

KAUA‘I PLANNING COMMISSION
REGULAR MEETING
October 23, 2018

The regular meeting of the Planning Commission of the County of Kaua‘i was called to order by Chair Apisa at 9:15 a.m., at the Līhu‘e Civic Center, Mo‘ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

Chair Donna Apisa
Vice Chair Glenda Nogami Streufert
Ms. Kanoe Ahuna
Mr. Elesther Calipjo
Mr. Roy Ho
Mr. Kimo Keawe
Mr. Sean Mahoney

The following staff members were present: Planning Department – Director Michael Dahilig, Dale Cua, Leslie Takasaki; Office of the County Attorney – Deputy County Attorney Jodi Higuchi Sayegusa; Office of Boards and Commissions – Commission Support Clerk Darcie Agaran

CALL TO ORDER

Chair Apisa called the meeting to order at 9:15 a.m.

ROLL CALL

Planning Director Michael Dahilig: Vice Chair Streufert.

Ms. Nogami Streufert: Here.

Mr. Dahilig: Commissioner Mahoney.

Mr. Mahoney: Here.

Mr. Dahilig: Commissioner Keawe.

Mr. Keawe: Here.

Mr. Dahilig: Commissioner Ahuna.

Ms. Ahuna: Here.

Mr. Dahilig: Commissioner Ho.

Mr. Ho: Here.

Mr. Dahilig: Commissioner Calipjo.

Mr. Calipjo: Here.

Mr. Dahilig: Chair Apisa.

Chair Apisa: Here.

Mr. Dahilig: Madame Chair, you have seven members present this morning.

APPROVAL OF AGENDA

Mr. Dahilig: Madame Chair, the Approval of the Agenda is on the agenda for your entertainment and the Department would recommend taking the agenda items as is this morning.

Chair Apisa: Motion to approve?

Mr. Mahoney: Chair, move to approve the agenda.

Ms. Nogami Streufert: Second.

Chair Apisa: All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 7:0.

Mr. Dahilig: Thank you, Madame Chair.

MINUTES of the meeting(s) of the Planning Commission

Meeting of September 25, 2018

Mr. Dahilig: We are on Item D. These are the minutes of the September 25, 2018, Planning Commission meeting.

Chair Apisa: Call for a motion to approve.

Mr. Nogami Streufert: I move to accept the minutes of the meeting of September 25, 2018.

Mr. Mahoney: Second.

Chair Apisa: All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 7:0.

Mr. Dahilig: Thank you, Madame Chair.

RECEIPT OF ITEMS FOR THE RECORD

Mr. Dahilig: We are on Receipt of Items for the Record. We have circulated a number of additional items to Agenda Item F.2.a.; in particular, letters of support, as well as a requests for deferrals.

We would request receiving these for the record and handling them as part of the agency hearing matter later on the agenda.

Mr. Keawe: Move to receive and accept the letters for Item 2.a.

Mr. Mahoney: Second.

Chair Apisa: All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 7:0.

Mr. Dahilig: Thank you, Madame Chair.

HEARINGS AND PUBLIC COMMENT

Continued Agency Hearing

Mr. Dahilig: We are on Item F.1. These are continued agency hearings. We have none for this morning.

New Agency Hearing

Class IV Zoning Permit Z-IV-2019-4, Use Permit U-2019-2, and Special Permit SP-2019-3 to demolish and replace the existing water tank with a new 0.5 MG tank on a parcel situated on the makai side of Kūhiō Highway in Moloa'a, approx. 1,500 ft. north of the Koolau Road/Kūhiō Highway intersection, further identified as Tax Map Key (4) 4-9-009:009, and affecting a portion of a larger parcel containing an area approx. 1.882 acres in size = Moloa'a Irrigation Cooperative (MIC). [Director's Report received 10/9/18.]

Mr. Dahilig: Item F.2. – New Agency Hearings. F.2.a. – Class IV Zoning Permit Z-IV-2019-4, Use Permit U-2019-2, and Special Permit SP-2019-3 to demolish and replace the existing water tank with a new half million gallon tank on a parcel situated on the makai side of Kūhiō Highway in Moloa'a, approximately 1,500 feet south [sic] of the Koolau Road/Kūhiō Highway intersection, further identified as Tax Map Key (4) 4-9-009 Parcel 009, and affecting a portion of a larger parcel containing an area of approximately 1.882 acres in size. The applicant for this matter is Moloa'a Irrigation Cooperative, or MIC, and there was a Director's Report received for the matter on October 9, 2018.

