

LAND USE COMMISSION

MEETING MINUTES

April 30, 2009- 10:30 a.m.

Naupaka I, II, & III Meeting Rooms

Waikoloa Beach Marriott Resort

69-275 Waikoloa Beach Drive, Waikoloa, Hawaii 96738

COMMISSIONERS PRESENT:

Kyle Chock

Thomas Contrades

Lisa Judge

Duane Kanuha

Normand Lezy

Ransom Piltz

Reuben Wong

COMMISSIONERS ABSENT:

Vladimir Paul Devens

Nicholas Teves, Jr.

STAFF PRESENT:

Orlando Davidson, Executive Officer

Riley Hakoda, Staff Planner

Diane Erickson, Deputy Attorney General

COURT REPORTER

Holly Hackett

AUDIO TECHNICIAN

Walter Mensching

**CALLED TO ORDER**

Chair Kanuha called the meeting to order at 10:38 a.m.

## **APPROVAL OF MINUTES**

Commissioner Wong moved to adopt the April 16, 2009 meeting minutes. Commissioner Piltz seconded the motion. The minutes were unanimously approved by voice votes.

## **TENTATIVE MEETING SCHEDULE**

Executive Officer Davidson provided the following:

- The tentative meeting schedule has been provided in the handout material for the Commissioners.
- Prior to the June 4, 2009 meeting scheduled to be held on Maui, there is a tentative plan for a site visit on the afternoon of June 3. The Commission would stay the night on Maui, have the meeting on June 4 and then return to Oahu for the June 5 meeting.
- Due to the deferral of D.R. Horton and to finish within the statutory time limit, it is being proposed to have a 4 day hearing on June 23, 24, 25, and 26, with the goal of concluding and closing the hearing by the end of June 26<sup>th</sup>. This is being done to help stay on track to complete other work. Commissioners were asked to report their availability to attend these meetings to ensure a quorum would be present to conduct the hearings.

Commissioner Wong inquired if it would be possible that the D.R. Horton witnesses who were providing written testimonies submit the written material ahead of time for review before the hearings so that the hearings could be used more for cross-examination.

Mr. Davidson advised that a meeting had been held with the parties on Wednesday, April 29 to discuss procedures. He stated that it has been mandated that all parties submit written testimony for their experts as exhibits.

## **ACTION**

**A87-617 BRIDGE AINA LE`A, LLC (Waikoloa, South Kohala, Hawaii)**

Chair Kanuha stated that this was a continued hearing and action meeting regarding the Commission's Order To Show Cause as to why the land that is the subject of Docket No. A87-617 should not revert to its former land use classification or be changed to a more appropriate classification.

### APPEARANCES

Mike Carroll, Esq. represented Bridge Capital

Hoolae Paoa, CEO, Bridge Capital represented Bridge Capital

Eric Maehara, Esq. represented DW Aina Lea LLC

Julie Mecklenburg, Esq., represented County of Hawaii Dept. of Planning

Bobbie-Jean Leithead-Todd , Dept. of Planning-County of Hawaii

Bryan Yee, Esq. represented Office of Planning

Abbey Mayer, State Office of Planning

Lorene Maki, State Office of Planning

### PUBLIC WITNESSES

#### 1. Michael Kimball

Mr. Kimball is representing the Puako Community Association. He testified that he shared the Commissioner's frustration over the lack of progress with the project. He stated that there have been many agreements that have not been fulfilled, time delays and broken promises over the years. He was aware that the project had a new prospective financial partner and had filed a new amendment for the project. He was not sure of what the right thing was to do for the community, but something should be done. He suggested that it might be best to go back to the original to start clean and start new since there were so many promises, conditions, agreements, and entitlements that make it hard to understand.

There were no questions by the parties and Commissioners.

2. John Bansemer

Mr. Bansemer testified in favor of the project. He stated the need for affordable housing and jobs that the project would provide. He added that he was a Mauna Lani resident and that there was a need for a signalized intersection near the Petition Area.

There were no questions by the parties and Commissioners.

3. Randy Vitousek

Mr. Vitousek is the attorney representing the Mauna Lani Resort Association. He testified that the Mauna Lani Resort had no position on the Order To Show Cause. He asked that if the project goes forward that there be a precondition that the developer be required to provide signalization of the Mauna Lani Drive intersection with Kaahumanu Highway and the Project's access road.

