

LAND USE COMMISSION
MEETING MINUTES
March 23, 2011
Conference Room 405, Fourth Floor,
Leiopapa A Kamehameha,
235 South Beretania Street, Honolulu, Hawai`i 96804

COMMISSIONERS PRESENT: Vladimir Devens
Charles Jencks
Ronald Heller
Thomas Contrades
Duane Kanuha
Lisa Judge
Kyle Chock

COMMISSIONERS ABSENT: Normand Lezy
Nicholas Teves, Jr.

STAFF PRESENT: Orlando Davidson, Executive Officer
Diane Erickson, Deputy Attorney General
Scott Derrickson, Staff Planner (attended DR11-44 and
DR10-41 portions)
Bert Saruwatari, Staff Planner (attended DR10-42
portion)
Riley Hakoda, Staff Planner/Acting Chief Clerk

COURT REPORTER: Holly Hackett

AUDIO TECHNICIAN: Walter Mensching

CALL TO ORDER

Chair Devens called the meeting to order at 9:51 a.m.

APPROVAL OF MINUTES

Chair Devens asked if there were any corrections or additions to the March 10, 2011 minutes. There were none. Commissioner Jencks moved to approve the minutes. Commissioner Kanuha seconded the motion. The minutes were unanimously approved by a voice vote (7-0).

TENTATIVE MEETING SCHEDULE

Executive Officer Davidson provided the following:

- The regular tentative meeting schedule for the calendar year 2011 was distributed in the handout material for the Commissioners.
- The April 20-21, 2011 meeting is planned for the Molokai IAL contested case.
- The May 12-13, 2011 meeting is planned to be a split Kaua'i/O'ahu meeting to accommodate the consideration of the A09-782 Decision and Order and a Kauai site visit and hearings.
- Any questions or concerns- please contact LUC staff.

ACTION

DR11-44 Department of Housing and Human Concerns, County of Maui (Lanai)

Chair Devens announced that this was an action meeting to consider DR 11-44, Department of Housing and Human Concerns, County of Maui (Lanai)'s Petition for a Declaratory Order requesting the Commission to determine whether Petitioner's noticed but unfiled Petition for a district boundary amendment to be brought under Chapter 201 H, Hawaii Revised Statutes ("HRS") may be allowed a waiver of the requirement for incremental plans under §15-15-50 (c) (19) Hawaii Administrative Rules.

APPEARANCES

Benjamin Matsubara, Esq., Wyeth Matsubara, Esq., and Curtis Tabata, Esq., represented Department of Housing and Human Concerns, County of Maui
Jo-Ann Ridao, Director, Department of Housing and Human Concerns, County of Maui
Clyde Almeida, Assistant Housing Administrator, County of Maui
Riki Hokama, Council Member, County of Maui-Lanai Representative
Bryan Yee, Esq., represented the State of Hawaii Office of Planning
Jessie Souki, Director, Office of Planning

PUBLIC WITNESSES

None

Chair Devens inquired if the Parties had any additional pleadings that they wished to file or present. Mr. Tabata responded that he did not. Mr. Yee responded that OP would rest on its statement of support.

There were no questions and no further discussion.

Commissioner Jencks moved to grant that Petitioner's noticed but unfiled Petition for a district boundary amendment to be brought under Chapter 201 H, Hawaii Revised Statutes ("HRS") may be allowed a waiver of the requirement for incremental plans under §15-15-50 (c) (19) Hawaii Administrative Rules. Commissioner Judge seconded the motion.

There was no discussion.

The Commission voted as follows:

Ayes: Commissioners Jencks, Judge, Kanuha, Heller, Contrades, Chock and Chair Devens.

Nays: None

The Motion passed 7-0 with 2 excused.

ACTION

DR10-41 Molokai Properties Limited

Chair Devens announced that this was an action meeting to consider State of Hawaii Department of Agriculture's Motion to Intervene in Declaratory Ruling No. DR10-41 Molokai Properties Limited, a Petition to designate Important Agricultural Lands for approximately 4,919 acres at West Moloka`i, Moloka`i, Hawai`i, TMK: 5-1-02: portion of 23, portion of 30.

