

LAND USE COMMISSION
MEETING MINUTES

October 5, 2012 – 9:00 a.m.

Marriott Courtyard Hotel,
Haleakalā Room, 532 Keolani Place,
Kahului, Maui, Hawai`i, 96732

COMMISSIONERS PRESENT: Lance Inouye
Sheldon Biga
Ronald Heller
Ernest Matsumura
Thomas Contrades

COMMISSIONERS EXCUSED: Napua Makua
Nicholas Teves, Jr.
Kyle Chock
Chad McDonald

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

COURT REPORTER: Holly Hackett

AUDIO TECHNICIAN: Walter Mensching

CALL TO ORDER

Vice Chair Heller called the meeting to order at 9:00 a.m. and stated that the proceedings would resume with the questioning of Mr. Lee by Petitioner.

CONTINUED HEARING

**A12-795 WEST MAUI LAND COMPANY, INC- KAHOMA RESIDENTIAL
LLC (Maui)**

Intervenor Bolomet Witness Michael Lee
Questions for Michael Lee

Petitioner

Mr. Geiger requested clarification on the number of visits that Mr. Lee had made to the Petition Area and on various physical and cultural features located within it; and on findings made in the Petition Area that disagreed with statements made by Petitioner Witness Rory Frampton. Mr. Lee stated that he had been to the Petition Area 8 times and described what he had perceived during his visits.

Discussion about Petitioner's Exhibit 41 occurred and Mr. Geiger offered it to the Commission. Intervenors Lincoln and Bolomet were unable to locate their copies of the exhibit and Vice Chair Heller allowed Mr. Geiger to use the map to continue his questions while Ms. Lincoln and Ms. Bolomet searched for their copies to expedite the proceedings. Mr. Lee identified various features on the map and stated why he disagreed with Figure 4 and the location of features identified by Mr. Frampton and described how cultural items had been overlooked.

Mr. Geiger also asked if Mr. Lee agreed with the testimony of Mr. Hobdy regarding *pueo* in the area and Mr. Lee replied that he disagreed with Mr. Hobdy's findings and explained why.

Mr. Geiger had no further questions.

County

Mr. Giroux requested clarification on the extent of Mr. Lee's cultural practices in the Petition Area. Mr. Lee expressed how it was difficult to isolate and confine his practice to just the Petition Area and described how his practice encompassed the entire region since there were many inter-related items that spanned from the mountain to the sea with interactions between the natural elements within that range while referring to photographs of the Petition Area posted on a poster board behind him.

Mr. Lee also described the negative impacts that he felt the proposed project and development in the area would have on his cultural practice; and what cumulative effects the stormwater/drainage runoff would have on water sources in the Petition Area.

Mr. Giroux requested further clarification on cultural/religious practices that occurred in the Petition Area. Mr. Lee shared his familiarity with the Petition Area growing up and what his family's experiences and cultural/religious practices were.

There were no further questions.

OP

Mr. Yee requested clarification on whether or not the photographs and maps used during Mr. Lee's questioning had been submitted as exhibits. Discussion ensued to determine the source of the photographs and maps. It was determined that the Public Works maps had been submitted at the August 23-24, 2012 meeting in Lāhainā, and Ms. Bolomet described how she had utilized internet links to add to her submissions. Mr. Yee was satisfied with the source documents for the exhibits.

Mr. Yee also requested clarification on the karst system and the native burials that Mr. Lee had described during his testimony. Mr. Lee shared how he had advised Ms. Bolomet to investigate her historical family ties to the Petition Area and provided further details about the karst system and burial claims that were part of his testimony.

There were no further questions from Mr. Yee.

Intervenor Lincoln

Ms. Lincoln requested clarification on what should be done to protect the *pueo* in the Petition Area. Discussion ensued regarding testimony about *pueo* in the Petition Area. Vice Chair Heller urged Ms. Lincoln to question the witness and not provide testimony and determined that the questioning had become cumulative.

Ms. Lincoln had no further questions.

Redirect

Ms. Bolomet requested clarification on what Mr. Lee's perception of expert witnesses was and how expert witnesses differed from Hawaiian cultural practitioners. Mr. Lee provided his perspective on the differences and described how religion factored into cultural practitioners.

Ms. Bolomet requested clarification on whether or not Mr. Lee understood Petitioner's Exhibit 41 and how it was applied to questioning his testimony. Mr. Lee responded that he grasped what Mr. Geiger had presented to him and had no questions about the exhibit. Discussion ensued on whether Exhibit 41 should be offered for the record. Ms. Bolomet stated that she had not had a chance to review the exhibit. Mr. Geiger stated that the exhibit had been received by the Commission on October 4, 2012 and that he had presented the document to the Parties shortly thereafter. Vice Chair Heller suggested that Ms. Bolomet review the map during the upcoming recess and stated that the offer of Exhibit 41 would be addressed during the rebuttal portion of the proceedings.