There were no questions by the parties and Commissioners.

The Commission went into recess at 10:58 a.m. and reconvened at 11:07 a.m.

Commissioner Judge moved that the Commission enter into Executive Session to consult with Deputy Attorney General as to the powers and duties of the Commission. Commissioner Contrades seconded the motion. The motion was unanimously approved.

The Commission went into Executive Session at 11:08 a.m. and reconvened its regular meeting at 11:34 a.m.

Chair Kanuha addressed the Parties to attempt to determine who was representing Petitioner Bridge Aina Le`a, LLC, since no one had identified themselves as such a representative. Bridge Aina Le`a, LLC is the entity before the Commission. He stated that the Commission had received Bridge Aina Le`a's Notice of Intent to Assign its interest in the Petition Area to DW Aina Le`a LLC.

Mr. Carroll stated that DW Aina Le`a LLC had taken over the development responsibilities pursuant to the Purchase and Sale Agreement and would be in charge of the development. Chair Kanuha asked who was representing Bridge Aina Le`a, and Mr. Carroll replied that he was.

Mr. Maehara argued that in a normal case proceeding, Bridge Capital would introduce DW Aina Le`a to the Commission and inform them about DW Aina Le`a's financial and other capabilities to take Bridge Aina Le`a's position and formally ask for

a substitution of Petitioners. However, in this case, there is a pending Order to Show Cause.

Commissioner Lezy commented that the Order to Show Cause was issued to the Petitioner Bridge Aina Le`a as the entitlement holder for the Petition Area. Therefore, he believed Bridge Aina Le`a was obligated to show why there should not be a reversion. No authorization had been provided to the Commission to indicate that any other entity has agency authority to make representations on behalf of Bridge Aina Le`a in connection with the Order to Show Cause.

Mr. Maehara stated that in the Purchase and Sale Agreement, the responsibilities of the entitlements and maintaining the entitlements had been or is in the process of being transferred from Bridge Aina Le`a to DW Aina Le`a along with the title. Commissioner Lezy asked what the current status was and asked Mr. Maehara to identify what document provided agency authority. Mr. Maehara referred to the Purchase and Sales Agreement (Exhibit A of March 20, 2009) Section 12-Pre-Closing Possession/Development Responsibilities, second sentence and identified the roles of buyer and seller. Mr. Maehara declared that this was the authority which conveyed the authority from Bridge Aina Le`a to DW Aina Le`a.

To enable Mr. Maehara to consult with DW Aina Le`a, the Commission went into recess at 11:48 a.m. and reconvened at 11:55 a.m.

## POSITION STATEMENTS

### Petitioner

Mr. Carroll stated that he would be representing Bridge Capital and that Mr. Maehara be excused.

Commissioner Wong stated that the papers he had seen were filed by Mr. Maehara and that if Mr. Carroll was going to be representing Bridge, it was normal for a filing to provide notice that he would be appearing as co-counsel of record. Commissioner Wong added that there was nothing to show that this notice had been provided. Mr. Carroll offered to either file notice on Friday or to step back and allow Mr. Maehara, if the Commission preferred, to represent Bridge to be consistent with the documentation that the Commission had received.

Chair Kanuha stated that the Notice to Assign Interest was filed by Mr. Maehara as attorney for the Petitioner, Bridge Aina Le`a LLC and questioned what his capacity currently was as attorney for the Petitioner. Mr. Maehara stated since they were in a transitional period, that he had not withdrawn as Petitioner's attorney but was also retained and representing DW Aina Le`a LLC. Mr. Maehara offered to withdraw as

counsel for Bridge Aina Le`a. Chair Kanuha replied that he did not feel that the Commission had objections with both attorneys representing Bridge Aina Le`a as co-counsel. Chair Kanuha asked what the role of DW Aina Le`a LLC would be- taking the position of the Petitioner, or being the Petitioner`s agent or representative.

Mr. Carroll responded that the Project status and the DW Aina Le`a LLC relationship to Bridge was what he hoped to explain in the hearing. He proposed that Mr. Maehara take the lead on representing Bridge Aina Le`a.

