

LAND USE COMMISSION
MEETING MINUTES
September 6, 2013, 8:00 a.m.
Marriott Courtyard Hotel, Haleakalā Room
Kahului, Maui, Hawai`i, 96732

COMMISSIONERS PRESENT: Chad McDonald
Ernest Matsumura
Lance Inouye
Ronald Heller
Sheldon Biga

COMMISSIONERS EXCUSED: Jaye Napua Nakasone
Carol Torigoe
Dennis Esaki (recused Docket No.A13-797)
Kyle Chock

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 8:02 a.m. and announced that this was a continued hearing for Docket No. A13-797 and called for the Parties to continue their presentations.

CONTINUED HEARING- A13-797 CMBY 2011 INVESTMENT, LLC

Petitioner Witnesses (continued)

6. Tom Nance- Expert in Groundwater and Surface Water Development, Hydraulics and Water System Design, Flood Control, Drainage and Coastal Engineering

Mr. Nance was offered and admitted as an expert witness and summarized his written testimony. Mr. Nance described the studies he had conducted of the Petition Area and its surroundings and shared his findings and recommendations with the Commission. Mr. Nance also described the various government agencies that would be involved with the search, discovery and maintenance of water resources for the Petition Area; and what associated

approvals and reports needed to be filed; and the development issues and estimated costs that might be incurred by the proposed project.

Mr. Giroux had no questions.

Mr. Yee requested clarification on the water analysis findings for the Petition Area. Mr. Nance provided the details of his findings and described the possible impacts from the construction of wells for the Petition Area. Mr. Nance stated that there was no setback from the disposal wells and shared what he thought the impacts would be for adjoining landowners digging for a potable water source and described what potential local impacts injection wells would have.

Commissioner Questions:

Commissioner Inouye requested clarification on what would happen if an adjacent landowner wanted to build an individual wastewater system within a thousand feet of a pump system. Mr. Nance replied that the only way the owner could be within the thousand foot radius was if they obtained a variance from the DOH and used an approved advanced septic system capable of doing a better job of cleaning the wastewater system than a conventional septic system. Mr. Nance also clarified that 1,320 feet was associated with disposal wells and a thousand feet was associated with individual wastewater systems.

Commissioner Inouye requested clarification on the notification process and what happened to comments that were received. Mr. Nance replied that the comments would be reviewed by the DOH and that disputes would have to be resolved by the applicant.

Commissioner McDonald requested clarification on the estimate for wastewater and expressed his concern about inadequate space within the Petition Area to locate all the necessary infrastructure to service the proposed project. Mr. Nance stated that he estimated approximately 100,000 gallons for wastewater and explained how he had arrived at that figure; and acknowledged that it would be challenging to accommodate the amount of individual IWS systems that were required.

Chair Heller requested further clarification on the restrictions on how close together individual lots, wastewater systems and leach fields could be. Mr. Nance replied that he was not aware of any restrictions on the proximity of the items Chair Heller had asked about.

Chair Heller requested clarification on the location of the potable well and the thousand foot radius, and the effect it could potentially have on uses by adjacent landowners; and on whether the notification process involved just

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September 6, 2013 Meeting Minutes

notification or if consent was actually required. Mr. Nance responded that notifications on wastewater systems don't actually happen and that the notification process is tied to UIC regulations. Chair Heller restated that he was asking about the well for potable water supply and asked if it was not possible to have a leach field or a septic system within that thousand foot radius. Mr. Nance affirmed that was the case and stated that a neighboring landowner's ability to do certain things on certain parts of their land would be affected; and clarified that the notification process is only associated with disposal wells and not associated with individual wastewater systems; and that any notification regarding a potable well system is a voluntary action; and that a neighboring landowner could be unaware that they were being restricted in terms of where they could put a septic system on their property.

Chair Heller requested clarification on the potential wastewater issues if chemicals or solvent-like materials were involved. Mr. Nance replied that the proposed CC&Rs for the Petition Area had certain requirements for that type of wastewater generation and disposal.

Chair Heller asked whether the individual systems would have a program or system to ensure that they are properly maintained. Mr. Nance responded he did not know the answer to the question.

There were no further questions for Mr. Nance.

7. Steve Dollar- Expert in Coral Reef Ecology and Coastal Oceanography

Mr. Dollar was offered and admitted as an expert witness and summarized his written testimony; and described how he had performed extensive sampling in the areas downslope of the Petition Area and combined it with the data that Mr. Nance had reported to arrive at his conclusions.

