

LAND USE COMMISSION  
MEETING MINUTES

**November 4, 2015 – 9:30 a.m.**

West Hawaii Civic Center  
74-5044 Ane Keohokalole Highway, Kailua-Kona, HI 96740

COMMISSIONERS PRESENT: Chad McDonald  
Edmund Aczon  
Kent Hiranaga  
Arnold Wong  
Nancy Cabral  
Linda Estes  
Aaron Mahi

COMMISSIONERS EXCUSED: Jonathan Scheuer  
(There are currently 8 seated Commissioners out of 9 positions)

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

COURT REPORTER: Jean McManus

**CALL TO ORDER**

Chair Aczon called the meeting to order at 9:33 a.m.

**APPROVAL OF MINUTES**

Chair Aczon asked if there were any corrections or additions to the October 22-23, 2015 minutes. There were none. Commissioner Wong moved to approve the minutes. Commissioner McDonald seconded the motion. The minutes were unanimously approved by 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.

- November 18-19 meeting will be on Maui for A10-786 Olowalu asking the LUC to accept the FEIS and SP94-386 Lanai Landfill Permit Extension on the 19th
- December 9-10 is planned for a status update on A94-706 Ka`onoulu Ranch and a site visit for the impending Ma`alaea Plantation 201H project.
- The January- February 2016 meetings are planned to complete hearings on the Ma`alaea Plantation docket.
- Any questions or conflicts, please contact LUC staff.

## HEARING AND ACTION

### A89-643 MCCLEAN HONOKOHAU PROPERTIES (HAWAI`I)

Chair Aczon announced that this was an action meeting to Consider Docket No A89-643 McClean Honokohau Properties' Motion To Release, Discharge and Delete All Conditions in the Land Use Commission's Findings of Fact, Conclusions of Law, Decision and Order, Entered April 16, 1991

#### APPEARANCES

Robert Smolenski, Esq. for (Petitioner) McClean Honokohau Properties ("MHP")

James McClean , MHP, Representative

David Elbogan, MHP, Representative

Amy Self, Esq., Deputy Corporation Counsel, County of Hawai`i Planning Department, ("County")

Duane Kanuha, Director, County (arrived at 9:38 a.m.)

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

Lorene Maki, Planner, OP

Chair Aczon updated the record; and described the procedures for the day. Mr. Smolenski requested clarification on various aspects of the procedures that Chair Aczon had announced. Discussion ensued to clarify the status of the proceedings and what matters had already be addressed, what matters that still remained to be covered and how the Parties would make their presentations. Mr. Smolenski requested that he be allowed to continue using his witnesses as part of his presentation and how he thought the proceedings should progress. Mr. Yee provided his perspective of the state of the proceedings and described the areas that he felt still needed to be covered.

The Commission went into recess at 9:56 a.m. and reconvened at 10:00 a.m.

Chair Aczon restated the procedures that the Parties would follow. There were no further questions on the day's procedures

Chair Aczon asked if there were any Public Witnesses who wished to testify and called the testifiers before the Commission.

## **PUBLIC WITNESSES**

None

## **PETITIONER**

Mr. Smolenski summarized that Conditions 4, 5, 7, 9 and 10 had already been addressed by the Commission, and had Mr. McClean testify as to Conditions 6, 8, and 11

## **Questions**

County had no questions.

## **OP**

In regards to Condition 6, Mr. Yee requested clarification on what contact with the Department of Health (DOH) Petitioner had regarding spill prevention and control measures. Mr. McClean recalled that his last DOH contact was approximately 5 years ago.

In regards to Condition 8, Mr. Yee requested clarification on what open spaces remained in the Petition Area, what uses they might have, and whether any construction would be required to develop them. Mr. McClean described how many lots remained vacant, indicated that construction could occur on vacant lots, and what degree of construction would be needed to improve them for different uses.

Commissioner Wong requested clarification on what measures had been taken to satisfy Condition 6. Mr. McClean described the filtration systems that were in place and what stormwater management systems were used to monitor and maintain the Petition Area. Mr. McClean also described how spills would be handled by tenants of the Petition Area and how larger spills would be contained and acted upon.

Commissioner Mahi requested clarification on what actions had been taken to satisfy Condition 8. Mr. McClean stated that an Archaeological Inventory Survey (AIS) had been performed by Dr. Rosenthal and described the historical background behind the AIS and what actions had been taken to satisfy Condition 8. Mr. McClean stated that no archaeological discoveries had been made since 2001 and referenced a letter from Don Hibbard attesting to this (Petitioner's Exhibit 4).

Commissioner McDonald requested clarification on how tenant non-compliance with Condition 6 would be handled. Mr. McClean described how tenants were informed of what their duties and obligations were and how reports to DOH would be filed if necessary.

Redirect

Mr. Smolenski requested clarification on what would be required to develop or improve vacant open lots in Increment I of the Petition Area. Mr. McClean described the excavation and site foundation preparation work involved for new construction.

Mr. Smolenski requested additional clarification on how Condition 8 had been satisfied. Mr. McClean provided his perspective that construction in Increment 1 of the Petition Area was essentially complete and that County ordinances were in place to handle any subsequent “cultural/archeological findings” if the Commission’s Condition 8 were removed or deleted. Mr. McClean also referred to Don Hibbard’s letter to support his position.

Mr. Smolenski stated that Petitioner had withdrawn its request to have Condition 2 (Roadway Improvements) released or deleted after discussions with County; and was also withdrawing its request to have Condition 12 released.

