

LAND USE COMMISSION
MEETING MINUTES

October 7, 2011 – 9:30 a.m.

Leiopapa A Kamehameha,
Fourth Floor, Room 405,
235 South Beretania Street, Honolulu, HI 96804

COMMISSIONERS PRESENT: Normand Lezy
Ronald Heller
Napua Makua
Nicholas Teves, Jr
Chad McDonald
Thomas Contrades
Kyle Chock

COMMISSIONERS EXCUSED: Lisa Judge
Ernest Matsumura

STAFF PRESENT: Orlando Davidson, Executive Officer
Diane Erickson, Deputy Attorney General
Bert Saruwatari, Staff Planner
Scott Derrickson, Staff Planner
Riley Hakoda, Staff Planner/Acting Chief Clerk

COURT REPORTER: Holly Hackett

AUDIO TECHNICIAN: Walter Mensching

CALL TO ORDER

Chair Lezy called the meeting to order at 9:34 a.m.

APPROVAL OF MINUTES

Chair Lezy asked if there were any corrections or additions to the September 22, 2011 minutes. There were none. Commissioner Chock moved to approve the minutes.

Commissioner Heller seconded the motion. The minutes were unanimously approved by a voice vote (7-0).

TENTATIVE MEETING SCHEDULE

Executive Officer Davidson provided the following:

- The tentative meeting schedule for the remainder of the calendar year 2011 was distributed in the handout material for the Commissioners.
- Any questions or concerns- please contact LUC staff.

ACTION

A06-771 D.R. HORTON-SCHULER HOMES, LLC., (O`ahu) - Senator Clayton Hee Motion for Reconsideration

Chair Lezy announced that this was an action meeting on A06-771 D.R. HORTON – SCHULER HOMES, LLC to consider: Intervenor Senator Clayton Hee’s Motion for Reconsideration

APPEARANCES

Benjamin Kudo, Esq., represented Petitioner D.R. Horton-Schuler Homes LLC
Cameron Nekota, D.R. Horton-Schuler Homes LLC
Dawn Takeuchi-Apuna, Esq., Deputy Corporate Counsel, represented City and County of Honolulu, Department of Planning and Permitting (DPP)
Randy Hara, City and County of Honolulu, Department of Planning and Permitting
Bryan Yee, Esq., represented State Office of Planning (OP)
Mary Lou Kobayashi, State Office of Planning
Dr. Kioni Dudley, represented Intervenor Friends of Makakilo (FOM)
Tatyana Cerullo, Esq., represented Intervenor The Sierra Club
Eric Seitz, Esq., represented Intervenor Clayton Hee (attended via telephone)
State Senator Clayton Hee

Chair Lezy updated the record and described the procedures for the proceedings. There were no questions or comments regarding the procedures.

Chair Lezy asked if there were any Public Witnesses who wished to give testimony.

PUBLIC WITNESSES

None

PRESENTATIONS

INTERVENOR SENATOR HEE

Mr. Seitz argued the reasons why Senator Hee's Motion for Reconsideration should be granted. Mr. Seitz argued that the Hawaii Administrative Rules and Hawaii Rules of Civil Procedure 60 (b) provided for Senator Hee to intervene in his official capacity as a Senator as well as in his individual capacity; how there was no constitutional infringement generated by Senator Hee's participation in his official capacity; and how the record would be more complete with the benefit of Senator Hee's additional shared information and sentiment regarding important land issues.

PETITIONER

Mr. Kudo stated that Petitioner took no position on the Motion for Reconsideration and expressed concern that if Senator Hee was granted Intervenor status in his official capacity, that his participation in the district boundary amendment proceedings might be interrupted by his legislative responsibilities. Mr. Kudo stated that if Senator Hee could provide assurance that the efficiency and manageability of the proceedings would not be jeopardized, Petitioner would be satisfied.

DPP

Ms. Takeuchi-Apuna argued DPP's reasons why Senator Hee's Motion for Reconsideration should not be granted. Ms. Takeuchi-Apuna expressed the concerns

that admitting Senator Hee as an intervenor in his official capacity would be a violation of the Separation of Powers Doctrine and noted that Senator Will Espero had shared an email from Senate President Shan Tsutsui stating that Senator Hee did not represent the interests of the Hawaii State Senate at a previous hearing on this matter.

OP

Mr. Yee stated that OP took no position on Senator Hee's Motion for Reconsideration and would rest on its pleadings.

