

LAND USE COMMISSION
MEETING MINUTES
August 27, 2009
Naupaka IV, V, and VI
Waikoloa Beach Resort
69-275 Waikoloa Beach Drive
Waikoloa, Hawaii 96738

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

COMMISSIONERS ABSENT: None

STAFF PRESENT: Orlando Davidson, Executive Officer
Russell Suzuki, Deputy Attorney
General
Robyn Loudermilk, Staff Planner
Riley Hakoda, Staff Planner

COURT REPORTER: Holly Hackett

AUDIO TECHNICIAN: Wade Kersey

CALL TO ORDER

Chair Kanuha called the meeting to order at 10:34 a.m.

ADOPTION OF MINUTES

Commissioner Wong moved to adopt the July 15-16, 2009 minutes. Commissioner Piltz seconded the motion. There was no discussion. The minutes were unanimously approved by voice vote 9-0.

TENTATIVE MEETING SCHEDULE

Executive Officer Davidson stated the upcoming tentative meeting schedule for the Commission included the 2009 HCPO conference in Honolulu on the second meeting date in September. Commissioners wishing to participate should contact Riley Hakoda to make arrangements. On October 8, 2009, a Maui meeting employing video conferencing is being planned.

Commissioners were encouraged to contact either Mr. Davidson or Mr. Hakoda for any questions on scheduling. Robyn Loudermilk was introduced as the new LUC Staff Planner.

There were no questions for Mr. Davidson.

ELECTION OF OFFICERS

Chair Kanuha provided background information on what was involved in the election process and described how Commissioner officers were nominated for election. Chair Kanuha nominated a slate with Commissioner Piltz as Chair, Commissioner Devens as First Vice Chair and Commissioner Wong as Second Vice Chair. There were no other nominations.

Commissioner Contrades moved to approve the slate of officers. Commissioner Teves seconded the motion. There was no discussion. The Commission was polled by voice vote and the motion passed unanimously 9-0.

Commissioner Piltz assumed the Chair position and thanked his fellow Commissioners for their vote of confidence. The hearing resumed to address the next agenda item.

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

Chair Piltz stated that this was a limited further hearing and action meeting regarding A87-617 Bridge **Aina Le`a LLC** relating to the Order to Show Cause.

Parties

Alan Okamoto, Esq., represented DW Aina Le`a Development, LLC

Robert Wessels, DW Aina Le'a Development, LLC Representative

Bruce Voss, Esq., represented Bridge Aina Le'a, LLC

Gerald Takase, Esq., Deputy Corporate Counsel Hawaii County

Bobbie-Jean Leithead-Todd, Planning Director Hawaii County

Bryan Yee, Esq., represented State Office of Planning

Abby Mayer, Director, State Office of Planning

Lorene Maki, State Office of Planning

Public Testimony

1. George Robertson (submitted written testimony)

Mr. Robertson stated that he was representing the Puako Community Association and described his concerns about the project and its proposed affordable housing, sewage disposal, EIS, and time share units. There were no questions for the witness.

2. Randy Vitousek

Mr. Vitousek stated that he was representing Mauna Lani Resort Association and the association was taking no position on the order to show cause. Mr. Vitousek asked that if the Project was allowed to go forward, the Commission amend some of the conditions in the decision and order- particularly Condition 4 relating to intersection improvements in the Petition Area. Mr. Vitousek explained his reasons for intersection signalization requirements and described the need for modifying the decision and order conditions to reflect and mitigate current day circumstances. There were no questions for the witness.

There were no other public witnesses.

Petitioner

Mr. Voss, on behalf of Petitioner Bridge Aina Le'a, LLC (Bridge), designated DW Aina Le'a Development, LLC (DW)-Alan Okamoto as its agent for the purposes of presenting evidence on the progress of the project in compliance with the decision and order.

Mr. Okamoto called Robert Wessels to submit testimony on matters which arose

after April 30, 2009. Mr. Wessels stated his position with DW and described the details of the Purchase Agreement and the roles that Bridge and DW had under the terms and conditions of the agreement. Mr. Wessels described the plans for the 61.37 acre first phase portion of the project. Mr. Wessels stated that DW would be able to proceed with the project even if Bridge did not participate in the project, and that DW had a source of funding from Singapore and was acquiring title to the property to move forward. Mr. Wessels represented that all the documents had been signed by all parties and were ready to process to close the sales transaction. Mr. Wessels provided background information on his Singapore funding source and explained how the funding for the project would occur.