Ms. Bolomet asked Mr. Lee to identify features in portions of Exhibit 41 and verify where they were located relative to her family's property; and how a karst system could develop in bedrock; and whether houses should be built in the Petition Area. Mr. Lee provided his understanding of the area features in the exhibit and described how he thought the karst system evolved over the ages.

Mr. Lee also referred to Clare Apana's public witness exhibits to indicate where he thought a pipe system existed in the Petition Area and shared his opinion on how it had been used in the past; and stated that it would depend on how effective mitigation measures were in reducing the impact of new housing to the environment and on cultural practices. Discussion ensued over the propriety of Ms. Bolomet's questions about Western law. Vice Chair Heller determined that Ms. Bolomet's questions were not relevant to the proceedings.

Ms. Bolomet requested clarification on the events that occurred during a Petition Area visit where Ms. Apana discovered a "base stone". Mr. Lee recollected what occurred when Ms. Apana made her discovery and what accommodations should be used to respect the location of culturally significant stones in the Petition Area. Discussion ensued regarding Ms. Bolomet's questioning technique and her continued introduction of testimony and going off point as she posed questions. Vice Chair Heller urged Ms. Bolomet to discontinue her practice of testifying while asking questions and described what the purpose of redirect questions were for her benefit.

Mr. Lee noted that a long-term cumulative study would be needed to determine what should be done to deal with the culturally significant items in the Petition Area. Discussion again occurred over Ms. Bolomet's questioning technique. Vice Chair again urged Ms. Bolomet to ask questions and not inject testimony.

Ms. Bolomet requested clarification on the cultural significance of *āumākua*. Mr. Lee provided his understanding of the role that *āumākua* played in Hawaiian culture.

Ms. Bolomet had no further questions.

The commission went into recess at 10:26 a.m. and reconvened at 10: 42 a.m.

Vice Chair Heller confirmed that Ms. Bolomet had no further questions for Mr. Lee; and asked if the Parties had any more question. The Parties responded that they had no further questions.

Commissioner Questions

Vice Chair Heller requested clarification on how water quality for Māla Bay could be affected by the five ahupua`a that were connected to it and also by urban development in the area. Mr. Lee described how certain streams connecting to the bay worried him; and also how the cumulative impacts from the waters running into Māla Bay concerned him and why mitigation measures were necessary for areas even outside of the Petition Area to remedy the current conditions.

Commissioner Biga requested clarification on the connection between the shoreline areas of Mākila and Kahoma. Mr. Lee described how the two areas shared water resources from the land above them; and how the water resources contributed to the shoreline environment. Commissioner Biga also requested clarification on Mr. Dega's reference to the Mākila/Kahoma area in his testimony. Mr. Lee provided his perception of why Mr. Dega's study used tax map keys that extended past the immediate Petition Area.

Commissioner Inouye requested clarification on what Mr. Lee felt was needed to address his concerns about the proposed project. Mr. Lee described how mitigation for issues that he had raised needed to be done and that the libation stone that he had identified in the Petition Area should be surrounded by a park. Mr. Lee also expressed how pollution controls or a long term study of the area might help alleviate his concerns.

There were no further questions from the Commissioners.

Vice Chair Heller asked if Ms. Bolomet had finished her presentation. Ms. Bolomet confirmed that she had.

Mr. Geiger stated that he had Mr. Frampton as a rebuttal witness to conclude his presentation. Discussion ensued to determine when Petitioner's Exhibit 41 would be offered to the Commission. Mr. Geiger stated that he planned to offer it during the rebuttal witness portion of his presentation. Vice Chair Heller acknowledged Mr. Geiger's comment.

Petitioner's Rebuttal Witness

Rory Frampton

Mr. Geiger offered the written rebuttal of Mr. Frampton with its two attached exhibits (Petitioner's Exhibit 37 and 38). County, OP, and Intervenor Lincoln had no objection to the exhibits. Ms. Bolomet stated

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

that she objected to the exhibits and argued why they should not be admitted. Discussion ensued and Ms. Bolomet described how the proposed exhibits conflicted with the public works map's description of pipes located in the Petition Area and with information she had obtained from Maui County engineers about the existing area's infrastructure. Vice Chair Heller described questions that Ms. Bolomet could consider asking to resolve her concerns about the photographs and stated that he was inclined to accept the exhibit. Ms. Bolomet argued that she felt that the photographs were not an accurate representation of the pipe infrastructure in the Petition Area. Vice Chair Heller noted Ms. Bolomet's concerns and stated that he would admit the written testimony and the exhibits.

Mr. Frampton described how he investigated Intervenor Bolomet's claims about a previously existing irrigation system and heiau in the Petition Area; and recapped his efforts to determine the accuracy of the claims.

