

LAND USE COMMISSION
MEETING MINUTES

December 22-23, 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 Wednesday, December 22nd, 2021

(https://us02web.zoom.us/webinar/register/WN_fBk8xPcaQaadSv-prz5v-w)

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
Dawn N. S. Chang
Lee Ohigashi
Dan Giovanni
Arnold Wong

COMMISSIONERS EXCUSED: Edmund Aczon
Gary Okuda

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

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

COURT REPORTER: via Naegeli Deposition and Trial
(from recorded ZOOM conference media)

CALL TO ORDER

Chair Scheuer called the meeting to order at 9:30 a.m.

Chair Scheuer and the attending Commissioners acknowledged that they were present and able to communicate via the ZOOM program. (6 Commissioners present)

APPROVAL OF MINUTES

The first agenda item was the approval of the November 10 and 23, 2021 Minutes. The Chair 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 Wong moved to adopt the Minutes. Commissioner Cabral seconded the motion. There was no discussion.

By a roll call, the November 10 and 23, 2021 Minutes were approved unanimously (6-0).

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

TENTATIVE MEETING SCHEDULE

Executive Officer Orodener provided the tentative meeting schedule from January 2022 to April 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.

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

Chair Scheuer moved to the next agenda item.

ACTION- DR21-73 Honoipu Hideaway, LLC (Hawai'i)

To Consider Petition for Boundary Interpretation for certain land consisting of approximately 17.5470 acres situated at 56-102 Old Coast Guard Road, Tax Map Key No. (3) 5-6-001-074, Kapaa-Upolu, North Kohala, County of Hawai'i, State of Hawai'i.

APPEARANCES:

Calvert Chipchase, Esq., Petitioner's Counsel

Chris Gooding, Esq., Petitioner's Counsel

Molly Olds, Esq., Petitioner's Counsel
Jean Campbell Deputy Corporation Counsel, County of Hawai'i, (County)
Alison Kato, Esq., Deputy Attorney General, Office of Planning and Sustainable
Development (OPSD)
Lorene Maki, Planner, OPSD
Mary Alice Evans, Director, OPSD

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

Mr. Chipchase stated that Exhibit 40 was also filed in the morning prior to the hearing. Clarification was later made that the last exhibit filed was Exhibit 39.

Chair Scheuer asked Mr. Chipchase if he had reviewed HAR §15-15-45.1 with regards to reimbursement of LUC expenses and if his client agreed. Mr. Chipchase acknowledged that his client had reviewed and accepted.

Chair Scheuer asked if there was any written testimony or if there were any members in the audience who wished to testify.

Ms. Quinones provided the list of written testimony received. There were no members of the public who wished to testify.

Chair invited County and OPSD to provide testimony.

Ms. Campbell stated that it was the County's belief that this matter was properly brought up to the LUC and that the LUC had jurisdiction and not the County.

There were no questions for the County.

Ms. Kato stated that OPSD did not support this petition for declaratory order to correct a boundary interpretation and that OPSD did not find sufficient reason to believe that the current official boundary is incorrect.

Questions from Commissioners

Commissioner Ohigashi and Chang requested additional information about OPSD's Exhibit 4 (Map) and the dirt road depicted on the maps.

There were no further questions for OPSD. Chair Scheuer moved on to Petitioner's presentation.

PETITIONER'S PRESENTATION

Mr. Chipchase provided clarification about the old dirt road and explained the reasons why they filed this petition for district boundary interpretation.

Discussion ensued to determine whether the late filing of Exhibits 35 through 39 were to be admitted into the record.

Commissioner Chang proposed to hear Petitioner's presentation and consider the rest of the exhibits after the presentation.

The Commission decided to reserve ruling on the late exhibits after the presentation.

Mr. Chipchase continued with a power point presentation that provided maps with the boundary lines in this area and further explained why Petitioner believed the Commission in 1969 intended to follow the roadway in this area and how they used the incorrect map.

Chair Scheuer declared recess at 10:25 a.m. and reconvened the meeting at 10:36 a.m.

Commissioner Giovanni inquired about the Petitioner's motivation to bring this petition.

Commissioner Chang asked for clarification on specific details about the property and its current use.

Mr. Chipchase continued with the presentation focusing on Exhibit 20 (Overlay New Road Current Line).

Commissioner Chang was concerned with accepting Mr. Chipchase's interpretation of the 1969 LUC Commission's intent to follow along the roadway.

Mr. Chipchase noted that DHHL, owner of the adjacent property, was notified of this petition and had not expressed any opposition. Mr. Chipchase offered the Petitioner's representative to answer Commissioners' questions.

Chair Scheuer made a disclosure about his ongoing work relation with DHHL. There were no objections to Chair's continued participation by Petitioner.

Chair Scheuer swore in Nathan Eggen, managing member of Honoipu Hideaway, LLC.

Mr. Eggen described the impact of the conservation line along his property and his desire to use this land for agriculture.

Chair Scheuer declared recess at 11:41 a.m. and reconvened the meeting at 11:51 a.m.

