

LAND USE COMMISSION
MEETING MINUTES

April 14-15, 2021 – 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

Meeting Link for Wednesday, April 14, 2021

(https://us02web.zoom.us/webinar/register/WN_j2M-pn9uSkWpwSNH75B3ZA)

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

COMMISSIONERS EXCUSED: None
(8 seated Commissioners as of 10/1/19)

STAFF PRESENT: Daniel Orodener, Executive Officer
(Attending via ZOOM conference media) Dan Morris, Deputy Attorney General (DAG)
Scott Derrickson, Staff Planner
Riley Hakoda, Staff Planner/Chief Clerk
Natasha Quinones, Program Specialist

COURT REPORTER: Jean McManus
(Attending via ZOOM conference media)

CALL TO ORDER

Chair Scheuer called the meeting to order at 9:18 a.m.

Chair Scheuer and the attending Commissioners acknowledged that they were present and able to communicate via the ZOOM program.

APPROVAL OF MINUTES

Chair Scheuer stated that the first agenda item was the approval of the March 24-25, 2021 minutes and asked if any public testimony had been submitted and if any corrections needed to be made. There was no public testimony and no corrections to be made. Commissioner Cabral moved to adopt the minutes. Commissioner Wong seconded the motion. There was no discussion.

By a show of hands, the March 24-25, 2021 minutes were approved unanimously (8-0).

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

TENTATIVE MEETING SCHEDULE

Executive Officer Orodener provided the tentative meeting schedule from April 2021 to July 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.

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

A18-806 BARRY TRUST (HAWAI'I) – ADOPTION OF ORDER

Chair Scheuer stated that the next agenda item was an action regarding Docket No. **A18-806 BARRY TRUST (HAWAI'I) Amended Petition to Amend the Land Use District Boundary of Certain Lands Situated at Keaau, Puna, County and State of Hawai'i; Consisting of 0,51 Acres from the Conservation District to the Agricultural District Tax Map Key No. (3) 1-5-059:059)**

Chair asked if there was any written testimony in this matter. There was none.

By roll call, all Commissioners acknowledge being prepared to participate and deliberate in the adoption of the order.

Commissioner Cabral moved to approve the form of the order. Commissioner Ohigashi seconded the motion.

Chair Scheuer called Mr. Orodener to poll the Commission. The motion passed with eight affirmative votes.

Chair called a recess at 9:30 a.m., reconvened the meeting at 9:31a.m. and called for the next agenda item.

STATUS REPORT

Docket No. **A11-790 Kula Ridge, LLC (Maui)**. To consider the status of Docket No. A11-790 in which the Commission granted the redesignation of approximately 34.516 acres of land from the Agricultural District to the Urban District and approximately 16.509 acres of land from the Agricultural District to the Rural District at Kula, Maui, Hawai'i for a mix of residential, park and open space uses.

APPEARANCES:

Thomas Welch, Esq., representing Raymond M. VonTempsky Marital Trust
Michael Hopper, Deputy Corporation Counsel representing Maui Department of Planning (County)
Jordan Hearsh Deputy Director of Planning
Brian Yee, Esq., Deputy Attorney General, Office of Planning (OP)
Rodney Funakoshi, Land Use Administrator, (OP)
Aaron Setogawa, OP

Chair Scheuer updated the record, described the procedures for the hearing and asked if there were any questions on the procedures. There were none.

Chair Scheuer asked if there was any written testimony. There was none.

PETITIONER'S PRESENTATION

Mr. Welch provided the background history and ownership record of the property and requested that the land use designation for the Petition Area be reverted from Urban and Rural to Agricultural use.

Commissioner Okuda had concerns about approvals for boundary amendments where the conditions were not met.

Mr. Welch described how the infrastructure for water and sewer had not been provided by the county making development of the Petition Area difficult.

Commissioner Chang requested clarification of the Petitioner's current and future use of the property, and whether efforts had been made to find a potential developer to assume the

project instead of requesting a reversion of land use designation. Mr. Welch responded that his client had not sought a replacement developer but had tried to find alternative financing.

Commissioner Aczon requested clarification on the successor Petitioner's ownership and why an extension of time to fulfill conditions of the Decision and Order had not been sought instead of seeking a land use designation reversion.

Commissioner Ohigashi opined on the remedy being sought by Petitioner.

Chair Scheuer requested clarification on the Petition Area's need for water and the infrastructure capacity to provide for it prior to the purchase of the land by Kula Ridge LLC.

Chair called for a brief recess at 10:03 a.m. and reconvened at 10:13 a.m.

