



LAND USE COMMISSION
STATE OF HAWAII

2019 APR 25 A 7:40

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of

DEPARTMENT OF PLANNING, COUNTY
OF MAUI,

To issue a declaratory order that Condition 1 (b) of the State of Hawaii Land Use Commission's Decision and Order filed July 29, 2013, in Docket No. A11-794, granting the Land Use District Boundary Amendment for 77.182 acres identified for real property tax purposes as tax map(2) 2-2-002:081, Kihei, Maui, Hawaii, requires an available above or below ground pedestrian crossing.

DOCKET NO. DR 19-65

ORDER GRANTING PETITIONER
DEPARTMENT OF PLANNING,
COUNTY OF MAUI'S PETITION FOR
DECLARATORY ORDER;
AND CERTIFICATE OF
SERVICE

ORDER GRANTING PETITION FOR DECLARATORY ORDER

AND

CERTIFICATE OF SERVICE



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ORDER GRANTING PETITION FOR DECLARATORY ORDER

On February 22, 2019, the Department of Planning- Maui County ("County"), through its attorney Tom Kolbe, Deputy Corporation Counsel, filed a Petition For Declaratory Order ("Petition"), pursuant to Hawai'i Revised Statutes ("HRS") Section 91-8, and Hawai'i Administrative Rules ("HAR"), Section 15-15-98 *et seq.*; Exhibits 1 – 8, and Certificate of Service. County sought a declaratory ruling from the Commission reiterating and reaffirming that condition 1(b) to the Commission's July 29, 2013 *Findings of Fact, Conclusions of Law*,

Decision and Order requires an available above or below ground pedestrian crossing to allow pedestrians to safely cross the Piilani Highway, prior to the opening of Phase I.

On March 4, 2019, the Commission mailed a Notice of Docket filing and filing deadlines to all potential interested parties as identified by Petitioner.

On March 15, 2019, the Department of Education (“DOE”) filed its Notice of Appearance of Counsel.

On March 20, 2019, the DOE filed a Petition to Intervene and a Motion to Continue Hearing and Deferral of Ruling on Petitioner Department of Planning.

On March 25, 2019, the State of Hawai‘i Office of Planning (“OP”) filed its Response to DOE’s Petition to Intervene and Motion to Continue Hearing and Deferral of Ruling on Petitioner Department of Planning. On this same day, the Commission mailed a Meeting Notice and agenda to Parties and the Statewide and Maui mailing lists for the April 3, 2019 meeting on Maui.

On March 29, 2019, the Commission received DOE’s withdrawal of its Petition to Intervene and Motion to Continue Hearing and Deferral of Ruling on Petitioner Department of Planning.

On April 3, 2019, the Commission met in Kahului, Maui Hawai‘i, to consider the Petition pursuant to Section 15-15-100, HAR. Tom Kolbe, Esq., appeared on behalf of County. The following individuals provided oral and/or written testimony: Andrew Beerer, Patricia Stillwell, John Laney, Diane Laney, Judy Williams, Mike Moran, James Williams, Brendan Brown, Cindy Dellefave, Calden Norman, and William Sams. The Commission also heard public testimony on the Petition from Dawn Takeuchi-Apuna, Esq., on behalf of OP. There were no representatives for the Department of Education.

Mr. Kolbe described the basis for County's requesting a declaratory ruling and noted that during the process of County's attempt to pass a corresponding change to County zoning and a Community Plan Amendment (Maui County Ordinance 4135), representations were made to the Maui Council's Land Use Committee by the DOE, reassuring the Council that an overpass or underpass would be provided pursuant to the conditions included in the Land Use Commission's *Decision and Order*. However, despite the assurances, by letter dated July 18, 2017, the Director of the State Department of Transportation ("DOT") notified Duane Y. Kashiwai, Public Works Administrator, Facilities Development Branch, DOE and the parties to the Docket that "No pedestrian crossing measures for Phase I were proposed by their transportation consultant, Fehr & Peers ("F&P"); and the DOT assumes F&P recommended that the traffic signal will accommodate an at-grade crossing and that a median pedestrian refuge will be installed for Phase I".

The condition 1(b) mandate for an "above or below ground pedestrian crossing", and this recommendation of an "at grade" crossing instead created a controversy as to the legal significance of condition 1(b). The County sought clarification on February 1, 2019 and passed Resolution No. 19-20 "REQUESTING THE LAND USE COMMISSION TO ISSUE A DECLARATORY RULING REITERATING AND AFFIRMING THE REQUIREMENT FOR A PEDESTRIAN OVERPASS OR UNDERPASS TO ALLOW SAFE ACCESS TO KIHEI HIGH SCHOOL".

Mr. Kolbe referenced LUC Docket No. A11-794, July 29, 2018 *Decision and Order* and described how Petitioner was to complete a pedestrian route study and analysis prior to executing a contract for Phase I of the Project; and how Petitioner shall cause to be constructed, or ensure that there is an available above or below ground pedestrian crossing and implement such

mitigation or improvements as may be required or recommended by the study and analysis to the satisfaction of DOT prior to opening Phase I of the Project. Mr. Kolbe also described how County had relied on DOE's representations and had approved the proposed Change in Zoning and Community Plan amendment for the project via ordinances 4134 and 4135.

In its discussion and deliberations on the Petition, the Commission confirmed the terms and conditions of the original decision and order. It was first noted that the DOE was no longer debating the issue and, by its actions, appears to agree with the County of Maui's interpretation of the condition and does not object to its interpretation. The Commission confirmed that at the time of hearing the original D&O, the LUC clearly intended the condition to be mandatory. A plain reading of the text supports such a conclusion.