INTERVENOR – FOM

Dr. Dudley stated that FOM supported Senator Hee's motion for reconsideration and described the reasons why FOM took that position.

INTERVENOR –THE SIERRA CLUB

Ms. Cuello stated that The Sierra Club supported Senator Hee's motion for reconsideration.

REBUTTAL- SENATOR HEE

Mr. Seitz restated why he felt Senator Hee's participation in his official capacity would not impede the proceedings and described the efforts that Senator Hee had made to cooperate with the LUC and the other Parties.

QUESTIONS

Commissioner Heller asked if there were any evidence or arguments that would be proper for Senator Hee to offer if he were to intervene in his official capacity, but would not be proper for him to offer as an intervening individual.

Mr. Seitz responded that he didn't see any difference or conflict of interest if Senator Hee had two roles, unless there was a Constitutional impediment. Commissioner Heller clarified that what he was seeking was whether or not there was a limitation on what Senator Hee could offer that would exist as an individual that would go away if he were allowed to participate as a Senator. Mr. Seitz replied that he did not believe there was and described his perspective of the matter.

Senator Hee requested and was granted an opportunity to respond. Senator Hee described the reasons why he felt public policy issues of governance had prompted him to appear before the LUC on this matter and why his motion for reconsideration was justified.

Chair Lezy requested clarification on what new issues that the Motion for Reconsideration was attempting to raise and whether, if Senator Hee's intervention role was as an individual versus in his official capacity, his role as an intervenor would be prejudiced in any way. Mr. Seitz provided his perspective of why the Motion for Reconsideration had merit under the circumstances involved and replied that he did not think that Senator Hee's role would be prejudiced and described certain distinctions that might be exceptions. Mr. Seitz also commented on his perception of what Senator Hee's participation in the proceedings would be like.

There were no further questions or discussion.

DECISION MAKING

Commissioner Chock moved to reconsider. Commissioner Teves seconded the motion. Chair Lezy requested clarification on whether Commissioner Chock's Motion was to grant the Motion for Reconsideration. Commissioner Chock acknowledged that it was.

Commissioner Heller commented that he shared the Chair's concern on whether it was proper to have a Motion for Reconsideration when there had been no new evidence or arguments that had not been made previously. Commissioner Heller shared his recollection of events at the prior hearing on this docket and noted that it appeared to him that Senator Hee's decision to participate as an individual at that time was voluntary.

The Commission was polled as follows:

Ayes: Commissioners Chock, Teves, McDonald, and Makua.

Nays: Commissioners Heller, Contrades and Chair Lezy.

Excused: Commissioners Judge, and Matsumura,

The motion failed 4-3 with 2 excused.

A06-771 D.R. HORTON-SCHULER HOMES, LLC. - Hannah Miyamoto Petition for Leave to Intervene

Chair Lezy announced that this was an action meeting on A06-771 D.R. HORTON – SCHULER HOMES, LLC, to consider Hannah Miyamoto’s Petition for Leave to Intervene.

APPEARANCES

Benjamin Kudo, Esq., represented Petitioner D.R. Horton-Schuler Homes LLC
Cameron Nekota, D.R. Horton-Schuler Homes LLC
Dawn Takeuchi-Apuna, Esq., Deputy Corporate Counsel, represented City and County of Honolulu, Department of Planning and Permitting (DPP)
Randy Hara, City and County of Honolulu, Department of Planning and Permitting
Bryan Yee, Esq., represented State Office of Planning (OP)
Mary Lou Kobayashi, State Office of Planning
Dr. Kioni Dudley, represented Intervenor Friends of Makakilo (FOM)
Eric Seitz, Esq., represented Intervenor Senator Clayton Hee (attended via telephone)
Tatyana Cerullo, Esq., represented Intervenor The Sierra Club
Hannah Miyamoto, Petitioner for Leave to Intervene

Chair Lezy updated the record and announced the procedures for the proceedings. There were no questions or comments on the procedures.

Chair Lezy asked if there were any Public Witnesses who wished to give testimony.

PUBLIC WITNESSES

None

PRESENTATIONS FOR LEAVE TO INTERVENE

Petitioner Hannah Miyamoto

Ms. Miyamoto argued the reasons why her Petition for Leave to Intervene should be granted and described her interests in the case; her “good cause” for late filing and why she felt that her intervention should be freely granted based on her perception of timeliness for this proceeding.