Chair Kanuha stated that whichever way the counsels decided to handle matters was workable and reminded the representatives that the subject of today's hearing was on the Order to Show Cause.

Commissioner Judge reiterated for understanding that both counsels will be representing Bridge Aina Le`a for the purposes of this hearing. Commissioner Lezy reconfirmed with Mr. Carroll for clarification and for the record that DW Aina Le`a LLC was no longer a party to the hearing and that Bridge Aina Le`a LLC was the sole party for the purposes of the hearing. Mr. Carroll responded affirmatively.

Mr. Carroll made a brief statement to withdraw their recently filed motion to amend the condition on affordable housing requirements. He stated that DW Aina Le`a LLC was prepared to go forward with the condition and did not need this amendment.

Mr. Maehara stated that he understood that the subject was the Order to Show Cause. He referred to the notice of March 20, 2009 and stated that a period of transition was underway and was prepared to show how the new party of interest was going to undertake the development. Chair Kanuha asked if that was Mr. Maehara`s position statement. Mr. Maehara answered that it was.

#### County of Hawaii

Ms. Mecklenburg stated that the County position statement had not changed- the urban designation was appropriate and the general public interest would best be served by allowing Petitioner to retain its current classification.

#### State of Hawaii Office of Planning

Mr. Yee stated that the reversion of the property to its original classification of agriculture was appropriate given the facts and circumstances of the case. He said that the issue was if the Petitioner had complied with its representations to develop the property and whether they could build and obtain the certificates of occupancy by November 2010. Mr. Yee referred to past statements included in OP`s position report where the Petitioner declared that it was unable to comply with the deadline. He added

that the change of ownership was not relevant and that the concern was if the conditions of the order could be met and cited the Petitioner's history of non-performance. The failure to comply with the conditions as promised was the basis for recommending reversion.

Chair Kanuha confirmed with Mr. Maehara and Mr. Carroll that Petitioner Bridge Aina Le`a was aware of the consequences of the proceeding and that the Order to Show Cause could result in the Petition Area being reverted back to the agricultural district or other appropriate district.

## PETITIONER'S PRESENTATION

### Petitioner

Mr. Maehara confirmed for the record that Bridge Aina Le`a was withdrawing its motion for an amendment to the affordable housing condition and would be filing a formal document shortly. He then called Sidney Fuke, Petitioner's Planning Consultant.

Mr. Maehara referred to a binder of material that he wanted to submit and use as an exhibit. The binders were received by the Commission and distributed to the Commissioners and the parties. Mr. Maehara explained how he would be using the documents in the binder during his presentation.

The binder is referred to as Exhibit 6, although not admitted into evidence at this time.

Mr. Fuke stated that about 4 or 5 years ago he began working with Bridge Aina Le`a on their land use entitlement process. Effective February, this year he no longer had a working arrangement with Bridge Aina Le`a and now had a relationship with DW Aina Le`a LLC. Mr. Fuke described how Bridge Aina Le`a attempted to use the Kaloko transitional housing program to satisfy some of the affordable housing requirements of the project.

Mr. Yee objected to the testimony, stating that the witness had only been speaking to off-site housing, but since the requirement is for on-site housing and the motion to amend has been withdrawn, the witness' testimony lacked relevance. Mr. Maehara replied that the relevancy would soon be revealed since developments since February had affected matters.

Mr. Fuke stated that his testimony was to demonstrate the difference in how Bridge Aina Le`a and DW Aina Le`a approached handling the affordable housing requirement.

Mr. Maehara asked that Exhibit 6, tab F, be entered into evidence and that he be allowed to proceed with Mr. Fuke's testimony. The County had no objection. OP objected based on relevance. Mr. Yee stated that the Kaloko transitional housing project had nothing to do with the issue before the Commission which was whether the Petitioner is complying with the conditions of the Decision and Order issued by the Commission.

Commissioner Lezy agreed with the OP position regarding relevance and that compliance with the Decision and Order was what was being addressed. He did not see what bearing this testimony and evidence had on the matter.

Commissioner Judge stated that she concurred with the State's position also.

Chair Kanuha ruled that the exhibit not be admitted.

