

LAND USE COMMISSION  
MEETING MINUTES

**May 3 2012 – 9:30 a.m.**

**Leiopapa A Kamehameha, Conference Room 405, 4th Floor  
235 South Beretania Street, Honolulu, Hawai`i 96804**

COMMISSIONERS PRESENT: Ernest Matsumura  
Chad McDonald  
Thomas Contrades  
Kyle Chock  
Normand Lezy  
Napua Makua  
Ronald Heller

COMMISSIONERS EXCUSED: Lisa Judge  
Nicholas Teves, Jr.

STAFF PRESENT: Bert Saruwatari, Staff Planner/Interim Executive  
Officer  
Sarah Hirakami, Deputy Attorney General  
Scott Derrickson, Staff Planner  
Riley Hakoda, Staff Planner/Chief Clerk

COURT REPORTER: Holly Hackett

AUDIO TECHNICIAN: Walter Mensching

CALL TO ORDER

Chair Lezy called the meeting to order at 9:32 a.m.

APPROVAL OF MINUTES

Chair Lezy asked if there were any corrections or additions to the April 4-5, 2012 minutes. There were none. Commissioner Contrades moved to approve the minutes. Commissioner McDonald seconded the motion. The minutes were unanimously approved by a voice vote (7-0).

## TENTATIVE MEETING SCHEDULE

Interim Executive Officer Saruwatari provided the following:

- The regular tentative meeting schedule for the calendar year 2012 was distributed in the handout material for the Commissioners.
- The May 21-22, 2012 LUC meetings will involve a trip to Maui on the 21<sup>st</sup>, and continued proceedings in Honolulu on the 22<sup>nd</sup>.
- Any questions or concerns- please contact LUC staff.

### DR12-46 James Spencer and Pamela V. Spencer Petition

Chair Lezy announced that this was an action meeting to consider DR12-46, James Spencer and Pamela V. Spencer's Petition for a Declaratory Order providing that the operation of a pet boarding kennel is a permissible use on certain land in the Agricultural District identified as Tax Map Key 9-2-25:047; Kahuku, Ka`ū, Hawai`i.

### APPEARANCES

Roy "Randy" Vitousek III, Esq. and Sean Smith represented Petitioner- James Spencer and Pamela V. Spencer

Ryan Kanakaole, Esq., Deputy Corporate Counsel, represented County of Hawai`i Planning Department (County)

Bryan Yee, Esq., represented State Office of Planning (OP)

Rodney Funakoshi, OP

Chair Lezy updated the record and asked if the Petitioner had been advised and was agreeable to the LUC reimbursement policy. Mr. Vitousek replied that he had been made aware of the policy and requested that the Petitioners be excused from paying the reimbursement expenses and described why he decided to handle the case pro bono. Discussion ensued to describe the LUC policy regarding reimbursements and what the amount of the Petitioner's expenses might be. Chair Lezy stated that it was the Commission's expectation that Petitioner would be responsible for reimbursement and Mr. Vitousek acknowledged that Petitioners would abide by the LUC reimbursement policy.

Chair Lezy described the procedures to be followed for the hearing and announced that public testimony would taken.

There were no questions, comments or objections to the procedures.

### PUBLIC WITNESSES

None

## PRESENTATION OF EXHIBITS

Petitioner

Mr. Vitousek requested clarification on why Hawai`i County had a representative present and stated that he was not aware that the County was a party to the proceedings. Discussion ensued to explain how LUC proceedings for declaratory orders were routinely handled and why representatives of the County and the State Office of Planning were present. Chair Lezy asked if Mr. Vitousek objected to the County participating in the hearing. Mr. Vitousek stated that he objected to the County appearing as a Party without making a formal request to be a Party to the proceedings and asked that County be limited to public testimony. Chair Lezy noted the objection and clarified how the County would be allowed to participate.

Mr. Vitousek offered Petitioner's Exhibits "A"-"H" to be accepted for the record and also offered and provided a brief description of the contents of Exhibit "I" that he served to the Commission, Hawai`i County and OP before his presentation.

There were no objections to accepting Petitioner's exhibits. Mr. Yee requested and was granted the right to possibly argue that additional time may be needed to consider any additional arguments not previously raised due to lack of time to review Exhibit "I".

