LAND USE COMMISSION
MEETING MINUTES
October 27, 2021 – 9:00 a.m.
Pursuant to Exhibit C of the Governor's Emergency Proclamation Related to the COVID-19 Response, the Commission conducted its meeting using interactive conference technology.
PLACE: Zoom Webinar Virtual Meeting
Meeting Link for Thursday, October 27th, 2021

(https://us02web.zoom.us/webinar/register/WN_ae3mBLa1SpSINpPO3L-zIQ)

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)	Dan Giovanni Nancy Cabral Gary Okuda Edmund Aczon Dawn N. S. Chang Lee Ohigashi Arnold Wong
COMMISSIONERS EXCUSED:	Jonathan Scheuer
(8 seated Commissioners as of 10/1/19)	
STAFF PRESENT: (Attending via ZOOM conference media)	Daniel Orodenker, Executive Officer Julie China, Deputy Attorney General (DAG) Scott Derrickson, Chief Planner Riley Hakoda, Staff Planner/Chief Clerk Natasha Quinones, Program Specialist
COURT REPORTER: (from recorded ZOOM conference media)	via Naegeli Deposition and Trial

CALL TO ORDER

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

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

A11-794 SOH, EPT. OF EDUCATION- KIHEI H.S.

To Consider Petitioner's Motion to Amend the LUC's Findings of Fact, Conclusions of Law and Decision and Order Filed July 29th, 2013.

APPEARANCES:

Stuart Fujioka, Esq., Deputy Attorney General, representing Petitioner Department of Education (DOE)
Ed Sniffen, Department of Transportation (DOT)
Randall Tanaka, Facilities Assistant Superintendent, DOE
Michael Hopper, Deputy Corporation Counsel, County of Maui Dept. of Planning (County)
Jordan Hart, Deputy Planning Director, County
Tara Furukawa, Planner, County
Alison Kato, Esq., Deputy Attorney General, Office of Planning and Sustainable Development (OPSD)
Rodney Funakoshi, Land Use Administrator, OPSD
Lorene Maki, Planner, OPSD

Acting Chair Giovanni updated the record, described the procedures for the hearing, and asked if the parties had any questions on the procedures.

There were no questions of the procedures.

Commissioner Ohigashi confirmed that he had reviewed the recording of the portion of the A11-794 docket meeting he had missed.

PETITIONER's WITNESSES

Acting Chair Giovanni called Mr. Fujioka to continue his presentation.

Commissioner Wong requested clarification on Mr. Ed Sniffen' s time constraints.

Mr. Ed Sniffen was called to testify and was sworn in by Acting Chair Giovanni.

Mr. Sniffen shared his perspective of Representative Wildberger's testimony, the option for a grade separated pedestrian crossing (GSPC) and the current status of the roundabout construction planning.

There were no questions from the parties

Questions from Commissioners

Commissioner Okuda quoted Mr. Sniffen's previous testimony and confirmed that he stood behind his testimony.

Commissioner Aczon, Chang, Cabral, Ohigashi, Giovanni and Wong questioned Mr. Sniffen in the areas of:

- DOT's recommendation for building the roundabout
- the viability, cost and timeframe of building a GSPC
- previous budget for an overpass
- GSPC delayed construction
- multilane roundabout and speed of traffic
- assisted crossing for students
- multi modal crossing
- ultimate decision maker

There were no further questions for Mr. Sniffen.

Mr. Fujioka next called Mr. Randall Tanaka Assistant Superintendent from the Office of Facilities (DOE).

Mr. Tanaka described the DOE budget approval process for the project, the budget cuts imposed by the Governor, Petitioner's Exhibit 5, and the DOE project decision making and design process.

Commissioner Wong suggested taking a break to allow Petitioner to review his Exhibits and provide responses in better detail.

Acting Chair Giovanni acknowledged Commissioner Wong's suggestion and declared a recess at 10:00 a.m. and reconvened the meeting at 10:11 a.m.

Mr. Fujioka provided the Exhibits that Mr. Tanaka was referring to during his testimony.

Acting Chair Giovanni provided his interpretation about the Exhibits.

Mr. Tanaka provided additional details on how the DOE assessed DOT's recommendations regarding the roundabout.

There were no further questions from the Parties

Questions from the Commissioners

Commissioner Giovanni and Chang further questioned Mr. Tanaka in the areas of budget request, funding, reallocation of funds and decision-making process.

Discussion ensued to deal with internet connectivity issues that were disrupting the questioning by the Commissioners. Communications were sufficiently restored to continue the meeting.

