

LAND USE COMMISSION

STATE OF HAWAII

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HEARING

PAGE

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VOLUME

A05-757 JAMES W. McCULLY and)
FRANCINE M. McCULLY (Hawaii))
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TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for a public hearing at the Waikoloa Beach Marriott, 69-275 Waikoloa Drive, Waikoloa, Hawaii, commencing at 8:35 a.m. on Friday, August 12, 2005.

REPORTED BY: HOLLY M. HACKETT, RPR, CSR #130
Certified Shorthand Reporter

A P P E A R A N C E S

1
2 COMMISSIONERS:
3 THOMAS CONTRADES
4 MICHAEL FORMBY
5 KYONG-SU IM
6 LISA JUDGE
7 DUANE KANUHA
8 STEVEN LEE MONTGOMERY
9 RANDY PILTZ
10 RANDALL SAKUMOTO (Chairperson)

11 EXECUTIVE OFFICER: ANTHONY CHING
12 CHIEF CLERK: SANDRA MATSUSHIMA
13 STAFF PLANNERS: MAXWELL ROGERS

14 DEPUTY ATTORNEY GENERAL: DIANE ERICKSON

15 AUDIO TECHNICIAN: WALTER MENCHING

16
17
18 A05-757 JAMES W. McCULLY and FRANCINE M. McCULLY

19 For the Petitioner: R. BENJAMIN TSUKAZAKI, ESQ.
20 JAMES McCULLY

21 For the County: BOBBY-JEAN LEITHEAD-TODD, ESQ.
22 Deputy Corporation Counsel
23 NORMAN HAYASHI, Planning Dept.

24 For the State of Hawaii: JOHN CHANG
25 Deputy Attorney General
LAURA THIELEN, ABE MITSUDA,
LORENE MAKI Office of Planning

I N D E X

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DOCKET WITNESSES

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NORMAN HAYASHI

Direct Examination by Ms. Leithead-Todd

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Redirect Examination by Ms. Leithead-Todd

26

Cross-Examination by Mr. Tsukazaki

27

1 August 12, 2005

2 **A05-757 James W. McCully and Francine M. McCully**

3 CHAIRPERSON SAKUMOTO: Good morning. I'd like to call
4 the meeting of the Land Use Commission to order. This is a
5 continuation of the hearing on Docket No. A05-757 James W.
6 McCully and Francine M. McCully to consider the reclassification
7 of approximately 4.6 acres of land currently in the Conservation
8 District to the Agricultural District at Wailea, South Hilo,
9 Island of Hawaii to consolidate and resubdivide the three
10 existing legal lots of record and the contiguous former railroad
11 right-of-way into three lots in order to provide a more useful
12 lot configuration.

13 Yesterday where we left off I believe, Mr. Kudo was
14 still -- I'm sorry, too many Bens -- Mr. Tsukazaki was in the
15 process of putting on his case in chief.

16 MR. TSUKAZAKI: No problem, Mr. Chairman. Just don't
17 call me "Matsubara". (Laughter) It's just he's a lot older than
18 I am. Actually we moved on beyond our direct case, Mr. Chair.
19 And I believe we went to the Office of Planning's case. So at
20 this point I believe the ball is in either OP's or County's
21 hands.

22 CHAIRPERSON SAKUMOTO: Thank you, very much.
23 Yesterday the County allowed the State to put on a witness out of
24 order. So at this time I'll ask Ms. Leithead-Todd if she has any
25 witnesses to put on.

1 MS. LEITHEAD-TODD: Yes we do. We have Norman Hayashi
2 of our Planning Department.

3 CHAIRPERSON SAKUMOTO: May I swear you in please.

4 NORMAN HAYASHI

5 called as a witness at the instance of County, being
6 first duly sworn to tell the truth, was examined and
7 testified as follows:

8 DIRECT EXAMINATION

9 BY MS. LEITHEAD-TODD:

10 Q. Mr. Hayashi, could you please state your full name and
11 your position with the county of Hawaii.

12 A. I'm Norman K. Hayashi and I'm a planner with the
13 County of Hawaii Planning Department.

14 Q. How long have you worked with the county Planning
15 Department?

16 A. Too long. (Laughter). Strike that. About 35 years.

17 Q. So when did you first start with the county?

18 A. I started in January of 1969.

19 Q. So you were a county employee when the first General
20 Plan was adopted?

21 A. Yes.

22 Q. Did you work on that?

23 A. Yes. I was one of the planners assigned to assist in
24 the drafting of the General Plan.

25 Q. Have you worked on the -- that would have been the

1 1971 General Plan. Did you also work on the 1989 General Plan?