COUNTY

Chair Scheuer called on Maui County. Mr. Hopper stated that Maui County had nothing to add and was just obtaining information about the status of the project.

Questions for Mr. Hopper

Commissioner Chang requested clarification on County's role in this project and shared her opinion on the value of a change in land use designation and whether a performance bond condition should be considered to help ensure compliance with decision and orders.

Commissioner Ohigashi expressed his concerns about the LUC's limited remedies and asked the county about its mechanism to enforce the terms and conditions of the LUC's decision and orders.

Commissioner Okuda questioned the county's best interest for this land and whether there was a possibility of lawsuits for specific performance and sanctions for filing deceptive status reports.

Commissioner Wong requested confirmation that this was a 201H project and whether performance timelines had expired.

OP

Chair Scheuer called on Office of Planning. Mr. Yee stated he had nothing to add.

Questions for Mr. Yee

Commissioner Chang, Okuda, Ohigashi and Aczon requested clarification on the use of performance bonds or other alternatives to ensure completion of proposed projects and how better planning decisions for land use could be made. Clarification was also sought on how to better react to status reports where material facts are omitted and when the need to modify an existing Decisions & Orders (D&O) arises.

Mr. Yee provided his perspective on requiring performance bonds and how enforcement and use of them might occur, and on Commissioner Chang's suggestion regarding enforcement of existing conditions.

Commissioner Chang clarified that her prior comments were in the context of a new DBA and not on this agenda item.

Commissioner Aczon sought clarification on what the consequences were for not taking any action in this matter.

Commissioner Cabral commented on how property taxes go up for urban designation.

There were no further questions.

Chair Scheuer asked Mr. Welch if he had any final comments or rebuttal. Mr. Welch had none.

Chair Scheuer called for deliberations.

Commissioner Ohigashi moved for a motion to an order to Show Cause in this matter. Commissioner Okuda seconded the motion.

Chair Scheuer directed Mr. Orodener to poll the Commission.

The Motion unanimously passed with 8 affirmative votes.

Chair Scheuer directed LUC staff to prepare an appropriate order with a hearing to be on June 9-10, 2021.

Chair called to take recess at 11:14 a.m. and reconvened the meeting at 12:31p.m.

DECLARATORY RULING PETITION DR21-71

Chair Scheuer moved on to the next Agenda item. Docket# DR21-71- Andrew Grier (Maui) Petition for Declaratory Order that the number of dwellings allowed on properties in the Rural District can be more than one per one-half acre if allowed by County Zoning.

APPEARANCES:

James Geiger, Esq., representing Andrew Grier (HG)
Andrew Grier, Petitioner
Kristin Tarnstrom, Maui Corporation Counsel
Michelle McLean County Director
Jordan Hart (Maui Planning Department)
Brian Yee, Esq., Deputy Attorney General, Office of Planning (OP)
Rodney Funakoshi, Land Use Administrator, OP
Aaron Setogawa

Chair Scheuer updated the record, described the procedures for the hearing and asked if there were any questions on the procedures.

Mr. Geiger asked for clarification on the procedures.

Chair Scheuer asked if Petitioner had reviewed HAR 15-15-45.11 with regards to reimbursement of LUC expenses. Mr. Geiger acknowledged that he had, and that Petitioner would comply. Chair Scheuer asked if there was any written public testimony on this matter. There was none.

COUNTY OF MAUI

Chair Scheuer called for County of Maui's Public Testimony.

Ms. Tarnstrom stated that the County had submitted its position statement and was seeking for the LUC to provide clarification on the application of the County Statute 46 4C to allow two dwelling units in one-acre lot.

Commissioner Okuda asked the County about the standard or procedure that was to apply to this case. Ms. Tarnstrom replied that State and County requirements had to be looked at.

Commissioner Ohigashi sought clarification on how many structures the county allows on a subdivision versus a condominium.

Commissioner Chang sought clarification on the Petitioner's building permits application.

There were no further questions for the County.

OFFICE OF PLANNING

Chair called for OP to provide their public testimony. Mr. Yee deferred making any comments.

Commissioner Okuda asked Mr. Yee about the doctrine for exhaustion of administrative remedies application and if that was the standard to be applied by the Land Use Commission.

Commissioner Chang expressed her concerns about the LUC role of providing an advisory opinion when the set of facts were not final as well as when other remedies that may be given in court are unknown.

Discussion ensued to clarify LUC's jurisdiction when interpreting State or County statutes and whether the LUC should exercise or defer that authority due to more restrictive County ordinance.

There were no further questions.

PETITIONER'S PRESENTATION

Chair Scheuer called on Mr. Geiger to make his presentation.