Mr. Maehara stated he was ready to proceed. Mr. Fuke stated that he was aware of the plans to fulfill the affordable housing condition in the amended Decision and Order and had received direction from DW Aina Le`a LLC that it was planning to build all required affordable housing units on site. Mr. Fuke said that there were several critical components that needed to be met to get the project underway. One was getting the affordable housing site subdivided. Mr. Maehara referred to Exhibit 6, Tab L which was a site plan, a subdivision map, and an additional site plan and asked Mr. Fuke to identify the site of the proposed affordable housing project.

Commissioner Wong stated that Mr. Fuke had represented that he was a consultant for DW Aina Le`a LLC and no longer represented Bridge Aina Le`a and failed to see the relevance of what DW Aina Le`a LLC was going to do in the future. Mr. Maehara replied that part of the proceeding was to convince the Commission that, as part of the transition, DW Aina Le`a LLC had the experience and financial capability to step into the place of Bridge Aina Le`a and meet the conditions that were set down in the amended Decision and Order.

Commissioner Piltz asked why the Commission should believe what the Petitioner was saying when past representations had not been fulfilled. Mr. Maehara replied that they were prepared to show, under oath, that considerable sums of money had been transferred from DW Aina Le`a LLC to Bridge, paid to consultants, including Goodfellow Brothers, and the County of Hawaii. Mr. Maehara added that he also had an executed agreement which Bridge had not submitted to the Commission, and that Goodfellow was to testify that they were proceeding with the work under the contract.

Commissioner Wong asked if DW Aina Le`a LLC had acquired all of the rights of Bridge Aina Le`a or hopes to acquire the rights in the future. Mr. Maehara responded



that DW Aina Le`a LLC did not have the legal title to the property and was working to acquire it through an installment contract- as payments were made, portions of the property would be transferred. Mr. Maehara stated that DW Aina Le`a LLC had assumed the responsibility of proceeding with all entitlements and the delivery of all of the affordable units; and had equitable title to the property which had been transferred, while the transfer of legal title was in process. Mr. Maehara said the submittal of March 20 was a request for approval of the Commission of the purchase and sale agreement and the subsequent transfer of the legal title.

Commissioner Judge stated that according to the conditions, the Petitioner was supposed to inform the Commission of intended transfers of ownership. She noted that the paperwork reflects that ownership changes were underway since 2008 and no mention had been made in the 2008 status report from the Petitioner or at the January hearing. She recalled past incidents where the Commission received a batch of documents just before the meetings to demonstrate that progress was being made, and this was a familiar trend.

Chair Kanuha said he would allow the testimony but that each Commissioner would weigh the evidence for relevance and accuracy individually. He added that the attention was on Bridge Aina Le`a and the Commissioners would weigh the testimony relative to that.

Commissioner Wong asked if a Petitioner's Representative was going to testify. Mr. Maehara responded that Mr. Wessels, a principal of DW Aina Le`a LLC, was going to follow Mr. Fuke. Mr. Wessels would then be followed by a representative from Goodfellow Construction Company.

Chair Kanuha asked if any witness for the Petitioner was going to testify. Mr. Maehara replied that there were no plans for a principal or officer of Bridge Aina Le`a to testify and that an authorization could be submitted to allow these parties to testify.

The Commission went into recess at 12:44 p.m. and reconvened at 1:52 p.m.

Mr. Maehara asked the Commission to allow Mr. Hoolae Paoa to testify and to defer Mr. Fuke's direct examination. He stated that Mr. Paoa might be able to clarify what the Purchase and Sale Agreement was about and what the relationships of the parties were in the transaction. Mr. Maehara stated that Mr. Carroll would be doing the questioning.

Commissioner Wong stated that there were several witnesses that would be testifying and asked if Mr. Maehara could make an offer of proof to have an understanding of what each witness would testify to. Mr. Maehara stated that Mr. Paoa

would be testifying on the nature and details of the purchase and sale transaction between Bridge Aina Le'a LLC and DW Aina Le'a LLC, including the transfers of responsibility and the timing of transfer of the legal title of the various parcels. Mr. Fuke would then continue his direct examination and be followed by Mr. Robert Wessels of DW Aina Le'a LLC. Mr. Wessels would be testifying on how DW was prepared to meet the housing condition. In addition, Mr. Maehara stated that, time permitting, he would like to call on Mr. Ed Brown of Goodfellow to describe the activities his company was undertaking to assist DW Aina Le'a LLC in the project.

