

LAND USE COMMISSION
MEETING MINUTES

November 8, 2013 – 8:30 a.m.
Conference Room #3, Airport Meeting Room
400 Rodgers Boulevard, Honolulu, Hawai`i

COMMISSIONERS PRESENT: Ronald Heller
Dennis Esaki
Lance Inouye
Ernest Matsumura
Carol Torigoe
Chad McDonald

COMMISSIONERS EXCUSED: Kyle Chock
Sheldon Biga

(The Commission currently has 8 seated Commissioners and 1 vacant position)

STAFF PRESENT: Daniel Orodener, Executive Officer
Diane Erickson, 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 Heller called the meeting to order at 8:36 a.m.

APPROVAL OF MINUTES

Commissioner Inouye moved to approve the minutes. Commissioner Matsumura seconded the motion. The minutes were unanimously approved by voice votes (6-0).

TENTATIVE MEETING SCHEDULE

Executive Officer Orodener provided the following:

- The regular tentative meeting schedule for the calendar year 2013 was distributed in the handout material for the Commissioners.
- The November 22, 2013 meeting is planned as a video conference from video conference centers on O`ahu, Kaua`i, Maui and Hawai`i.
- The December 11-12, 2013 meeting is open.
- The January 8-9, 2014 meeting is planned for (1) DR13-50 Kamehameha Schools Bishop Estate's Petition for an Important Agricultural Land on Kaua`i and (2) for a possible approval for the LUC to file for a Declaratory Ruling on Renewable Energy Utilities on Agricultural Land.
- The January 22-23, 2014 meeting is planned for a status/update report on DR08-36 Ko Olina Boat Ramp.
- February 13-14, 2014 is currently open.
- February 26-27, 2014 is when the Commission plans to hear its Petition for a Declaratory Ruling for Renewable Energy on Agricultural Land.
- If there are conflicts or problems with the scheduling, Commissioners should advise LUC staff.

There were no questions or comments regarding the tentative schedule.

ACTION

Docket No. A85-595, Defend O`ahu Coalition's Renewed Motion for Issuance of an Order to Show Cause

Chair Heller announced that this was a hearing and action meeting on Docket No. A85-595 to consider Defend O`ahu Coalition's Renewed Motion for Issuance of an Order to Show Cause why the boundary reclassification of Kuilima Development Company should not be revoked for Failure to Perform Conditions, Representations, and Commitments by Kuilima Development Company.

APPEARANCES

Wyeth Matsubara, Esq. and Curtis Tabata, Esq., represented Petitioner Turtle Bay Resort Company, LLC ("TBRC")
Drew Stotesbury, representative, TBRC
Bryan Yee, Esq., represented State Office of Planning ("OP")

Jesse Souki, Director, OP
Dawn Takeuchi-Apuna, Esq., represented City and County of Honolulu,
Department of Planning and Permitting ("DPP")
Randy Hara, DPP
Gregory W. Kugle, Esq. and Bethany Ace, Esq., represented Defend O`ahu
Coalition (Movant) ("DOC")

Disclosures by Chair Heller

Chair Heller updated the record and disclosed that through his law practice, he had cases representing clients adverse to the City and County of Honolulu and stated that although he did not feel his work would affect his participation in this docket, he was making the disclosure to afford the parties an opportunity to voice their objections. There were no comments or objections to Chair Heller continuing his participation in the proceedings.

PUBLIC WITNESSES

1. Victoria Cannon-
Ms. Cannon stated that she supported DOC's renewed motion and shared her reasons why.
There were no questions for Ms. Cannon.
2. Danna Holck-Turtle Bay Resort, - Gen. Mgr.
Ms. Holck submitted written testimony and voiced her opinion on why TBRC's proposed project should be allowed to move forward.
There were no questions for Ms. Holck.
3. Paul Nelson
Mr. Nelson stated that he supported the DOC motion and described why he felt his support was justified.
There were no questions for Mr. Nelson.
4. Tim Vandever-
Mr. Vandever submitted written testimony and stated that he was co-chair of DOC; and shared why his organization had come forward with its renewed motion and described what the contents of his submittals were.
There were no questions for Mr. Vandever.
5. Tom Pohaku Stone- non-profit organization Kanalu Representative
Mr. Stone submitted written testimony to the Commission and expressed why he supported TBRC's proposed project.
There were no questions for Mr. Stone.
6. Peter H.M. Lee- LCET representative
Mr. Lee submitted written testimony and stated that he represented the Laborer/Employer's Corporation Education Trust and described why his organization supported TBRC's position in this matter.
There were no questions for Mr. Lee.