Mr. Geiger described how his petition specifically questioned a section of Chapter 205 on whether it limits the County's ability to allow Ohana zoning in the rural district and provided a history on why the petition was brought to the Commission.

Questions for Mr. Geiger

Commissioner Wong provided information about the pending House Bill 502 dealing with HRS 205-2 HRS Section C which would make this matter moot.

Chair Scheuer called for a brief recess at 1:30 p.m. and reconvened at 1:41 p.m.

Commissioner Chang suggested alternatives that might better serve Petitioner's needs.

Commissioner Okuda asked Mr. Geiger about his understanding if LUC is required to defer to the stricter application of the law.

Commissioner Cabral requested clarification on condominiums versus subdivisions law.

Chair Scheuer sought clarification on why Mr. Geiger felt that the LUC could only provide interpretation on HRS 205 but not on County statutes.

COUNTY FINAL COMMENTS

Ms. Tarnstrom argued how Petitioner's requesting the LUC to determine how HRS Chapter 205 and County's 46-4C restricted county's ability to provide for greater density, and how the County needed better clarification on this law.

Chair called for a recess at 2:26 p.m. and reconvened the meeting at 2:46 p.m.

Commissioner Questions for the County

Commissioner Chang requested clarification on how many units had been already permitted, and on what the consequences were to the County if the Commission was to rule in favor of Mr. Geiger's interpretation.

Discussion ensued to clarify how many units were permitted under the county's statute exception.

Commissioner Ohigashi sought clarification on 46-4C and whether how it implicated 205 was within LUC's purview.

Chair Scheuer expressed his concerns on how interpreting the relationship between 205 to 46-4C might impact the LUC's public trust responsibilities and at what point a rural lot may would go from less than fully developed to fully developed.

OP FINAL COMMENTS

Mr. Yee commented on how the more restrictive requirements of the law apply whether State or County and on OP's view of Chapter 205, and on the issue of "condominiumizing" a property (CPR) as a method of subdivision not a land use process.

Mr. Yee also commented on whether the LUC should even address this matter since it is pending legislation and provided the reasons why he thought the Commission may refuse to issue a declaratory order and whether the Commission had jurisdiction to interpret 46 4C

Commissioners questions for OP

Commissioner Chang requested clarification on the number of dwelling units allowed with or without a subdivision.

Commissioner Okuda shared his concerns about inadvertent damage the Commission might do by making a ruling that would have a statewide effect since only one county was participating in the hearing.

Chair called for a recess at 3:48 p.m. and reconvened the meeting at 4:00 p.m.

PETITIONER'S FINAL COMMENTS

Chair called on Mr. Geiger for his final comments.

Commissioner Chang requested clarification about his position on the county's ability to authorize additional dwellings.