APPEARANCES

Bryan Yee, Esq., represented the State of Hawaii Department of Agriculture
Russell Kokubun, Chair, Department of Agriculture
Benjamin Matsubara, Esq., Wyeth Matsubara, Esq., and Curtis Tabata, Esq., represented Molokai Properties Limited

PUBLIC WITNESSES

None

Chair Devens inquired if Mr. Yee had anything to add to his motion.. Mr. Yee responded that he did not and would rest on his motion. Mr. Tabata stated that he had nothing to add.

There were no questions or further discussion.

Commissioner Chock moved to grant the State of Hawaii Department of Agriculture's Motion to Intervene. Commissioner Contrades seconded the motion.

There was no discussion.

The Commission voted as follows:

Ayes: Commissioners Chock, Contrades, Heller, Jencks, Judge, Kanuha and Chair Devens.

Nays: None

The Motion passed 7-0 with 2 excused.

ACTION

DR10-42 Castle & Cooke Homes Hawaii, Inc.

Chair Devens announced that this was an action meeting to consider DR10-42, a Petition for Declaratory Order to Designate Important Agricultural Lands ("IAL") for approximately 902.066 acres at Waialua, Wahiawa, and Waikele, Oahu, Hawaii and that the documents submitted by the Department of Agriculture, Office of Planning, City and County of Honolulu and Petitioner's response would become part of the record in this matter.

There were no comments, questions or objections and the documents were made part of the record.

APPEARANCES

Benjamin Matsubara, Esq., Wyeth Matsubara, Esq., and Curtis Tabata, Esq., represented Castle & Cooke Homes Inc.

Dawn Takeuchi-Apuna Esq., represented City and County of Honolulu Department of Planning and Permitting (“DPP”)
Randolph Hara, Department of Planning and Permitting
Russell Kokubun, Chair, Department of Agriculture (“DOA”)
Bryan Yee, Esq., represented State Office of Planning (“OP”)
Jesse Souki, State Office of Planning

PUBLIC WITNESSES

None

STAFF REPORT

Mr. Saruwatari provided the LUC map orientation and staff report. There were no questions or comments about the staff report.

PRESENTATIONS

PETITIONER

Mr. Matsubara argued the reasons why the Petitioner’s proposed four parcels (Waialua, Whitmore, Dole Plantation and Mililani South) should be designated IAL and answered questions posed during the site visit. Mr. Matsubara stated that allowable storage and accessory structures were situated on the lands and that no farm dwellings or any intent to have farm dwellings on the parcels existed. Mr. Matsubara also described how the landfill on the Waialua property had been closed for ten years and why it should no longer be considered an issue; and how the Petitioner could be penalized for attempting to designate its existing agricultural lands IAL.

Mr. Matsubara stated that he accepted the OP and DOA assessment that the Waialua and Mililani South parcels met the IAL criteria and argued why OP’s and DOA’s additional proposed conditions for these parcels were not acceptable to Petitioner.

Mr. Matsubara stated that the Whitmore parcel had been used as agricultural land for past pineapple production for about a hundred years and an alternative crop had not yet been established for the area. Mr. Matsubara further noted that the parcel enjoyed 60 inches of annual rainfall and argued that based on its history, the Whitmore parcel should receive serious consideration for IAL designation since it met five of the eight IAL criteria.

Mr. Matsubara stated that the opposition to the Dole Plantation parcel was due to it being primarily a reservoir and gulch system and explained why it should be designated IAL and further how it served an irrigation purpose consistent with IAL criteria.

DPP

Ms. Takeuchi-Apuna stated that the City had 11 comments on the Petition and recited them for the Commission. Chair Devens inquired if Petitioner's March 14, 2011, response letter was satisfactory in addressing the comments of the DPP. Ms. Takeuchi-Apuna responded that not all the responses had been satisfactory and requested additional time to summarize the comments that still needed clarification. Chair Devens stated that he would continue with the comments of the DOA and OP and receive the City's summary after the DOA and OP were finished.

DOA

Chair Kokubun described how the DOA had interpreted the IAL criteria and applied them to considering this Petition to determine which parcels should be designated IAL. Chair Kokubun encouraged the Commission to consider the significance of applying all eight identification criteria for IAL to each parcel in making its decision and to continue to maintain the high standards established for the IAL designation.

OP

Interim Director Souki deferred to the expertise of the DOA on what was required for lands to be designated IAL. He described OP's role in the IAL designation determination/analysis process and further elaborated on the concerns that his department had with IAL designation impacts at the county and state levels when IAL cases were presented before the LUC.

