

LAND USE COMMISSION
MEETING MINUTES

May 16, 2014 – 9:30 a.m.

Airport Conference Center
400 Rodgers Blvd. Suite 700, Room #3
(In Hawaiian Airlines Terminal Building)
Honolulu, HI 96819

COMMISSIONERS PRESENT: Sheldon Biga
Ernest Matsumura
Dennis Esaki
Chad McDonald
Carol Torigoe
Ronald Heller
Aaron Mahi
Kyle Chock (arrived at 9:57 a.m.)

COMMISSIONERS EXCUSED: Lance Inouye

STAFF PRESENT: Daniel Orodener, Executive Officer
Diane Erickson, Deputy Attorney General
Bert Saruwatari, Staff Planner
Riley Hakoda, Staff Planner/Chief Clerk

COURT REPORTER: Holly Hackett

AUDIO TECHNICIAN: Walter Mensching

CALL TO ORDER

Chair Heller called the meeting to order at 9:35 a.m.

APPROVAL OF MINUTES

Chair Heller asked if there were any corrections or additions to the January 23, 2014 minutes. There were none. Commissioner Biga moved to approve the minutes. Commissioner Esaki seconded the motion. The minutes were unanimously approved by a voice vote (7-0).

TENTATIVE MEETING SCHEDULE

Executive Officer Orodener provided the following:

- The regular tentative meeting schedule has been distributed in the handout material for the Commissioners.
- Next hearing is planned for June 25-26, 2014 for A83-610 Kamehameha Schools.
- July 9-10, 2014 is planned for Commissioner training and the LUC aloha/mahalo ceremony. It may be necessary to have “working lunches” to complete all the planned activity for both days.
- July 23-24 is planned for the Kaua`i Community College docket on the tentative calendar.
- Any questions or conflicts, please contact LUC staff.

There were no questions or comments regarding the tentative meeting schedule.

ACTION

A76-418 KIAHUNA MAUKA PARTNERS LLC (Kaua`i)

To Consider Request to Withdraw Petitioner’s Motion to Delete Condition Nos. 5 and 7-12 of Decision and Order

Chair Heller stated that this was an action meeting to Consider Petitioner’s Request to Withdraw Petitioner’s Motion to Delete Condition Nos. 5 and 7-12 of Decision and Order

APPEARANCES

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

Rodney Funakoshi, OP

(Petitioner’s Representative, Walton Hong, Esq. notified the Commission via letter on May 12, 2014 that Kiahuna Mauka Partners LLC would not be appearing; and Kaua`i County Planning Department (“KCPD”) -Ian Jung, Esq. Deputy Corporation Counsel, via letter advised the Commission on May 15, 2014 that KCPD would not be appearing.)

Chair Heller updated the record, described the procedures for hearing this request, and called for public witnesses.

Commissioner Esaki disclosed that he had performed work for the Petitioner and recused himself from the proceedings in this docket item.

PUBLIC WITNESSES

None

Chair Heller asked if there were any representatives of the other Parties involved in this docket present who would like to comment on the proceedings. There were none.

Chair Heller asked if OP had any comments regarding Petitioner's request to withdraw. Mr. Yee responded that OP had no opposition to the request, and added that OP had a discussion with Mr. Hong and had offered him the option to re-file his motion; and that OP would be available to render assistance with crafting future petitions and assist his efforts if need be.

There were no further comments or discussion.

Commissioner McDonald moved and Commissioner Matsumura seconded the motion to grant Petitioner's request to withdraw its motion. There was no discussion. The Commission voted unanimously (6-0 with 1 recused) to grant the motion.

Chair Heller moved on to the next agenda item.

SP09-403 DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU (WAIMANĀLO GULCH SANITARY LANDFILL), (O`ahu)

APPEARANCES

Dana Viola, Esq., represented City and County of Honolulu, Department of Environmental Services ("ENV")

Lori Kahikina, Director, ENV

Richard Wurdeman, Esq., represented Intervenor Colleen Hanabusa, who was present
Calvert Chipchase, Esq., represented Intervenors-the Ko Olina Community Association (KOCA)
and Senator Maile Shimabukuro

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

Rodney Funakoshi, OP

Chair Heller updated the record, described the procedures to be followed for the hearing, and reminded the audience that the Commission would not be considering the merits of the Special Use Permit No. 2008/SUP-2 petition; but rather, the Commission was interested in learning what the current state of the proceedings related to this Special Permit pending before the Department of Environmental Services and the Honolulu Planning Commission was.

Chair Heller stated that Public Testimony in regards to this report would be heard after the Commission's question and answer period, and that the intervenors Colleen Hanabusa, and

Ko Olina Community Association and Senator Maile Shimabukuro, and OP would be given the opportunity to comment afterwards.

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

Chair Heller disclosed his firm's relationship representing a client adverse to the Ko`Olina Community Association and stated that he believed he had previously made this disclosure and was mentioning it again to afford the Parties an opportunity to object to his continued participation in this matter. There were no comments, questions or objections to Chair Heller's continued participation.

