

minutes of meeting
Order
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Land Use Commission Hearing Room
426 Queen Street, Honolulu, Hawaii

October 12, 1962
10:00 A. M.

SPECIAL MEETING OF STATE AND COUNTY
LEGAL AND PLANNING AGENCIES REGARDING
ACT 187, SLH 1961 AND INTERIM REGULA-
TIONS ESTABLISHED PURSUANT THERETO

ATTENDED BY:

John Canright
David F. Wong
Bertram Kanbara
Kase Higa
Yoshito Tanaka
R. J. Darnell
Franklin Y. K. Sunn
Frank Lombardi
Frank Skrivanek
Raymond Yamashita
Arthur Frelin
Calvin Ching

Toshio Kabutan
Hiromu Suzawa
Frederick Lee
Robert Ohata
Hiroshi Kasamoto
W. M. Mullahey
Stanley C. Friel
Philip T. Chun
Broder Lucas
Donald Wolbrink
Ted Damron

Darnell called the meeting to order and stated that the purpose of this meeting was to discuss the legal background of Act 187; administration of the interim regulations in effect; and ways to simplify co-ordination between the Land Use Commission and the various county agencies involved.

Darnell (Briefly outlined the Act itself, the composition of the commission and its duties. Defined the three districts specified in the Act. Noted that HB&A is consultant for project to prepare standards, final regulations and boundaries required by the Act. Outlined the interim regulations presently in effect.)

Canwright (Outlined the legal history of the Act, especially regarding the two opinions (62-33 and 62-38) issued by the Attorney General's office.)

In the discussion involving the validity of the counties' actions in the period between the two opinions, Canwright commented as follows:

"Since both regulations were ruled invalid from their inception, this leaves the fact that single-family dwellings as a primary use in the A district has never been authorized by the LUC; and so any county actions must be re-considered in the light of either a Special Permit or a Boundary Change.

"The county jurisdiction within the A district is the same as it was before the inception of the Act, except that it cannot authorize the use of land for any other than those stipulated by the interim regulations."

Darnell (Outlined the text of the proposed rule change)

Kasamoto "The Hawaii County Planning & Traffic Commission approved subdivisions in July. Now they are declared void, how should we notify the applicants?"

Canwright "Your county attorney will help you--the best procedure would be to have the people affected contact the LUC and instigate a petition or application---and inform them that your action taken is invalid until LUC has taken action on it."

Kabutan "It seems to me that the basic question is the jurisdictional authority---the LUC should establish general standards and criteria to support these general standards. I am unable to find standards that support urban or agricultural districts. This should be the job of the LUC, rather than going into detail regarding single-family dwelling units.

(Cited Act 187 Sec. 3 paragraph 2. 'Zoning power's granted to counties under section 138-42 shall govern the zoning within the districts, with the exception that areas may not be zoned for urban uses except in those districts that are designated as urban by the commission.')

"Incidental uses within the A district should be left to the counties."

Canwright "Of course you must remember that a prime purpose of Act 187 was to prevent the misuse of the Agricultural land."

(Cited SECTION 2, Sec. 8, 187/61--',...prepare proposed regulations prescribing the appropriate uses for the land in the various classes of districts.')

"The LUC has undertaken to limit the use only in the A district whereas SECTION 2, Sec. 8, allows the LUC to regulate all districts."

Kabutan "General standards are needed so that county-state jurisdictional conflicts will not occur."

Ohata "I agree with Mr. Kabutan, as sec. 3 states '...with the exception that areas may not be zoned for urban uses except in those districts designated as urban by the commission', while the definition of urban in the act refers to 'city-like concentrations."

"With this conflict the LUC has proceeded to define, thru their interim regulations, agricultural uses permitted in the A district, instead of listing prohibited uses within the A district."

"Any industrial use or commercial use should be allowable under the above definitions---as it is the concentration of these uses that create an urban area." (Speaking of the A district)

Canwright "Both of you, may I ask what you think SECTION 2, Sec. 8 means?"

Higa "I think legislative intent was for the State to set aside broad boundaries in three categories--and reserve zoning within the districts to the county or the Dept. of Land and Natural Resources."

"The Interim Regulations on use in the A district takes away all county zoning powers granted under 138-42."

(Canwright later tabulated the powers restricted by the LUC within the A district.)

Canwright (Cited Sec. 8 once again) "We are trying to work with the counties to accomplish any needed changes in the administration thru revision of the regulations...leaving the Act itself unchanged for perhaps 2 or 3 years."

(Discussed the question of conflict of intent between Sec. 3 and Sec. 8.) "It seems to me that the Sec. 3 was a general provision and that Sec. 8 was a specific provision which would govern the action of the LUC."