Commissioner Wong stated that the offer to show proof suggested that all the witnesses testify and provide information to determine that a valid case existed and that the Petitioner should be providing reasons why a reversion of land use should not occur and not refer to hopes and dreams of what Petitioner aspired to accomplish. He added that there were no explanations for the failure of the Petitioner to comply with meeting the conditions, and there were other conditions besides affordable housing that had not been met. Commissioner Wong then moved that the Petition Area be reverted to agriculture.

Commissioner Contrades seconded the motion.

Commissioner Judge made a motion that the Commission enter into executive session. Commissioner Wong seconded the motion. The motion was unanimously approved by a show of hands.

The Commission went into executive session at 2:00 p.m. and reconvened its regular meeting at 2:17 p.m.

Commissioner Wong asked to amend his motion to be: to revert the Petition Area to an agriculture classification- the motion to revert would be set aside provided that within 30 days of this hearing date, the Petitioner furnished a \$10 million dollar cash bond in favor of the State of Hawaii.

Commissioner Contrades seconded the amended motion.

Commissioner Wong stated how the Petitioner had failed to establish credibility in complying with the Decision and Order and explained why he felt that the \$10 million bond would ensure that the Petitioner would perform.

Commissioner Piltz stated that the project could be a good project and could provide jobs, affordable housing and contribute to the betterment of the community, but only promises had been made to date with no action. He supported the motion.

Commissioner Lezy echoed Commissioner Piltz's concerns and stated that it was not the intent of the Commission to frustrate development. He stated that the failure of the Petitioner to comply with the obligations of the Decision and Order moved him to support reversion, but he was uncomfortable with imposing a bond requirement in lieu of simply reverting the land. Commissioner Lezy stated that opportunities had been provided to the Petitioner and that he did not feel a bond requirement would make a difference.

Commissioner Contrades stated that he supported reversion but not the bond obligation.

Chair Kanuha asked the Petitioner to make statement before the matter was put to a vote. Mr. Carroll asked for a recess to prepare his statement.

The Commission went into recess at 2:29 p.m. and reconvened at 2:38 p.m.

Mr. Carroll stated that on behalf of Bridge that they would strongly object to the motion on the grounds that it was procedurally improper. Mr. Carroll stated that there were some statements made by the Commissioners which he believed were not accurate that could be corrected during testimony- he cited as an example the \$18 million was not related to financing, it was the mortgage on the project. Mr. Carroll added that the disclosures of what happened on March 20 had not been explained and they would like the opportunity to explain them. He also stated that the agreement was not signed till February 9 and that was why it was not disclosed since it was not finalized. Mr. Carroll stated that the project should be given a chance and that the question was if the affordable housing requirements could be built on the site by November 2010. He asked for the support of the Commission to make the project happen since Bridge had spent over \$20 million on the project already.

Commissioner Judge asked the Hawaii County representatives what the feasibility of the project was given its current state with no infrastructure, wastewater, and need for permits in the time remaining. Ms. Leithead-Todd replied that it would be very difficult but since there had been a sub-division application, and with 18 months still remaining, she would like to see them proceed and accomplish the project. Ms Leithead-Todd stated that the land was appropriately designated urban due to its nearby location to the hotel resort sources of employment and would help alleviate some existing transportation issues.

Commissioner Judge asked Ms. Leithead-Todd what needed to happen in the next 90 days to get the project completed in 18 months. Ms. Leithead-Todd replied that sub-division approval and final sub-division approvals with sub-division bonds needed to be obtained.

Commissioner Piltz asked Ms. Leithead-Todd about building permit being obtained in the remaining months. Ms. Leithead-Todd commented that it would depend on what the building plans looked like. She did not anticipate the approval process to take too long if the plans were already prepared, and if the plans were for affordable units, those would be expedited.

Chair Kanuha asked Hawaii County if it would consider bonding the units. Ms. Leithead-Todd responded that Hawaii County typically looked for infrastructure bonding and didn't think that the County had ever bonded units.