PETITIONER

Mr. Kudo stated that Petitioner had no objection to Ms. Miyamoto’s Petition for Leave to Intervene and added that Petitioner would have concerns if Ms. Miyamoto’s participation in the proceedings were hampered by her studies at the University of Hawaii. Mr. Kudo requested that assurances be provided by Ms. Miyamoto that there would be no adverse effect on the efficiency of the hearings.

DPP

Ms. Takeuchi-Apuna stated that DPP had no objection to Ms. Miyamoto’s Petition for Leave to Intervene.

OP

Mr. Yee stated that though the Parties had filed notices either in support or opposition to Ms. Miyamoto’s Petition, he did not feel that a sufficient analytical legal framework had been provided for the Petition and that regardless of what decision was made, the intervention process and the applicable LUC rules involved in determining timeliness and “good cause”; and the various criteria involved in analyzing an LUC petition to intervene, and how it differentiated from Federal court rules needed to be provided to avert future procedural problems.

Mr. Yee stated that OP would defer to the LUC to determine whether or not good cause existed and described what guidelines the LUC should use in considering whether to grant the petition for intervention. Mr. Yee expressed OP’s concerns that the proceedings should not be unduly delayed because of the additional intervention and described how Ms. Miyamoto had already missed the September 26, 2011 deadline for

filings and still needed to submit her exhibits and position statement; and the possible collateral delays that the Parties might experience in responding to Ms. Miyamoto's filings. Mr. Yee added that OP would be opposed to any efforts Ms. Miyamoto might use to disturb the procedural stipulation on evidence and witnesses already in place with the Parties. Mr. Yee again deferred to the LUC to determine whether intervention should be granted based on the facts and evidence of this case.

INTERVENOR – FOM

Dr. Dudley stated that FOM objected to Ms. Miyamoto's Petition for Leave to Intervene and argued why it was untimely and described past misunderstandings that FOM had with Ms. Miyamoto, and how FOM had to struggle to meet the LUC deadlines and conform to the procedural requirements of the case.

INTERVENOR- SENATOR HEE

Mr. Seitz stated that he did not file a position statement but agreed with OP's legal presentation and FOM's position; and described the proper role that he felt Ms. Miyamoto could assume in the case.

INTERVENOR –THE SIERRA CLUB

Ms. Cuello stated that The Sierra Club objected to Ms. Miyamoto's Petition for Leave to Intervene and echoed the comments made by OP, FOM and Mr. Seitz.

REBUTTAL- MS. MIYAMOTO

Ms. Miyamoto stated that she did not expect her academic schedule to interfere with her participation in the proceedings; described her understanding of the definition of "good cause" ;why she was entitled to intervene; why her position was unique; and what her role as a member of The Sierra Club was.

Mr. Yee requested and was granted an opportunity to provide clarification in regards to the citation of LUC rules §15-15-52 (e) used in Ms. Miyamoto's presentation.

There was no further discussion or questions.

DECISION MAKING

Commissioner Chock moved to grant Ms. Miyamoto's Petition for Leave to Intervene. Commissioner Heller seconded the motion for the sake of discussion. Commissioner Chock expressed why he believed Ms. Miyamoto's Petition should be granted. Commissioner Heller noted that though he had seconded the motion, he opposed the motion and described why he felt that it would set a bad precedent for other LUC cases.

There was no further discussion.

The Commission was polled as follows:

Ayes: Commissioners Chock

Nays: Commissioners Heller, Teves, McDonald, Contrades, Makua and Chair Lezy.

Excused: Commissioners Judge, and. Matsumura,

The motion failed 1-6 with 2 excused.

Chair Lezy encouraged Ms. Miyamoto to continue to participate in the process and remain involved and described various alternatives that Ms. Miyamoto could consider. Commissioner Heller commented that he found Ms. Miyamoto's submissions interesting and well-prepared and encouraged her to remain involved as a public witness in the case since she appeared to have a lot to contribute.

Chair Lezy urged the Parties to work together during the case to keep the proceedings as efficient as possible and to contact LUC staff if necessary to do so.

Executive Officer Davidson reminded the Parties and the audience that there would be a site visit of the Petition Area at 1:30 p.m. later in the afternoon and described the logistics involved.

There being no further business, Chair Lezy adjourned the meeting at 10:21 a.m.