2 A. Yes. The 1989 General Plan was done under my
3 supervision.

4 Q. What about the one that was recently adopted in
5 February of 2005?

6 A. I was also actively involved in the drafting of the
7 current General Plan.

8 Q. In your career with the Planning Department were you
9 the planning director at one point in time?

10 A. Yes. I was the Planning Director back in during 1990
11 to 1992.

12 Q. Okay. During your tenure with the Planning Department
13 have you become familiar with both the County's General Plans,
14 its zoning ordinances and subdivision codes?

15 A. Yes. I'm quite familiar with the codes.

16 Q. Okay. Could you explain a little bit about the County
17 General Plan designations of open and conservation and we'll go
18 to the zoning later?

19 A. First of all maybe a brief history as to how this area
20 was designated open. Back in 1991 when we initially had done the
21 General Plan, drafted the General Plan --

22 Q. In 1971?

23 A. In 1971. And that was our first comprehensive General
24 Plan. It was both a policy document as well as a map form. The
25 map was a component of the General Plan.

1 Now, at that time we decided to place the lands, many
2 of the lands along the shoreline or coastline and designate a
3 strip of those areas open would be a band of open designation for
4 those areas that were not urban in nature.

5 This particular property was one of those areas. At
6 that time we did not necessarily designate -- the open
7 designation did not necessarily coincide with the state land use
8 Conservation District line.

9 However, back in 2005 when we started the review of
10 the 2005 General Plan there was a policy decision to designate a
11 majority of the lands within the state land use Conservation
12 District into the County's General Plan conservation area or an
13 open area.

14 For this particular area the open designation was
15 still retained. We do have also areas such as that are basically
16 areas for preservation like areas mauka of the Kealakekua Bay
17 which is designates Conservation District. And we designated
18 those areas as conservation on our General Plan. So there are
19 two categories, conservation and open.

20 The Conservation District in our General Plan is
21 conservation in the true sense of the word. These areas are
22 areas of natural reserves or watershed areas, areas of
23 preservation. Those areas are designated conservation on the
24 General Plan.

25 Other areas along the Hamakua Coast and along the

1 shoreline we just designated areas open. These areas are
2 basically for recreational purposes or areas that are basically
3 shoreline properties.

4 Now, as far as the county's open designation, the
5 General Plan open designation, we do allow agricultural lands or
6 agricultural uses. That is one of the policies of the General
7 Plan. The General Plan in the policy states agricultural uses
8 may be permitted within the areas designated open.

9 So in this particular case the current designation of
10 the land zoned designation which is agricultural 20 acres and the
11 proposed use of the property for agricultural purposes would be
12 consistent with the county's open designation on the General
13 Plan.

14 Q. Okay. Thank you. You anticipated my next question
15 about the consistency. Were you also involved with the 1979
16 Northeast Hawaii Community Plan?

17 A. I was in the office at that time. I was not directly
18 involved with the drafting of the plan. Those were done by our
19 planning consultants at that time Hiroshi Kazumoto and Philip
20 Yoshimura.

21 Q. I just wanted to confirm that that was adopted by
22 ordinance?

23 A. Yes. That was adopted by ordinance by the county
24 council in 1979.

25 Q. Zoning for the property, how far back would the ag

1 zoning to your knowledge go?

2 A. The ag zoning for this area and other properties along
3 the Hamakua Coast that were in sugar production were designated,
4 zoned agricultural 20 acres since 1968.

5 Q. In terms of the county process for farm dwellings is
6 there a process if you're on ag land to be able to build a house?

7 A. Yes. We do inform the person that comes in for
8 building permit that they need to comply with the farm dwelling
9 requirement as stated in Chapter 205, the State Land Use Law.

10 Q. And do they have to sign a farm dwelling agreement?

11 A. No, they don't have to sign a farm dwelling agreement.
12 We just make them aware that there is this requirement.

13 Q. Now, before somebody can get a second dwelling do they
14 have to come in and show an actual agricultural activity?

15 A. That is correct. That's where they would be required
16 to submit a farm dwelling agreement application. And with that
17 they would have to show justification that the land is or will be
18 used for agricultural purposes.

19 Q. Now, if a lot preexists 1976 do they have a right to
20 build the farm dwelling?

21 A. That's correct.

22 Q. Or a single-family residence?

23 A. Yes, that's correct. That's based on state law.

24 Q. So if these were preexisting lots that existed prior
25 to 1976, under state law as well as the Hawaii County Code there

1 would be a right to do a single-family residence if this had been
2 just ag lands?