Commissioner Okuda requested clarification regarding Exhibit #4 from the County and a Letter sent by DOE to the County of Maui.

Testimony from Mr. Tanaka was interrupted once again by connectivity issues but communication was restored to allow continued questioning.

Commissioner Okuda continued his line of questions on:

- DOE's decision to not proceed with the plan for a GSPC.
- testimony from Ms. Lowrey (DOE witness at prior meeting) that DOE decision had been made in November 2019, when Facilities Administrator, John Chung retired.
- Petitioner's Exhibit 4 - Misleading statement of intention to build GSPC on Letter from DOE to County in April 2020.
- Supplemental County Exhibit 4 - correspondence showing how the Maui Planning Department issued 4 building permits to DOE relying on the incorrect information contained in the DOE letter.

Commissioner Wong requested details on the DOE decision making process including ideas, plans and recommendations; DOE's ability to reject a recommendation; and the phases and cost of the construction.

Commissioner Ohigashi and Cabral echoed Commissioner Okuda's concerns about mixed information in the letter from DOE to the County in April 2020.

Acting Chair Giovanni expressed his dismay about not hearing recommendations that specifically addressed Safety and asked Mr. Fujioka for any rebuttal.

Mr. Fujioka argued how Exhibit 9 supported Mr. Tanaka's position on the roundabout.

Acting Chair Giovanni temporarily suspended Petitioner's presentation and reopened Public Testimony.

PUBLIC TESTIMONY:

Acting Chair Giovanni called for public witnesses from the virtual audience.

1) Andrew Beerer- Education and Recreation Committee Chair for KCA.

Mr. Beerer described his reasons for opposing DOE's request to the Commission.

Commissioner Cabral requested clarification on the estimated completion times that Mr. Beerer had collected on alternate proposals for an underpass.

2) Tina Wildberger- State House Representative for District 11. Opposed.

Ms. Wildberger reiterated how District 11 was awarded $250 K in capital improvement project funding in 2020 which in turn was offered to DOE but was unsure of what DOE did with the money.

Commissioner Chang asked Ms. Wildberger if she was willing to introduce legislation. Ms. Wildberger responded affirmatively. There were no other questions.

Acting Chair Giovanni closed public testimony, declared a recess at 11:10 a.m. and reconvened the meeting at 11:20 a.m.

PETITIONER'S PRESENTATION (continued)

Mr. Fujioka concluded his presentation.

Questions from the Commissioners

Commissioner Okuda sought clarification on:

- why DOE's Motion's language was inconsistent with Mr. Sniffen's testimony -
- Ms. Lowrey's testimony that DOT had not made the decision not to build a GSPC.
- Exhibit 11 – Fehr & Peers Technical Memorandum Table 4
- DOE's response to Rep. Wildberger's testimony on the FEIS with respect to Kihei H.S. and the 2014 walking audit.
- DOE's misrepresentations to the County of Maui Planning Department to obtain building permits
- DOE's other inconsistent representations to the County.
- Foreseeable risks to the State of Hawaii's if a GSPC is not built.
- what evidence was in the record to prove that the LUC could trust the representations made by DOE.

Commissioner Chang requested clarification on:

- County of Maui's Supplemental Exhibit 2- County's list of reasons to approve the certificates of the permits.

- Petitioner's response to County on the GSPC option alleging DOT's "steadfast" opposition to building it.
- DOE's reservations about feasibility of the GSPC when reallocation of funds for Phase 3 had not being considered.

Commissioner Ohigashi requested clarification on Petitioner's Exhibit #2- Kihei HS Project Timeline.

Commissioner Wong sought clarification on Mr. Fujioka's role and what the limitations of his legal representation were for the Department of Education.

Commissioner Ohigashi sought further evidence in the record about plans and designs for the GSPC and an Environmental Assessment.

There were no further questions.

Acting Chair Giovanni declared recess at 12:05 p.m. and reconvened the meeting at 12:50 p.m.

COUNTY'S PRESENTATION

Acting Chair Giovanni called for the County to make its Presentation.

Mr. Hopper argued why the County of Maui could not support the DOE's Amendment Request to release the mandatory Condition to provide a GSPC, and how County recognized the substantial community testimony received in support of the GSPC.

Questions from Commissioners

Commissioner Okuda requested clarification on the County's recommendations for moving forward and whether the Commission could prevent the opening of the school or revert the property, and what power the County had over the project by withholding certificates of occupancy.

Commissioner Chang sought clarification on County's position on which agency was at fault for the new school not opening on time.