"The LUC does set general uses. The county is free to enact stricter zoning under the general uses set up by the interim regulations."

- Kabutan "The words use and district have been used interchangeably thruout the statute. Therefore uses in Sec. 8 means general uses."
- Canwright "In other words, you would think that the LUC, acting on the mandate of Sec. 8, would say that 'within the A district agricultural uses are allowed'---- and stop right there?"
- Kabutan "Yes, that is correct."
- Kanbara "Mr. Canwright, are you saying that use designation and zoning are two different things?"
- Canwright "No, I did not intend to say that. Use designation is only one phase of zoning."
- Kanbara "If you take away use designation from the county thru your interim regulations, zoning doesn't mean anything."
- Canwright "You have various uses of A districts established by LUC regulations within which the county may further limit use by zoning. The counties may designate areas within which specific agricultural uses may operate."
- Lee "With regard to Secs. 3 and 8, how is the county to know what is urban and what is agricultural without better definition of the term? How specific are we to be; and how general are we to be?"
- Canwright "Let us deal with 2.1 (b)(1)... would you think this to be workable as it now stands...what additions would you suggest?"
- Lee "How about a dude ranch in the A district?"
- Canwright "That can be cleared up by a declatory ruling by the LUC.
"Do you feel other agricultural uses should be added to 2.1 (b)?"
- Lee "We have quite a long list of permissable uses in out county agricultural areas. Could not an agreement be reached between the county and state that would leave the counties with some discretionary powers in the Act 187 a districts?"
- Ohata (Felt that Act 138-42 powers are overridden by the LUC interim regulations which call for specific uses in A districts, and that a further delineation of specific use zones on the county level within the A district would be impossible in the wide areas that we are dealing with.)
- Canwright "I feel that it was legislative intent that we do no more limiting of areas than is absolutly necessary."
- Kabutan (Cited interim regulation 2.1 "...subject to ordinances of the state or county, whichever may be more restrictive...") "this

implies that a conflict exists where the 187 general allowed uses deny uses allowed by county ordinance...state regulations should be broadened."

Lee "If the LUC grants a Special Permit for a drive-in theater, does the county now have to zone this area for a drive-in theater. Is your jurisdiction such that the county does not have to zone the area subsequent to LUC action?"

Canwright "It is my conception that the LUC in effect says that (this) is a valid use which the county, if it wants to, may authorize. We have done nothing for the county except to open that use to the county."

Kanbara "We run into the problem now that this area is still districted A by the LUC, and the county may not permit an urban use in and A district (SECTION 2, Sec. 3). So as far as the county is concerned we have no authority to authorize this urban use which the LUC has allowed by Special Permit."

Canwright "It would seem to me that, with regard to this urban use we are speaking of, there would be a different interpretation between the two of us...my definition of an urban area is a concentration, or a lot of drive-in theaters."

Kanbara "Act 187 speaks of areas of concentration (SECTION 2, Sec. 1 (f)) whereas I am speaking of specific urban uses, as in the case of a drive-in theater."

Canwright "I do not think that 187 was set up to prohibit single-family residential within the A district as long as a concentration does not exist."

Kanbara "When does a concentration exist?"

Canwright "That is a good question."

Suzawa "You mentioned leaving the Act as is for a few years--with the ambiguity evidenced this morning in Act 187, why the hesitation in going to the legislature to get the wording changed?"

Canwright "To my way of thinking no ambiguity exists in SECTION 2, Sections 3 & 8."

Lee "Why not list the uses not permitted instead of permitted uses?"

Canwright "Why restrict further on the state level when there is a chance to work this thing out on the county level?"

Higa "Must the applicant of a Special Permit go back to the county upon receipt of LUC approval?"

