses, but that these deadlines will be liberal in nature given that there will only be one day of hearing before the matter is continued.

The Commission went into recess at 10:18 a.m. The Commission reconvened at 10:39 a.m.

HEARING

A06-771 D.R. HORTON- SCHULER HOMES, LLC.

Chair Kanuha announced that this was a continued hearing on Docket A06-771 D.R. Horton-Schuler Homes, LLC, a Delaware limited liability company, to Amend the Agricultural Land Use District Boundaries Into the Urban Land District for approximately 1,553.844 Acres of Land at Honouliuli, Ewa District,

Oahu, Hawaii, Tax Map Key Nos.: 9-1-17:4, 059 and 072 (por); 9-1-18: 1 and 4 (por).

APPEARANCES

Benjamin Kudo, Esq., Naomi Kuwaye, Esq. and Yuko Funaki, Esq. represented Petitioner

Dawn Takeuchi-Apuna, Esq., and Tim Hata represented the City & County of Honolulu, Dept. of Planning and Permitting

Bryan Yee, Esq., represented State Office of Planning

Abbey Mayer, State Office of Planning

Scott Derrickson, State Office of Planning

Dr. Kioni Dudley-Friends of Makakilo, Intervener

Dana Viola, Esq.-represented Haseko (Ewa) Inc., Intervener

PUBLIC WITNESSES

1. Buzz Hong

Mr. Hong is the Executive Director of the Hawaii Building Trades Council AFL-CIO and had also submitted written testimony. He testified that his organization's members would like their community concerns rectified before the application is approved.

The City and State had no questions.

Intervener Kioni Dudley asked for clarification on what rectifying "community concerns" meant. Mr. Hong replied that issues such as pollution, the Waimanalo Dump, traffic and inadequate infrastructure were of concern to his membership. Dr. Dudley asked if Mr. Hong would be bringing up these concerns again before the Commission. Mr. Hong answered that he would if it were necessary.

There were no other questions for Mr. Hong from Commissioners or Haseko (Ewa).

2. Tesha Malama

Ms. Malama is a longtime Ewa Beach resident. She testified in favor of the land use change. She stated that D.R. Horton had worked with the community to resolve many of the concerns such as connectivity points and other infrastructure issues.

There were no questions for Ms. Malama.

There were no other Public Witnesses.

Commissioner Chock made a motion to defer public hearing on this matter till the next meeting on May 15 due to the concerns heard from the community.

Commissioner Devens seconded the motion.

Chair Kanuha called for discussion and Commissioner Chock elaborated on his reasons for moving for deferring the public hearing. First he stated that he would like more substantive information from the Petitioner than he had already received. He suggested that the Petitioner take time out to prepare information to more thoroughly explain how the project is planned out since it would be the first transit-oriented development in Hawaii. He asked that the Petitioner provide more specific information from their witnesses on what the Commissioners needed to know to make better decisions on this matter. Secondly, Commissioner Chock stated that he would like the Petitioner to address the community concerns that Mr. Hong's group had during the deferral period.

Commissioner Devens stated that he echoed the sentiments of Commissioner Chock and also did not feel that the witnesses were providing enough information and detail. He stated that he had expected more specific details and fewer generalities about the issues so far discussed and that other important issues were coming up, including traffic and employment opportunities that he was particularly interested in and expected would need to be explained in depth.

Commissioner Teves stated that he also supported the motion to defer since he felt that the Petitioner needed to provide information in regards to provisions for cemeteries, places of worship, private school sites, elderly housing and affordable rental units.

Commissioner Devens stated that if an expert witness was going to read from prepared testimony, advance copies should be made available for the Commissioners to review to help streamline matters; and that the witnesses should be more open to

questioning during cross-examination from the parties and direct examination from the Commissioners to obtain further information and details.

Commissioner Wong stated that he also agreed with the motion to defer and would like to see LEED certification information included that would explain what efforts are being made in using energy conservation measures in the project.

Chair Kanuha asked Executive Officer Davidson how the motion deferral would affect the Petition time schedule. Mr. Davidson replied that he had been scheduling this matter with the goal of completing the hearing by June 26 to allow sufficient time for the Commission to deliberate. Extra hearing dates in June or July were a consideration that would need to be explored or the Petitioner could consider applying for an extension. Mr. Davidson offered to work on the situation and do what needed to be done to make the deadlines.

Chair Kanuha stated that he felt the Commissioners would be provided the requested information during the course of the hearing, but due to the size and complexity of the project, the presentation methods used by the Petitioner may need to be adjusted to facilitate the exchange of data.

Mr. Kudo stated that this was a unique case since it is the first transit oriented development project in Hawaii and understood the concerns of the Commission. He offered to rethink the lineup of witnesses and the presentation of evidence.

Chair Kanuha stated that given the size and time constraints of the project, consideration might be given to dividing it into increments.

There was no further discussion or comments. The Commission was polled as follows:

Ayes: Commissioner Chock, Devens, Judge, Lezy, Piltz, Teves, Wong and Chair Kanuha

The motion passed with 8 ayes and 1 absent.

Intervener Dudley expressed concerns about his witnesses and exhibits relative to the May 15 hearing date. Chair Kanuha asked Executive Officer Davidson to work on coordinating with the parties to avoid undue hardship in lining up witnesses and exhibits. Mr. Davidson advised that the City also needed to make adjustments and that

a meeting to organize the presentation of witnesses and exhibits by all parties would be set up in the coming weeks.

Chair Kanuha stated that the continuation of the hearing proceedings were concluded for the day and declared a recess at 11:03 a.m. The meeting resumed at 11:09 a.m. to discuss legislative and other items.

LEGISLATIVE AND OTHER MATTERS

Executive Officer Davidson provided updates on legislative, administrative and organizational matters. OP- Mr. Mayer provided comments on current legislation. The LUC Commissioners voted unanimously to authorize Mr. Davidson to write a letter to the Legislature providing reasons why the LUC should remain administratively attached to DBEDT instead of being moved to DLNR and also providing reasons why the LUC should remain funded from the general fund rather than a special fund.

There being no further business or discussion, Chair Kanuha adjourned the meeting at 11:27 a.m.