

## LAND USE COMMISSION MEETING MINUTES

**November 6, 2019 – 9:00 a.m.**

Planning Department Conference Room, First Floor,  
Kalana Pakui Building, 250 South High Street, Wailuku, Maui, Hawaii 96793

COMMISSIONERS PRESENT: Edmund Aczon  
Nancy Cabral  
Gary Okuda  
Jonathan Scheuer  
Dawn N. S. Chang (left at 2:06  
p.m.) Arnold Wong  
Lee Ohigashi

COMMISSIONERS EXCUSED: Dan Giovanni  
(8 seated Commissioners as of 10/1/19)

STAFF PRESENT: Daniel Orodener, Executive Officer  
Patricia Ohara, Deputy Attorney  
General Rasmi Agrahari, Staff Planner  
Riley Hakoda, Staff Planner/Chief Clerk

COURT REPORTER: Jean McManus

### **CALL TO ORDER**

Chair Scheuer called the meeting to order at 9:10 a.m.

### **APPROVAL OF MINUTES**

Chair Scheuer asked if there were any corrections or additions to the October 24-25, 2019 meeting minutes. There were none.

Commissioner Cabral moved to approve the minutes and Commissioner Ohigashi seconded the motion. There were no comments or discussion on the minutes.

The minutes were unanimously approved by voice vote.  
(7 ayes-0 nays- 1 excused 8 sitting Commissioners).

Chair Scheuer asked if there were any corrections or additions to the October 31, 2019 meeting minutes. There were none.

Commissioner Ohigashi moved to approve the minutes and Commissioner Cabral seconded the motion. There were no comments or discussion on the minutes.

The minutes were unanimously approved by voice vote.

(7 ayes-0 nays- 1 excused 8 sitting Commissioners).

## **TENTATIVE MEETING SCHEDULE**

Executive Officer Orodenker provided the following:

- The regular tentative meeting schedule has been distributed in the handout material for the Commissioners.

### LUC meeting Schedule

- NOV 6-7- SP19-410 Sacred Earth Assembly (Maui) on Maui  
NOV 20- mtg for DR19-66 Poma`ikai Partners IAL, & A87-610 Waiawa on O`ahu at airport
- NOV 21-A17-804 Hawaiian Memorial Life Plan on O`ahu at SOT 2<sup>nd</sup> floor  
DEC 4-5- on Maui- A04-751 C. Brewer (continued)  
DEC 18-19 Kauai – A11-791 Hokua Place  
JAN 8- Kona for A02-737 U of N Bencorp & A90-660 HHFDC status reports  
JAN 9- TBD  
JAN 22-23 on Oahu for A17-804 Hawaiian Memorial Life Plan (JAN 22 at Koolau Ballroom/ JAN 23 at HNL airport  
Any questions or conflicts, please contact LUC staff.

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

## **SP19-410 SACRED EARTH ASSEMBLY (MAUI)**

### APPEARANCES

Leslie Iczkowitz, Esq., represented Sacred Earth Assembly (“SEA”)

Michael Hopper, Esq., represented County of Maui, (“County”)

Dawn Takeuchi-Apuna, Esq. represented State of Hawai`i Office of Planning (“OP”)

Lorene Maki, Planner, OP

Chair Scheuer updated the record and described the procedures to be followed for the hearing.

There were no comments or questions regarding the procedures.

Ms. Apuna stated that she had a procedural issue request to make. Chair Scheuer requested clarification on the request and Ms. Apuna commented that it concerned the jurisdiction of the Commission in this issue. The Chair noted the request and proceeded.

There were no objections to Ms. Apuna's request.

## DISCLOSURES

None.

Chair Scheuer called for Public Witnesses.

The Court Reporter requested and was granted a brief recess to adjust her equipment.

The Commission went into recess at 9:21 a.m. and reconvened at 9:22 a.m.

