

LAND USE COMMISSION
MEETING MINUTES

January 23, 2019- 12:30 p.m.
Hilo State Office Building, Meeting Room ABC
725 Aupuni Street, Hilo, Hawai`i, 96720

COMMISSIONERS PRESENT: Edmund Aczon
Gary Okuda
Arnold Wong
Nancy Cabral
Dawn Chang
Jonathan Scheuer
Lee Ohigashi

COMMISSIONERS EXCUSED: Aaron Mahi

LUC STAFF PRESENT: Daniel Orodener, Executive Officer
Randall Nishiyama, Deputy Attorney General
Scott Derrickson, Staff Planner
Riley Hakoda, Staff Planner/Chief Clerk

COURT REPORTER: Jean McManus

CALL TO ORDER

Chair Scheuer called the meeting to order at 12:30 p.m.

APPROVAL OF MINUTES

Chair Scheuer asked if there were any corrections or additions to the December 13, 2018 meeting minutes. There were none. Commissioner Aczon moved to approve the minutes and Commissioner Wong seconded the motion.

The minutes were unanimously approved by voice vote (7 ayes-0 nays- 1 excused).

TENTATIVE MEETING SCHEDULE

Executive Officer Orodener provided the following:

The regular tentative meeting schedule has been distributed in the handout material for the Commissioners for the following dates and docket numbers.

JAN 24- meet at HNL airport for DR18-64 Robinson Kuia IAL

FEB 6-at Courtyard Marriott North Shore for DR18-63 Malaekahana IAL
FEB 7-at NELHA for A00-730 Lanihau, A10-788 HHFDC and A06-770 Shopoff Status Reports & Action if necessary

FEB 20-21- Maui overnight- A11-794 Kihei HS- evening status report and A94-706 Ka`ono`ulu Intervenor Motion/Status Report

MAR13-14- TBD

MAR 27- TBD

MAR 28-- @Kona-NELHA – A06-767 Waikoloa Mauka Adoption of Order

APR 10-11 TBD (APR 10 could be for A87-610 Waiawa but likely to move to later date)

APR 23-24 (note TUES-WED skdl) HNL (Kaneohe Bayview GC) DBA A17-804 Hawaii Memorial Park

NO MTG- MAY 8-9

MAY 22-23- Kauai overnight – A11-791 Hokua Place & A17-803 Kealia

Any questions or conflicts, please contact LUC staff.

There were no questions.

Chair Scheuer provided a summary to the audience of what the LUC does and how the Commission processes its business.

Chair Scheuer announced that the Commission would next address was Docket No. A 18-806 Barry Trust (Hawai`i)

ACTION

A18-806 Barry Trust (Hawai`i)

Consider Petitioner's Motion Requesting the Land Use Commission to be the Approving Agency for an Environmental Assessment

Chair Scheuer stated that the Commission would address Docket No. A18-806 Petition of Kevin M. Barry and Monica S. Barry, Trustees of the Barry Family Trust's Motion Requesting the Land Use Commission to be the approving agency for the Environmental Assessment in the matter of the Barry's Petition to Amend the Land Use District Boundary of Certain Lands Situated at Keaau, Puna, County and State of Hawaii, Consisting of 0.51 acres from the Conservation District to the Agricultural District Tax Map Key No. (3) 1-5-059:059

APPEARANCES

Derick Simon, Esq., Counsel for Petitioner Barry Family Trust (“BFT”)
Ronald Kim, Esq., Deputy Corporation Counsel, for County Planning Department
 (“County”)
Jeff Darrow, Planning Department Manager, County

*State Office of Planning attended via telephone conference-

Dawn Takeuchi Apuna, Esq., Deputy Attorney General, for State Office of Planning (“OP”)
Rodney Funakoshi, Land Use Administrator, OP

Chair Scheuer updated the record and described the procedures for the hearing. There were no questions or comments on the procedures.

Chair Scheuer asked if Petitioner was familiar with the Commission’s policy on reimbursement for hearing expenses. Mr. Simon replied that he was not.

Chair Scheuer declared a recess at 12:37 p.m. and LUC staff provided Mr. Simon information on the matter. Chair Scheuer reconvened the meeting at 12:39 p.m.

Chair Scheuer asked if Petitioner would comply with the reimbursement policy. Mr. Simon acknowledged that Petitioner would.