Madame Chair, there is a request for intervention as noted on the agenda under Item F.2.a.1., from Moloa'a Farms LLC and Jeffrey S. Linder's Petition to Intervene, and there is a memorandum as part of that transmittal. But there is also, as received by the Commission, two letters from both the applicant's representative and intervener's representative, asking for an open-ended deferral of this matter.

What I would recommend to the Commission is opening the agency hearing, receiving any public testimony regarding this agency hearing, and moving forward from that point.

Chair Apisa: We will open the public hearing.

Mr. Dahilig: Agency hearing.

Chair Apisa: Agency hearing, I'm sorry.

Mr. Dahilig: Madame Chair, we do not have anybody signed up to testify on this agency hearing. The Department would recommend closing this agency hearing given the lack of additional testimony for this matter.

Ms. Nogami Streufert: I move to close the agency hearing.

Mr. Mahoney: Second.

Chair Apisa: All in favor of closing--? (Unanimous voice vote) Any opposed? (None) Motion carried 7:0.

Mr. Dahilig: Subsequent to that, Madame Chair, what I would request is that, one, the Commission receive Item F.2.a.1. for the record.

Mr. Keawe: I move to receive Item F.2.a.1. for the record.

Ms. Nogami Streufert: Second.

Chair Apisa: All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 7:0.

Mr. Dahilig: Thank you, Madame Chair.

Given that, the Department would recommend – based off (the) request from both the applicant's representative and the intervener's representative – to defer this matter until a time set, as appropriate.

Ms. Nogami Streufert: Do we know what that time is?

Mr. Dahilig: No. Based on what they both said in their letters, there is no actual date there, so my suggestion would be to wait until either one of these parties communicates back with the Planning Commission and asks to be placed back on the agenda.

Mr. Ho: Are there time limits to the applications?

Mr. Dahilig: Given that both of them are stating and asking for the deferral, it would be charged to them versus charged to the Commission's time.

Deputy County Attorney Jodi Higuchi Sayegusa: If you folks do prefer, in the abundance of caution, you could set it for a date in the future and then it's a means to have it on the agenda and just encourage the parties to talk and resolve the intervention.

Ms. Nogami Streufert: There is a health and safety issue here, as I recall, on this one. And there is the...the roof of the tank has deteriorated and (inaudible), I recall. Is that an issue that we need to...?

Mr. Dahilig: I think rather than deal with the merits of the application, because this is the potential to open up a Contested Case hearing, given the attorney's advice, it may be prudent to then just schedule a hearing on a calendar and then have them respond to that because the action on the Petition to Intervene will require an actual approval by the Planning Commission to admit them as a party.

Ms. Ahuna: Are we allowed to do just an open deferral for now until we hear back from one of them? But just a date to give them, maybe, perhaps; a time to respond.

Mr. Dahilig: I think what is going on is both parties are trying to negotiate with each other to avoid a Contested Case hearing.

Ms. Ahuna: Right.

Mr. Dahilig: So however long that takes is within, generally, the Commission's discretion to have a say, and I think as the attorney is pointing out, just so that it doesn't fall off the top of mind with everybody, that having some kind of respond-by date would be helpful to give the parties a little bit of incentive to actually start and have the negotiations versus having it drag out indefinitely.

Ms. Nogami Streufert: Does the Department have any suggested timeframe?

Mr. Dahilig: We don't; maybe the attorney's office would have something that makes sense. But I think going into November...the calendars are very heavy in November, so maybe sometime after November.

Ms. Ahuna: January or February.

Mr. Dahilig: Yes, sometime after November would make sense. And we likely will only have one meeting in December, also.

Mr. Keawe: Madame Chair? The original request, though, was to grant their petition as interveners. Is that correct?

Ms. Higuchi Sayegusa: Yes.

Mr. Keawe: That was the original request.

Ms. Higuchi Sayegusa: Well, we have an application – the Class IV (Permit), Use Permit, Special Permit application – and then within the timeframe, there was an intervention petition filed, so the next appropriate action that you folks will have to take is to decide whether to admit them as intervener or not.

Mr. Keawe: Right, so that's...my point was the action that we need to decide was to admit them or not as an intervener based on the evidence the two provided.

Ms. Higuchi Sayegusa: Yes, but both parties have requested the deferral of that determination.

Mr. Keawe: So the deferral, in hopes, will alleviate having to go through this step.

Ms. Higuchi Sayegusa: Right.

Mr. Keawe: And not having to go through a Contested Case. Is that correct?

Ms. Higuchi Sayegusa: Yes, correct.