- Canwright "Yes."
- Sunn "There is nothing in the act or in the regulations that says that the applicant must return to the county."
- Canwright "That is correct; but SECTION 2, Sec. 7 says that the LUC may stipulate protective restrictions upon the grant. The LUC staff reports have recommended county control, which the LUC has adopted."
- Lee (Reading SECTION 2, Sec. 7 (b)) "It would seem to say that one of the reasons for filing a Special Permit would be that the county regulations prohibit the desired use... 'either the county planning commission or the department to which is assigned the responsibility of administering the provisions of Act 234, SLH 1957, rules that the use for which the district in which his land is situated is classified or the regulations adopted by the commission do not permit such desired use, he may petition....'"
- Canwright "Not so. The words 'do not permit such desired use' refers only to the Land Use Commission's regulations. SECTION 2, Sec. 8 says 'the commission shall.....prepare proposed regulations prescribing the appropriate uses for the land in the various classes of districts'."
- Lee "I do not disagree with your interpretation; but the layman might misinterpret the language used in Sec. 7 (b) to infer that he is applying for a Special Permit from county regulations, and that once he has it he does not have to bother with the county. I think that if the language were changed to make these several passages more readable we would have a much better Act than we do now."
- Canwright "Of course our thought is that we do have an Act now and that to keep it we should try and work together and use what we have."
- "My interpretation of the Special Permit language was a difficult one to arrive at (i.e. (b) regulations do not permit such desired use) but when viewed in the light of Sec. 3 and Sec. 8 it was my opinion that the Special Permit was a request for variance from state regulations and therefore still subject to county review and action."
- "This act (187) was not intended to invade the county zoning powers."
- Ohata "If Opinion 62-33 had not been issued, we would not have these problems---the 5-acre limitation precluded concentration."
- "The intent of the law was to prevent urban sprawl--this I think was the legislature's largest concern; and the 5-acre limitation precluded urban sprawl."

(Break for lunch)

Suzawa: "One way is to cull through the allowable uses in the county ordinances."

Canwright: "We should work on this, or on the criteria."

Lee: "What differentiates urban and agricultural uses?"

Arthur Gallion: "Concentration, not just citylike streets, etc., appears in the definition of Urban. It offers an opportunity to make distinction between Urban and Agricultural, aside from growing of crops. When you extract from a City, a filling station, which in the City is an Urban use, lift that out and put it in some rural cross-road that does not then make it an Urban use. Even a drive-in theater, which is an urban use as identified where there is a concentration of population in a city, or a town, if you extract it and put it on a rural cross-road, it does not carry with it the Urban usage. There is no reason why farmers shouldn't have a drive-in theater as well as urban dwellers; and there is no reason why because the man is a farmer he has to come to a town where a drive-in is, if a drive-in without any public burden of expenditures shouldn't be on a crossroad. So it is the problem of extracting from a context of concentration under the designation of urban areas of specific uses in trying to say you can't put those in the country because they are usually in the city.

"This is where I think Fred Lee is driving at something. I would suggest we use two categories for this sort of thing: residential and commercial structures (please accept it as a very vague and not clarified thing). These are permitted in the agricultural district provided:

- (1) They are accessory to an agricultural pursuit or they do not preempt important agricultural lands or lands that may be developed economically or feasibly for agricultural uses;
- (2) That they are in conformance with zoning ordinances, and subdivision regulations adopted by the County - this is presumed they are going to do these things, though if they do not, then they are not permitted in any way.
- (3) That they do not require public services which are available within the urban districts, economically, including, but not limited to water, sewer, police and fire protection, the construction and maintenance of public roads, and educational and recreational facilities.

"This is the general concept. The basis for it is that I am suggesting by this approach that the key to the protection of values, broad public values indicated in 187 is the degree of

Review of Questions Submitted by Hawaii and Oahu Counties

- QUESTION: Difference between Special Permit and Rezoning.
- Canright: "Rezoning: the area is needed for another classified use. ~~Either~~ one of two things exist: (a) not suitable for the classified use, or (b) there has been a change in conditions or development trends.
- "Special Permits: Unusual conditions or uses that could not have been anticipated and LUC may grant the use only if it finds that by so doing the interests of the chapter will be promoted.
- "Let me go back again to the discussion over Sec. 8 where it says the Commission shall prepare regulations: here is a good example of legislative intent regarding the controversy over Sec. 3 versus Sec. 8...if the Commission did not prepare regulations as mandated in Sec. 8, there would be no need whatsoever for the Special Permit."
- QUESTION: Can the County initiate a Special Permit.
- Darnell: "There does not come to mind a case where this would be necessary, as anything that the county would conceivably petition for would be a public building or utility which uses are allowed in the 'A' district."
- QUESTION: Can an enforceable time limit be set for the starting and completion of a Special Permit project.
- Darnell: "Yes. Sec. 7 says "...under such protective restrictions as it may be necessary..." It is not likely, however, that the LUC would put a time limit on a permanent type building or facility. The limit would have to be demonstrably reasonable."
- QUESTION: Can the LUC, in its land use regulations, notwithstanding Section 3, authorize a use which is not provided for in applicable county zoning ordinance.
- Canwright: "Yes. But it does not do that as it makes all authorizations subject to county review and authorization."
- Kanbara: "Who makes the determination as to whether or not a use proposed for the 'A' district is urban?"
- Canright: "The Land Use Commission. The only uses allowed in the 'A' district are the use permitted by the LUC. Sec. 8 was explicit in that the nature of use was the function of the LUC and to that extent county zoning was invalid--but all the rest of the county zoning in that connection still exists, under what circumstances they can exist is a county function."