Mr. Dollar described the concerns that DOH and OP had regarding the effect the proposed project would have on the marine resources downslope of the Petition Area in the areas of the near shore ocean, its marine biology and water quality; and stated that the proposed project would generate very small changes to the area and that the mud caprock fronting the coastline would direct the groundwater flowing under the site- discharging it far offshore with little effect to near shore marine biology or water quality.

Mr. Giroux had no questions.

Mr. Yee requested clarification on Mr. Dollar's findings. Mr. Dollar noted that Mr. Nance's study had detected small changes to the salinity and nutrients; and stated that he had not performed an analysis on whether or not groundwater

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September 6, 2013 Meeting Minutes

from the Petition Area would have an impact on near shore waters and/or the Keālia Wildlife Refuge.

There were no further questions for Mr. Dollar.

Redirect

Ms. Benck requested that Mr. Dollar share his opinion on OP Condition 4- Pollution Prevention, Best Management Practices. Mr. Dollar stated that he felt that the proposed conditions were fair and adequate to address the industrial uses of the Petition Area; and that the only additional suggestion that he had was to provide for a monitoring of the area to ensure that there were no developing negative impact threats.

Mr. Yee requested clarification on what type of monitoring Mr. Dollar was suggesting. Mr. Dollar described monitoring services that were performed for two Maui resort projects as required by their zoning changes; and suggested a similar type of monitoring specifically for heavy industry use as it applied to the Petition Area.

Commissioner Questions:

Chair Heller requested clarification on whether the conditions requiring monitoring imposed on the resort properties were a condition of county zoning. Mr. Dollar replied that the county zoning process had required it and that the conditions were similarly worded for both resort projects.

There were no further questions for Mr. Dollar.

Chair Heller assessed whether County or Petitioner had any remaining witnesses to present. Both Mr. Giroux and Ms. Benck stated that they had no further witnesses. Mr. Yee stated that he had one witness, Rodney Funakoshi.

Chair Heller called for OP's witness.

OP Witness

1. Rodney Funakoshi- Expert in Land Use and Planning

Mr. Funakoshi was offered and admitted as an expert witness and summarized his written testimony. Mr. Funakoshi stated that OP recommended approval of the Petition subject to conditions and described the concerns and considerations that factored into OP's decision. Mr. Funakoshi summarized the proposed OP conditions and provided the reasoning and justification for wanting to have them included.

(Please refer to LUC Transcript for more details on these matters)

September 6, 2013 Meeting Minutes

Ms. Benck asked if Mr. Funakoshi was familiar with the *Kaua`i Springs vs. Planning Commission* case and whether the public trust issues that were raised in that case had been considered by OP. Mr. Funakoshi responded that OP had not done a public trust analysis but had simply acknowledged that it had been considered; and that the OP analysis was consistent with it.

Ms. Benck requested clarification on the conditions of approval provided by Mr. Funakoshi. Mr. Funakoshi acknowledged that his testimony was consistent with what OP was recommending with the exception of some non-substantive wording changes to OP Condition No. 4- DOH; and that a dispute over Condition 1A with Petitioner existed. Ms. Benck stated that there were 2 pieces to OP's original condition which were: 1) to submit the revised TIAR for review and 2) to have DOT accept the TIAR. Ms. Benck requested clarification on OP's position regarding Petitioner wanting to defer submitting the revised TIAR till final subdivision approval. Discussion occurred over what the "review and acceptance" portion of the OP condition meant. Ms. Benck asked what would constitute DOT acceptance and if OP believed that acceptance should be done prior to final subdivision approval. Mr. Funakoshi replied that OP was recommending acceptance prior to preliminary subdivision approval; and described various ways how DOT showed that they accepted a TIAR; and stated that the proposed revisions for this case were very minor and that he did not see a problem with DOT issuing a letter well within the 9 month timeframe. Mr. Funakoshi noted that DOT had been requiring a Memorandum of Agreement (MOA) which incorporated both the approved or accepted traffic study along with responsibility and timeframe for improvements and updates.

Further discussion occurred and Ms. Benck requested clarification on whether Petitioner would be in violation of OP's proposed Condition No. 1A if DOT did not issue a letter after Petitioner submitted its revised TIAR explicitly stating that DOT accepted the TIAR and Petitioner began its subdivision process without such an approval letter. Mr. Funakoshi responded that it would be a violation. Ms. Benck asked if Petitioner would be able to proceed and get final subdivision approval without DOT signing off on construction plans. Mr. Funakoshi replied that it would be necessary to get the approval before final.