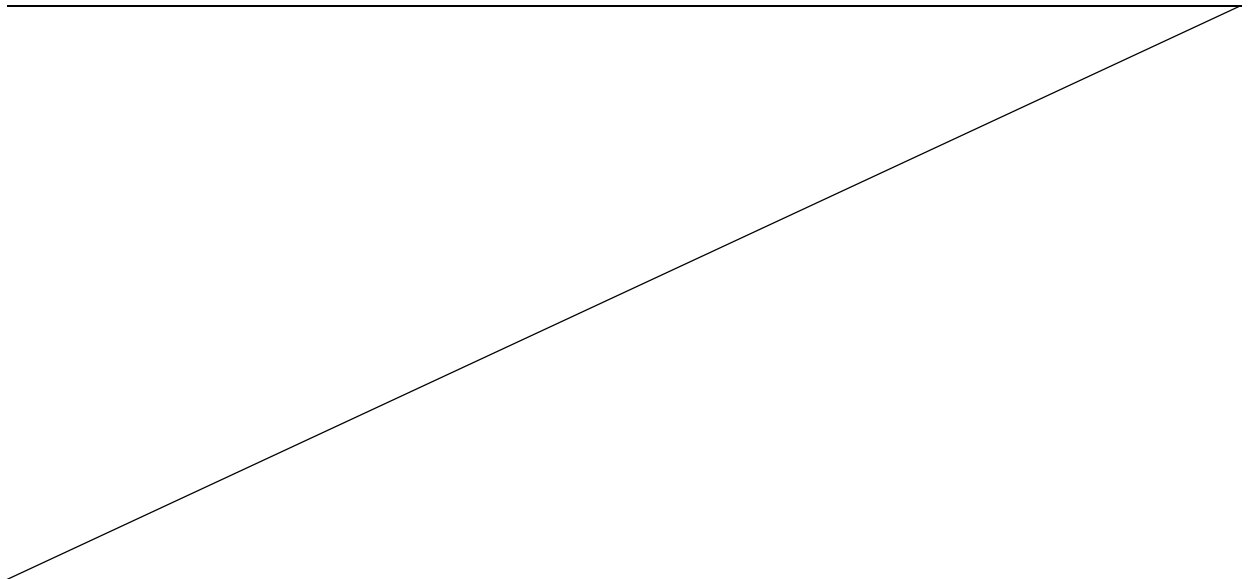
FORMAL DELIBERATIONS

Commissioner Okuda moved that the Motion for the Petition for Declaratory Ruling be denied in this matter. Commissioner Ohigashi seconded the motion.

Commissioner Okuda spoke to the motion. Commissioners Ohigashi provided his comments.

Chair Scheuer asked Mr. Orodener to poll the Commission. The Motion passed with 8 affirmative votes.

Chair Scheuer confirmed quorum for next day's meeting and declared a recess 4:16 pm until 9:00am April 15, 2021.



LAND USE COMMISSION
MEETING MINUTES

April 15, 2021 – 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

Meeting Link for Thursday, April 15, 2021

(https://us02web.zoom.us/webinar/register/WN_TOmIW3dQRouryk243IFfTg)

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: Jonathan Scheuer
(Attending via ZOOM conference media) Nancy Cabral
Gary Okuda (joined meeting at 9:27 a.m.)
Arnold Wong
Dawn N. S. Chang (excused 10:30 a.m.-1:00 p.m.)
Dan Giovanni (joined meeting at 10:00 a.m.)
Lee Ohigashi
Edmund Aczon

COMMISSIONERS EXCUSED: None
(8 seated Commissioners as of 10/1/19)

STAFF PRESENT: Daniel Orodener, Executive Officer
(Attending via ZOOM conference media) Dan Morris, Deputy Attorney General (DAG)
Scott Derrickson, Chief Staff Planner
Riley Hakoda, Staff Planner/Chief Clerk (joined meeting at 11:00 a.m.)
Natasha Quinones, Program Specialist

COURT REPORTER: Rita King
(Attending via ZOOM conference media)

CALL TO ORDER

Chair Scheuer called the meeting to order at 9:01 a.m.

Chair Scheuer and the attending Commissioners acknowledged that they were present and able to communicate via the ZOOM program. Commissioners Okuda and Giovanni were excused not present at the time.

CONTINUED ACTION

Chair Scheuer stated that this was a continued action meeting regarding docket: **A11-791 HG Kauai Joint Venture LLC– HoKua Place (Kaua`i); Petition To Amend the Land Use District Boundary of Certain Lands Situated at Kapa`a, Island of Kaua`i, State of Hawai`i, Consisting of 97 Acres from the Agriculture and Rural District, to the Urban District, Tax Map Key No. (4) 4-3-03:POR 01 –**

APPEARANCES:

William Yuen, Esq., representing Petitioner HG Kauai Joint Venture, LLC's (HG)
Janna Ahu, Esq., representing Petitioner HG Kauai Joint Venture, LLC's (HG)
Chris Donahoe, Deputy County Attorney representing Kaua`i Planning Dept. (County)
Jodi Higuchi Sayegusa, Deputy Director, County
Brian Yee, Esq., Deputy Attorney General, Office of Planning (OP)
Rodney Funakoshi, Land Use Administrator, OP
Bianca Isaki, Esq., representing Liko-o-Kalani Martin (Intervenor)
Lance Collins, Esq., representing Liko-o-Kalani Martin (Intervenor)
Liko-o-Kalani Martin, Intervenor

Chair Scheuer updated the record, described the procedures for the hearing and asked if there were any questions on the procedures. There were none.

Chair Scheuer called for Petitioner to continue its presentation.

PETITIONER PRESENTATION Continued

Mr. Yuen called David Rietow and offered him as a Witness.

1) David Rietow- Agriculture

Mr. Rietow described his educational and professional background in Agriculture.

Mr. Rietow provided specific Petitioner's land information about agricultural and food sustainability, lack of agricultural infrastructure and land study bureau ratings.

Questions for Mr. Rietow from the Parties

County

Mr. Donahoe requested clarification from Mr. Rietow on how the land study bureau ratings.

Commissioner Okuda joined the meeting at 9:27 am. (7 Commissioners in attendance).

There were no further questions from County.

OP

Mr. Yee had no questions.

Intervenor

Ms. Isaki requested clarification from Mr. Rietow on the mayor constraints for agricultural development of the petition area and crops suitable for the area.