Mr. Iczkovitz inquired on how Public Witnesses could be questioned. Chair Scheuer described how questions to clarify the witnesses' testimony would be allowed.

*For brevity, the minutes will provide a list of the witnesses in the order they testified. "Support" notation indicates that testimony was in favor of the LUC granting the Petition. "Reject" notation indicates that testimony was against the LUC granting the Petition. "Other" notation indicates that the testimony was unclear on accepting or denying the Petition. (Parentheses indicate organizational representation)*

*Please refer to the transcripts for further details of public testimony. Only comments and/or questions asked of testifiers are noted. No notation indicates that no questions were posed to the testifier.*

## PUBLIC TESTIMONY

### 1. Robin Vanderpool - Support

Commissioners Chang, Okuda, and Ohigashi requested clarification on Mr. Vanderpool's awareness of farming activities and crop products produced on the

Petition Area, what types of possible Constitutional freedoms might be limited by the Maui Planning Commission's ("PC") Conditions, what type of activities and attending group sizes were involved on the Petition Area, and how parking accommodations were used.

2. Katherine Morgan – Support

Commissioners Cabral, Wong and Okuda requested clarification on Ms. Morgan's observations and experiences in the Petition Area regarding prior agricultural use of the Petition Area, farming activity and crops, parking of cars, types of possible Constitutional freedoms that might be limited by the PC's Conditions for the Special Permit, and the types of activities and attendance involved with events on the Petition Area grounds.

3. Aerie Waters – Support

Commissioners Chang, Okuda, Cabral and Chair Scheuer requested clarification on the meals served at activities conducted in the Petition Area, educational offerings provided, what types of possible Constitutional freedoms might be limited by the PC's Conditions, what type of facilities were available to attendees to events hosted on the Petition Area grounds, and what message Ms. Waters was trying to convey using the Hawaiian language.

4. Romy Bugg – Support

Commissioners Wong and Chang requested clarification on the location of the Petition Area relative to the ocean and on more specific details on the organic farming being conducted on the premises.

5. Michelle Drewyer – Reject

Ms. Drewyer described why she opposed the Special Permit application and shared her experiences when she opposed the application at the Maui County Planning Commission meetings.

Mr. Iczkovitz vigorously questioned Ms. Drewyer on her past position on the application when it was before the PC and on why she opposed the application at the current LUC proceeding. Mr. Iczkovitz was repeatedly cautioned not to badger

the witness during her testimony by Chair Scheuer after Commissioners Ohigashi and Wong noted their objections to Mr. Iczkovitz's behavior. Ms. Drewyer described how Dr. Abrams had conducted well-attended public events on the Petition Area and surrounding properties and how Dr. Abrams had been cited with numerous violations by the County over the years for various infractions.

Mr. Hopper stated that County's testimony was part of the record of the application and that County's suggestions on this application were also included.

Ms. Apuna stated that OP had no questions.

Mr. Iczkovitz requested that the Commission procedurally not consider the negative letters submitted regarding the application. Chair Scheuer noted Mr. Iczkovitz's request.

Commissioners Ohigashi, Cabral, Wong, Chang, Okuda and Aczon requested clarification on Ms. Drewyer's testimony regarding the shared driveway/common road to access the Petition Area, parking accommodations and ground surface treatment (gravel/asphalt material) to handle the traffic, distance of the site activities relative to the ocean, what occurred at the PC meetings that affected the input of public testimony, what type of legal or other standard should be applied to this case, and for additional information on how many neighbors could potentially be impacted by activities in the Petition Area.

Chair Scheuer declared a recess at 10:35 a.m. and reconvened the meeting at 10:50 a.m.

Chair Scheuer recognized Commissioner Aczon's request to address Mr. Iczkovitz regarding his behavior during the proceedings. Commissioner Aczon admonished Mr. Iczkovitz for his continued failure to comply with the Chair's directions and noted that he would appreciate if Mr. Iczkovitz would cooperate with the Chair's request to not badger the witness.