Interim Director Souki stated that although OP did not have issues with the Waialua and Mililani South parcels after reviewing Petitioner's responses in regard to the length of the leases and permissible agricultural uses, OP did have concerns with the gulch areas interspersed in the Whitmore and Dole Plantation parcels and the need to discourage fragmentation of the area and promote contiguous and intact land units for the sake of long-term viability for agriculture. Interim Director Souki also expressed

the concerns that OP had with Dole Plantation's large reservoir system in proportion to the available land for productive agriculture and the lack of water for the Whitmore parcel.

Chair Devens questioned the Commission's legal authority to mandate longer lease agreements. Interim Director Souki responded that he was not aware of the legal authority and that Petitioner might be able to assist in providing appropriate language for the Decision and Order. Mr. Yee offered his opinion on the authority for requiring long-term leases.

Chair Devens resumed hearing the City and County's comments on Petitioner's responses..

DPP (continued)

Ms. Takeuchi-Apuna requested clarification on Comment #2-Petitioner's inventory of agricultural lands, Comment #5- adjacent land uses, and Comment #6- explanation of the gap between the Whitmore and Dole Plantation parcels. Mr. Matsubara responded that he recognized that Mr. Souki was not the Director of OP at the time that the written correspondence between OP and the Petitioner was prepared and offered his perception of how the IAL criteria and incentives should be applied in the interest of long-term viability of agricultural use of the land when designating IAL. Mr. Matsubara described the factors that were considered in drafting the responses to DPP's comments. He also stated that Petitioner did not believe disclosing all the land that it owned was relevant to its request for IAL since the lands were not included in the Petition. He further explained that Petitioner did not own the adjacent lands nor the gap of land between the Whitmore and Dole Plantation parcels.

Mr. Matsubara described how large tracts of land used for "plantation-style" farming could be used for diversified agriculture with different alternative crops being grown and argued how the four parcels listed on the Petition should be designated IAL.

Mr. Yee stated that OP no longer sought restrictive easements, and that the long-term lease arrangements were more of a question than a requirement. He argued why OP believed that both water and land availability considerations should be made in designating IAL.

The Commission went into recess at 10:57 a.m. and reconvened at 11:10 a.m.
COMMISSIONER'S QUESTIONS

Commissioner Heller requested clarification on how the use of water to promote agriculture on adjacent lands factored into designating IAL and whether more information was required on the actual and potential use of adjacent lands.

Mr. Matsubara provided his perception of how water resources helped promote viable agricultural production, and therefore deserved consideration in determining whether to include it in the IAL designation analysis. He pointed out that the adjacent lands were owned by the Dole Company and utilized the Tanada Reservoir for irrigation of its property and its tenants. Mr. Matsubara further related that he had been told if the Tanada Reservoir were not available, it would pose a significant threat to continuing agricultural activities in the surrounding area.

Mr. Yee responded that OP and DOA had considered asking a similar question on whether the adjacent lands needed to be designated as IAL, but did not since Petitioner did not have an understanding of the other lands and moreover did not include the adjacent lands in the Petition.

Commissioner Heller requested clarification from the DOA on the type of long-term lease requirements that should be required and how they were better for prospective tenants than the existing five year with five-year option leases. Chair Kokubun shared his perception of the importance of long-term leases to obtaining existing DOA loan program financing for farming and further described how farmers could use the long-term benefits of the IAL designation to their advantage. Chair Kokubun expressed his opinion of how commitments could not be made by the owner of the adjacent lands with respect to the water issue for the Dole Plantation parcel and why he believed it should not be designated IAL.

Commissioner Jencks requested that Petitioner clarify the irrigation services that Tanada Reservoir provided, including its water quality and the benefits derived to the agricultural activities. Mr. Matsubara described how the Tanada Reservoir provided for and benefited those receiving its water and explained that since it was surface water, it could be used in more ways than reclaimed water.

Commissioner Jencks requested clarification from DPP about the responses it received from Petitioner in regard to DPP's comments and questions. Ms. Takeuchi-Apuna noted that she only received Petitioner's responses at this hearing.

Commissioner Jencks requested clarification from DOA on how water availability might affect the classification of land and alter how the land was initially categorized. He also questioned whether grazing ranch land could be designated IAL if it was not classified "A" or "B" quality. Chair Kokubun responded that ranching was a bona fide agricultural activity and described how the DOA assessed/evaluated whether land qualified for IAL designation and how the "Unique" land category was used for lesser land quality categories.