Mr. Giroux requested clarification on DOT's condition since it seemed to pose a "Catch-22" for the developer. Mr. Funakoshi provided his understanding of why the DOT condition was reasonable since DOT needed a clear understanding of what highway improvements were needed or triggered by the proposed project and to obtain an understanding of that at an early stage; and

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September 6, 2013 Meeting Minutes

why all that was being required was an accepted TIAR. Mr. Funakoshi stated that a clear understanding between DOT and Petitioner of what was needed and what would be developed to support the proposed project needed to be in place.

Mr. Giroux expressed his concern that there was no guarantee that DOT would review the TIAR or submit a letter. Mr. Funakoshi responded that there was no time frame requirement and that it might be necessary to prod the DOT to complete its review. Mr. Giroux described how the preliminary subdivision would be very sketchy at the beginning and would gather recommendations as it went through the approval process making it difficult to ascertain what would be finally required. Mr. Funakoshi described what needed to significantly occur during the approval process that would warrant revisiting the traffic study. Mr. Giroux requested clarification on why, during the preliminary subdivision process, things could not be worked out since the developer would be working all the details out with all the other agencies including the County. Mr. Funakoshi replied that it was possible, and that it was a reasonable request.

Mr. Giroux asked if the TIAR could be revised at any point during the process to assure safety of the highways. Mr. Funakoshi acknowledged that it was possible to revise the report and that DOT would not sign off on anything that it felt was unsafe.

Redirect

Mr. Yee requested clarification on what might happen if the LUC imposed a requirement to have the acceptance of the TIAR prior to tentative or preliminary subdivision approval and if DOT would wait for construction documents before signing off. Mr. Funakoshi responded that he thought the sign offs were separable and that it was unlikely that DOT would wait for construction documents since there was a specific condition that had a deadline for them to act.

Commissioner Questions:

Commissioner Inouye requested clarification on what regulations might be in place to require how adjacent landowners would be notified when a potable water source system was being constructed nearby. Mr. Funakoshi responded that another proposed project had encountered similar notification problems and stated that he would follow up on the issue with the DOH.

Commissioner Inouye requested clarification on Petitioner's position on fair-share contributions towards regional roadway improvements and how legislation adopting regional impact fees prior to final subdivision approval would impact the

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September 6, 2013 Meeting Minutes

process. Discussion occurred to clarify what OP's proposed Condition 1C was trying to require. Mr. Yee stated that 1C says that Petitioner would provide their fair-share contribution but not "subject to legislation".

There were no further questions for Mr. Funakoshi.

CLOSE OF EVIDENCE

Chair Heller declared the evidentiary portion of the hearing concluded and directed that the parties draft their individual proposed findings of fact, conclusions of law and decision and order based upon the record in this docket and serve the same upon each other and the Commission; and regardless of whether the parties pursue a partial or fully stipulated order, that each party file its proposal with the Commission and serve copies on the other parties no later than the close of business on September 20, 2013. All responses or objections to the parties' respective proposals shall be filed with the Commission and served upon the other parties no later than noontime on October 4, 2013. Any responses to the objections must be filed with the Commission and served on the other parties no later than noontime on October 10, 2013; and deliberation and decision-making is tentatively scheduled for October 17, 2013.

Mr. Yee asked that OP be excused from filing its proposed Findings of Fact, Conclusions of Law and Decision and Orders; and be allowed to file comments and objections to Petitioner's Proposed Findings of Fact, Conclusions of Law, and Decision and Order on October 4, 2013 and follow the pursuant schedule thereafter. Mr. Giroux stated that County would like to join in OP's request. There were no objections and Chair Heller granted OP and County's requests.

Ms. Benck requested clarification on Chair Heller's request for a copy of the zoning ordinance. Chair Heller requested that Ms. Benck file it as an exhibit and asked if Mr. Giroux and Mr. Yee had any objections. Mr. Giroux stated that he was aware of the contents of the conditions contained in the ordinance and that he had no objections. Mr. Yee stated that he had no objections and requested clarification on whether a follow-up with DOH regarding the formal notification requirement issue for the water systems was necessary. Chair Heller responded that the Commission would find the information helpful and requested that OP find out if there was a DOH notification or consent requirement.

(Please refer to LUC Transcript for more details on these matters)
September 6, 2013 Meeting Minutes

Ms. Benck asked if the Commission also wanted Mr. Dollar's most recent report. Chair Heller acknowledged that Mr. Dollar's report would be helpful.

There were no further questions or comments regarding filings by the Parties or on the post-hearing procedures.

There being no further business, the meeting was adjourned by Chair Heller at 9:31 a.m.

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September 6, 2013 Meeting Minutes