7. Angela Huntemer
Ms. Huntemer expressed why she supported DOC's renewed motion and described her concerns about the impacts of proposed development on the North Shore of O`ahu.
There were no questions for Ms. Huntemer.
8. Brandy Burke
Ms. Burke stated that she was a Turtle Bay Resort employee and shared her reasons for supporting TBRC's proposed development.
There were no questions for Ms. Burke.
9. Cindy McMillan- PRP Representative
Ms. McMillan stated that she represented Pacific Resources Partnership and shared why her organization supported TBRC's proposed project.
There were no questions for Ms. McMillan.
10. Bob Nakata
Mr. Nakata described his long-time involvement with the issues surrounding the Petition Area and shared his reasons for supporting DOC's efforts.
There were no questions for Mr. Nakata.
11. Andrea Anixt
Ms. Anixt stated that she supported DOC's efforts to preserve the North Shore and shared her concerns about why the area needed to be protected.
There were no questions for Ms. Anixt.
12. Margaret Primacio
Ms. Primacio shared her concerns about impending development and why she supported DOC's motion.
There were no questions for Ms. Primacio.

The Commission went into recess at 9:28 a.m. and reconvened at 9:43 a.m.

13. Tamayo Perry-
Mr. Perry described why he was appearing and providing his support to DOC's position.
Commissioner Esaki asked if Mr. Perry was aware that the LUC Commissioners were not compensated for their time as he had implied in his testimony and served on a voluntary basis. Mr. Perry responded that he was not aware that Commissioners volunteered their time and expressed why he thought that the Neighbor Islands should share in development and why he did not care for further growth on O`ahu.
There were no further questions for Mr. Perry.
14. Dr. Kioni Dudley-
Dr. Dudley stated that that he was speaking as President of the Friends of Makakilo and shared his organization's concerns about too much development on the island of O`ahu and described why it supported DOC's position.

- There were no questions for Dr. Dudley.
15. Sarah Cadiz
Ms. Cadiz submitted written testimony and described why she supported TBRC's position.
There were no questions for Ms. Cadiz.
16. Jesse Ryan Kawla Allen
Mr. Allen stated that he was a Realtor Associate and described why he supported DOC's position.
There were no questions for Mr. Allen.
17. Ben Schafer
Mr. Schafer described why he supported DOC's renewed motion.
There were no questions for Mr. Schafer.
18. Allison Lum
Ms. Lum described why she was appearing in support of DOC's position.
There were no questions for Ms. Lum.
19. Rodney Nakashima
Mr. Nakashima shared his perspective on the negative aspects of development on O`ahu and why he supported DOC's position.
There were no questions for Mr. Nakashima.
20. Bob Leinau
Mr. Leinau provided his perspective on development issues and described why he supported DOC's renewed motion.
There were no questions for Mr. Leinau.
21. Ralph Makaiau
Mr. Makaiau described his role in the development and maintenance of the land and facilities in and around the Petition Area and stated that he opposed the DOC's renewed motion.
Mr. Kugle requested clarification on Mr. Makaiau's past involvement with development in the area and what type of projects he had participated in. Mr. Makaiau provided his recollection of the type of infrastructure and vertical construction that he had been involved with and how the current proposed project differed from what had been originally represented since it was a reduced version of it.
Mr. Matsubara requested clarification on Mr. Makaiau's understanding of the different development proposals that were included in the supplemental EIS. Mr. Makaiau provided further details about his knowledge of what the various proposals were.
Mr. Kugle requested clarification on what the "full build out" proposal included. Mr. Makaiau described the alternatives that had been proposed by the developer.
There were no further questions for Mr. Makaiau.
22. Gil Riviere
Mr. Riviere stated that he supported DOC's position and shared his reasons why and what his concerns were.
There were no questions for Mr. Riviere.

23. Junior Fremrahal

Mr. Fremrahal stated that he opposed DOC's renewed motion and provided his perspective of how North Shore residents were coping with the problems that continued development on O`ahu presented.

There were no questions for Mr. Fremrahal.

24. Rob Borreca

Mr. Borreca shared why he supported the DOC.

There were no questions for Mr. Borreca.

25. Buddy Ako

Mr. Ako stated that he opposed DOC's position and described how the community had benefited from growth in the area.