Kabutan: "What is the provision for private schools in the 'A' district?"

Canright: "I see no mention made of allowing private schools in the 'A' district."

Higa: (With reference to Opinion 62-33). "I thought that Shigezawa was wrong on this, because if the LUC is going to enforce the 'A' district they should have the power to determine lot size. The LUC should (1) generalize the permitted uses and let the county take over control of the 'A' district, or (2) detail permitted uses fully so that no question may exist down to lot size determination then the LUC could take over completely and organize variance procedures. What I am saying is that the people do not know who to go to for a decision. It would be much more efficient if the LUC determined, in great detail permitted uses, and even lot size in the 'A' district."

Suzawa: "If the statute is not clear even to the county attorney, who do we go to?"

Darnell: "If we cannot agree, the easiest thing to do is to amend the statute."

Suzawa: "Our point is this, the statute is not clear. Here we try to resolve administration, but legal opinions (AG vs. CA) cannot be settled in this fashion."

Sec. 3 versus Sec. 8

Canwright: "All zoning remains with the county except for specified uses. I take the position that Sec. 8 is specific while Sec. 3 is general, and that where a statute is specific it will prevail over any implications in a general section."

Tanaka: "I agree on your point of law--but is Sec. 3, in fact, a general, and Sec. 8 the specific section in this legislation?"

Canwright: "I did not think that there would be any question as to whether the LUC had the power to specify uses."

Suzawa: "Yes, a question exists--and this has been our basic problem."

Sunn: "The trend here today seems to be to have the LUC take over completely the zoning function within the 'A' district--how does this leave both the parties involved (ie. county and state)?"

Lee: "Well, then the problem would be that you would have two separate state and county functions ('A' and 'U') zoning land, this would seem to be a duplication of effort."

Sunn: "What if the LUC regulations were changed to conform to county zoning in the 'A' district?"

Lee: "Fine, take all of the ordinances and evolve a zoning in which all counties conform."

- Darnell: "The counties zoning probably should not conform to each other."
- Lee: "Since the jurisdiction of zoning in the 'A' district is confusing to both administrators and the public--what the counties are saying is that we will give the controls to the LUC on a high level and leave the specifics to the counties which is the way the way the public is used to doing it--if we violate the general principles then the LUC should step in."
- Darnell: "The only way that you can say that general principles are being violated is to lay down specific principles. What has been done was to set up our specifics so that county principles and prerogatives already on the books would not be violated, where they did not violate the spirit and intent of the law."
- Gallion: "Is the conflict that is suggested here, between Sec. 3 and Sec. 8 in the Act, or is it an apparent conflict because in the regulations some specific uses were recited which in their repetition seems to appropriate powers that are normally exercised by the counties?"
- Suzawa: "We view it as a conflict stemming from Sec. 3 and Sec. 8."
- Canwright: "Does the initial wording of Sec. 16 help?"
- Suzawa: "No."
- Canwright: "Sec. 3 provides that zoning powers may not be lifted and Sec. 8 relates to land use. I feel that land use is more specific than zoning, so that the wording in sec. 16 which says except as specifically provided by this chapter would seem to bolster Sec. 8. It also refers to specific regulations in sec. 16."
- Suzawa: "If you use that approach, the LUC regulations could supersede completely the county zoning."
- Canwright: "I don't think I can accept that, as you know the intent of this legislation was to set up these open spaces with as little interference with the county as is possible; and that it was contemplated that these uses would be set up broadly so that the city would not be limited except insofar as was necessary to keep the open spaces open and to prevent this scatter that we have been speaking of."
- QUESTION: Private schools in the 'A' district.
- Canwright: "As public schools are allowed (and I can see nowhere in the 187 regulations where private schools are allowed), I think that the regulations should be changed to allow private schools.
- "How do we arrive at a set of regulations specific enough to eliminate county/state conflict in the 'A' district? Fred Lee's suggestion of general criteria is unworkable, so how do we arrive at this list?"

public expenditure services that occur are required rather than the detail of the way the people wish to either gather together or spread apart or in their respective pursuit in each of the counties."

Skrivanek: "Can't you handle this by Special Permit?"

Gallion: "What I am seeking here is to avoid special permit in order that the interests of the people of the state, under Act 187, are adequately protected, and those objecting fulfilled without requiring the repetition of request for special permits. For instance, a fella wants to build a filling station on a rural corner, I wonder if it makes much sense he had to go through a 120 days delay just to get a special permit when I believe the Land Use Commission would be disposed to okay it any way, except insofar as whatever a man wants to do in a rural area, be it residential or commercial, he is then demanding that the county or the state participate in the development of the waterline, or he has to pay more money to get his kids to school or has to impose upon him streets, the paving and curbs and the sidewalks, because that is the standard there. (Why doesn't the public industry declare to spend more money.)"