Discussion occurred regarding the use of a map which had not been introduced into evidence. Mr. Frampton determined that he could continue his presentation without using the map and described the activities that occurred during the site visits to investigate locations where Mr. Lee had indicated where he thought burials existed. Mr. Frampton described how his team had conducted its field investigation and how a SHPD representative was present to observe and confirm that there were no findings.

Mr. Geiger offered Exhibit 41 to the Commission. County, OP, and Intervenor Lincoln had no objections.

Ms. Bolomet argued that the exhibit was incomplete and contained inaccurate information. Vice Chair Heller offered Ms. Bolomet the opportunity to voir dire Mr. Frampton about the circumstances under which the photographs were taken. Ms. Bolomet accepted Vice Chair

Heller's offer and extensively questioned Mr. Frampton about the photographs and what they represented, how and why they were taken, and what significance the photographs had relating to his previous testimony. Discussions occurred several times during the questioning to have Ms. Bolomet properly utilize questions to obtain information about the photographs and avoid argumentative or cumulative testimony when asking them. Ms. Bolomet was repeatedly urged to remain on point and not argue her points during this portion of the proceedings. At the conclusion of her questioning, Ms. Bolomet stated that she did not know

what else to do and repeated that she still objected to the exhibit based on her argument. Vice Chair Heller offer Ms. Bolomet an opportunity to add to the basis of her objection and Ms. Bolomet responded that she thought that the exhibit only reflected one side of what was being shown and not the whole story of what the exhibit represented. Vice Chair Heller determined that the exhibit would be admitted over the objection of Ms. Bolomet.

Mr. Frampton completed his summary of his report for the Commission and described how the “no findings” result of his investigation for a *heiau* was determined; and how attention had then focused on a single boulder in the Petition Area and that he was not able to find any evidence that indicated the area contained any *`iwi*. Mr. Frampton stated that his investigation was done realizing the seriousness of the culturally sensitive matters to provide proof for the record and that the exhaustive measures had been taken to investigate the claims made to assure that they had no basis.

Mr. Frampton also described what the proposed project was going to do to address water quality. Discussion ensued over Mr. Frampton’s ability to comment on water quality and Vice Chair Heller requested that Mr. Geiger repeat his question. Mr. Frampton provided his understanding of what efforts had been made to assure that proper water quality for the proposed project could be provided and maintained. Mr. Frampton also provided details of how runoff and drainage needs for the proposed project had been assessed and evaluated; and what infrastructure design features and measures were selected to assure that all existing agency standards were met.

County

Mr. Giroux had no questions.

OP

Mr. Yee requested clarification on whether the Kahoma area described by Mr. Dega was off the Petition Area. Mr. Frampton responded that he, not Mr. Dega, had made that conclusion after examining the landmarks in and around the Petition Area and comparing various existing surface features against those depicted on two area maps. Mr. Frampton described the methodology involved in making his conclusion.

Mr. Yee requested clarification on what findings and determinations were made regarding rock formations in the Petition Area. Mr. Frampton reported what assessment had been made for the rocks in

the Petition Area and stated that there was correspondence from SHPD stating that no additional archaeological work needed to be done.

Mr. Yee had no further questions.

Intervenor Lincoln

Ms. Lincoln requested clarification on what measures would be taken to control mosquitoes in the drain basin area to protect public health. Mr. Frampton described how the limited rainfall water in the area was expected to percolate into the soil and responded that the Petitioner would consider investigating whether or not measures needed to be taken for potential mosquito infestation in the management plan for the drainage basin.

Ms. Lincoln also requested clarification on Petitioner's Exhibit 37. Mr. Frampton identified various features captured on the photograph and described how he had determined the location of telephone pole #6.

Intervenor Bolomet

Ms. Bolomet requested clarification on the age of the various reference materials used for his report. Mr. Frampton provided the dates associated with the maps and surveys that he used.

Ms. Bolomet continued questioning Mr. Frampton on his references and discussion occurred several times on Ms. Bolomet's questioning technique. Vice Chair Heller repeatedly urged Ms. Bolomet to ask pertinent questions and avoid being argumentative and cumulative.

Ms. Bolomet responded that she had completed her questions regarding the map and survey references used by Mr. Frampton and still had other areas that she would be addressing.

The Commission went into recess at 12:07 p.m. and reconvened at 12:18 p.m.

Continued Questioning of Frampton by Bolomet.

Ms. Bolomet extensively questioned Mr. Frampton on the Exhibit 41 photographs and on various portions of his testimony to clarify her understanding of its content. Mr. Frampton provided the details associated with the exhibit photographs and described how the markings on the stones captured in the photograph came about and provided his recollection of the events associated with the investigation of the alleged burial sites. Discussion occurred intermittently during the questioning regarding Ms. Bolomet's questioning technique and Vice Chair Heller

reminded Ms. Bolomet to ask questions and refrain from being argumentative, repetitive and cumulative.