Commissioner Kanuha requested clarification from DPP on whether it had all the information DPP had requested. He also requested that DPP clarify its position on this Petition. Ms. Takeuchi-Apuna stated that DPP did not take a position as it was interested in protecting its interests as the criteria for designating IAL evolved and more of the limited information on criteria became available.

Commissioner Kanuha requested clarification from Petitioner on its thought process in preparing and presenting the Petition. Mr. Matsubara described how the eight criteria for IAL designation were measured against the four parcels included in the Petition. He also explained the differences between this Petition and previous IAL Petitions before the Commission, and further elaborated why he believed that the parcels should be designated IAL.

Commissioner Judge requested clarification on why land was designated Unique by ALISH on the Whitmore map (Petitioner's Figure 5B). Mr. Matsubara responded that Petitioner had simply replicated the ALISH map and did not have a role in making the Unique determination.

Earl Yamamoto, DOA planner shared his understanding on the background of the Unique classification with a respect to the ALISH map of the Whitmore parcel. Mr. Yamamoto explained that the Unique category was used to identify that the parcel was used at that time for growing non-irrigated pineapple crops. Mr. Matsubara inquired if ALISH maps reflected differences between irrigated and non-irrigated crops. Mr. Yamamoto was not able to answer the question. Mr. Matsubara then inquired if Land Study Bureau maps would reflect irrigated and non-irrigated crops. Mr. Yamamoto replied that they would.

Chair Devens asked whether Petitioner or DPP had any objections to Mr. Yamamoto's participation in providing information to the Commission. There were no objections or comments.

Mr. Matsubara inquired if the Land Study Bureau guidelines would be upgraded for the Whitmore area if water were made available. Mr. Yamamoto replied that he was not sure and described how the Land Study Bureau determined its soil productivity ratings.

Commissioner Jencks asked Petitioner about the size of the Petition Area in Docket No. A07-775 Castle & Cooke Homes Hawaii, Inc. (Koa Ridge). Mr. Matsubara replied that it consisted of approximately 575 acres and that Petitioner was before the Commission with this Petition for IAL with over 900 acres to honor the representations it had made during the hearings for A07-775.

Chair Devens asked Petitioner about its future plans for the Whitmore parcel if the IAL designation were granted. Mr. Matsubara responded that alternative crops were being considered, but no firm plans were in place and crop options were still being considered.

Chair Devens then asked Petitioner about whether any new irrigation infrastructure was planned for the parcel. Mr. Matsubara described the courses of action that Petitioner had explored and noted that unless a well was used to provide water, the parcel would have to rely on rainfall or whatever water source that was practically available.

Commissioner Kanuha asked Petitioner why it believed IAL designation was necessary for the parcels. Mr. Matsubara replied that the Petition was submitted to fulfill representations made to the Commission and in response to commitments made to the Farm Bureau in the past. Commissioner Kanuha noted that the IAL designation did not preclude Petitioner from pursuing its intended use of the proposed parcels.

Commissioner Judge requested clarification on whether designating the Whitmore parcel IAL would help Petitioner obtain water for it. Mr. Matsubara described the alternatives that Petitioner would have with and without the IAL designation and how water resource systems in the area needed to be maintained to prevent their deterioration.

Chair Devens asked Petitioner how its plans would change if the Whitmore and Dole Plantation parcels were not designated IAL. Mr. Matsubara provided his perception of how Petitioner might experience additional costs and difficulty in maintaining water resources in the areas by having to use tax credits.

There were no further questions or discussion.

Commissioner Jencks moved to grant the IAL designation to the four proposed parcels in DR10-42. Commissioner Contrades seconded the motion.

Commissioner Heller expressed that the Commission might consider voting on the Waialua and Mililani South parcels separately from the Whitmore and Dole Plantation parcels and proposed an amendment to Commissioner Jencks' motion to consider granting the Waialua and Mililani South parcels first and then considering the remaining parcels. Commissioner Jencks accepted the amendment and moved that the Commission grant IAL designation to the Waialua and Mililani South parcels subject to Petitioner abiding by the representations it made to the Commission. Commissioner Contrades seconded the amended motion.

There was no discussion.