Chair Scheuer called for public witnesses.

PUBLIC WITNESSES:

None

PRESENTATIONS

Chair Scheuer called for the Parties to make their presentations.

Petitioner

Mr. Simon described how the motion before the Commission had been crafted to comply with the requirements of HRS Chapter 343 and for the Commission to be the accepting authority for the Environmental Assessment; and argued why Petitioner’s Motion should be granted.

There were no questions for Mr. Simon. Mr. Simon stated that he would like time to respond to any comments, if any, as his rebuttal.

County

Mr. Kim stated that as mentioned in its Position Statement, the County had no objections to the Commission being the accepting authority for an Environmental Assessment (EA) or Environmental Impact Statement (EIS).

There were no further questions for Mr. Kim.

OP

Ms. Apuna summarized OP's position of no objections to the granting of the Motion.

Rebuttal

Mr. Simon stated that he had no rebuttal except to correct County's description of the Motion (that the Commission be the approving agency for the Environmental Assessment).

Commissioner Chang requested clarification on related agricultural uses proposed in the Petition. Mr. Simon replied that the amended Petition would go into further detail on the matter when it came before the Commission.

There were no further questions or comments. Chair Scheuer asked for the pleasure of the Commission.

Commissioner Cabral moved to approve Petitioner's motion as follows:

- 1) The Project proposes the use of and reclassification of State Conservation District lands which triggers a requirement to prepare an environmental assessment pursuant to HRS section 343-5(a)(7), HAR section 11-200-6(b)(1)(F), and HAR 15-15-50(b).
- 2) The LUC agrees to be the "approving agency" to process and review applicant's proposed actions pursuant to Chapter 343, HRS, as the Petition to amend land use district boundaries represents the earliest practicable time to determine whether an environmental impact statement (EIS) shall be required; and,
- 3) Direct the Petitioner to prepare and submit an environmental assessment to the Commission for review pursuant to HAR sections 11-200-9(b)(3)(B) and 11-200-12 so that they can determine whether the action warrants an anticipated finding of no significant impact (AFONSI) or an environmental impact statement preparation notice (EISPN).

Commissioner Ohigashi seconded the motion to grant the Petition.

Commissioner Cabral requested clarification on why the Commission seemed to be receiving so many requests to be the "accepting authority". Chair Scheuer asked the Deputy Attorney to respond. Mr. Nishiyama stated that, as a function of the HRS Chapter 343 statute, it was a necessary procedural step for Petitioners to approach the Commission with such requests.

There were no further questions or comments.

Chair Scheuer had Mr. Orodener poll the Commission. By a unanimous vote (7-0- 1 excused), the Commission voted to grant the Motion Requesting the Land Use Commission to be the approving agency for the Environmental Assessment in the matter of the Barry's Petition

Chair Scheuer declared a recess at 12:49 p.m. and reconvened the meeting at 12:52 p.m., and announced that the Commission would next address Docket No. A18-805 – Petition of Kenneth Stanley Church and Joan Evelyn Hildal to Amend the Conservation Land Use District Boundary into the Agricultural Land Use District for Approximately 3.4 Acres of Land at Wailea, Island of Hawaii, Tax Map Keys: (3) 2-9-003; 029, 060 to Consider Amended Motion that the Land Use Commission Accept an Existing EA/FONSI as Sufficient to Support the Petition

ACTION

A18-805 Church (Hawai`i)

Consider Amended Motion that the Land Use Commission Accept an Existing EA/FONSI as Sufficient to Support the Petition

APPEARANCES

Kenneth Church and Joan Hildal, Petitioners

Ronald Kim, Esq., Deputy Corporation Counsel, for County Planning Department
("County")

Jeff Darrow, Planning Department Manager, County

***State Office of Planning attended via telephone conference-**

Dawn Takeuchi Apuna, Esq., Deputy Attorney General, for State Office of Planning ("OP")

Rodney Funakoshi, Land Use Administrator, OP

Chair Scheuer updated the record; described the procedures for the hearing; and called for public witnesses. There were no questions or comments on the procedures. Chair Scheuer asked if Petitioner would comply with the Commission's reimbursement policy. Mr. Church acknowledged that he would.

PUBLIC WITNESSES:

None.

PRESENTATIONS

Chair Scheuer called for the Parties to make their presentations.