Chair Scheuer acknowledged that more civil behavior would be appreciated and called for the next public witness.

6. Dawna Richmond – Reject

Mr. Iczkovitz began to vigorously question why Ms. Richmond opposed the granting of the permit application. Chair Scheuer again requested that Mr. Iczkovitz display more civil behavior.

Commissioners Cabral, Chang and Chair Scheuer requested clarification on the Homeowner's Association ("HOA") that Ms. Richmond represented, whether similar testimony had been given at the PC's meeting, and the length of residency Ms. Richmond had in her community.

7. Judith Levy – Support

Commissioners Cabral and Chang requested clarification on the security gate located within the Petition Area, how Ms. Levy became aware of the public hearings on this matter and whether similar testimony had been provided by Ms. Levy at the PC meeting.

8. Christiane Douglas – Support

Commissioners Chang, Ohigashi, and Cabral requested clarification on how Ms. Douglas became aware of the public hearings on this matter and whether similar testimony had been provided at the PC meeting, what type of building structure existed on the Petition Area site before and after the permit application was made; and what farm organization(s) participate in activities in the Petition Area.

9. Taya Raine – Support

Commissioner Cabral recognized Ms. Raine's comments about the Big Island and thanked her for her testimony.

10. Kedar St. John – Support

Commissioners Cabral, Chang, Ohigashi and Chair Scheuer requested clarification on the amount of building structures' agricultural support uses in the Petition Area, the amount of church activity using the same buildings, what details Mr. St. John's testimony to the PC included, and where living accommodations were provided for visiting teachers to the Petition Area

11. Alan Lott - Support

Commissioners Chang, Cabral, and Chair Scheuer requested clarification on what Mr. Lott thought might happen if church activities were not allowed in the Petition Area, how the neighbors in the area might strive to get along better, and how the meaning of Haiku (“sharp break”) in the Hawaiian language might apply to the proceedings.

## 12. Jonathan Yudis – Support

There were no further Public Witnesses.

Chair Scheuer declared the Public Testimony portion of the meeting formally closed and recognized OP to honor the earlier request made by Ms. Apuna to address the Commission.

Ms. Apuna stated that she wished to withdraw her request.

Chair Scheuer acknowledged Ms. Apuna’s request and declared a recess at 11:39 a.m. and reconvened the meeting at 11:41 a.m.

## PRESENTATIONS

### SACRED EARTH ASSEMBLY

Mr. Iczkowitz provided a historical recap of how the Special Permit application had been processed at the PC, argued why the LUC should grant the Special Permit Application and offered Petitioner’s Witness Dr. Lew Abrams.

### Petitioner’s Witness – Dr. Lew Abrams

Dr. Abrams described his professional background and provided a history of how he had developed the Petition Area within his land holdings to operate a farm and church on the property. Dr. Abrams recounted his experiences in dealing with his neighbors and their grievances, the County Planning Department and Planning Commission to address concerns and negotiate the conditions contained in the application provided to the LUC by the PC, the types of events and educational sessions he provided on the Petition Area, the structural upgrades that needed to be installed to handle the type of operations he was conducting, and stated that he was committed to abiding by the Conditions set forth by the PC.

Commissioner Wong moved for an Executive Session to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities regarding treatment of public testimony and determining what was included or not included on the record and suggested that the Commission might take a "working lunch" to be more efficient. Commissioner Ohigashi seconded the Motion. Chair Scheuer led a brief discussion on the logistics involved with conducting a "working lunch" and described how the Commission would move forward. There was no further discussion and by voice vote, the Commission unanimously voted to combine a "working lunch" as an integral part of its Executive Session to more efficiently utilize the time available (7-0- 1 excused).

Chair Scheuer declared a recess/Executive Session at 12:11 p.m. and reconvened the regular meeting at 1:01 pm. with continued questioning of Dr. Abrams by County and OP.