3 A. That's our understanding, correct.

4 Q. You've had an opportunity to take a look at some of
5 the review and comments by the staff and staff report?

6 A. Yes, I have.

7 Q. Is there anything you'd like to add to that or respond
8 to?

9 A. I think all of the concerns that are expressed by the
10 staff and the staff's report has been covered and discussed in
11 the application as well as in our testimony, as well as State's
12 testimony and by the previous speakers yesterday.

13 Q. And the county's General Plan has several sections in
14 it that speak to promoting agriculture and diversified
15 agriculture?

16 A. Yes. We do have that agricultural element in our
17 General Plan.

18 MS. LEITHEAD-TODD: I have no other questions but
19 reserve the right to redirect.

20 CHAIRPERSON SAKUMOTO: Thank you. State, do you have
21 any questions for Mr. Hayashi?

22 MR. CHANG: State has no questions.

23 CHAIRPERSON SAKUMOTO: Petitioner?

24 MR. TSUKAZAKI: No questions.

25 CHAIRPERSON SAKUMOTO: Commissioners, any questions

1 for Mr. Hayashi? Commissioner Formby.

2 COMMISSIONER FORMBY: Norman, thank you for your
3 testimony today.

4 THE WITNESS: You're welcome.

5 COMMISSIONER FORMBY: Just as an education to me,
6 drawing upon your experience with respect to a parcel like parcel
7 13 that the Petitioner originally purchased, I think that was
8 13 acres, in order for him to be able to subsequently sell off
9 the 4 parcels did he have to come back to the county and get some
10 sort of approval to be able to subdivide and sell off individual
11 parcels or even to be able to just sell them?

12 THE WITNESS: He had to come in and we had to
13 recognize that as preexisting lots. After that the lots were
14 created, reestablished and they were able to sell those 4 lots.
15 Yeah, 4 lots.

16 COMMISSIONER FORMBY: Okay. As it stands right now
17 there's nothing that is inconsistent between the county's
18 diversified agricultural goals and open zoning, correct?

19 THE WITNESS: That's correct.

20 COMMISSIONER FORMBY: Thank you.

21 CHAIRPERSON SAKUMOTO: Commissioner Montgomery.

22 COMMISSIONER MONTGOMERY: Mr. Hayashi, when you
23 arrived at the planning agency at the dawn of the 1970s did you
24 have a chance to talk with the human beings who were involved in
25 the first redistricting or districting under the State Land Use

1 Law of this green belt along the Hamakua Coast?

2 THE WITNESS: There may have been some discussions but
3 I can't recall. We worked closely with the Land Use Commission
4 back in that time also.

5 COMMISSIONER MONTGOMERY: I remember there was like
6 Ramon Duran and others. I'm trying to get at what the philosophy
7 was, what planning theory was opined on this section of the
8 coast. Because it looks like for several hundred feet in all
9 along there's some kind of master plan that would include some
10 scenic easement.

11 Are you aware of any records we could look at to see
12 what the thinking was?

13 THE WITNESS: I don't think of any records that are
14 available for your viewing. If there are any they should be with
15 the Land Use Commission's office.

16 But I think the intent was basically to, like the
17 county, was to designate these shoreline areas or coastal areas
18 for some kind of open type of designation for preservation of the
19 shoreline. I don't know why the Conservation District extended
20 beyond the shoreline area.

21 COMMISSIONER MONTGOMERY: Thank you.

22 CHAIRPERSON SAKUMOTO: Commissioner Kanuha.

23 COMMISSIONER KANUHA: Norman, the General Plan open
24 designation and the conservation designation, were those always
25 designations on the General Plan maps?

1 THE WITNESS: Yes. Those two designations were from
2 from its inception back in 1971.

3 COMMISSIONER KANUHA: So can you explain what the
4 differences are? Why a piece of property would be placed under a
5 conservation designation versus being in an open designation?

6 THE WITNESS: If I may refer to our General Plan. The
7 conservation area on our General Plan or designation relates to
8 areas -- I'm going to read from that. "Forests and water
9 reserves, natural and scientific reserves, areas in active
10 management for conservation purposes, areas to be kept in largely
11 natural state. And also lands within the State Land Use
12 Conservation District in certain areas." So that's what the
13 definition of conservation is in our General Plan.