PRESENTATIONS

Petitioner

Ms. Viola stated that the status of the landfill proceedings was that the parties involved were still negotiating the consolidation of case matters and the continuation of operations at the Waimanalo Gulch facility. She also described the activities that the ENV had been involved in since 2012 with regards to the landfill and stated that Ms. Kahikina would address the Commission to provide additional details on the status of the landfill and what the City was hoping to do about this matter in the future. Chair Heller noted that the Commission would not be making any decisions on the renewal of the Special Permit at this hearing and swore Ms. Kahikina in.

Ms. Kahikina used a PowerPoint presentation to describe the progress made by the ENV on the Landfill project; what future benchmarks and timelines could be expected; and summarized what remaining operational details needed to be monitored. Ms. Kahikina's staff also provided hard-copy reference materials for the Commissioners to use during her presentation consisting of an interim report to the Honolulu Planning Commission dated December 16, 2013 and data contained in her presentation.

Commissioner Questions

Commissioner Esaki asked whether a facility for handling sewer sludge and green waste existed on Maui. Ms. Kahikina responded that Maui had such a facility and though the City currently had a contract with Hawaii Earth Products to do this work, it would be building its own similar facility in the future.

Commissioner McDonald requested clarification on the waste diversion percentages described in the presentation. Ms. Kahikina described what the percentages represented and how her department was exploring uses for the ash remaining after the waste processing; how the ash would be diverted, and what would ultimately go to the landfill.

Commissioner Esaki requested clarification on what the composition of the materials in the ash were. Ms. Kahikina described the components of the ash residue and how dilution methods were used to reduce the ash's toxicity levels to limits acceptable to the Department of Health (DOH) and the Environmental Protection Agency (EPA); and how determinations were

made on what needed to be deposited into a specially lined monofill cell for high metal content material.

Chair Heller requested clarification on the Planning Commission's process; and whether there were any specific dates or timetables that could be shared with the LUC. Ms. Viola responded that the Planning Commission was awaiting the recommendations of the Parties and that the City did not have a specific appearance date yet.

Commissioner Chock inquired whether the City intended to cancel its current contract with its existing operator; and whether the City found the operator's performance acceptable. Ms. Kahikina responded that the City had no intention of cancelling its contract and that it was satisfied with the work performed by the operator.

There were no further Commissioner questions and Chair Heller called for Public Witnesses.

PUBLIC WITNESSES:

None

There were no public witnesses. Chair Heller asked if Mr. Wurdeman had any comments.

INTERVENOR HANABUSA

Mr. Wurdeman described his client's concerns regarding the lack of progress in the landfill issue; and how the City was still operating the landfill without a Special Permit. He also provided his perspective of the status of the landfill negotiations and noted that Ms. Hanabusa had not been invited to participate in any of the discussions or negotiations that were being conducted; and argued that this matter should not have been remanded down to the Planning Commission. Discussion occurred to better define the nature of the objections and concerns Mr. Wurdeman had regarding the landfill. Chair Heller requested clarification on whether Mr. Wurdeman believed that it was still in the LUC's power to "unremand" the case and take back its decision or that the LUC should wait for the Planning Commission to act. Mr. Wurdeman suggested that the LUC could reconsider its earlier order and argued how the mandate of the Hawai'i Supreme Court was for the LUC to take action consistent with its opinion.

Chair Heller noted that the LUC would then not have an updated record from the Planning Commission. Mr. Wurdeman argued that the record was made in the original proceedings; and that Intervenor Hanabusa was currently not a party to the subsequent proceedings that were before the Planning Commission; and that this was a violation of her right to due process if she couldn't participate in those proceedings; and that Intervenor Hanabusa's position was 1) that the case should not have been remanded to the Planning Commission and 2) she was not in agreement to consolidation before either the Planning Commission or the LUC.

Chair Heller asked if Intervenor Hanabusa's position was also that the LUC should make a decision without any updated record from the Planning Commission; and base it on the record that was previously developed. Mr. Wurdeman argued that imposing Condition 14 could be done using evidence based on the initial record and with findings and conclusions by the Commission that were consistent with its earlier decision. Discussion continued to determine how Mr. Wurdeman's suggestion could be sustained if the Supreme Court determined that Condition 14 was not supported by sufficient evidence. Mr. Wurdeman argued that there was sufficient evidence in the record from the first proceedings and if the LUC wanted to add more findings of fact and conclusions of law, that the Supreme Court had not foreclosed that; and that this evidence could support a new condition similar to the original condition 14 if the LUC were to redo its order in the approval process.

There were no further Commissioner questions

Chair Heller called for Mr. Chipchase to make his presentation.

INTERVENORS KO 'OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO

Mr. Chipchase stated that he was representing Intervenor Ko 'Olinia Community Association and Maile Shimabukuro; and asked to obtain copies of the ENV presentation materials provided to the LUC and to cross-examine Ms. Kahikina on her testimony, or on any other matters. Chair Heller responded that Mr. Chipchase could proceed with his comments and that his procedural cross-examination question would be answered after consulting with LUC counsel.