#### COUNTY AND OP QUESTIONS

Mr. Hopper stated that County had no questions.

Ms. Apuna requested clarification on Petitioner's Exhibit "A" on what lots (elements) "A", "B" and "C" would be used for. Chair Scheuer indicated that "A", "B" and "C" were noted as elements in a "condominiumization" map depicting the Petition Area, and Dr. Abrams described how each element factored into the final overall review of the property.

#### COMMISSIONER QUESTIONS

Commissioner Chang requested clarification of what intentions/justifications for current and future improvements had been made to PC's consideration of the Special Permit application. Dr. Abrams described how he believed the PC had arrived at its decision.

Commissioner Ohigashi requested clarification on whether the PC had considered applying a Special Management Area ("SMA") process to review and determine the worthiness of this application, what maps were used by the PC to determine the Petition Area acreage, what was included or excluded from the maps considered by the PC, whether consideration for a District Boundary Amendment

("DBA") had been done instead of for an SP, the permanency of the structures built in the Petition Area and on the updated information used for the record. Dr. Abrams described how he thought the PC proceedings had used the evidence to produce their final decision.

Commissioner Cabral requested clarification on what preparations were being made for any future operations in the Petition Area and how they would be monitored and managed. Dr. Abrams described how he intended to observe any conditions applied to his property and shared his understanding of how County authorities would be processing his application.

Chair Scheuer questioned how various suggested alternatives/solutions might assist in resolving inherent problems that the application had with cultural/traditional practices issues. Dr. Abrams shared his understanding of the situation and described how he would react to historic archaeological discoveries.

There were no further questions for Dr. Abrams.

#### FINAL COMMENTS

Mr. Iczkovitz argued how both the County and OP had recommended approval of the application, and how the Commission should not consider late testimony submitted by those opposed to the Special Permit application; and that the Commission should grant the application as presented by the PC.

#### COMMISSIONER COMMENTS

Commissioner Okuda shared his concerns about the lack of a standard of review on the subject matter and how the application's record failed to provide enough information on matters that he considered important.

Commissioner Chang commented that she felt the LUC legally had no jurisdiction in the matter since the acreage was unclear and shared her concerns of how public comments were not allowed at the PC meetings and how notifications about the public meetings were conducted.

Commissioner Ohigashi expressed his concerns about the use of a 2009 dated State Historic Preservation Department correspondence (PC Exhibit 22) instead of a more current document during deliberations on the application.

(Commissioner Chang leaves the meeting at 2:06 p.m. There are still 6 Commissioners present to hold quorum).

Commissioner Ohigashi continued commenting on the confusion over what was included in the acreage being considered as the Petition Area, and how the record was unclear in its references.

Chair Scheuer declared a recess at 2:14 p.m., reconvened the meeting at 2:26 p.m., and allowed Commissioner Ohigashi to resume commenting on the application.

Commissioner Ohigashi noted that the lack of Department of Transportation (“DOT”) input and review despite dated correspondence from the DOT noting “no comment” and the absence of a Traffic Impact Analysis Report (“TIAR”) were concerning, and Mr. Iczkovitz was unable to respond to questions regarding whether an analysis had been done to ensure that water systems providing service to the Petition Area were adequate. Commissioner Ohigashi also requested clarification on whether the record of violations was accurate and if any open matters with the PC had been resolved; and noted that Mr. Iczkovitz’s characterization of the Haleokula settlement was incorrect.

Commissioner Wong shared his observations of the proceedings and requested that Chair Scheuer’s reminders for respectful behavior be followed.

Chair Scheuer summarized his assessment of the proceedings and identified the 5 guidelines to be considered by the Commission when issuing a Special Permit and commented on how the permit application’s record was unclear of the acreage involved and though County recommended approval of the permit application, there were still important areas within the application that were still questionable and required clarification.

