

LAND USE COMMISSION
MEETING MINUTES

December 30, 2020 – 9:00 a.m.

Pursuant to Exhibit F of the Governor’s Seventeenth Proclamation Related to the COVID-19 Emergency, the Commission conducted its meeting using interactive conference technology.

PLACE: Zoom Webinar Virtual Meeting
Wednesday December 30, 2020 Meeting

https://us02web.zoom.us/webinar/register/WN_1qyg4r8MSMOZ3VAPdhAkyg

Due to the COVID-19 pandemic, the meeting was held remotely with Commission members, Staff and Applicants participating via an online meeting venue. The public could participate in the meeting via the “ZOOM” platform. Interested persons were also advised to submit written testimony no later than 24 hours in advance of the meeting to allow for distribution to Commission members prior to the meeting and to register to testify during the ZOOM meeting using instructions circulated on the meeting agenda.

COMMISSIONERS PRESENT:

(Attending via ZOOM conference media) Gary Okuda
Jonathan Scheuer
Arnold Wong
Dawn N. S. Chang
Lee Ohigashi
Dan Giovanni
Nancy Cabral

COMMISSIONERS EXCUSED:

(8 seated Commissioners as of 10/1/19) Edmund Aczon

STAFF PRESENT:

(Attending via ZOOM conference media) Daniel Orodener, Executive Officer
Dan Morris, Deputy Attorney General
Scott Derrickson, Staff Planner
Bert Saruwatari, Staff Planner
Riley Hakoda, Staff Planner/Chief Clerk
Natasha A. Quiñones/Program Specialist

COURT REPORTER:

(Attending via ZOOM conference media) Jean McManus

CALL TO ORDER

Chair Scheuer called the meeting to order at 9:00 a.m. and all the Commissioners present acknowledged that they were able to communicate via the ZOOM program. Mr. Orodenker announced that Commissioner Aczon was excused from the meeting.

Chair Scheuer recognized and welcomed the new LUC Program Specialist, Natasha Quiñones to the meeting. Chair Scheuer also recognized retiring LUC Staff Planner Bert Saruwatari and Commissioners Okuda, Chang, Ohigashi, and Chair Scheuer thanked him for his service.

APPROVAL OF MINUTES

Chair Scheuer stated that the first agenda item was the approval of the December 3, 2020 minutes and asked if there had been any public testimony submitted and if there were any corrections to be made. There was no public testimony and no corrections to be made. (Public Witness James Buika initially signaled that he wanted to testify but had done so in error.)

Commissioner Wong moved to approve the minutes. Commissioner Ohigashi seconded the motion. There was no discussion. By a roll call vote, the December 3, 2020 minutes were approved unanimously (7-0)

Chair Scheuer called for Mr. Orodenker to provide the LUC Tentative Meeting Schedule.

TENTATIVE MEETING SCHEDULE

Executive Officer Orodenker provided the tentative meeting schedule from January to March 2021 for the Commissioners and cautioned that it was subject to change based on the pandemic impacts. Commissioners were advised to contact LUC staff if there were any questions or conflicts.

Commissioner Giovanni requested details on the required Commissioner training class on Native Hawaiian Law. LUC staff advised that the training class would be conducted via the ZOOM virtual meeting platform on January 11-12, 2021 and that further information would be forthcoming from the University of Hawai'i Law School.

There were no further questions or comments regarding the tentative meeting schedule.

ACTION

A89-642 C. BREWER PROPERTIES, INC (Maui)

Consider PETITIONERS WAILUKU PLANTATION LLC, EDGAR SOMERA, FAY SOMERA, LARRY S. SKY, DAYONG ZHAO, XIU XIANG FANG; BONG HWA SHI JORDAN; WENXIAO LIU and ELISE TRAVIS' MOTION FOR ORDER BIFURCATING DOCKET NO. A89-642

APPEARANCES

Jason McFarlin, Esq. represented Wailuku Plantation LLC. ("WP")

Randall Sakumoto, Esq. represented current owner RCFC ("RCFC")

Michael Hopper, Esq., Deputy Corporation Counsel, represented County of Maui Planning Department ("County")

Jordan Hart, Deputy Director, County

Dawn Takeuchi Apuna, Esq., Deputy Attorney General, for State Office of Planning ("OP")

Aaron Setogawa, Planner, OP

Chair Scheuer updated the record and explained the procedures for the meeting. There were no questions on the procedures.