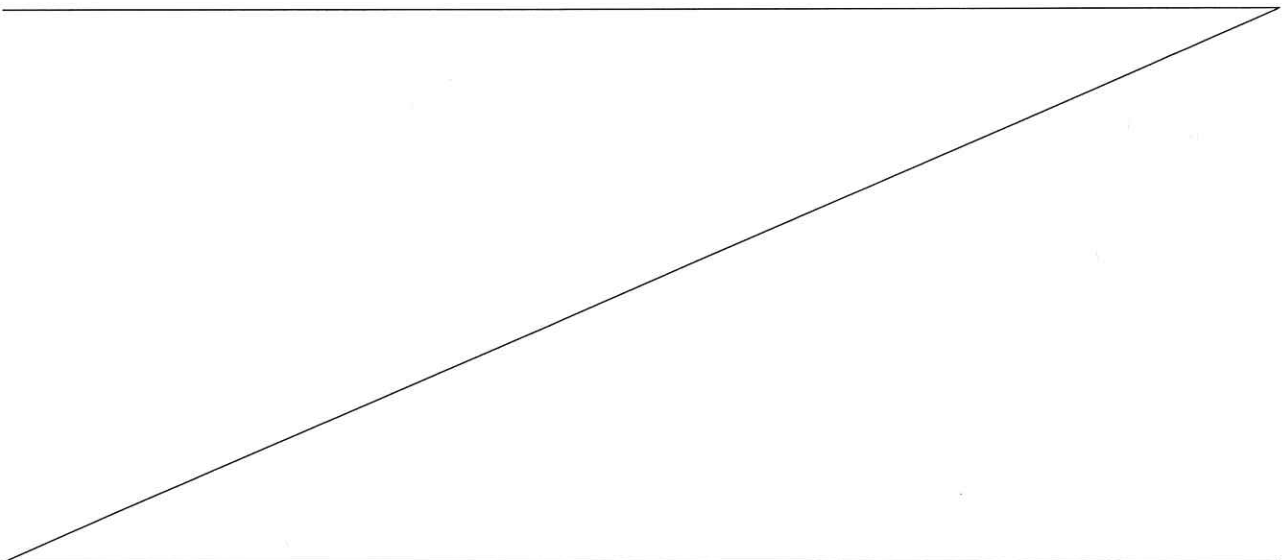
During its discussions on the matter, the LUC Commissioners noted that condition 1(b) had a "clear and unambiguous meaning" and was intended to protect the lives of the precious members of the community. The clause had in effect two parts. One was the requirement of an above or below ground crossing. The second was that part of the condition subsequent to the word "and". The sentence structure would indicate the original D&O intended that in addition to the grade separated crossing, any additional requirements of DOT were also to be met.

The Commission noted that the safety concerns voiced by the community were genuine and concluded the plain language of the condition in the decision and order was specific that either an overpass or underpass was required prior to the opening of Phase I. The Commission also affirmed the intent of condition 1(b) and urged the community to continue to advocate for safe access to the high school and for funding from the legislature to provide for whatever type of overpass/underpass infrastructure was decided upon.

Thereafter, a motion was made and seconded to GRANT the Petition pursuant to Section 15-15-100(a)(2), HAR. Following discussion by the Commissioners, a vote was taken on this motion. There being a vote tally of 8 ayes and 0 nays, the motion carried.

ORDER

Having duly considered the Petition and the written and oral arguments presented by County, the pleadings filed by OP, as well as public comments received, and a motion having been made at a meeting conducted on April 3, 2019, in Kahului, Maui, Hawai`i, and the motion having received the affirmative votes required by Section 15-15-13, HAR, and there being good cause for the motion, this Commission ORDERS that the Petition be GRANTED and it is declared that under the particular facts of this case, that Condition 1(b) of the Decision and Order of July 29, 2013, Docket No. A11-794 DOE Kihei High School requires that a pedestrian overpass or underpass be constructed before the opening of the first phase of the new high school in Kihei and that construction of the overpass or underpass was a mandatory requirement and was not optional. In addition, the DOE is required to get approval from DOT of its Pedestrian and Traffic plans.



ADOPTION OF ORDER

This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Kahului, Maui, Hawai'i, this 25th, day of April, 2019, per motion on
April 3, 2019.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAI'I

Randall S. Rishiyama
Deputy Attorney General

By 
JONATHAN SCHEUER
Chairperson and Commissioner

Filed and effective on:

04/25/2019

Certified by:


DANIEL ORODENKER
Executive Officer



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THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT
COPY OF THE DOCUMENT ON FILE IN THE OFFICE OF THE
STATE LAND USE COMMISSION, HONOLULU, HAWAII.

Date 04/25/2019

A stylized, handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

BY
DANIEL ORODENER
Executive Officer



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CERTIFICATE OF SERVICE

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I hereby certify that an ORDER GRANTING PETITION FOR DECLARATORY ORDER was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular or certified mail as noted:

DEL.: MARY ALICE EVANS, Director
State Office of Planning
P. O. Box 2359
Honolulu, Hawai'i 96804-2359

REGULAR
MAIL: DAWN TAKEUCHI-APUNA, Esq.
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CERT.
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CERT.
MAIL: THOMAS KOLBE, Esq.
Deputy Corporation Counsel
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Wailuku, HI 96793

REGULAR
MAIL: Michele McClean
Director of Planning
Department of Planning
County of Maui
250 South High Street
Wailuku, Hawaii 96793

Dated: Honolulu, Hawai'i, 04/25/2019

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

DANIEL ORODENKER

Executive Officer