Mr. Wessels described the construction aspects of Phase I and explained the details of DW's Exhibits "EE" Goodfellow Bros. construction contract, and "FF" performance and payment bonds that were issued in conjunction with the contract. Mr. Wessels clarified the differences between the contracts submitted to the Commission and described the infrastructure improvements that DW already completed to the area. Mr. Wessels explained the methodology used to develop construction scheduling chart in DW's Exhibit "EE"; and the described how the permit application processing was planned for DW's Exhibit "GG".

Mr. Wessels described the vertical construction plans detailed in DW's Exhibit "DD" which were derived from a prior project that he had done and explained his plans for handling the infrastructure and wastewater treatment plant requirements for the Petition Area.

Mr. Wessels addressed the issues of affordable housing using DW's Exhibit "HH" and described his efforts to work with the County of Hawaii. Mr. Wessels described the methods, pricing and guidelines that would be used for marketing the project and explained how he perceived the project's conformance to County of Hawaii requirements. Mr. Wessels referred to DW's Exhibit "BB" and a visual aid map to describe the development schedule for subsequent phases of the Project.

Mr. Wessels stated that he was familiar with the details of the letter reporting on the status of the project to the LUC and that DW was prepared to comply with the conditions as described in the letter. Mr. Wessels described the work that had been done to move the project along and stated the motion to revert the property made it difficult to go forward and develop the property. Mr. Wessels asked for relief from the motion which hung over the project and stated that although the project appeared on schedule for completion; that he would like to

be allowed an “open-door” policy to appear before the Commission to explain any delays which might require approving additional time to deal with.

Mr. Wessles provided his understanding of the draft EIS status and its delivery date and explained the plans to handle the State intersection in the Petition Area.

The Commission went into recess at 11:37 a.m. and resumed at 11:56 a.m.

County

Mr. Gerald Takase requested clarification on the interior sizes and features of the affordable units that DW was proposing to construct. Mr. Wessels responded by describing the details for the various types of units DW was planning to construct.

State

Mr. Yee requested clarification on DW’s Exhibit “CC”, an environmental impact statement preparation notice. Mr. Wessels supplied information on housing units, zoning, traffic and various other details related to the EIS. Mr. Wessels provided his understanding of what was required before a certificate of occupancy could be issued and how he would proceed through the zoning, subdivision and permitting approval process. Mr. Wessels stated that two environmental assessments had already been done on the site and that he would have to check on the dates that they were done and who the approving authority was.

Mr. Yee requested clarification on DW’s Exhibit “EE”, the design-build contract with Goodfellow Brothers. Mr. Wessels provided his understanding of the various parts of the contract the Mr. Yee had questions on. Mr. Yee indicated for the record that this document was not a guarantee that the work would actually be done- DW has an “out-clause” within the contract where, if they cannot agree on a guaranteed maximum price, they can walk away. Mr. Yee argued that the certainty of construction may not necessarily be true. Commissioner Kanuha asked if this was something that would require monitoring or enforcing and what agency would be expected to perform this task. Mr. Yee replied that this presentation being brought before the Commission appeared to be more paperwork which did not convey the actual commitment since they could “walk-away” from it.

Commissioner Teves excused himself at 12:24 and returned at 12:40.

Mr. Yee requested further clarification on how schools were going to be accommodated in the Petition area, infrastructure plans for sewage treatment, and on details of the Purchase/Sales Agreement's transfer of title arrangements and DW obligations to consummate the purchase transaction. Mr. Wessels responded with how DW would be handling and responding to these items.

Mr. Yee requested clarification on the funding for the Project. Mr. Wessels responded by explaining DW's financing arrangements with Redwood Capital and Capital Asia. Mr. Wessels described how vertical construction and infrastructure would be coordinated, and provided his estimate of when the draft EIS would be completed- in January/February 2010. Mr. Wessels acknowledged that he anticipated providing a public notice in a couple of weeks.

Commissioners

Commissioner Lezy requested further clarification of the funding arrangements that DW had for the affordable housing component of the project. Mr. Wessels described how DW would work its financing arrangement with Redwood Capital and Capital Asia to meet capital requirements during the project and provided the deposit amounts already submitted to Hawaii Escrow and Title. Commissioner Lezy requested clarification on the DW notice to proceed with the Goodfellow contract. Mr. Wessels responded by providing his understanding of how the contract was proceeding and reported on the progress that had been made since it was initiated. Mr. Wessels described the actions that DW would take for handling EIS and sewage treatment plant delays and problems and related the impact that reversion of the land use would have on his company and others associated with the project.

Commissioner Wong asked if DW had title to the 61.37 acre parcel. Mr. Wessels responded that DW did not have title and described how the parcel had been subdivided and how escrow was still holding funds pending the outcome of the decision-making on the reversion. Mr. Wessels stated that DW had approximately \$4.5 million dollars at risk in the project, and provided his perception of what might be at risk to others associated with the project. Mr. Wessels deferred to Mr. Okamoto to answer any further legal details.