Hawai`i County and OP had no exhibits.

## PETITIONER PRESENTATION

Mr. Vitousek described how the Petition evolved and recounted the interaction that he had with County agencies; and recapped the events and details that motivated him to seek a statutory interpretation from the Commission; and argued why the Petition should be granted.

Chair Lezy shared his understanding of how this appeal was pending at the County Board of Appeals and inquired whether the County Planning Director had indicated how the Commission's decision on this matter would influence the Board's decision-making. Mr. Vitousek responded with his perception of what he and the Planning Director had agreed to, and stated that he would withdraw his appeal if the Petition were denied and described his alternate plans of action against the County.

*(Please refer to LUC Transcript for more details on this matters)*

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Chair Lezy requested clarification on whether or not past practices were demonstrated to Petitioner to support the Planning Director's April 13, 2012 letter's references to consistencies with Commission policies on Special Permits. Mr. Vitousek replied that past practices had not been demonstrated and no written policy had been produced; and argued how zoning codes appeared to "expressly permit" the type of activity that the Petitioner was engaged in.

## COMMENTS

### Hawai'i County

Mr. Kanakaole referred to Petitioner's Exhibits "D", "F" and "H" and stated that the County rested on its comments and written correspondence.

Commissioner Heller asked if County agreed with Mr. Vitousek's characterization of the County zoning code and whether a Special Permit could be obtained and whether it would be burdensome to get one. Mr. Kanakaole responded that he agreed with the characterization and that no application for a Special Permit had been made yet; and that he did not feel it would be burdensome to obtain one.

Chair Lezy noted that he could not recall an instance where the County had deferred to the State for decision-making and asked why this case was being brought to the Commission and if the County's policy was memorialized anywhere. Mr. Kanakaole responded that it was his understanding that the County's policy was to require Special Permits for commercial kennels on State agriculturally designated lands and that the Planning Director would be the person to respond to questions regarding this matter. Mr. Kanakaole also stated that he could not specify any past practice to support the County's policy.

### OP

Mr. Yee stated that OP agreed that the primary question lay with the definitions of "animal husbandry" and "raising livestock"; and described the statutory provisions and dictionary definitions and terms that he felt supported OP's position against granting the motion.

Commissioner Heller requested clarification on how Mr. Yee interpreted HRS 205-2 and 205-4.5(a) and to what statutory rule he expected the Commission to use when considering matters. Mr. Yee described his perception of how the various terms

described in the statute were defined and what considerations were used to form the basis of OP's docket position for the Commission to consider.

Commissioner Contrades asked if the use of the facility as a commercial enterprise made any difference in how OP evaluated the situation. Mr. Yee responded that it did not appear that the statutes made a distinction between commercial or personal use of the facility.

Chair Lezy asked if it was curious to OP that the County was taking the position that it had. Mr. Yee provided his perspective of how the County might have taken its position based on a possible conflict between a statute and an ordinance and stated that he did not have an answer. Chair Lezy also inquired if Mr. Yee thought that the Commission's granting the Petition in this matter might result in setting a precedent or bind the Commission in future matters. Discussion ensued to determine how the Petition might be specifically binding to the Petitioner and how different courts might consider an LUC decision to grant the Petition; and to clarify the stated interpretations of different sections of HRS 205.

#### REBUTTAL

Mr. Vitousek provided his interpretation of how commercial use was defined by the Hawai'i County zoning code and described how the kennel use conformed to permit requirements; and clarified how portions of Hawai'i County Code section 25-5-72 specified what "permitted uses" were allowed in the agricultural district.

Mr. Vitousek also provided clarification on how the term "livestock" could be interpreted to include many varieties of domesticated animals; and why ambiguities in the law should favor the "free and unrestricted use of the land" for the landowner.

Mr. Vitousek described how Chair Lezy's questions regarding the Commission's authority relative to HRS 205 supported the Petition and stated that the Petitioner had demonstrated reasonable cause for the Commission to make a determination in this matter.

Mr. Yee stated that Mr. Vitousek had raised a new argument about HRS 205-4.5 (c) that he would like to respond to. Chair Lezy granted Mr. Yee permission to provide clarification on how HRS 205-4.5 (c) provided for a special permit in a specific circumstance.