Chair Scheuer sought Mr. McFarlin's position on the Petitioner's reimbursement of LUC expenses. Mr. McFarlin replied that he had no position and had previously addressed his client's compliance with the LUC reimbursement policy.

Chair Scheuer called for public witnesses.

PUBLIC WITNESSES

1. James Buika

Mr. Buika stated that he opposed the bifurcation and had recently submitted written testimony containing a condition that he had crafted for the Commission to consider adopting before granting the bifurcation.

Commissioners Ohigashi, Okuda, Cabral and Chair Scheuer requested clarification on Mr. Buika's understanding of what the original project developer had represented to the Commission and to the purchasers of units in the proposed project, how the current project developers were handling complaints about the failure to abide by the imposed conditions upon the property, and what Mr. Buika's proposed condition ultimately sought to achieve.

Mr. Buika described his experiences with trying to obtain answers and action on his requests from the original and current land developers and how his proposed condition sought to require fulfilling the conditions imposed by the original decision and order before allowing the proposed bifurcation to occur.

There were no further questions for Mr. Buika.

2. Livett Callentine

Ms. Callentine stated she had provided written testimony to the Commission and agreed and supported Mr. Buika's testimony; and shared her concerns about the original conditions not being fulfilled.

There were no questions for Ms. Callentine. Chair Scheuer clarified the role that the LUC had during the bifurcation proceedings and shared how the Commission would consider the matters involved in the docket.

3. Karin Phaneuf

Ms. Phaneuf stated that she had provided written testimony and also supported both of the other public testifiers' concerns about allowing the bifurcation to occur before the original conditions of the decision and order had been fulfilled.

Commissioner Okuda requested clarification on Ms. Phaneuf's understanding of how the various community association(s)/board(s) of directors were organized and whether the original or current project developers had performed any outreach to discuss the issues troubling the community members. Ms. Phaneuf replied that she was not aware of any efforts outside of the notice regarding the December 30, 2020 meeting and agreed that she would not object if the Commission sought to continue this matter at a later date to allow the community outreach to occur.

There was no further public testimony and Chair Scheuer closed public testimony.

Chair Scheuer declared a recess at 9:52 a.m., reconvened the meeting at 10:02 a.m. and called for Petitioner WP's presentation.

WP Presentation

Mr. McFarlin described how a stipulation had been reached by the Parties and updated the Commission on the status of the unfulfilled conditions of the original decision and order. He also argued why his motion for bifurcation of Docket No. A89-642 should be granted and how the RCFC component of the Petition Area would cooperate and facilitate the process.

Mr. McFarlin went on to described how WP had agreed in the Stipulation's proposed Decision and Order that the Pi`ihana Project District owners would, within six months of the date of the LUC Bifurcation Order to file with the Commission the following:

- A statement of current costs for the remaining development within the Wailuku Project District and outstanding improvements as well as a detailed schedule for necessary approvals and development;
- Information to verify the financial capability to complete the Pi`ihana Project District development as represented in accordance with Hawai`i Administrative Rules ("HAR") § 15-15-50(c)(9); and
- A detailed report explaining how substantial compliance with the conditions of the Pi`ihana Project District is being achieved.

Mr. McFarlin summarily argued how the bifurcation was a procedural matter and how designating a separate docket for the Pi`ihana Project District after the bifurcation would facilitate addressing the respective issues concerning each project district area.

COMMISSIONER QUESTIONS

Commissioner Chang, Okuda, Ohigashi, Cabral, Giovanni and Chair Scheuer requested clarification on WP's portion of the bifurcated Petition Areas; the sales activity occurring within the WP portion of the Petition Area; what benefit the community would derive by allowing the bifurcation, WP Owner Lindsey's future intentions for the WP portion of the Petition Area, how conditions associated for infrastructure improvements and maintenance issues

would be addressed, and whether the representations made by Mr. Lindsey to Mr. McFarlin were credible.