The Commission voted as follows:

Ayes: Commissioners Jencks, Contrades, Kanuha, Judge Heller, Chock and Chair Devens.

Nays: None

The Motion passed 7-0 with 2 excused.

Commissioner Jencks moved to grant IAL designation to the Whitmore and Dole Plantation parcels. Commissioner Kanuha seconded the motion.

Commissioner Heller stated that he had difficulty distinguishing the remaining parcels as IAL and described why he believed the Whitmore and Dole Plantation parcels did not deserve the IAL designation.

Commissioner Jencks noted that all the parcels presented to the Commission reflected the spirit and intent of the IAL law and further described why he believed the Whitmore and Dole Plantation parcels should be designated IAL.

Chair Devens acknowledged the DOA's concerns and the Commission's role in setting the IAL standards through a selective process.

There was no further discussion.

The Commission voted as follows:
Ayes: Commissioners
Jencks, Kanuha, Judge, Contrades, and Chair Devens.
Nays: Commissioners Heller, and Chock

The Motion failed 5-2 with 2 excused.

Commissioner Judge noted that voting for the Whitmore and Dole Plantation parcels together prevented their separate consideration and questioned how the Commission could procedurally consider the parcels separately.

Chair Devens responded that he would investigate the procedures that would allow that and declared a recess.

The Commission went into recess at 11:55 a.m. and reconvened at 11:58 a.m.

Mr. Matsubara asked whether it would be appropriate to present an oral motion for reconsideration to the Commission regarding the remaining parcels. Discussion ensued to clarify Petitioner's request and whether any of the agencies had objections to the proposed suggestion. There were no objections to the proposed oral motion for reconsideration and the associated procedures to facilitate it.

Chair Devens moved for an Executive Session to confer with the Deputy Attorney General to determine what powers and authorities the Commission had in this situation. Commissioner Judge seconded the motion.

By a unanimous voice vote of 7-0, the Commission voted to enter into Executive Session at 12:00 p.m. and reconvened at 12:08 p.m.

Chair Devens asked Mr. Matsubara if he would like the Commission to consider other actions in regard to DR10-42. Mr. Matsubara replied that he wished to make an oral motion for reconsideration of the Commission's vote denying the Whitmore and Dole Plantation parcels' IAL designation. He also requested that the Commission separately vote for each parcel.

Chair Devens asked the agencies whether they had any objections to the process of hearing the motion for reconsideration. The DPP had no comment. Mr. Yee stated that OP/DOA did not oppose the process but would oppose the granting of the motion.

Commissioner Heller requested clarification on whether a “yes” vote implied taking a vote on the remaining parcels separately. Chair Devens requested that Mr. Matsubara restate his oral motion to confirm that a “yes” vote implied taking a vote on the remaining parcels separately. Commissioner Heller acknowledged his understanding of the oral motion before the Commission.

Commissioner Judge moved to approve the oral motion for reconsideration. Commissioner Jencks seconded the motion.

There was no discussion.

The Commission voted as follows:

Ayes: Commissioners Judge, Jencks, Kanuha, Heller, Contrades, Chock and Chair Devens

Nays: None

The Motion passed 7-0 with 2 excused.

Commissioner Judge moved to designate the Dole Plantation parcel as IAL. Commissioner Jencks seconded the motion.

Commissioner Judge referred to OP map (Fig. 1) and expressed her concerns about the availability and necessity of water for future agricultural purposes and described why she felt the Dole Plantation should be granted an IAL designation.

There was no further discussion.

The Commission voted as follows:

Ayes: Commissioners Judge, Jencks, Kanuha, Contrades, and Chair Devens

Nays: Commissioners Heller, Chock

The Motion failed 5-2 with 2 excused.

Commissioner Judge moved to designate the Whitmore parcel as IAL. Commissioner Jencks seconded the motion.

There was no discussion.

The Commission voted as follows:

Ayes: Commissioners Judge, Jencks, Kanuha, Contrades, Chock, and Chair Devens

Nays: Commissioners Heller

The Motion passed 6-1 with 2 excused.

Petitioner, DPP, and the DOA had no comments. Interim OP Director Souki requested that the Commission continue to be aware of the kinds of agricultural lands were being proposed for IAL designation in future cases.

There being no further business to discuss, Chair Devens adjourned the meeting at 12:17 p.m.