14 As far as the open designation basically relates to
15 parks and other recreational areas. Like state parks are
16 designated open recreational areas. We have historic sites of
17 lands that are for historic preservation certain areas along the
18 shoreline. For instance, we have a site in Ku'emanu heiau in
19 North Kona close to the Keauhou Beach Hotel. That area is
20 designated open.

21 Other areas like this particular area along the
22 Hamakua Coast which is basically to delineate the shoreline areas
23 or coastal areas. Those areas are designated open.

24 COMMISSIONER KANUHA: Thank you. Thank you. That was
25 very good. In your opinion which of the two designations is the

1 more restrictive in terms of uses?

2 THE WITNESS: I think, well, the Conservation District
3 conservation designation definitely more restrictively.

4 COMMISSIONER KANUHA: Thank you.

5 CHAIRPERSON SAKUMOTO: Commissioner Piltz.

6 COMMISSIONER PILTZ: Could you tell me what the
7 building requirements are or the differences as far as what you
8 can build on state conservation versus what the county allows to
9 have built on open.

10 THE WITNESS: You're saying as to whether they can
11 build farm dwellings on farm?

12 COMMISSIONER PILTZ: Farm or any type of structure as
13 fas as the county's open designation.

14 THE WITNESS: Okay. We have to understand that
15 although this land is designated open on the General Plan, the
16 county's designation is agriculture 20 acres. So they can do
17 agricultural use. They can have agricultural related structures
18 like the surround shades, that kind of stuff.

19 They can also have farm dwellings or in this
20 particular case because these lands are preexisting prior to 1976
21 they can have single-family dwellings on it.

22 The process is normally they would just come in for a
23 building permit with our office, I mean with the Department of
24 Public Works, county Department of Public Works. The permit
25 would be routed through the various governmental agencies

1 including the Planning Department. We would check to see whether
2 those uses are permitted. And we will sign off on the building
3 permit.

4 Now, as far as the state, areas designated state land
5 use Conservation District those plans would have to be approved
6 by the Department of Land and Natural Resources or the Board of
7 Land and Natural Resources depending on, I guess, the magnitude of
8 the project.

9 So there is the process they go if the lands is
10 designate in the Conservation District.

11 COMMISSIONER PILTZ: Thank you.

12 CHAIRPERSON SAKUMOTO: Commissioner Judge.

13 COMMISSIONER JUDGE: Thank you. Good morning, Norman.

14 THE WITNESS: Good morning.

15 COMMISSIONER JUDGE: If I understood correctly, the
16 open zoned designation in your County General Plan was used
17 mostly or in the 2005 the conservation was used mostly for
18 natural reserves, preservation property. And the open was
19 designated for recreational purposes also along the shoreline
20 property. And agricultural uses are allowed in the open
21 designation.

22 On the maps I noticed a lot of the shoreline in this
23 area because it's the Hilo Coast or the Hamakua Coast, a lot of
24 it is designated conservation. I'm guessing you stated was in
25 that open designation?

1 THE WITNESS: These areas have General Plan open.

2 COMMISSIONER JUDGE: Okay. I'm just trying to
3 understand are there other homes and agricultural pursuits going
4 on in that area in the open designated Conservation District?

5 THE WITNESS: Yes. There are other agricultural
6 pursuits or uses conducted within these areas along the Hamakua
7 Coast. There are some single family dwellings also situated
8 within these areas designated open on the General Plan.

9 But be mindful the land is still zoned agriculture, is
10 zoned agriculture 20 acres by the county.

11 COMMISSIONER JUDGE: Is it in the state Conservation
12 District along the shoreline? I'm just trying to establish are
13 there other people in a similar -- is diversified ag going on
14 because it's allowed in the open, it's allowed in the county ag
15 zoning and did they get CDUAs for it?

16 THE WITNESS: That I'm not aware as to whether they
17 have received CDUA. They may or may not be. I'm not too sure as
18 to whether these structures or homes are within the Conservation
19 District, State Land Use Conservation District. But I know there
20 are agricultural activities that are or were conducted in the
21 past along this Hamakua Coast that are designated State Land Use
22 Conservation.

23 COMMISSIONER JUDGE: To your knowledge right now
24 you're not aware of any agricultural activities that exist in the
25 state conservation/county open/ag zoned?

1 THE WITNESS: I believe there are lands that are being
2 used for agricultural purposes. Whether there are any dwellings
3 or structures within those areas designated conservation by the
4 State Land Use Commission I'm not too sure.