Intense discussion ensued on the conflicting information being provided to the Commission by Mr. McFarlin on Mr. Lindsey's behalf. Mr. McFarlin described how he had relied on certain information from Mr. Lindsey going into negotiating the stipulation that had resulted in the agreed upon terms and conditions. Then subsequently after the stipulation was signed, Mr. Lindsey abruptly changed his mind and begun seeking alternative resolutions on his own to avoid fulfilling the obligations of the imposed conditions. Commissioners Okuda and Ohigashi interrogated Mr. McFarlin in detail on the sequence of events before and after the stipulation between the Parties was transacted and whether any "material facts" had been overlooked or undisclosed.

Commissioner Wong shared his concerns regarding what he perceived as misleading information and moved for an Executive Session to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities and liabilities as related to the conflicting responses being provided to the Commission by Mr. McFarlin on behalf of Mr. Lindsey. Commissioner Cabral seconded the Motion. There was no discussion. The Commission voted unanimously (7-0) to enter Executive Session.

The Commission entered Executive Session at 10:47 a.m. and reconvened in regular session at 11:25 a.m.

Chair Scheuer recognized Commissioner Wong.

Commissioner Wong stated his apologies to Mr. McFarlin for the misunderstanding of the representations being provided to the Commission. Mr. McFarlin acknowledged the apology and described the difficulties that he was experiencing with being kept apprised of his client's intentions.

There were no further questions for Mr. McFarlin and Chair Scheuer called for RCFC's presentation.

RCFC Presentation

Mr. Sakumoto described why RCFC had signed the recent stipulation by the Parties and argued why the LUC should grant the motion for bifurcation of

Docket No. A89-642. Mr. Sakumoto also responded to Commissioner Okuda's questions regarding the community benefit of granting the bifurcation and described how the bifurcation would solve outstanding problems for the Petitioners and allow the County to better oversee both sections of the original Petition Area.

COMMISSIONER QUESTIONS

Commissioner Okuda, Chang, Ohigashi and Cabral requested clarification on Mr. Sakumoto's reaction to Mr. McFarlin's recent disclosure on how Mr. Lindsey was intending to revert his portion of the Petition Area to its original designation once the bifurcation was granted. Mr. Sakumoto described how the current Petition Area ownership arrangement created a "cloud on the title" and how the County had been kept advised of the activity occurring between the two ownership entities till recently, and why the community center was not a true condition.

Mr. Okuda further inquired how the deferral or denial of the bifurcation request could be prejudicial and whether potential buyers of Mr. Lindsey's lots had the LUC condition requirements disclosed to them during their sales presentations.

Commissioner Chang inquired whether the proposed land use reversion by Mr. Lindsey affected the RCFC position on the stipulation, how condition obligations that were the responsibility of two Parties would be impacted by the bifurcation action, and whether a performance bond would be a suitable alternative to assist in guaranteeing that certain actions be accomplished.

Commissioners Ohigashi and Cabral requested clarification on how terms of the stipulation were agreed upon and how open space dedication would be handled.

Chair Scheuer declared a recess at 12:13 p.m. and reconvened the meeting at 1:00 p.m.

Commissioner Cabral thanked the public witnesses for their participation.

Chair Scheuer confirmed that Mr. Buika's written testimony had been received by the Commission and requested clarification on how the affordable

housing initially proposed to be included in the original decision and order was going to be provided. Mr. Sakumoto described how the initial development districts had respectively assessed and determined the affordable housing numbers to produce in each development district and why it still appeared to be unresolved. Commissioners Okuda, Chang and Chair Scheuer requested clarification on how the Petition Area had been acquired, who the relevant entities/Parties of the transactions were, and how RCFC was organizationally structured with its Kehalani and Pi`ihana components.

There were no further questions for Mr. Sakumoto and Chair Scheuer called for County's presentation.

County Presentation

Mr. Hopper described the considerations and analysis that had been made to determine County's position on the stipulation and stated that County was satisfied with it. Mr. Hopper described how the County had assessed the affordable housing requirements for the general Petition Area and what the possible difficulties for enforcement without bifurcation might be since the two separate portions of the original Petition Area posed unique and separate requirements for each district.

COMMISSIONER QUESTIONS

Commissioners Wong, Okuda, and Ohigashi requested clarification on how satisfied County was with the stipulation, how County enforcement of the decision and order would be conducted, how the obligation for a community center would be met and how the potential loss of promised affordable housing units would be handled.