Commissioner Kanuha requested clarification of the Community Facilities District Bond issue and how it integrated into the financing of the project. Mr. Wessels provided his understanding of how the District Bond would be providing funding and how the working capital was arranged with it. Mr.

Wessels explained DW's backup plan for funding if the Bond issue was not available.

Commissioner Judge requested clarification on how the school location's in agricultural land would be in compliance with Condition #7 which required schools within an urban area. Mr. Wessels replied that he would need to revisit the requirement details of Condition #7 and described his reasoning for locating the schools where they were reported to be designated. Mr. Wessels reported that he would work with the DOE on a resolution to this issue and return before the LUC for approval if necessary. Commissioner Judge requested clarification of how the sewage treatment plant met Condition #5. Mr. Wessels provided the background and methodology used in determining the location of the sewage treatment plant and offered to readjust their plans if necessary.

Commissioner Wong requested clarification on how vertical construction would proceed on the project. Mr. Wessels described how DW planned to construct and produce units to meet the output requirements of completing about one and a half units per day. Mr. Wessels estimated that by March 31, 2010, according to their construction schedule, about 32 units would be completed.

Chair Piltz requested clarification of page 14 of the signature page with Goodfellow Brothers. Mr. Wessels explained why he signed the contract in the manner he did and provided details on the roles that the various entities identified on the signature page had in the transaction. Mr. Wessels stated that it was a liability situation, not a management-owner situation that motivated this arrangement.

There were no further questions from the Commissioners.

Mr. Okamoto requested that DW's Exhibits "BB" and "HH" be admitted. Chair Piltz acknowledged his submittal. There were no objections from the other parties. Mr. Okamoto clarified that he had consulted with the Planning Consultant for the Project, Sidney Fuke and could report that the draft EIS will be delivered around the first to the middle part on November, 2009.

Commissioner Lezy requested that given the weight of the hearing today, that Mr. Fuke be sworn in to testify before the Commission. There were no objections to this request and Mr. Fuke was admitted as a witness.

Sidney Fuke

Mr. Fuke explained his relationship to DW and described his role in preparing the EIS and permit processing for the project. Mr. Fuke provided an update of

the status of the draft EIS and stated that his goal was to have it submitted by early to mid-November, 2009 and expected to have final EIS approval in about three months.

Commissioner Piltz requested clarification on how permits and the EIS would impact vertical construction. Mr. Fuke provided his understanding of the current status of the project and the coordination that was expected to occur between the different components of planning and construction.

Commissioner Judge requested clarification of the basis for locating the sewage treatment plant on agricultural land and what permits would be required for this decision. Mr. Fuke provided his understanding of the requirements and timing of the County of Hawaii and Department of Health permits involved.

Commissioner Piltz requested clarification on who would construct the sewage treatment plant. Mr. Fuke deferred the question to Mr. Wessels to answer.

Commissioner Lezy requested clarification on County permit applications and approvals relative to the acceptance of the final EIS. Mr. Fuke described his experiences with these situations.

Mr. Yee asked what timeframes Mr. Fuke has experienced between EIS submittal and acceptance. Mr. Fuke stated that it could range from three months to about a year and that the average time frame was around six months depending on the comments that are received during the draft EIS process.

Commissioner Judge asked who the accepting authority would be for the EIS. Mr. Fuke responded that it would be the County Planning Department.

County

Mr. Takase called Ms. Leithead-Todd as a witness.

The Commission went into recess at 1:04 p.m. and resumed at 1:16 p.m.

Ms. Leithead-Todd stated that the County of Hawaii supported the project and explained the County's reasons for taking its position. Ms. Leithead-Todd expressed her impressions of the parties involved with the project and described the types of units that were proposed. Ms. Leithead-Todd upgraded her past assessment of the chances for the project being completed to 85% from 50% and provided the reasoning for increasing the odds for completing the project.

There were no questions from DW and the State.

Commissioner Kanuha requested clarification on the EIS components, the approval process and the timing of the project. Ms. Leithead-Todd provided her understanding of how the project would proceed and the package sewage

treatment plant would factor into the process. Commissioner Kanuha requested clarification on the status of the draft agreement with the County Housing Office. Ms. Leithhead-Todd responded that the County had just received the agreement and had not made a determination yet and that the County preferred that a private developer take on the project and monitoring the developer.

Commissioner Judge requested clarification on the accepting authority for the County of Hawaii for the EIS. Ms. Leithhead-Todd responded that she would be receiving the EIS as the Director of the Planning Department.