5 COMMISSIONER JUDGE: Thank you.

6 CHAIRPERSON SAKUMOTO: Any other questions,
7 Commissioners? Commissioner Im.

8 COMMISSIONER IM: You know, this land, the Petition
9 Area has been divided. I'm wondering in the past most of it was,
10 I understand, sugarcane plantation. So I imagine it was
11 subdivided prior to Brewer taking over the property and running
12 the sugar plantation.

13 How come it was subdivide into small lots if it was
14 one big plantation?

15 THE WITNESS: I don't know the history of that as far
16 as why those lots were created back in those days. But research
17 was done by the Applicant to show that those lands were, there
18 were preexisting lots within this given area which includes the
19 four other lots. And that documentation was provided to our
20 office. So we did recognize those as preexisting lots, a total
21 of seven including some of the remnant or right of railroad
22 reserves.

23 COMMISSIONER IM: Maybe you don't know but do you know
24 when they were subdivided originally?

25 THE WITNESS: It would have to have been prior to 1946

1 maybe. Because since 1946 we did have a subdivision code at that
2 time. So they would have had to comply with the various
3 subdivision requirements.

4 COMMISSIONER IM: Thank you.

5 CHAIRPERSON SAKUMOTO: Any other questions
6 Commissioners? Commissioner Formby.

7 COMMISSIONER FORMBY: Norman, in response to
8 Commissioner Im's question you said, I think, this is probably
9 not an exact quote but something to the effect that the Applicant
10 researched and showed that there were lots on parcel 13 which he
11 purchased as a whole.

12 How does that process work? In other words, he buys a
13 lot that's 13 acres. And then he files something with the county
14 to prove that there's a history showing that it was previously
15 parceled into lots?

16 THE WITNESS: That's correct. That's the general
17 procedure. They would be the ones responsible to verify that
18 those lots were preexisting.

19 COMMISSIONER FORMBY: But the applicant has to go back
20 and do the history, and bring the proof to the county the county
21 does some sort of verifying research, either grants or does not
22 grant it?

23 THE WITNESS: Yes, that's the general procedure.

24 COMMISSIONER FORMBY: So in this case, the Petitioner
25 in this case, the applicant back then, came to the County and was

1 able to prove based upon his historical research that that
2 13-acre parcel was in fact seven lots.

3 THE WITNESS: That's correct.

4 COMMISSIONER FORMBY: Thank you. Ten lots, I guess,
5 originally.

6 THE WITNESS: Yes. That includes the remnant portion
7 the reserves, roadway reserves.

8 COMMISSIONER FORMBY: Thank you.

9 CHAIRPERSON SAKUMOTO: Commissioners, any other
10 questions? Norman, I had one question. You said this is zoned
11 agricultural 20 acres, the Petition Area, is that correct?

12 THE WITNESS: That's correct.

13 CHAIRPERSON SAKUMOTO: So I know this is an open ended
14 question. What does that mean? If you can summarize what's
15 agriculture 20 areas?

16 THE WITNESS: Generally within the County's
17 Agricultural District we do have various designations. The
18 agricultural 20-acre designation means that the minimum lot size
19 within that area is 20 acres if you were to subdivide.

20 In this particular case we recognize, however, there's
21 these three preexisting lots. So in that particular case they
22 would be able to consolidate and resubdivide into the same number
23 of lots.

24 Now, if this was vacant land which was 15 acres in
25 size, no preexisting lots, then they would not be able to

1 | subdivide the lot further unless they came through the zoning
2 | system. The minimum lot size is 20 acres.

3 | CHAIRPERSON SAKUMOTO: How is it the lots were created
4 | in the first place if the Ag 20 designation was established? How
5 | did they get cut down into smaller than 20 acres?

6 | THE WITNESS: Again, the lots, the preexisting lots
7 | were, well, they were preexisting prior to the adoption of the
8 | zoning code and the zoning designation for that area which was
9 | back in 1968. So those lots were already created or identified
10 | in these smaller size lots prior to 1968.

11 | So these are basically considered to be non-conforming
12 | sized lots based on the current zoning, or zoning since 1968.
13 | And that applies to all the lands along the Hamakua. I think our
14 | zoning category for the Hamakua Coast was Agricultural 20 acres.
15 | We just took that number at that time.

16 | CHAIRPERSON SAKUMOTO: So as a non-conforming lot can
17 | you tell me just generally what does that mean in terms of
18 | implications under zoning code or what you can do and what you
19 | can build?