#### Argument on Remaining Conditions

Mr. Smolenski made his argument on why Conditions 3, 6, 8, 11 and 13 and 14 should be removed, released or deleted. Mr. Smolenski provided his perspective of how Condition 3 was linked to Condition 12 and how Condition 3 could be removed if Condition 12 still remained in effect.

Mr. Smolenski argued that Condition 8 (Traditional and Cultural Practices) could be removed since County ordinances were in place to address any issues that might arise in the future since development in Increment I of the Petition Area was complete.

Mr. Smolenski argued that Condition 11 (Soil Erosion/Control) could be removed since construction in Increment I of the Petition Area was complete and that any future permits for grading from the County required the permit applicant to observe similar strict controls as those stated in the Condition.

Mr. Smolenski argued that Condition 13 could be removed since construction was finished in Increment I of the Petition Area and Petitioner had developed the property in substantial compliance with the representations it had made to the Commission.

Mr. Smolenski stated that Petitioner was also withdrawing its request for the removal of Conditions 15 and 16; and provided the Commission with the reasoning behind this decision; and argued that Condition 14 (Ownership) should be removed

since it had been a Condition that OP and County had stipulated to removing, releasing or deleting.

#### Commissioner Questions

Commissioner Cabral requested clarification on where Exhibit 22 came from. Ms. Self responded that it was provided by Petitioner.

Commissioner Mahi requested clarification on what Conditions had been withdrawn from the original motion. Chair Aczon asked if the Petitioner had withdrawn its request to remove, release or delete Conditions 1, 2, 12, 15 and 16. Mr. Smolenski acknowledged that Petitioner had.

Chair Aczon declared a recess. The Commission went into recess at 10:51 a.m. and reconvened at 11:02 a.m.

Chair Aczon called for argument from County and OP.

#### County

Ms. Self stated that County had no objections to the removal of Conditions 6, 8, 11, and 13, in addition to Conditions 4, 5, 7, 9, 10 and 14 that had been previously stipulated to.

There were no questions for Ms. Self.

#### OP

Mr. Yee argued that Conditions 3, 6, 8, 11, and 13 should be retained. Mr. Yee described what considerations OP had made in determining that these Conditions should remain part of the Decision and Order and provided additional details on why retaining Condition 12 did not justify releasing Condition 3; how Condition 8's requirements were different from what the County required for notification of any cultural/historic findings for surface and sub-surface areas; and how Conditions 11(Dust Control) and 13 (Compliance with Representations) would need to remain in place for the future.

#### Commissioner Questions

Commissioner Cabral requested clarification on OP's position on Condition 14. Mr. Yee responded that OP had no objection to its deletion and had included it as a stipulated Condition for release.

Commissioner McDonald requested clarification from Mr. Yee and Mr. Smolenski on the level of jurisdiction and engagement that DOH had in regards to Petitioner's efforts to satisfy Condition 3. Mr. Yee described how DOH usually

coordinated with developers in matters regarding pollution control. Mr. Smolenski stated that correspondence to DOH from Cheryl Palish- (Petitioner Witness- Belt Collins) supported his request for the removal of Condition 3.

Commissioner Wong requested clarification on how OP perceived the application of Condition 11(Dust Control) over the Petition Area. Mr. Yee replied that it applied to the entire Petition Area, but since Petitioner felt that Increment I was completed, Petitioner was seeking to have that portion released from the Condition.

Commissioner Wong shared his concerns about the need for pollution controls and requested further clarification on DOH controls to protect the ecosystem from stormwater runoff. Mr. Yee described how DOH reviews the requirements of an LUC Condition and evaluates a specific Petition Area and its proposed infrastructure system in relation to other docket activity in the area in order to determine appropriate control levels.

#### Rebuttal

Mr. Smolenski argued why Conditions 3, 6, and 13 should be removed, released or deleted; and stated that Petitioner felt that there were no further DOH regulatory requirements that needed to be met to satisfy Condition 3; and that since development in Increment I of the Petition Area was complete, Conditions 6 and 8 were no longer required; and that Condition 13 was no longer applicable as well.

#### Commissioner Questions

Commissioner Hiranaga requested clarification on why Petitioner filed its motion. Mr. Smolenski replied that the motion had been filed in response to concerns that institutional knowledge about the original Petition might be lost and that since the Petitioner felt that Increment I of the Petition Area was complete, it was an opportunity to update what Conditions applied to the Petition Area for the future.

Commissioner Cabral acknowledged Mr. Smolenski's explanation for filing the motion and expressed her concerns about granting the release of all the remaining conditions that were being addressed. Commissioner Cabral noted that Conditions 13 and 14 should remain; and moved that since Petitioner had withdrawn Conditions 1, 2, 12, 15, and 16 from its motion, and that the Commission had granted the release of Conditions 4, 5, 7, 9 and 10 at its September 10, 2015 hearing, that the Commission deny the release of Conditions 3, 6, 8, 11, 13, and 14.

Commissioner Wong seconded the motion.

#### Discussion

LUC Meeting Minutes *(Please refer to LUC transcript for more details on this matter)*  
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Commissioner Hiranaga asked what the test was for whether or not a Condition was satisfied. Mr. Orodener stated that the LUC has an evidentiary standard that needs to be met and provided examples of past decisions. Commissioner Hiranaga asked if satisfaction had to be beyond a reasonable doubt. Mr. Orodener replied that it would be based on the best evidence available.

There was no further discussion.

Chair Aczon called for Mr. Orodener to poll the Commission.

The Commission voted unanimously (7-0) in favor of the motion.

Mr. Smolenski thanked the Commission and Parties for their time.

Chair Aczon adjourned the meeting at 12:01 p.m.