Commissioner Heller requested clarification on whether the Parties thought that further evidentiary hearing on this matter was necessary. None of the Parties asked for a further evidentiary hearing.

There were no further questions or comments.

Chair Lezy stated that “according to the Commission's administrative rules, section 15-15-100, within 90 days after receipt of a petition for declaratory order, the Commission shall either deny the petition in writing stating the reasons for the denial, issue a declaratory order, OR set the matter for hearing as provided in section 15-15-103 of the Commission rules. In addition, section 15-15-102 of the Commission rules provided that the Commission, for good cause, may refuse to issue a declaratory order by giving specific reasons”.

Chair Lezy made a motion to grant the Petition for discussion purposes. Commissioner McDonald seconded the motion and stated why he agreed that the current use of the property was compatible.

Commissioner Contrades stated that he agreed with Chair Lezy and Commissioner McDonald and commented that he felt that the Commission should not be involved with issues that appear to be County's responsibility.

Commissioner Heller stated that he did not have a problem with the motion and wished to include that the Commission was not making any decisions to set a precedent or making a ruling that raising dogs or cats was an agricultural activity that would qualify a dwelling as a farm dwelling. Chair Lezy stated that he would accept Commissioner Heller's suggestion as a friendly amendment that the motion was not intended to set a precedent and was limited to the specific facts of the case. Chair Lezy added that he echoed Commissioner Contrades' comment regarding the County's responsibilities in this matter and asked that the Commission be polled. Commissioner McDonald did not object to the friendly amendment.

The Commission voted as follows:

Ayes: Chair Lezy, Commissioners Matsumura, Contrades, Makua, Heller and Chock.

Nays: None

The motion passed 7-0 with 2 excused.

The Commission went into recess at 10:38 a.m. and reconvened at 10:45 a.m.

A99-718 Housing and Community Development Corporation of Hawai`i (Oahu)  
Department of Hawai`ian Home Lands

Chair Lezy stated that Commissioner Contrades had a disclosure to make. Commissioner Contrades disclosed that he was President of a non-profit organization that did business with the Department of Hawai`ian Home Lands. There were no objections or comments regarding Commissioner Contrades's disclosure.

Chair Lezy announced that this was an action meeting on A99-728 Housing and Community Development Corporation of Hawai`i (HCDCH) to consider Petitioner, The State of Hawai`i Department of Hawaiian Home Lands' ("DHHL") Motion for Order amending the Findings of Fact, Conclusions of Law, and Decision and Order Dated September 8, 1999 to:

- 1) Recognize DHHL's standing to seek and obtain the relief requested by Petition
- 2) Re-designate a new docket (A99-728 (c)), covering that portion of the Petition Area identified as Tax Map Key No. (1) 9-1-016:142 comprising approximately 67.184 acres of land (Petition Area "C" or the Subject Property) separate and apart from the remaining 715 acres reclassified under Docket No. A99-728
- 3) Release the Petition Area "C" from the conditions of the 1999 Decision and Order and
- 4) Issue a new Findings of Fact, Conclusions of Law, and Decision and Order for the subject property.

Commissioner Makua announced that she also had a disclosure to make and stated that she was a homesteader on DHHL land and served on her community board. There were no objections or comments on Commissioner Makua's disclosure.

APPEARANCES

Craig Iha, Esq., and Matt Devanche, Esq., represented DHHL  
Alapaki Nahale`a, DHHL

Collette Honda, Esq. represented HCDCH (until 10:40 a.m.)

Sandra Ching, Esq. represented HCDCH (from 10:40 a.m.)

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

Tim Hata, Department of Planning and Permitting

Bryan Yee, Esq., represented State Office of Planning (OP)

*(Please refer to LUC Transcript for more details on this matters)*

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Rodney Funakoshi, OP

Chair Lezy updated the record and described the procedures to be followed for the hearing. . There were no comments or objections to the procedures and Chair Lezy announced that public testimony would taken.

#### PUBLIC WITNESSES

1. Glenn Oamilda-

Mr. Omilda stated his cultural organizational affiliations and described his concerns about the treatment of cultural/historic sites in the Petition Area; and what methods of site mitigation he thought should be included in the conditions for the Petition.

There were no questions for Mr. Oamilda.