Petitioner

Mr. Church argued why the Amended Motion that the Land Use Commission accept an Existing EA/FONSI as sufficient to support the Petition should be granted. Ms. Hildal stated a correction to Mr. Church's testimony that they acquired the property in 2014, not 2004.

Commissioners Chang, Cabral and Chair Scheuer requested clarification on what the Motion specifically was requesting, what the Petitioner expected the action of the Commission should be, what intended uses for the Petition Area might be, and what types of agricultural products were being farmed.

Mr. Church shared additional information on his expectation that the Commission be the accepting authority for the EA/FONSI and described the current and future planned agricultural uses for the Petition Area. Commissioner Chang described how the Motion appeared to request two separate actions from the Commission- one to be the accepting authority for the EA/FONSI, and secondly, to accept the existing EA/FONSI as sufficient to support the Petition. Commissioner Cabral questioned how the property had been acquired and managed since acquisition and expressed her reluctance to treat both actions together. Chair Scheuer shared his perception of Petitioner's Motion and requested clarification on the type of crops being produced for harvest.

There were no further questions for Mr. Church.

County

Mr. Kim stated that County had no objections to the proposed Motion.

OP

Ms. Apuna summarized the Office of Planning's position of no objections to the Motion.

Commissioner Okuda requested clarification from either OP or County on how any new use of the property that might disagree with Petitioner's representations or filings might be perceived.

Chair Scheuer acknowledged that questioning of County and OP had not occurred and allowed questioning of the respective Parties.

County Response

Mr. Kim stated that Mr. Darrow would respond to any questions.

Mr. Darrow provided the historical background of the Petition Area and stated that Petitioner's statement was correct, but in a limited sense. Mr. Darrow described why Petitioner was partially correct and how County had determined that it had no objection to the prior EA/FONSI.

Commissioner Okuda asked whether it was appropriate to rely on a past EA/FONSI in this case and if a new EA would have different results or conclusions. Mr. Darrow responded that the County had no objection to the Motion based on the information used to determine its position on the matter; and that there were few changes under consideration by the County that could affect the EA, except for the Hamakua Development Plan.

Commissioner Cabral requested clarification on how the County could allow a residential dwelling on Conservation designated land. Mr. Kim shared how the State Board of Land and Natural Resources made that type of decision and County would abide by it.

There were no further questions for County.

OP Response

Commissioner Okuda had no further questions. Commissioner Cabral asked if OP agreed with County's response regarding structures on Conservation land. Ms. Apuna replied that she was not familiar with the BLNR's allowed uses and would have to check the statute.

Chair Scheuer shared his awareness of the BLNR's Conservation District policies.

Commissioner Chang requested additional information from County on its conservation and agricultural zoning determination process. Chair Scheuer determined that there were no objections to continued County questioning. Mr. Darrow described how historical use was part of the Conservation Designation determination process, and how some coastal areas might be considered Shoreline Management Areas (SMAs). Mr. Darrow also described how the County works with land use designations and other government agencies before issuing permits.

There were no further questions for OP.

Rebuttal

Mr. Church began describing DLNR policies on non-conforming agricultural uses and what conflicts he had encountered while attempting to get further guidance from that agency. Chair Scheuer recognized that the Petition had a difficult history and requested that Mr. Church focus his rebuttal to the relevant presented materials regarding his motion.

Mr. Church took issue with County's comment regarding the 1-year cessation of use on a non-conforming piece of land and provided his perspective on the matter and argued why he disagreed with County's interpretation.

Commissioner Cabral referred to a map of the Petition Area (Petitioner Exhibit No. 98) and requested clarification on different points of reference on it.

Commissioner Wong asked if the map being referenced was from the Petition. Commissioner Cabral replied that it was; and that it was also on the County website.

Commissioner Chang asked whether Mr. Church was aware of the Conservation designation before he purchased the land and why he was pursuing a District Boundary Amendment (DBA). Mr. Church replied that he was aware of the Conservation designation and was seeking a DBA to better align the Petition Area with the uses that he had planned for it since the DLNR had no policy to address those non-conforming agricultural uses.

Commissioner Chang moved for an Executive Session to consult with the board's attorney on the Commission's powers, duties, privileges, immunities and liabilities in this matter. Commissioner Cabral seconded the motion. By a unanimous voice vote (7-0-1 excused), the Commission voted to enter Executive Session.