20 | THE WITNESS: Okay. If a lot is a non-conforming size
21 | it can exist. For instance, if you have a 1-acre lot within
22 | Agriculture 20 acres you can put a single-family dwelling or
23 | construct it if the lot was established prior to 1976. You can
24 | do agricultural activities. All of the uses within the
25 | Agricultural District would still have to apply, the types of

1 uses. So you can't put in a commercial use or that kind of
2 stuff. It has to be what's permitted under the county's
3 Agricultural zoning.

4 CHAIRPERSON SAKUMOTO: So the only difference, then,
5 is if I heard you correctly, that if the lots were ever
6 consolidated to form a larger lot, they could not be then
7 resubdivided to form more lots than three. All they can do is
8 basically be resubdivided to form the same number of lots that
9 were there before.

10 THE WITNESS: That's correct.

11 CHAIRPERSON SAKUMOTO: Otherwise it's
12 indistinguishable from any other 20-acre lot in Ag 20.

13 THE WITNESS: Yes. And our code does allow for the
14 consolidation of resubdivision into the same number of lots. And
15 we waive the requirements like as long as there's no public
16 health and safety welfare kind of problems. We allow them
17 without the necessary water or roadway improvement conditions.

18 But say this particular lot, just to explain a little
19 bit more, if this lot was consolidated into 4 acres, and not
20 resubdivided at the same time then -- say if Mr. McCully came in
21 today to consolidate all 3 properties into a 4-acre lot. He
22 cannot come back tomorrow and say that "I want to subdivide this
23 into 3 other lots." Once it's consolidated then that lot, if
24 they were to subdivide, has to meet the minimum requirement of
25 20 acres.

1 CHAIRPERSON SAKUMOTO: I see. So he would lose the
2 non-conforming benefit in that sense once he forms this larger
3 lot.

4 THE WITNESS: Yes.

5 CHAIRPERSON SAKUMOTO: I understood from the staff
6 report this property is in the special management area, is that
7 correct?

8 THE WITNESS: That's correct.

9 CHAIRPERSON SAKUMOTO: Does that have any implications
10 with regards to the proposed project from the Planning
11 Department's standpoint?

12 THE WITNESS: Yes? They would have to come in for a
13 SMA, Special Management Area assessment. Basically a
14 consolidation resubdivision actually would be exempt. So the
15 director could say that this provision is exempt from the SMA
16 requirement.

17 Or if he feels that there are some impacts then he may
18 require a minor permit. A minor permit he would be able to
19 condition certain things as part of the approval.

20 CHAIRPERSON SAKUMOTO: Is the construction of
21 dwellings, farm dwellings, are those SMA minor permit matters?
22 Or are they exempt from the SMA permit process?

23 THE WITNESS: Normally as far as a single-family
24 dwelling or a farm dwelling that would be considered to be
25 exempt. However, if there's a number of farm dwellings on a

1 particular lot then it would be considered part of a larger
2 development. So we would require them to come in for a SMA major
3 permit. That would have to be processed and approved by the
4 Planning Commission through a hearing process.

5 CHAIRPERSON SAKUMOTO: Okay. The fact that the, well,
6 I guess at the current time the lot is in Ag 20 under the County
7 zoning code and the state Land Use Commission district.

8 But did I hear correctly it's still subject to the
9 farm dwelling agreement procedures that the Planning Department
10 has in place even if it's not in the state land use Agricultural
11 District?

12 THE WITNESS: No.

13 CHAIRPERSON SAKUMOTO: So you don't ask them to sign
14 the agreement?

15 THE WITNESS: No. Because if the land is in the
16 Conservation District we leave it up to the board of DLNR or the
17 Board of Natural and Land Resources. When that person gets
18 approval, then they'll come for a building permit with us.

19 As far as our Department is concerned all we say, note
20 on the building permit, the land is in the Conservation District
21 and we say it's not applicable as far as the County code
22 requirements.

23 CHAIRPERSON SAKUMOTO: I see. So it's really only
24 subjected to county agricultural restrictions then at this
25 current time because it's exempt from the state land use

1 agricultural requirements since it's not in the state land use
2 Agricultural District.

3 It's under the county zoning Ag 20. So whatever the
4 requirements are by the county under that designation obviously
5 are still applicable.

6 THE WITNESS: It's not applicable because the land is
7 in the Conservation District. The Conservation District -- if
8 the Land Board approves the permit for whatever they want to do,
9 say if they want to build a greenhouse or single-family dwelling,
10 we would just sign off on it.