Chair Scheuer called for the County’s comments.

## COUNTY COMMENTS

Mr. Hopper commented on why the PC had decided to involve the Commission in considering this permit application and how the statutory powers of the LUC might apply.

Commissioner Wong commented on how the lack of a TIAR, a Cultural Impact Assessment survey (“CIA”), the failure to consider submitted Public Testimony or lack of explanation for not considering Public Testimony was disconcerting.

Commissioner Ohigashi requested clarification of the acceptance of a second, different Petition Area map for PC consideration on this matter, whether an SMA permit had been issued, and how permits were obtained for structures and uses within the Petition Area. Mr. Hopper described how the two maps had been assessed by the PC, that an SMA had been issued and how County permits for the Petition Area had been issued. A brief discussion with County ensued regarding a supplemental record but concluded when Commissioner Ohigashi withdrew his question.

Commissioner Okuda requested clarification on how County applied its zoning determinations in this matter and how urban or agricultural land uses balanced against legal case considerations might influence decision-making. Mr. Hopper described how the Planning Department had assessed how Dr. Abrams had used or planned to use the property and determined that a Special Permit was appropriate.

Chair Scheuer declared a recess at 3:32 p.m., reconvened the meeting at 3:44 p.m., and allowed Commissioner Okuda to continue his questioning.

Commissioner Okuda requested clarification on what consideration for 14<sup>th</sup> Amendment rights or any other Constitutional or State rights and for noise and nuisance factors had been made when the PC conditions were drafted; and what impact did it have. Mr. Hopper described the various considerations that were made in developing the conditions that were proposed to the PC to consider for adoption.

Commissioner Okuda opined that it might be better to remand the application to the PC to allow intake of more specific details to sufficiently assist the LUC in making a more informed decision. Mr. Hopper argued why a remand was not necessary, but if it

did occur, the specific issues that the LUC wanted to have addressed would need to be identified.

Commissioner Cabral echoed that she also had concerns about the lack of basic infrastructure information for the Petition Area and its activities and questioned how the County would monitor and enforce conditions imposed for the Special Permit. Mr. Hopper described how the County handled and monitored Special Permit approvals.

Chair Scheuer asked if the entire record had been submitted, what standards for noise levels were used for Condition No. 4, and how investigations were initiated when changes of use occurred and what permitting agency would be involved. Mr. Hopper responded that the original application had not been included in the submittal to the LUC and described how the County had decided its noise standard and how routine Special Permits were monitored and managed by County.

There were no further questions for County. Chair Scheuer called for OP's presentation.

OP

Ms. Apuna shared OP's concerns about LUC's jurisdiction in this matter and how the incomplete record that PC had submitted failed to distinctly define the acreage amount involved, and how the footprint that County had approved was ill-defined. Ms. Apuna described the alternatives of action that the LUC had and commented on how LUC conditions should not be less restrictive than what the County had imposed.

Ms. Apuna stated that the best option for the LUC was to remand the application to the County and that OP would withhold its position on the application since the "B" element on the map was not clear and the protections and limits involved in the permit award could be better defined.

Commissioner Ohigashi questioned how much more restrictive the LUC could be. Ms. Apuna responded that there was no baseline established on the record.

Commissioner Okuda posed a hypothetical situation of deleting condition(s) during the approval process. Ms. Apuna responded that deletion of condition(s) were not appropriate since it would make the Special Permit less restrictive.

Mr. Hopper noted that the Department of Health had language in the transcript.

There were no further comments or questions.

Chair Scheuer announced that the Commission would begin formal deliberations and had Mr. Orodenker poll the Commission to ensure all Commissioners present were prepared to deliberate. The Commission unanimously confirmed that they were ready to deliberate (6-0-2 excused).