Mr. Chipchase stated that he felt the remand ordered by the Commission was appropriate and that the Supreme Court had directed the Commission to proceed as it determined; and argued that a consideration of the record developed in the further proceedings before the Planning Commission was relevant, and should be something that the Commission considered; and that the remand for the purpose of consolidation and the issuance of the combined Findings of Fact, Conclusions of Law and Decision and Order was the correct decision.

Mr. Chipchase updated the Commission on the action that KOCA and Maile Shimabukuro had taken during the Planning Commission meeting to "effect the consolidation of the separate proceedings in 2008 SUP-2 as ordered by the State Land Use Commission on October 8, 2012." Mr. Chipchase stated that the City opposed that action and no hearing was ever held on it; and that the Parties subsequently agreed to stay the proceedings before the Planning Commission so that they could discuss whether it was possible to submit a stipulated or joint Findings of Fact, Conclusions of Law and Decision and Order for the Planning Commission to consider. Mr. Chipchase added that if the Planning Commission adopted such Findings of Fact, Conclusions of Law and Decision and Order, with or without modifications, it would come before this body for *de novo* review; and that the Parties were not attempting to reach a resolution that was any binding on either the Planning Commission or the Commission.

Mr. Chipchase stated that he could not give a specific date when discussions would be concluded and that he believed that they had put more time into it than they had yet to spend on it and suggested that if the Commission would like to have continual updates, that it could either order the Parties back in 60 days for another status report, or have the Parties submit status reports in writing to remain fully informed as to the status of their negotiations.

Chair Heller declared a recess at 10:21 a.m. and the Commission reconvened at 10:31 a.m.

Chair Heller stated that since the LUC had accepted testimony of a witness, it was appropriate to allow the Parties to question that witness; and granted permission for Mr. Chipchase to question Ms. Kahikina.

Mr. Chipchase stated that he was not prepared for a full examination of the witness and reserved his right to do so later; and to present rebuttal testimony; and that he had four questions that he had reviewed with the witness and her counsel just in the nature of clarification so that he could better understand the report that had been presented to the Commission.

DIRECT EXAMINATION OF MS. KAHIKINA BY MR. CHIPCHASE

Mr. Chipchase requested clarification on what comprised the 26,000 tons of MSW. Ms. Kahikina described what types of rejected H-POWER waste material made up the 26,000 tons.

Mr. Chipchase requested clarification on when the site selection committee had identified 11 potential sites, who the contracted consultant was, and when a timetable for developing any of the sites could be expected. Ms. Kahikina responded that the sites had been identified sometime during 2012 and that the City had a technical review being performed on them by R.M. Towill, the original consultant on the project whose contract had been extended to perform the analysis of the sites and calculate the longevity of the existing landfill; and that the timetable for this could be expected at the end of the year.

Mr. Wurdeman and Mr. Yee had no questions. Ms. Viola had no redirect.

Mr. Chipchase stated that he had neglected to inform the Commission that the City filed its opposition to the Motion to Effect the Consolidation on January 23, 2013.

There were no further questions or comments for Ms. Kahikina.

Chair Heller asked if OP had any comments.

OP

Mr. Yee noted the length of time since any filings had been made in this matter and described OP's position regarding Mr. Wurdeman's comments and suggested possible alternatives that could be considered to improve the manner in which discussions were being handled in order to be more inclusive and timely.

COMMISSIONER QUESTIONS

Commissioner Esaki commented that it appeared that site selection was the key issue and that more effort should be made on it..

Commissioner Biga echoed Commissioner Esaki's sentiments and stated that all parties needed to be involved, and that Intervenor Hanabusa needed to be part of the discussion.

Chair Heller asked if there were any motions or recommended actions that the Commission was considering.

Commissioner Chock moved that the Petitioner submit written reports every other month to the Commission; and if needed, appear in person to answer questions regarding the status of the situation. Chair Heller requested clarification on whether the reports should start in July, and every other month thereafter. Commissioner Chock acknowledged and agreed with the start date and reporting cycle. Commissioner Torigoe seconded the motion

There were no further Commissioner questions or comments.

By a unanimous voice vote (8-0), the Commission approved the motion.

Ms. Viola requested clarification on what type of information the report should include. Chair Heller responded that the Commission was asking for a procedural update and that it could be in the form of a letter.

Mr. Chipchase asked if the City's report would be served on the Parties; and whether the Parties would have an opportunity to submit their own reports if warranted. Chair Heller clarified that as the reports came in, they would be filed as public documents and that they should be served by the City on the other parties.

Chair Heller asked if there was any new business. There was no new business; and Chair Heller asked for a motion to enter into Executive Session.

EXECUTIVE SESSION

Commissioner Chock moved and Commissioner Matsumura seconded the Motion to enter into Executive Session. By a unanimous voice vote (8-0), the Commission elected to enter into Executive Session at 10:45 a.m. and reconvened at 11:05 a.m.

There were no further comments or questions by the Commission.

There being no further action, Commissioner Chock moved and Commissioner Matsumura seconded the Motion to adjourn. By a unanimous voice vote (8-0), the Commission adjourned at 11:05 a.m.