The Commission entered Executive Session at 1:53 p.m. and exited at 2:16 p.m.

Chair Scheuer summarized the state of the proceedings and asked if the Commissioners had any further questions. There were none.

DELIBERATIONS

Commissioner Wong moved that the Commission approve being the accepting agency for the compliance with Chapter 343. Commissioner Ohigashi seconded the motion.

Commissioner Wong clarified that the intent of his motion was to separate the actions that he perceived were before the Commission- first to recognize the LUC as the accepting agency for an EA/FONSI and then to separately consider the acceptance of an EA/FONSI. Chair Scheuer asked if the Motion was to grant in part the Commission being the accepting authority for the EA/FONSI and deny the acceptance of the EA/FONSI until it had been further reviewed. Commissioner Ohigashi shared his concerns about how the Petitioner's Motion was worded, and how other legal issues could be caused by allowing the Motion to remain with undivided actions; and affirmed why he also felt that the separate acceptance of an EA/FONSI was necessary.

Commissioner Wong acknowledged that only the accepting authority portion of Petitioner's Motion was currently being addressed by his Motion and described why he felt the request for a boundary change needed to treat the EA/FONSI process separately.

Commissioner Chang stated that she agreed that the Commission could be the accepting agency to process Petitioner's application and shared her reasons for being in favor of the Motion.

Commissioner Aczon stated that he also supported the Commission being the accepting agency but was hesitant to act and accept the Petitioner's 2016 EA/FONSI.

Commissioner Okuda described what he had considered during deliberations and stated how he would consider voting in favor of the Motion.

Chair Scheuer asked if Commissioner Okuda was proposing an amendment to the active Motion. Commissioner Okuda declined to amend the Motion. Chair Scheuer refocused deliberations to the original Motion and assessed the proceedings.

Commissioner Cabral stated that she was in favor of the Motion and approved of the separation of two actions as stated by Commissioners Wong and Ohigashi; and was comfortable with the Commission being the "receiving" body.

Commissioner Chang shared her concerns that the Commission consider the public being allowed to participate in the EA/FONSI process and stated that she was in favor of separating the Petitioner's Motion into two actions as stated during deliberations.

Chair Scheuer stated that he was in favor of the Motion and provided his understanding of how the acceptance process for EA/FONSI matters were handled; and described how the division of the initial Petitioner's Motion by the Commission allowed for an orderly process to first have the Commission be the accepting authority and then allow for interested parties to participate in EA/FONSI decision-making subsequently.

There were no further questions or comments.

Chair Scheuer had Mr. Orodener poll the Commission. By a unanimous vote (7-0-1 excused), the Commission voted to grant the motion to have the Commission be the accepting authority.

Chair Scheuer asked if Commissioner Okuda wished to make a second motion. Commissioner Okuda declined to do so and shared his reasons why.

Chair Scheuer summarized the progress of the proceedings and focused the Commission's attention to either accept, deny or defer the second part of the Motion regarding the acceptance of the EA/FONSI.

Commissioner Wong moved to defer action on the acceptance of the EA/FONSI. Commissioner Aczon seconded the Motion.

Chair Scheuer declared a recess at 2:41 p.m. and reconvened the meeting at 2:47 p.m.

Chair Scheuer described how Petitioner's Motion had requested two separate actions from the Commission and provided reasons why the Commission should hear a motion to deny the acceptance of Petitioner's EA/FONSI.

Commissioner Wong stated that he would retract his Motion. Commissioner Aczon agreed to withdraw his second to the Motion to Defer.

Commissioner Chang moved to deny the request that the Commission accept the previous EA/FONSI without prejudice. Commissioner Ohigashi seconded the motion.

Commissioner Okuda spoke in favor of the Motion and provided his understanding of what the term "without prejudice" meant, and why public review of the process was proper.

Chair Scheuer had Mr. Orodener poll the Commission. By a unanimous vote (7-0-1 excused), the Commission voted to grant the motion to deny the request that the Commission accept the EA/FONSI submitted by Petitioner.

There being no further business, Chair Scheuer stated that the Commission would reconvene at the Airport Conference Center meeting rooms at 0930, January 24, 2019 and declared a recess at 2:51 p.m.