Commissioner Ohigashi questioned what the potential pressures were to issue the Certificate of Occupancy (CO), what the appeal process for the denial of the CO was and what County enforcement mechanisms were available.

Acting Chair Giovanni shared his agreement with Commissioner Ohigashi's concerns.

OPSD

Ms. Kato argued why OPSD recommended approval of the Amendment and described why OPSD accepted DOT's recommendation.

Questions from Commissioners

Commissioner Okuda provided his perspective on the basis of Petitioner's Motion and requested clarification on whether OPSD had reason for the LUC to trust DOE .

Mr. Fujioka objected to the question and Commissioner Okuda withdrew his question.

Commissioner Wong requested clarification on whether OPSD was aware of the GSPC condition in the D&O and where in the record DOE had attempted to meet this condition.

Commissioner Cabral requested clarification on OPSD's process for arriving at its Position Statement.

There were no other questions.

APPLICANT'S FINAL COMMENTS

Mr. Fujioka stated that DOE staff had found some of the preliminary drawings for the GSPC from March 2019 and asked to submit them for the record as Exhibit 47.

Acting Chair Giovanni admitted the late Exhibit into the record.

Commissioner Chang raised an objection to the admission of Exhibit 47 and noted that the evidentiary portion of the proceeding had been closed.

Commissioner Cabral noticed that Exhibit 47 had been produced by G70, the same company that had issued a technical memorandum for the proposed school project indicating that a roundabout was not a safe option for pedestrians.

Commissioner Ohigashi shared his concerns about key dates on the record regarding DOE's representations and why Exhibit 47 was irrelevant.

Acting Chair Giovanni acknowledge the Commissioners' concerns for accepting Exhibit 47 after evidence was closed and asked if there were any other questions or comments. There were none.

Acting Chair Giovanni called recess at 1:44 p.m. and reconvened the meeting at 1:51 p.m.

DELIBERATIONS

Acting Chair Giovanni asked the Commission if they were prepared to deliberate. By a roll call all seven Commissioners responded affirmatively.

Commissioner Ohigashi moved to deny Petitioner's Motion. Commissioner Cabral seconded the Motion.

Commissioner Ohigashi spoke to the motion and described why he felt that the Petitioner had not met their burden of proof and how the record demonstrated that DOE had made no attempt to meet LUC's Conditions. He also supported the County's position and urged the Petitioner to work on a solution with the County of Maui.

Commissioner Cabral endorsed Commissioner Ohigashi's statement and added her concerns about the lack of effort by DOE to comply with the LUC Condition and ignoring the issue of public safety.

Commissioners Chang, Aczon, Ohigashi, Okuda, Wong and Giovanni also shared their reasons for supporting the Motion to Deny.

Acting Chair Giovanni directed Mr. Orodenker to poll the Commission. By a roll call the motion passed unanimously (7-0).

Vice-Chair Giovanni called recess at 2:17 p.m., reconvened the meeting at 2:25 p.m. and called for the next Agenda item.

Mr. Orodenker noted that a portion of the first agenda item was still pending and discussion ensued on how to procedurally address the situation. Deputy Attorney General China recommended that the Acting Chair declare the remaining portion moot.

Acting Chair Giovanni rendered the second Motion of the Department of Education (Petitioner's Request for the Issuance of Written Findings) moot and moved to the previously deferred Agenda items.

ADOPTION OF MINUTES

Acting Chair Giovanni stated that the first agenda item was the approval of the October 21, 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.

Commissioner Okuda clarified that since he had recused himself on the IAL matter and did not participate in 1st Executive Session, his vote would only apply to the remainder portion of the Minutes that did not involve the IAL Executive Session. Acting Chair Giovanni acknowledged his statement.

By a roll call, the October 21, 2021 Minutes were approved unanimously [portion 1 (6-0-1 abstain) and portion 2 (7-0)].

Acting Chair Giovanni called for Mr. Orodenker to provide the Tentative Meeting Schedule.

TENTATIVE MEETING SCHEDULE

Executive Officer Orodenker provided the tentative meeting schedule from November 2021 to February 2022 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.

Acting Chair Giovanni requested clarification on when there would be more information regarding the continued use of virtual meetings for the next calendar year.

Mr. Orodenker responded that it would be at the discretion of the Commission and that the Legislature had passed a measure that allowed the continuation of meetings by Zoom effective with the new year.

Commissioner Cabral commented on why she valued in-person site visits and why she felt they were necessary for the Commission's decision-making process.

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

Acting Chair Giovanni adjourned the meeting at 2:34 p.m.