2. Grace Furukawa

Ms. Furukawa submitted written correspondence and stated that she was a member of the Hawai`i Coalition Against Gambling and described why her organization was suggesting that a condition prohibiting gambling in the Petition Area should be included in the decision and order.

There were no questions for Ms. Furukawa.

3. Dr. Kioni Dudley

Dr. Dudley submitted written testimony and described his concerns about the Petition and what his perception of the future for the Petition Area could be; and how it might be achieved by "land swapping".

There were no questions for Dr. Dudley.

4. Victoria Cannon

Ms. Cannon described her concerns about the Petition and suggested that particular attention be paid to infrastructure issues related to the Petition Area.

There were no questions for Ms. Cannon.

#### MAP ORIENTATION

LUC Staff Planner Scott Derrickson provided a map orientation of the Petition Area for the Commission. There were no questions or comments about the map orientation.

#### PUBLIC WITNESSES (continued)

Chair Lezy recognized a member of the public that wished to make Public Testimony.

5. Benjamin Sadowski

Mr. Sadowski stated that he represented Unite Here Local 5 and read his submitted testimony describing his organization's concerns and various

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conditions and considerations that it wished the Commission would consider during its assessment of the proposed Petition.

There were no questions for Mr. Sadowski.

There were no other Public Witnesses.

#### ADMISSION OF EXHIBITS-

##### Petitioner

Mr. Iha offered Petitioner's exhibits "1"- "4" for the record

There were no objections to Petitioner's exhibits.

##### HCDCH

Ms. Honda had no exhibits to offer.

##### DPP

Mr. Kitaoka offered DPP's exhibit "A" for the record.

There were no objections to DPP's exhibits.

##### OP

Mr. Yee offered exhibits "1"- "8" and stated that due to an error while duplicating the documents, he would be withdrawing the exhibit "5": that was a duplicate of exhibit "1" and that the intended exhibit (a letter from the DOT) would be submitted later.

There were no objections to OP's exhibits and to the later submittal of the missing exhibit.

#### PRESENTATIONS

##### Petitioner

Mr. Iha introduced members of the proposed project team and described the DHHL's mission and its future plans for the Petition Area; why the Petition had been brought before the Commission; and what alternatives were being considered for financing and implementing the proposed project.

Chair Lezy requested clarification on why Mr. Iha was requesting that the hearing be continued so that a stipulation could be attained amongst the Parties. Mr.

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Iha responded that the Parties had been working closely with each other and that he expected that stipulations could be reached on most terms and conditions soon. Discussion ensued to determine how close to agreement the Parties were and whether it would be more efficient to complete the stipulation portion of the Petition before moving forward.

Chair Lezy suggested that the Parties continue working on the Petition and advise the Commission when they were ready to continue this matter. There were no objections to Chair Lezy's suggestion and the Parties agreed to continue working on the stipulations and to reschedule the docket with the Commission when they were ready to proceed.

#### APPEARANCE

Ms. Sandra Ching stated that she was representing HCDCH in place of Ms. Honda. Chair Lezy acknowledged Ms. Ching and noted Ms. Honda's departure.

#### PRESENTATIONS (Continued)

Mr. Kitaoka stated that he had no objections to continuing the hearing pending efforts to see if a stipulated decision and order could be reached.

Mr. Yee stated that he had no objections to continuing the hearing; and verified that almost all issues had been stipulated to.

Chair Lezy asked if Mr. Iha had an estimate of the amount of time before DHHL would be approaching the LUC. Mr. Yee commented that the market study for the proposed project had just been received and was still under review. Discussion ensued to determine what still needed to be addressed and Chair Lezy proposed that this docket matter be continued and that DHHL remain in contact with LUC staff regarding the timing of its submissions and scheduling its next appearance before the Commission. There were no questions or comments regarding Chair Lezy's proposal.

There was no further business to consider on this docket matter and Chair Lezy dismissed the Parties.

Chair Lezy entertained a motion for Executive Session. Commissioner Heller moved for an Executive Session. Commissioner Chock seconded the motion. By a voice vote of 7-0, the Commission exited to enter into Executive Session at 11:35 a.m. and reconvened at 12:07 p.m. Chair Lezy adjourned the LUC meeting at that time.