Commissioner Lezy asked what the extent of discussions had been between the developer and the County. Ms. Leithead-Todd replied that most of their discussions had been in regards to the Kaloko transitional housing project and not about the Petition Area; she also explained how DW Aina Le`a LLC did not end up participating in the Kaloko transitional housing project. Ms. Leithead-Todd stated that the Petitioner faced difficulties in meeting the 2010 deadline in the Decision and Order, but if the developer were able to complete the project, there could potentially be that many more affordable homes available. Commissioner Lezy asked what type of numerical probability the project had of being completed by the deadline. Ms. Leithead-Todd replied 50%.

Commissioner Contrades stated that he understood the County's position of hoping to see affordable units built but that an agreement had been made and the agreement had not been met. He referred to a passage from the minutes of September 2005 where Mr. Paoa testified that the units would be built in three years in a worst case scenario and that the zoning was completed and the Petitioner would have completed executing all contracts within 30 days of receiving Commission approval to take the affordable housing requirement from 60% to 20 %. Commissioner Contrades stated that no progress had been made since then and that there were more questions than answers today on what the status of the Petitioner was. He offered to withdraw his second to the motion and make a new motion, if the maker of the motion would withdraw the motion since the Petitioner's representative had said that they could not do the project with the \$10 million bond obligation. Commissioner Wong agreed to withdraw his motion.

Commissioner Contrades moved that since the Petitioner had failed to meet the conditions as promised, that the land be reverted back to agricultural use. Commissioner Lezy seconded the motion.

Mr. Carroll asked to preserve an objection on the new motion and reasserted all the objections made previously. He stated that after that 2005 meeting, the Superferry

decision came out and impacted progress of their work. Mr. Carroll urged the Commission to deny the motion.

Commissioner Wong stated his understanding of the motion was that it was based on the offer of proof, made by Petitioner's counsel, that failed to demonstrate what the evidence would have shown relative to the Order to Show Cause if admitted.

Chair Kanuha asked Ms. Leithead-Todd, if the situation that the Petitioner represented in the January hearing regarding a zoning configuration that made it impossible for Petitioner to make the November 2010 deadline still existed. Ms. Leithead-Todd replied that Petitioner had zoning, but the plans and designs that were proposed would not work with the way the zoning was configured.

Mr. Carroll asked if Mr. Paoa could testify to explain what occurred with the County. Mr. Paoa stated that a project of this size was usually done through a project district. Currently all the zoning was done by pods and described by metes and bound. To build this number of units, a subdivision was sought by reconsolidating and bringing all the zoning pods together into one sub dividable property. The former County administration denied this request on the basis of an EIS requirement and it was appealed. The tentative sub-division approval has been obtained from the current administration and the thrust today was to demonstrate that they did have the capability to meet the conditions.

Chair Kanuha asked Mr. Paoa how long he had zoning approval on the property and when was he aware he needed a project district to proceed.. Mr. Paoa replied that he had the zoning for 5 or 6 years or more and it was around the time when the affordable housing requirement was reduced when the project district was needed.

Commissioner Judge asked if there had been any changes to the zoning of the Petition Area since 2005. Mr. Paoa replied that it was still the same. Commissioner Judge recalled the activities of the Commission at the 2005 hearings and stated that Condition 1 of the Order was written the way it was as a safeguard to make sure the affordable units were constructed. She supported Commissioners Contrades and Lezy's position. Commissioner Judge stated that the January hearing statements by the Petitioner regarding inability to meet conditions besides affordable housing were unsettling and that the issues were larger than meeting the affordable housing deadline.

The Commission was polled as follows:

Ayes: Kyle Chock, Thomas Contrades, Lisa Judge, Duane Kanuha, Normand Lezy, Ransom Piltz, Reuben Wong

The motion passed 7-0, 2 absent.

Chair Kanuha stated that the next item on the agenda, A87-617 BRIDGE AINA LE'A, LLC & BANTER, INC. fka Puako Hawaii Properties- Motion to Amend Findings of Fact, Conclusions of Law, and Decision and Order, Filed November 25, 2005, and that had been withdrawn by the Petitioner by oral communication earlier in the meeting.

The meeting was adjourned at 3:08 p.m. to resume at 9 a.m. May 1, 2009 in Honolulu.