Mr. Keawe: Okay. I got it.

Mr. Dahilig: First Planning Commission meeting in January is January 8, 2019, followed by January 22, 2019.

Chair Apisa: I would think we don't want to defer it too long.

Mr. Keawe: Yes.

Chair Apisa: Go for the 8th?

Mr. Mahoney: Sounds good.

Chair Apisa: Everybody okay with that?

Mr. Mahoney: Yes.

Chair Apisa: It looks like we are in agreement.

Mr. Dahilig: We would need a motion to defer to January 8th.

Chair Apisa: Motion to defer this hearing to January 8th?

Ms. Nogami Streufert: I move to defer the Class IV Zoning Permit Z-IV-2019-4, Use Permit U-2019-2, and Special Permit SP-2019-3 until 1/8/2019.

Ms. Ahuna: Second.

Chair Apisa: Thank you. All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 7:0. Thank you.

Mr. Dahilig: Thank you, Madame Chair.

Continued Public Hearing

Mr. Dahilig: We are on Item F.3. These are continued public hearings. We have none for this morning.

New Public Hearing

Mr. Dahilig: Item F.4. – New Public Hearings. We have none for this morning.

All remaining public testimony pursuant to HRS 92 (Sunshine Law)

Mr. Dahilig: And also Item F.5. – all remaining public testimony pursuant to the Sunshine Law.

Madame Chair, I do not have anybody signed up to testify for any Sunshine Law rights on any other agenda item this morning. The Department would suggest making a final call for any of those that would like to testify on any agenda item this morning.

Chair Apisa: Final call – if anyone would like to testify on any agenda item this morning. Hearing none.

Mr. Dahilig: Thank you, Madame Chair.

CONSENT CALENDAR

Status Reports

Director's Report(s) for Project(s) Scheduled for Agency Hearing on 11/13/18.

Class IV Zoning Permit Z-IV-2019-5 and Project Development Use Permit PDU-2019-3, to allow a residential development containing 67 affordable units and a 32-lot subdivision on property situated in Waimea Town, along the mauka side of Kaumuali'i Highway, immediately adjacent to the Waimea Technology Center, further identified as Tax Map Key: 1-6-008:006, and containing a total area of 6.5625 acres = Ahe Group & Kaula'i Habitat for Humanity.

Mr. Dahilig: We are on Item G. This is Consent Calendar. We do have one Director's Report for the calendar that is being scheduled for an agency hearing on November 13, 2018, relating to Class IV Zoning Permit Z-IV-2019-5 and Project Development Use Permit PDU-2019-3.

Other than that, that is all we have for the Consent Calendar this morning.

EXECUTIVE SESSION

Mr. Dahilig: Item H – Executive Session. There is no Executive Session this morning.

GENERAL BUSINESS MATTERS

Annual Status Report 2018 relating to Condition 5 of Class IV Zoning Permit Z-IV-92-38, Use Permit U-92-36, and Special Permit SP-92-6, Tax Map Keys: (4) 2-9-003:005, 006 (Portion) = Jas. W. Glover, Ltd. [Director's Report received 10/9/18, deferred 10/9/18.]

Mr. Dahilig: Item I – General Business Matters. This was a holdover from the last meeting regarding (an) annual status report relating to Condition No. 5 of Class IV Zoning Permit Z-IV-92-38, Use Permit U-92-36, and Special Permit SP-92-6 at TMK: (4) 2-9-003:005 and 006, Jas Glover, Ltd.

We do have Mr. Cua here who can provide any answers to any questions concerning...I think there were some questions regarding this from Vice Chair Streufert from last meeting.

Chair Apisa: Thank you. Mr. Cua will give his report.

Staff Planner Dale Cua: Good morning, Madame Chair and members of the Commission. What you have before you is a status report regarding the Use Permit, Class IV Zoning Permit for the quarry operations at Māhā'ulepū. As a requirement of the permits, they are required to submit an annual status report regarding its operations. So what you have before you is the most recent status report regarding their operations in its current location.

Just wanted to let you know, I did contact the applicant and tried to get them to attend the meeting; however, they have previous commitments so they were unable to attend today's meeting. However, if there are any specific questions that commissioners may have regarding its operations, we could handle it two ways. We can forward those specific questions to them and get them to reply via correspondence, or I could try to get them to attend the next meeting in November or whatever meeting they are available to meet. So whatever is your preference; I am willing to forward whatever questions or get them to come and attend the meeting.

Chair Apisa: What would the Commission like to do?