Commissioners Ohigashi moved to remand the Special Permit application to the PC for more specific findings on the area and uses to be covered by the Permit, and that a clear map of the Petition Area be provided and that if the LUC is determined to not be involved, it was requested that specific findings be provided to support the conditions on the record with reasons stating on what basis they are being imposed and addressing:

1. Specific questions regarding the “driveway” and accessory uses should be answered. Including:

- Whether or not the driveway is used solely for the purposes of accessing the Church use,
- Whether or not the roadway will be used for parking by church goers
- Whether or not the churchgoers will use open space areas or portions of the property outside of the delineated 14.8 acres for any type of activity;
- Whether or not there will continue to be active farming on the remaining acreage or the farming activity will be a church related function.

2- Traffic impacts which were raised but not adequately addressed as DOT may not have been provided sufficient information regarding the number of days and number of cars subject to the permit. Applicant should provide more specific information that accurately reflects estimated traffic volumes.

3. The water system identified for the project. It is a private system governed by a homeowners’ association and Petitioner has not sought approval from the association for the increased use on the system that would be required based on the Special Permit. Approval of a Special Permit will cause direct impacts on the shared water system that has not received approval by the impacted parties.

4. A history of violations and complaints show a pattern of applicant non-compliance and disregard for County requirements and community. The County should definitively make findings that the applicant is currently in compliance with all County regulations and permits prior to issuing the SP.
  5. The intensity of use should be analyzed to determine if Chapter 205 safeguards have been considered and complied with, and whether a Ka pa`akai analysis is or is not required.
- Commissioner Wong seconded the motion.

Mr. Orodener was requested to repeat the order for clarification.

Commissioner Okuda had a procedural question on the number of votes required for the motion to pass.

Mr. Hopper requested clarification on what the County was being asked to provide in the Motion. Chair Scheuer specified what information being sought and described how the Commission was seeking to determine whether threshold of acreage for this issue to be considered by the Commission had been met.

Commissioner Ohigashi spoke in favor of the Motion and explained how his Motion sought to clarify jurisdiction in the matter and that if the LUC was determined to be involved, have an associated Findings of Fact, Conclusions of Law and Decision and Order be provided for consideration.

Chair Scheuer noted that the original Petition would normally be forwarded to the Commission when acreage of 15 acres or more are being considered by the Commission.

Commissioner Aczon stated that he sided with Commissioner Ohigashi and was in support of the Motion since he was unclear of the acreage involved and would like further information on the matters that had been stated.

Commissioner Cabral shared her concerns with the Motion and commented on how she perceived the entire 25 acres to be impacted by the Special Permit request and opined how she thought the Commission should consider the application.

Commissioner Okuda stated that he was unsure of the Motion and described why he agreed with Commissioner Cabral and was still deciding on issues such as

subject matter jurisdiction, policy questions, Constitutional rights and the incomplete record.

Commissioner Wong shared why he seconded the Motion and described why he thought a remand would be helpful.

Commissioner Ohigashi added why he thought the 15-acre definition was missing from the Special Permit Application and responded to concerns raised by Commissioner Okuda.

Commissioner Okuda stated that after considering Commissioner Ohigashi's comments, he would be voting in favor of the Motion.

Chair Scheuer stated that he was conflicted as he considered Commissioner Cabral's concerns and reflected on how definite established boundaries provide for a better foundation to enable people to thrive and how a remand would help accomplish that.

Commissioner Cabral described the types of problems that she anticipated would develop over time based on her experience in managing properties and re-stated why she felt the Commission should perceive the application to involve the entire 25 acres of land and not just a portion of it.

There was no further discussion.

Chair Scheuer had Mr. Orodener poll the

Commission. The Commission voted as follows:

Yeas- Commissioners Ohigashi, Wong, Okuda, Aczon and Chair Scheuer. Nay – Commissioner Cabral

The Motion passed. (5-1- 2 excused)

Chair Scheuer stated that the Commission would reconvene at the State DOT conference room at 9 a.m. on November 7, 2019; and declared a recess at 5:01 p.m.