There were no questions for Mr. Ako.

26. Warren Soo

Mr. Soo described how he had been involved in past discussions regarding development in the area and why he supported TBRC's proposed project.

There were no other Public Witnesses.

Chair Heller called for the parties to make their arguments.

PRESENTATIONS

DEFEND O`AHU COALITION (MOVANT)

Mr. Kugle argued why the Renewed Motion for an Order to Show Cause should be granted. He referred to comments made about a "new project" by several of the public testifiers and summarized how he perceived the Petition Area's original and current proposed project development plans had changed and how the various conditions and representations of the original Decision and Order had not been fulfilled by Petitioner. Mr. Kugle cited various legal decisions, rules, statutes and findings to support his argument and described the actions that he was suggesting the LUC take.

There were no questions for Mr. Kugle.

The Commission went into recess at 11:07 a.m. and reconvened at 11:22 a.m.

PETITIONER

Mr. Wyeth Matsubara stated that Petitioner was well aware of the authority that the LUC had and argued why DOC's Motion should be denied. He provided information on Petitioner's efforts to comply with the original Decision and Order conditions and described how other past LUC decisions allowed certain flexibility for complying with its Decisions and how TBRC had invested

additional capital for development in and around the Petition Area and how the Hawai`i Supreme Court decision on the EIS matter impacted Petitioner and affected some of its development actions and decisions.

Mr. Matsubara also argued why the various rules and legal issues cited by DOC during its presentation were not applicable to the proceedings; and how the Petitioner was compliant with the original Petition. Mr. Matsubara described what development achievements had been accomplished over time and why the Commission should dismiss DOC's motion.

DPP

Ms. Takeuchi stated that DPP had no argument and took no position on this matter.

There were no questions for DPP.

OP

Mr. Yee referred to various areas on a map of the Petition Area and provided OP's perspective of how development in these areas had occurred over the years under the various conditions applied from the original Petition; and stated that OP's position was that DOC's Motion for an Order to Show Cause and renewed Motion for an Order to Show Cause should be denied. Mr. Yee explained the reasoning behind OP's position, and argued how the legal citations and authorities cited by DOC were not applicable to the current proceedings involving the Petition Area and why there was no basis for an Order to Show Cause.

REBUTTAL

DOC-

Mr. Kugle argued how his legal citations were applicable to the proceedings; why he felt OP had shifted its position since 2008; and how the new proposed development differed from what had been originally represented.

Chair Heller asked if Petitioner and OP had any final comments. Mr. Matsubara stated that he had none and expressed his thanks to the Commission. Mr. Yee stated that OP had not changed its position and argued how OP's position and perspectives in this matter had remained consistent.

The Commission went into recess at 12:04 p.m. and reconvened at 1249 p.m.

Commissioner McDonald moved to enter into Executive Session to consult with the Commission's attorney on issues and questions pertaining to the Commission's powers, duties, privileges and liabilities. Commissioner Esaki seconded the motion. By a unanimous voice vote, the Commissioners entered Executive Session at 12:50 p.m. and reconvened at 1:23 p.m.

COMMISSIONER QUESTIONS

Commissioner Esaki asked if Petitioner was familiar with Senate Concurrent Resolution 164 (“SCR164”). Mr. Matsubara responded that he was not. Commissioner Esaki described the resolution for Mr. Matsubara’s benefit and Mr. Matsubara stated that he was not personally aware of it, but that Petitioner was.

Mr. Stotesbury (TBRC Representative), after being sworn as a witness, responded to questions regarding Petitioner’s role in the discussions described in SCR164 and provided a status report of what had occurred. Mr. Stotesbury stated that discussions were ongoing and that discussions were to take place later in November.

Commissioner McDonald asked if DOC was a party to the discussions pursuant to SCR164. Mr. Stotesbury replied that to his knowledge, DOC was not a party and described the members of the working group for SCR164 and how they had been selected. Mr. Kugle shared his understanding of what DOC members’ concerns might be in the matter if they were individually participating.

Commissioner McDonald requested clarification on the project “improvement” costs that Petitioner had expended. Mr. Matsubara replied that Petitioner had expended \$37 million since 2010; and that from 1986 till 2010, \$100 million; for a total of \$137 million for the entire Turtle Bay development.

Commissioner Inouye requested clarification on the status of the SEIS process for the Petition Area. Mr. Matsubara shared his understanding of what the current status of the SEIS was with DPP and what applications, permits and development action could be taken or obtained during the SEIS appeal period after initial approval.