11 CHAIRPERSON SAKUMOTO: That's right because the state
12 has exclusive jurisdiction.

13 THE WITNESS: Yes. Correct. Except because the land
14 is within the Special Management Area they need to get SMA permit
15 approval from us first, either an exemption, a minor permit or a
16 major permit, depending on the situation. And that's in
17 accordance within state law.

18 CHAIRPERSON SAKUMOTO: Okay. Regardless of the state
19 land use classification this SMA permit is still going to be, the
20 SMA standards are still going to be applied.

21 THE WITNESS: Yes. Technically they cannot apply to
22 the Land Board for a Conservation District permit until they get
23 approval, clearance on the SMA.

24 CHAIRPERSON SAKUMOTO: Thank you.

25 COMMISSIONER KANUHA: One more question, Mr. Chair.

1 CHAIRPERSON SAKUMOTO: Yes.

2 COMMISSIONER KANUHA: Norman, so is there any force
3 and effect, then, of the county's Ag 20 zoning within the
4 Conservation District if, you know, the county doesn't have the
5 authority to zone within the Conservation District?

6 THE WITNESS: Technically no, we don't have that
7 jurisdiction.

8 COMMISSIONER KANUHA: Okay. Thank you.

9 CHAIRPERSON SAKUMOTO: Commissioners, any other
10 questions? Commissioner Piltz.

11 COMMISSIONER PILTZ: In this particular case since
12 conservation is at the shoreline and the property is set on a
13 cliff area, would there be a shoreline certification required by
14 your department?

15 THE WITNESS: We could require them to come in for a
16 certified shoreline certificate before granting the consolidation
17 resubdivision action.

18 COMMISSIONER PILTZ: Thank you.

19 CHAIRPERSON SAKUMOTO: Commissioners, any other
20 questions? Ms. Leithead-Todd, any redirect?

21 MS. LEITHEAD-TODD: A couple. Mainly because there
22 were some questions about how do you end up with all these
23 preexisting lots.

24 REDIRECT EXAMINATION

25 BY MS. LEITHEAD-TODD:

1 Q. Norman, on this property there's a land grant and
2 there's a royal patent grant. When would those date from?

3 A. I'm not too familiar with that.

4 Q. But they would probably be land grants and royal
5 patent grants were granted not by the state of Hawaii. They were
6 granted before Hawaii was a state, right?

7 A. That's my understanding, correct.

8 Q. So these would predate 1959. And many of these grants
9 ran mauka/makai.

10 MS. LEITHEAD-TODD: Maybe -- do you mind if I take and
11 show him the map so he can take a look at it?

12 Q. This is the boundary interpretation from 1992. This
13 is figure 6 in the report that was the final environmental
14 assessment that was filed. Just as a general principle, not this
15 particular one, but just for general principles if you have a
16 land grant, and in this case I'm looking at there's a grant to
17 Na'ai. And then there's a -- actually there's two. Royal patent
18 grant 1874 to Na'ai. And then there's a royal patent grant 803
19 to Na'ai. Then there was a grant a 7396 to the Wailea Milling
20 Company.

21 So those grants alone back when they were granted
22 would have created three separate lots, right? It's a general
23 concept because those were created prior to statehood an they
24 gave title to, I guess in this case, to Na'ai and then one to
25 Wailea.

1 A. I really don't know the answer to your question. I
2 can answer yes since you're asking me the question but I don't
3 know the answer.

4 Q. Okay. Well, as a general concept then when you have
5 an existing piece of property, and then it's subsequently
6 bisected by something like a public highway or in this case you
7 have the railroad that went across it.

8 On the map it says that railroad property was deeded
9 to Hakalau Plantation. That would have cut the existing grants
10 into separate pieces of property because the railroad lot was
11 granted to somebody else.

12 Would that be a correct assessment?

13 A. I think we can make that assumption, yes.

14 MS. LEITHEAD-TODD: No further questions.

15 CHAIRPERSON SAKUMOTO: Any recross-examination, Mr.
16 Tsukazaki?

17 RECCROSS-EXAMINATION

18 BY MR. TSUKAZAKI:

19 Q. I wanted to ask this question earlier. Mr. Hayashi,
20 when you were testifying about the process of establishing
21 preexisting lots, is that a very rare occurrence? Or would you
22 say it's a common occurrence?

23 A. It's a common occurrence along the Hamakua Coast.

24 MR. TSUKAZAKI: Thank you.

25 CHAIRPERSON SAKUMOTO: State, did you have any

1 questions?