Questions from the Commissioners

Commissioners Chang, Ohigashi, Giovanni, Wong had a detailed discussion with Mr. Eggen on the following subjects:

- reason and meaning of the name Honoipu Hideaway, LLC
- details about the purchase of the land
- reasons for a boundary interpretation petition rather than a boundary amendment.
- Petitioner's Exhibit 19 (Corrected Boundary Survey) and OPSD's Exhibit 4 (1982 road)
- Petitioners' understanding of conservation line at time of purchase
- History of the property and previous owners- Federal gov. 1959-2000 and Parker Ranch 2000-2018.
- public trails in proximity of the property

Chair Scheuer had questions for Mr. Eggen about:

- permit obtained for Special Management Area from the County
- petitioner's intention to grow produce for sale
- current water service to the property
- estimation of the potential increase in value of the property with approval of the petition

There was no redirect from Mr. Chipchase.

Chair Scheuer declared a recess at 12:51 p.m. and reconvened the meeting at 1:21 p.m.

Mr. Chipchase moved to Closing Arguments emphasizing the areas of:

- public support for the petition
- petition for declaratory ruling steps including actual survey maps
- the Stengle case as precedent (DR99-21)
- data points such as 1961 road, drafter's intent, and county zoning

Questions from the Commissioners

Commissioner Ohigashi raised the differences of the Stengle and Honoipu's case and asked for further clarification on Mr. Chipchase's interpretation of the Stengle case and the boundary line following roadways.

Discussion ensued to clarify LUC's authority to interpret district boundaries and to not include County or OPSD's comments as evidence.

Commissioner Giovanni asked for specific dates in the record to determine whether the Commission in the 1969 review was aware that the houses in the area existed.

Chair Scheuer commented on the lack of information on the record about any resources that should be protected in the conservation district and asked if those were irrelevant considerations in this case.

Chair Scheuer moved on to questions for the County and OPSD.

There were no questions for the County.

Commissioner Ohigashi, Chang and Chair Scheuer asked Ms. Kato to clarify what the purpose of Exhibit 4 was; whether DLNR-Division of State Parks had any comments regarding this petition; and her comment about missing evidence of Commission's intent in 1969.

There were no other questions for OPSD.

Commissioner Cabral then questioned the County.

Ms. Campbell commented that the County zoning will not be affected by moving the boundary line and deferred to the authority of the LUC to make boundary changes.

Mr. Chipchase addressed one of Ms. Kato's previous points by explaining how staff's original interpretation was based on the location of the roadway but later issued an Errata letter changing the basis of their interpretation to a 300-foot setback.

Petitioner's Exhibits 35-39 were admitted into the record. There were no objections.

There were no more questions or comments. Chair moved on to formal deliberation.

FORMAL DELIBERATIONS

Chair Scheuer described the process of deliberations for a declaratory order ruling and confirmed with all the Commissioners by a roll call that they were prepared to deliberate on this matter.

Commissioner Wong made motion to deny the Petition. Commissioner Chang seconded the motion.

Commissioner Wong spoke to the motion and expressed his belief that there was not enough evidence at this time to support the Petition.

Commissioner Chang added her concerns with existing potential litigation from another declaratory ruling case, not knowing if other adjoining landowners may raise similar issues and believed no mistake was made on the current boundary line.

Commissioner Ohigashi, Giovanni, Cabral and Chair Scheuer provided their comments in support of the motion.

Chair Scheuer asked Mr. Orodener to poll the Commission.

By a roll call, the Motion to Deny the Petition and affirming that the LUC's original boundary determination was deemed correct passed unanimously (6-0-2 excused).

Chair Scheuer declared recess at 2:38 p.m. until 9:00 a.m. on December 23, 2021.

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CALL TO ORDER

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DR21-76 KEKAHA AGRICULTURE ASSOCIATION- IAL (Kaua'i)

To Consider Petition for Declaratory Order to designate approximately 12,123 acres at Kekaha, Kaua'i; 4-1-2-002:001 por. IAL

APPEARANCES:

Douglas Codiga, Esq., Petitioner's Counsel

Tom Schnell, PBR Hawai'i, Petitioner's Consultant

Josh Uyehara, President of Board of Directors of Kekaha Agriculture Association (KAA) and Manager of Hartung Brothers, Hawai'i

Laura Barzilai, Deputy County Attorney, County of Kaua'i, (County)

Marie Williams, Manager Dept. of Planning, County

Alison Kato, Esq., Deputy Attorney General, Office of Planning and Sustainable Development (OPSD)

Lorene Maki, Planner, OPSD

Mary Alice Evans, Director, OPSD

Chair Scheuer updated the record and disclosed that he works as a consultant for the Department of Hawaiian Homelands (DHHL) and has been involved in an advisory capacity to a number of parties including the Agribusiness Development Corporation (ADC) but felt that he could be fair and impartial in this matter.

Chair declared a brief break at 9:09 a.m. for Mr. Codiga to consult with Petitioner for any objection. Meeting reconvened at 9:11 a.m.

There were no objections to Chair's continued participation.