Chair Heller requested clarification on Mr. Matsubara’s interpretation of retroactivity and what Petitioner’s position was. Mr. Matsubara stated that he believed that the prime foundation was that the Commission had power and authority over the Decision and Order; and argued that the process by which the Commission enforced the Decision and Order had changed; and that the Order to Show Cause process shifted the burden on the Petitioner, and how changes in Petitioner’s substantial rights was not retroactive- so the Order to Show Cause process was not applicable to this Decision and Order. Mr. Matsubara argued that what was applicable were the rules existing in 1986 pursuant to 6-3 that indicated that if there was a violation found as to a condition, that the Commission could pursue the reclassification process according to HRS 205-4 (at that time HRS205-4 was the normal District Boundary Amendment process).

Chair Heller requested clarification on whether Mr. Matsubara was saying that as of the time that the Commission entered its Decision and Order, the

process for enforcing the Decision and Order was essentially frozen; and that if the process for enforcing a Decision and Order was subsequently amended, the Commission could not use the new process on an already existing Decision and Order. Discussion occurred to clarify the case law Mr. Matsubara was citing. Mr. Matsubara stated that it was *Richard vs. Metcalf*, 82 Haw. 249 and argued how it was applicable.

Chair Heller requested clarification on Mr. Yee's comments on how lessening environmental burdens on the Petition Area might impact potential benefit yields as well. Mr. Yee explained how in regards to the Petition Area itself, it would be appropriate to look at the burdens and the benefits to establish if either side of the equation had changed.

Commissioner Esaki requested clarification on what relevance or connection Mr. Kugle's reference to *Morgan vs. Kauai Planning Department* had to the proceedings. Mr. Kugle stated that the citation was 104 Haw. 173 and argued how it was applicable and relevant to his position.

There were no further questions or comments.

DECISION-MAKING

Commissioner Esaki moved that action on this matter be deferred. Discussion ensued to determine if there was a specific time frame to be applied to the deferral. Commissioner Esaki responded that it should be deferred till after the next legislative session. Commissioner McDonald seconded the motion.

Chair Heller commented that there hadn't been much discussion about the working group or negotiations surrounding the Petition Area as described in SCR164; but that decision outcomes resulting from these activities could affect whether this was the best time to make a decision. Chair Heller stated that he was hesitant about deferring action on this matter and described how pending decisions affecting the Petition Area could impact the situation materially; and why it might be better to know whether there was an agreement regarding the Petition Area before attempting to make a decision.

Commissioner Inouye stated that he did not have a problem with deferring the matter but noted that he would prefer to deny the DOC's Petition without prejudice and shared his reasons for taking his position. Chair Heller asked if Commissioner Inouye was making a motion. Commissioner Inouye clarified that he wanted to amend the motion from deferring DOC's Renewed Motion for Issuance of an Order to Show Cause to denying it. Chair Heller seconded the motion and clarified that the Commission was voting on Commissioner Inouye's Motion to Amend Commissioner Esaki's Motion to Defer DOC's Renewed Motion for Issuance of an Order to Show Cause to a Motion to Deny DOC's Renewed

Motion for Issuance of an Order to Show Cause. There were no further comments or discussion.

The Commission voted as follows:

Ayes: Commissioner Inouye, Chair Heller

Nays: Commissioners Matsumura, Torigoe, McDonald, and Esaki.

The Motion failed to carry (4-2 with 2 excused).

Chair Heller stated that the Commission would now vote on the original Motion to Defer DOC's Renewed Motion for Issuance of an Order to Show Cause.

There were no further comments or discussion.

The Commission voted as follows:

Ayes: Commissioners Esaki, McDonald, Matsumura, Torigoe, Inouye and Chair Heller

Nays: None

The Motion passed (6-0 with 2 excused).

Mr. Matsubara thanked the Commission. Mr. Yee asked if the Motion included deferring the matter until after the legislative session. Chair Heller replied that it did and that this matter would be heard again sometime around June of 2014. There were no other questions or comments.

Chair Heller announced that the Commission would be entering Executive Session to complete the day's agenda. There were no comments or objections. Commissioner McDonald moved and Commission Inouye seconded to enter into Executive Session.

The Commission entered Executive Session at 1:50 p.m. and reconvened at 2:09 p.m.

There being no further business, Chair Heller adjourned the meeting at 2:09 p.m.