2 MR. CHANG: State has no questions.

3 CHAIRPERSON SAKUMOTO: If there's nothing further,
4 thank you.

5 THE WITNESS: Thank you.

6 CHAIRPERSON SAKUMOTO: County, did you have any other
7 witnesses you wished to call?

8 MS. LEITHEAD-TODD: No.

9 CHAIRPERSON SAKUMOTO: Mr. Tsukazaki, would you like
10 to, I guess, respond to any of the testimony that we received
11 yesterday and this morning?

12 MR. TSUKAZAKI: Yes. I have discussed this with my
13 client. Again, based upon the record prior to this hearing and
14 the Land Use Commission's order finding no significant impact in
15 relation to the final environmental assessment, the parties did
16 determine that from the parties' perspective there were no major
17 issues in this docket. So that's why the parties went forward to
18 develop a stipulated decision.

19 And, quite frankly, with the points, the concerns
20 raised by this body yesterday, I believe that my client would
21 benefit from having an opportunity to discuss with the parties
22 how those kinds of concerns can be addressed.

23 So I think it's really appropriate at this time from
24 our point of view to seek a continuance of a hearing. I might
25 also say that we received some additional information from the

1 Office of Planning yesterday evening regarding some additional
2 input from DLNR. And that's another reason why we would like an
3 opportunity to regroup and study all of these issues and perhaps
4 come back with some information to present to you the next
5 hearing.

6 CHAIRPERSON SAKUMOTO: I think that would be
7 appropriate. I guess a draft of the decision and order was
8 prepared even prior to the hearing so there were a lot of facts
9 that came out yesterday that would be obviously germane to the
10 document. We would want to see it incorporated.

11 I think the other thing we talked about yesterday if
12 we were going to continue the hearing we wanted to hear from
13 somebody at DLNR. I think that's probably going to be the case.
14 So I think your request is well taken. Any further comments?

15 MR. TSUKAZAKI: I don't have any at this time.

16 CHAIRPERSON SAKUMOTO: Yes, Mr. Chang?

17 MR. CHANG: We have not closed our evidentiary process
18 because we understood you may want somebody. If you could be
19 more specific as far as what you want so we can try to obtain the
20 proper testimony for you.

21 CHAIRPERSON SAKUMOTO: I think the suggestion was made
22 because we received testimony from Ms. Thielen about the process
23 that the DLNR goes through in terms of, I guess, determining
24 whether or not a particular piece of property should remain in
25 the Conservation District or need not remain in the Conservation

1 District. And what I wanted to make sure is that we had evidence
2 in the record, aside from just the direct testimony of the OP
3 director, from somebody at DLNR who could provide us with that
4 testimony in support.

5 It would also give us a chance to ask questions to
6 somebody at DLNR about their processes as well. So, you know,
7 the people who are involved with commenting on, for example,
8 district boundary amendment applications, those types of
9 personnel would be helpful.

10 I think only one person. But if that one person has
11 the ability to respond to those types of issues that would be
12 helpful.

13 MR. CHANG: Fine. We will try to obtain that type of
14 witness for you.

15 CHAIRPERSON SAKUMOTO: Okay. And I acknowledge -- do
16 you have question other witnesses for today?

17 MR. CHANG: No.

18 CHAIRPERSON SAKUMOTO: So at this point I would
19 entertain a motion by the Commissioners to continue this hearing
20 to the next date that we're on the Big Island.

21 COMMISSIONER JUDGE: So moved.

22 COMMISSIONER PILTZ: Second.

23 CHAIRPERSON SAKUMOTO: Motion by Commissioner Judge,
24 seconded by Commissioner Piltz. All in favor say aye.

25 COMMISSIONES VOTING: Aye.

1 CHAIRPERSON SAKUMOTO: Opposed? Seeing none, this
2 hearing is continued until our next meeting here on the Big
3 Island. Thank you very much. We're adjourned for today. (Gavel)

4 (Proceedings adjourned at 9:20 a.m.)

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C E R T I F I C A T E

I, HOLLY HACKETT, R.P.R., C.S.R. in and for the State of Hawai'i, do hereby certify;

That I was acting as shorthand reporter in the foregoing LUC matter on the 12th day of August 2005

That the proceedings were taken down in computerized machine shorthand by me and were thereafter reduced to print by me;

That the foregoing represents, to the best of my ability, a correct transcript of the proceedings had in the foregoing matter.

I further certify that I am not counsel for any of the parties hereto, nor in any way interested in the outcome of the cause named in the caption.

DATED: This 22 day of August 2005

Holly M. Hackett
HOLLY M. HACKETT, R.P.R., C.S.R. #130
Certified Shorthand Reporter