Skrivanek: "Aren't you overlooking the fact that you may be using the prime agricultural lands? The intent of the agricultural district is to reserve for agricultural use rather than any single type of urban use."

Gallion: "A very good point. I do believe that needs to be covered. I mentioned economically feasible to development for agricultural; that isn't very clear yet."

Darnell: "This will not prevent urban sprawl at all."

Suzawa: "These are attempts to consider it as an urban use. If that thing stands by itself, we do not normally consider it an urban use. Therefore in developing any criteria we should consider the number that is in one location and make the restriction as to number. For example: We have one filling station on the highway, there will be no question that is not a concentration. But if you say a bar and drive-in theater is located contiguously then there would be a lot of doubt raised whether that was a concentration or not; and that would raise the issue whether it is urban uses or not."

Darnell: "This would be encouraging the scatteration of your commercial facilities, so that they couldn't be located next to one another where they belong."

Gallion: "Don't misunderstand. The objective is not to scatter. The objective is to avoid the burden on the public which scatteration imposes. If those burdens are avoided, probably the scatteration will, by its vary nature would be avoided."

Darnell: "I don't agree. Your objectives may not be to scatter, but the result would be to scatter."

Kasamoto: "What is to prevent this: If you have a service station or other use, you will need police protection, fire protection, etc.; how can you avoid these public facilities, to some extent?"

Callion: "I don't know, specifically. I had hoped that with some brains concerned with this they would be able to explore this. But I am suggesting that there are decided advantages in the public interest of concentration which we call urban, because facilities that make it good are more economically available. You can provide large supplies for a concentration: sewage disposal, schools, police and fire protection, without breaking the taxpayer. If the person chooses not to live that way, instead of a set of rules which deny him the right to live this way, you simply say you may but you must pay the price. If people choose to live in a particularly area which is remotely situated from the public schools, we know that the law says the public is obliged to educate all the children. Now, if the schools, to the best of the public capacity, are located here, but the man decides to live out there, he has little right, I am suggesting, to suggest to the State or the County at the same time that they have an obligation to pick the kid up and bring him to school; but the public rather should be in a position to say the law requires that child to be educated, so you get him to school wherever the public can provide the facility. This is the twist.

"On Kauai it costs him \$3.50 per capita for every man, woman, and child for bus service; on the Big Island \$2.50; and on Maui its around \$2.00. If the people want to pay this, I would think they should be allowed the right to, but they will have to make up their own minds. The public just can't simply accept this scatteration with all of the mounting compounding bills that the taxpayer must pay, and this is one of the features of Act 187 which seems to have made it absolutely an imperative passage. But it is the method now that we are talking about to accomplish that objective."

Skrivanek: "To cite a different example: It may be true that the individual has an obligation to get his child to school where he is living away from the urban concentration. Let's presume that he has his gas station out in the country near the crossroads, it catches on fire, does the fire department have the right to say no to that man because he is out in a rural area, say we will not send a fire truck out there?"

Gallion: "Sure. I would say he has the right. I don't know. The local laws may impose certain obligations, but I'll wager the insurance company will give you a pretty good idea whether the county has the right to do it. The rates will be higher."

Skrivanek: "The rates will be higher, but this is not in effect whether the fire department has a covered function as to the right to refuse service."

Gallion: "I don't know how far it's obligatory of the fire department to go to fight fires, or how frequently these fire stations would have to be established in order to give everybody adequate fire protection."

Canwright: "We can count on the counties to give very careful consideration to those things too, before they corride through these scatterations. They would be quicker to consider it, probably, than would we."

QUESTION: Is the special permit limited to the 'A' district.

Canwright: "I think that it would be limited to the 'A' districts, as the LUC, by its regulations turned over to the county's complete jurisdiction re: the Urban districts and to the Department of Land and Natural Resources re: Conservation districts."

Sunn: (In closing)"There seem to be three critical problems here:

1. Enforcement of interim regulations and temporary district boundaries--this must be done by the counties.
2. Possible statute clarification on special permit requiring county approval in addition to county approval.
3. Difference between Sec. 3 and Sec. 8, or who specifies zoning in the 'A' district - if LUC defines 'Urban' as Gallion intimated this may clear up the problem."

Mr. Darnell thanked Commissioner Sunn for his summation; expressed appreciation for participation by all present; and closed the meeting.