Chair Scheuer declared a recess at 2:07 p.m. and reconvened the meeting at 2:16 p.m.

Commissioner Ohigashi stated that he had concluded his questioning and Chair Scheuer recognized Commissioner Giovanni.

Commissioner Giovanni requested clarification on the County's perspective on the requirements on Petitioner identified in the stipulation and why a settlement of required conditions couldn't be done prior to bifurcation while maintaining joint responsibility for the Petition Area. Mr. Hopper described how Mr. Lindsey had failed

to obtain financing while the stipulation was under construction and was expected to continue his efforts after the bifurcation was granted.

Commissioner Chang shared her angst at dealing with comparing the current bifurcation motion end results to what had originally been proposed and decided upon with the first decision and order for the Petition Area.

Commissioner Giovanni sought further clarification on the RCFC entities' roles before and after RCFC became involved in the ownership of the Petition Area.

Chair Scheuer requested clarification on the County's analysis of how conditions #1 and #10 should be considered and shared his disagreement with the County's reading of FOF#25.

There were no further questions for County.

Chair Scheuer called for OP's presentation.

OP Presentation

Ms. Apuna stated that OP had been supportive of the stipulation but with the new information on the potential reversion of the WP portion of the Petition Area, would like more time to study the potential impact of the bifurcation action.

COMMISSIONER QUESTIONS

Commissioner Okuda commented on Commissioner Chang's observation regarding the original and current state of the representations made to the Commission and questioned how the LUC could achieve better results to benefit the community. Ms. Apuna provided her perspective on how OP might apply more stringent timelines for development.

Chair Scheuer asked if there were further questions for the Parties or any final comments.

WP and RCFC had nothing to add.

County stated it was not taking a position and shared its concerns with compliance and enforcement issues.

OP had nothing to add.

DELIBERATIONS

Commissioner Wong stated that based on the information obtained at today's hearing and the ensuing discussion, he moved to reject the stipulation and to have the Parties continue discussions on the matter and to verify the financial capabilities of the Petitioners to comply with conditions and the resolution of the issues presented by the public regarding the community center. Commissioner Ohigashi seconded the Motion.

Discussion on the Motion

Commissioners Wong and Ohigashi shared their concerns about loss of affordable housing, the community center and bridge to be built, and the financing to fulfill these conditions; and what kind of results they were hoping the continued discussions would yield.

Commissioners Cabral, Giovanni, Chang, Okuda and Chair Scheuer shared their desire for fulfilling the representations originally made to obtain the first decision and order, their angst with dealing with a 30 year old Petition with unmet conditions for affordable housing and infrastructure, and government's failure to demonstrate to its citizens that it is trustworthy.

Chair Scheuer directed Mr. Orodener to poll the Commission.

The Commission voted unanimously (7-0-1 excused) to deny the proposed Motion and Stipulation.

Chair Scheuer called for the final agenda item.

LEGISLATIVE MATTERS IMPACTING THE LUC

Chair Scheuer directed Mr. Orodener to brief the Commission on the current state of 2021 legislative matters.

Mr. Orodener described how the State's fiscal crisis was expected to impact the Legislature's decisions regarding LUC operations and staffing.

Discussion ensued to determine on how LUC staff could make scheduling adjustments and adjust for staff shortages.

Commissioner Giovanni requested an update on Commissioner term renewals that were coming due in 2021 that required Legislative attention. Mr. Orodenker reported that Commissioners Giovanni, Cabral and Okuda were due for renewal and needed to submit their applications for consideration.

Chair Scheuer expressed his desire to continue discussion on the LUC's legislative concerns and requested that LUC staff add it to the January 28, 2021 agenda. Mr. Orodenker acknowledged that LUC staff would comply and have additional items for the Commission to consider at the meeting.

Chair Scheuer entertained comments on how the use of the virtual interactive "ZOOM" platform meetings were going. Commissioners Cabral and Giovanni shared their appreciation for the virtual meetings and described how the "in person" meetings allowed for a more personal atmosphere despite having to travel.

Chair Scheuer asked if there was any further business to discuss. There was none and Chair Scheuer adjourned the meeting at 3:24 p.m.