Further discussion occurred regarding how burial searches were conducted and what SHPD/burial council involvement occurred. Mr. Yee expressed how Ms. Bolomet's questions were not relevant to the proceedings. Ms. Bolomet argued why she felt she needed to ask the questions and asked for guidance on the matter. Vice Chair Heller described the procedural alternatives that Ms. Bolomet had and described what the purpose of rebuttal was and what questions were appropriate during this phase of the proceedings; and what should be included in preparing for her arguments later.

Ms. Bolomet requested clarification on the alleged irrigation pipe system in the Petition Area and Mr. Frampton provided his observations and knowledge of the system.

Discussion occurred over the repetitive nature of Ms. Bolomet's questions. Vice Chair Heller requested that the questions be focused on the rebuttal testimony only. Mr. Frampton detailed how he had determined that no water source for an irrigation system currently served the Petition Area and what was necessary to supply water to it.

Discussion occurred on whether the questions should have been directed to Mr. Lee instead of Mr. Frampton. Ms. Bolomet responded that she may have the testimonies confused and attempted to refocus her question. Vice Chair Heller noted that Ms. Bolomet had repeatedly asked the same question and asked her to move on.

Ms. Bolomet requested clarification on what mitigation efforts to protect Māla Bay were going to be pursued by the Petitioner. Mr. Frampton described what mitigation measures were planned.

Ms. Bolomet had no further questions.

Vice Chair Heller asked if the Parties had any recross and all Parties responded that they did not.

Commissioner Questions

Commissioner Inouye requested clarification on the location of the alleged libation stone on the Petition Area. Mr. Frampton referred to the subdivision map and stated that it was near lot 56.

Vice Chair Heller requested clarification on whether the Petitioner could provide the Commission with the expected correspondence from SHPD after the latest *heiau* search confirming that no further action was

required. Mr. Geiger responded that the letter would be provided to complete the record.

CONCLUSION OF EVIDENCE

Vice Chair Heller declared that the evidentiary portion of this proceeding had been completed, subject to the receipt of various follow-up reports and/or answers that may have been requested during the course of this hearing; and directed that the parties draft their individual proposed findings of fact, conclusions of law and decision and order based upon the record in this docket and serve the same upon each other and the Commission. Vice Chair Heller added that the proposed findings of fact must reference the witness as well as the date, page and line numbers of the transcripts to identify facts; and that in addition to the transcript, the exhibits in evidence should also be referenced. The Parties were advised to contact Holly Hackett, court reporter, to arrange for copies of transcripts.

Vice Chair Heller noted for the parties that the Commission had standard conditions, which the parties should consider in preparing their proposed orders and that a copy of the standard conditions could be obtained from Commission staff; and added that should any of the parties desire to stipulate to any portion or all of the findings of fact, conclusions of law and decision and order, they were encouraged to do so; and regardless of whether the parties pursue a partial or fully stipulated order, each party should file its proposal with the Commission and serve copies on the other parties no later than the close of business on October 31, 2012. All comments or objections to the parties' respective proposals should be filed with the Commission and served upon the other parties no later than the close of business on November 14, 2012; and any responses to the objections must be filed with the Commission and service on the other parties no later than the close of business on November 21, 2012.

Vice Chair Heller advised the parties to consult with staff early in the process to ensure that technical and non-substantive formatting protocols observed by the Commission are adhered to and all arguments would be scheduled after receipt of the parties' respective filings.

Vice Chair Heller asked if there were any questions with respect to the post-hearing procedures. Mr. Yee requested that OP be waived from the submission requirements for a Decision and Order on October 31, 2012, and offered that OP would be submitting comments or objections on November 14, 2012 due to anticipated agreement with almost all provisions of the Decision and Order with Petitioner. There were no objections to Mr. Yee's request.

Mr. Yee also suggested a time limit for oral argument. Vice Chair Heller agreed and asked the parties to try to limit arguments to 15 or 20 minutes, with a limit of 25 minutes maximum per presentation. Ms. Bolomet requested clarification on what the Commission's expectations were of her during the upcoming proceedings and Vice Chair Heller detailed what was expected of Ms. Bolomet's future appearances for the remainder of the proceedings.

Ms. Lincoln requested clarification on what accommodations could be made for her in her preparation for oral arguments. Vice Chair Heller described the expectations that she assumed when she intervened in the proceedings and what conformance to Commission rules were involved.

There were no further questions.

Vice Chair Heller stated that the agenda included discussion on proposed administrative rule amendments and queried the audience to determine if anyone wanted to testify on that item. There were no responses to his call to testify.

Commissioner Biga moved to adjourn, Commissioner Inouye seconded the motion. By a unanimous voice vote (5-0) the Commission voted to adjourn the meeting at 2:04 p.m.