Mr. Rietow provided explanation about wind breaks, soil amendments that would be needed

Ms. Isaki sought further details on food sustainability and the Master Agricultural Plan included in the EIS for this project.

There were no further questions from Intervenor.

Chair Scheuer declared a recess at 9:52a.m. and reconvened the meeting at 10:02 a.m.

Commissioners' Questions

Commissioner Chang asked Mr. Rietow about agricultural use and promoting sustainable agriculture by using alternative crops more suitable to the land.

Commissioner Okuda questioned the witness about the crops grown in the Agricultural Lots adjacent to the HoKua Petition area and on evidence that those same crops could not be grown in the petition area.

Commissioner Wong asked the Petitioner about other agricultural uses for this petition area such as grazing cattle.

Commissioner Cabral commented on the problems associated with having agricultural land next to residential land.

Chair Scheuer requested clarification on the witness' perspective on Agriculture for profit and the food sustainability issue.

There were no further questions and no redirect from Mr. Yuen.

Mr. Yuen called his next witness, Mr. Randall Okaneku

2) Mr. Okaneku- Licensed Engineer (prepared the TIAR for HoKua Place in 2017.)

Mr. Okaneku described his educational and professional background and summarized the TIAR conclusions and traffic improvements recommended for the HoKua Place, Kapa`a Highway in his report.

Questions from the Parties

County

Mr. Donahoe sought clarification on the need for an updated TIAR prior to the county's approval and on four of the seven traffic improvement recommendations in the TIAR.

Chair Scheuer declared a recess at 11:02 a.m. and reconvened the meeting at 11:12 a.m.

Commissioner Chang and Giovanni rejoined the meeting at 11:12 a.m. (8 Commissioners in attendance).

Mr. Donahoe completed his questioning the witness on the Kapa`a bypass extension, emergencies services access, roundabout, multimodal transportation analysis.

There were no further questions from County.

OP

Mr. Yee probed Mr. Okaneku on his understanding of the TIAR, DOT approvals, and LUC conditions, the need to update the TIAR, and OP's Exhibit 7(letter from DOT).

There were no further questions from OP.

Intervenor

Ms. Isaki sought further details on Intervenor's Exhibit 2 Transportation Solutions Plan, traffic during the development stage and peak hours traffic.

Chair Scheuer declared a recess at 12:04 p.m. and reconvened the meeting at 1:01 p.m.

Ms. Isaki sought additional clarification on Petitioner's Exhibit 19- Traffic Memorandum 2021.

There were no further questions from Ms. Isaki.

Commissioners' Questions

Commissioner Giovanni, Ohigashi, Chang, Okuda, and Wong requested clarification on the limitations of the 2017 TIAR and waiting to pre-pandemic traffic levels to get the TIAR updated, the lack of effective mitigation efforts for the heavy traffic congestion and the time spent on the field investigations study.

Chair Scheuer finalized by asking the witness about his understanding of the LUC's role and who ultimately would bear the burden.

There were no further questions from the Commissioners.

Chair Scheuer declared recess at 2:09 p.m. and reconvened the meeting at 2:21 p.m.

Mr. Yuen took the opportunity for redirect and had Mr. Okaneku clarify the procedures used to update the TIAR and describe how the concerns of the state and the county were being addressed.

Mr. Collins requested the opportunity to recross the witness. Discussion ensued to clarify procedures on witness questioning. DAG Morris stated that it was possible to recross the witness and provided the scope and limitations of the recross.

Ms. Isaki proceeded with the recross and requested clarification on the data that would be used to update the TIAR and whether the response to the questions had been discussed with Mr. Yuen.

There were no further questions from the Intervenor.

Mr. Yuen called his next witness.

3) Ricky Cassidy- Real Estate Market Consultant

Mr. Cassidy described his professional experience and background and shared his perspective on Kauai housing trends, housing supply and demand, affordable housing for HoKua place, affordable housing and project economic benefits to Kauai.

Commissioner Wong excused himself from the meeting with the Chair's approval at 2:55 p.m. (7 Commissioners now present).

Chair Scheuer noted the time and asked the parties if there were any objections to defer cross examination of the witness.

There were no objections to defer cross-examination.

Mr. Donahoe confirmed that the LUC had received the County's last-minute filing.

Mr. Yee asked Chair Scheuer for procedural clarification on the filing of revised Exhibits.

Chair Scheuer deferred to Mr. Orodener to clarify the procedure.

There being no further business or items to discuss, Chair Scheuer adjourned the meeting at 3:17 p.m.