Commissioner Wong asked if the County foresaw any obstacles to the builder completing the Project. Ms. Leithhead-Todd replied that she did not and described why she felt the project should move forward.

Commissioner Judge moved to enter Executive Session to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities. Commissioner Contrades seconded the Motion. The Commissioners were polled by a show of hands and unanimously agreed (9-0) to enter into Executive Session at 1:29 p.m.

The Commission resumed the hearing at 1:38 p.m.

Mr. Takase requested that Mayor Kano'e's letter be admitted to the record, just in case it had not been received by the Commissioners. There were no objections from the other parties. Chair Piltz acknowledged the submittal.

Commissioner Judge observed that the State had not made a presentation. Mr. Yee responded that he had advised the Executive Officer earlier that OP would stand on its written presentation and would not be submitting evidence.

CLOSING STATEMENTS

Petitioner

Mr. Voss thanked the Commission for allowing the Presentation by the Petitioner and asked the Commission to consider rescinding the Order to Show Cause.

Mr. Okamoto argued that DW's presentation before the Commission demonstrated what DW had been able to do since February, 2009. He described the accomplishments of obtaining working capital, gaining county support and the credentials and experience of Mr. Wessels that the Commission should consider to justify allowing DW the opportunity to move forward and to consider all the new information provided to the Commission since its April 30, 2009 decision.

County of Hawaii

Mr. Takase argued that the project's situation had changed with the entry of DW and argued that the new parties and new financing had altered the County's perception of the project to be very supportive of allowing it to move forward.

OP

Mr. Yee argued that the original decision should be retained and that the land should be retained and held in Agriculture. Mr. Yee provided his reasoning for why the original decision should be upheld.

DECISION-MAKING

Chair Piltz summarized the activities of the proceedings to prepare the Commission to deliberate.

Commissioner Wong moved that the LUC rescind the Order to Show Cause provided that the Petitioner completes construction of at least 16 affordable units by March 31, 2010. Commissioner Kanuha made a point of clarification in that there were two motions on the floor- one which spoke towards rescinding the Order to Show Cause, and the other spoke towards allowing DW to either be a co-Petitioner or to be given Party status. Commissioner Kanuha questioned which would be first and indicated that both motions would need to be disposed of.

Commissioner Wong recognized Commissioner Kanuha's concern and offered to add the second motion to his original motion.

Chair Piltz repeated the motion that Commissioner Wong made to clarify what the Commission would be voting on. Commissioner Kanuha seconded the motion for further discussion.

Commissioner Wong repeated his motion for clarification and moved that the LUC rescind the Order to Show Cause provided the Petitioner completed construction of at least 16 affordable units by March 31, 2010. Commissioner Piltz confirmed that Commissioner Kanuha seconded the Motion.

Commissioner Wong provided his reasons for why he made his motion and recognized the efforts that had been made in recent months to move forward on the project by all parties. Commissioner Wong described how another intermediate step might be to suspend the Order to Show Cause till a certain date and explained how a lender might be reluctant under that situation. By rescinding the order, provided the Petitioner fulfilled the condition, he reasoned that the Petitioner and its lender would feel if they complied with the condition, they could move forward.

Commissioner Kanuha commented on his prior experiences on this docket and related the differences that he noticed in the current efforts of DW and the County of Hawaii. Commissioner Kanuha offered a friendly amendment to the motion that the County Planning Department be asked to provide the Commission with quarterly status reports on the progress of the Petition.

Commissioner Wong accepted Commissioner Kanuha's friendly amendment.

Commissioner Lezy stated that he would not be supporting the motion and provided the reasons why he took his position and agreed with the State's position on the matter. Commissioner Lezy expressed why he felt there were too many unanswered questions for the Commission to rescind the order.

Commissioner Piltz commented on his feelings about the Project and shared his reasoning for allowing the Project to move forward. Commissioner Piltz stated that he was willing to go along with the proposal on the floor.

The Commissioner was polled as follows:

Ayes: Commissioners Judge, Teves, Contrades, Wong, Kanuha and Chair Piltz.

No: Commissioners Chock, Lezy, and Devens.

The motion passed 6-3 with no one absent.

Commissioner Wong made a housekeeping motion to accept DW as co-petitioner to the proceeding. Commissioner Judge seconded the motion.

There was no discussion.

The Commission was polled as follows:

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

No: Commissioner Lezy

The motion passed 8-1 with no one absent.

Commissioner Judge asked if there was an additional housekeeping motion with the third motion on the agenda. Mr. Voss, as a Movant on the motion, stated he would withdraw the motion based on the actions of the Commission.

Chair Piltz adjourned the meeting at 2:16 p.m. and advised that the Commission would resume at 8:30 a.m. in Honolulu on the 28th of August, 2009.