Commissioner Okuda made a disclosure about knowing and working with Commissioners of the Hawaiian Homes Commission. There were no objections.

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

Commissioner Chang was concerned about continuing with this hearing when DHHL was potentially requesting a contested case hearing.

Ms. Chow (DAG) acknowledged the concern and explained the procedure in light of the request being conditional if the case was not deferred.

Chair Scheuer made clarification on the procedure for the day and asked if there were any questions on the procedures. There were none.

Chair Scheuer opened Public Testimony on the matter of deferral only and held off on testimony on the petition itself.

PUBLIC TESTIMONY

Chair Scheuer called for public witnesses from the audience and swore in each testifier.

- 1) Beth Tokioka from Kaua'i Island Utility Cooperative (KIUC) testified requesting deferral.

Commissioner Okuda and Ohigashi requested clarification from the witness regarding their prior knowledge of the petition, their request for deferral and consideration to intervene.

- 2) William Aila Jr., Chairman of Hawaiian Home Commission and Director of the Department of Hawaiian Homelands, provided his position and supported deferral.

There were no questions from the Parties or Commissioners.

QUESTION OF AUTHORITY- PARTIES

Chair Scheuer addressed the Parties to determine whether or not Petitioner has proper authority to file the petition and whether or not State lands may be subject to IAL designation by individual lessees.

Mr. Codiga explained how the record supports ADC's authority to authorize KAA to file the Petition and offered Mr. James Nakatani and Ms. Myra Kaichi as witnesses to clarify.

Commissioner Okuda made a disclosure about knowing Mr. Nakatani and Ms. Kaichi through his previous service on the Nisei Veterans Legacy Foundation Board and his practice of law. There were no objections to Commissioner Okuda's participation.

Commissioner Okuda provided relevant statutes to address the issue of authority by citing the definition and exceptions to the definition of public lands.

Commissioners Okuda, Chang and Giovanni requested clarification from Mr. Codiga about ADC's interest in the land, administrative rules used for filing the petition and the KAA Coop entity.

Chair Scheuer declared recess at 9:55 a.m. and reconvened the meeting at 10:04 a.m.

Chair Scheuer swore in Ms. Myra Kaichi, Senior Executive Assistant with ADC.

Ms. Kaichi provided testimony to clarify why they believed that ADC was the proper party to give approval for filing an IAL petition.

Commissioners Giovanni, Ohigashi and Cabral continued to question Ms. Kaichi on the following:

- respective relationship in terms of farmers between ADC and KAA.
- amount of acreage belonging to large versus small farmers
- notification efforts to small farmers
- ADC's management control of the land
- Reverter clause contained in the Executive Order
- fee simple ownership

Mr. Codiga and Ms. Kaichi attempted to explain the question of fee simple ownership and the Reverter clause.

Chair Scheuer asked about any evidence in the record of ADC's request to DLNR to approve KAA's proposed action. There was none.

Chair Scheuer swore in Mr. Josh Uyehara, President of KAA Board of Directors.

Commissioners Cabral, Ohigashi and Okuda asked Mr. Uyehara and Ms. Kaichi about:

- notification to smaller farmers. Never formally done.
- evidence of ADC's anticipated additional revenues.
- Land Board approval of KAA's proposed action. None
- any prejudice KAA may have for deferral. None.

Chair Scheuer provided his assessment on the status of the proceeding and stated that critical issues may not be addressed in this meeting and expressed his desire to move to deferment.

Commissioner's Chang asked to hear from OPSD and County on the issue of authorization first.

Commissioner Giovanni supported the request to hear briefly from OPSD and County.

Chair Scheuer moved to hear from the rest of parties on the issue of DLNR jurisdiction.

Ms. Barzilai (County) was in support of deferring to a later time with a better understanding on the issue of authority due to the points raised by the Commissioners.

Ms. Kato (OPSD) agreed that the matter should be deferred but did believe that ADC has authority to approve KAA.

Commissioners Chang, Okuda and Ohigashi commented on OPSD position.

Discussion ensued to clarify the distinction between management of the land and fee simple ownership and the Executive Order delegating control and management to ADC.

Commissioner Ohigashi remarked on ADC's opportunity to obtain that approval from Land Board before coming back to the Commission.

Chair Scheuer reaffirmed his previous request to move to deferment and for ADC to provide:

- Additional briefing on the issue of authorization or proof that DLNR has approved KAA action.
- Briefing on whether State lands may be subject to IAL designation by individual lessees.
- Notification to the small landowners that lease about 700 acres of the Petition Area.

Chair Scheuer stated that he would entertain a motion to defer and allow for staff to send a letter that summarizes these issues to be briefed before the Commission.

Commissioner Giovanni made the motion to defer this matter and asked LUC staff to prepare a letter to summarize these issues. Commissioner Cabral seconded the motion.

Commissioner Chang supported the motion.

Chair Scheuer asked Mr. Orodener to poll the commission. The motion passed unanimously with 6 affirmative votes.

There was no further business to discuss. Chair Scheuer adjourned meeting at 11:08 a.m.