Ms. Nogami Streufert: Since this is a status report as opposed to a request for a new permit or an extension of a permit, I think just asking questions and forwarding our questions to them for answers would be sufficient right now.

Mr. Cua: Okay. I will coordinate those questions with the Commission and forward them—

Ms. Nogami Streufert: That would be my suggestion, but...

Mr. Mahoney: I concur.

Chair Apisa: Do I have a consensus on that?

Mr. Mahoney: I concur, yes.

Chair Apisa: All right. It looks like we are in agreement on that.

Mr. Cua: Okay.

Ms. Nogami Streufert: Thank you.

Chair Apisa: Anything further? Is that it?

Mr. Dahilig: Given that, maybe what I would suggest is leaving the receipt of the status report open-ended until we receive comments back from Glover, and then we will handle them both at the same time.

Ms. Nogami Streufert: That's great.

Chair Apisa: Correct.

Mr. Dahilig: So I guess I would...Dale, how much time do you think you need?

Mr. Cua: I will see when they can reply, but they have been pretty timely in responding to whatever concerns the Department has, so I will see if I can get their response back at the next Commission meeting in November – the first meeting in November.

Mr. Dahilig: So I guess, Madame Chair, the Department would recommend...well, we request a deferral of this matter until the next Planning Commission meeting.

Chair Apisa: Do we need a motion on that?

Mr. Dahilig: Yes.

Chair Apisa: (Can I) have a motion to defer this until our meeting in November?

Mr. Mahoney: Chair, move to defer this matter to our next November meeting, which is November 13th.

Ms. Nogami Streufert: Second.

Chair Apisa: All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 7:0.

Mr. Dahilig: Thank you, Madame Chair.

In the Matter of Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNVCVU# 1171 (Ivy's Place) for Failure to Renew for Property Situated in Wainiha, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-004:026, containing 8.343 acres = Bryson K. Nishimoto and Catherine J. Nishimoto.

Mr. Dahilig: We are on Item I.2. This is a return from the Hearing Officer and I will turn this over to the County Attorney for handling this matter.

Ms. Higuchi Sayegusa: You folks have received the Hearing Officer's report and recommendation dated October 9th. Also, you folks are also in receipt of Respondent, Planning Department, exceptions to the Hearing Officer's report and recommendation. So at this point, you folks do have several options on the table. You can adopt...I'm sorry...in addition – backing up a little bit – you folks also received this morning – handed to you folks – communication forwarded to Mike Laureta of the Planning Department from the applicant that does clarify that he requested that his attorney, that handled the matter through the Contested Case, not attend today. So based on that, I think we are okay to move forward. He also did submit a letter, or note, to you folks expressing his general opinions and concerns.

I think at this point you still have the options on the table; whether to adopt the Hearing Officer's report and recommendation as is. The Department requested that the report and recommendation be adopted with two modifications, which were to delete Conclusion of Law Nos. 52 and 53. So that is the Department's request. The other option for you is to adopt the Hearing Officer's report and recommendation as amended, which is to delete Items 52 and 53.

If you folks do have questions, I could recommend that...Chair, it is your decision whether or not you wanted to have the Department's attorney come and clarify any of her requests.

Chair Apisa: Yes, I think I would like to have the Planning Department come up to further clarify this.

Ms. Higuchi Sayegusa: Could you just introduce yourself?

Deputy County Attorney Maryann Sasaki: Maryann Sasaki. I am the new deputy attorney for the County of Kaua'i; still don't know the building perfectly well.

I would like these paragraphs deleted because I believe they violate the Separation of Powers clause and this hearing officer lacked subject matter jurisdiction to hear the constitutional issues.

Moreover, the Supremacy Clause guarantees the right for the interpretation of the Constitution to be heard by Federal court, typically; I mean, at the highest level of Federal court. So I don't think these issues really belong in a hearing in this level of this part of government; that is why I asked for those deletions. He is exceeding his authority when he opines on these issues. It is really a court or judicial matter. It is not a matter for a hearing officer.

Do you have any questions?

Ms. Higuchi Sayegusa: I mean, there are several issues...like, for instance, the Commission has to weigh issues that are essentially a constitutional right. For instance, public trust is a right and a distinction guaranteed by the Hawai'i Constitution, so there are certain issues that, of course, are constitutional in nature but yet, the Commission and the Hearing Officer can weigh them and make a determination.

Ms. Sasaki: That's true. I mean, yes, and increasingly so that is the precedent that has precedential value. Increasingly, Hearing Officers do address these matters, but this is a fundamental...I mean, this is a very fundamental right and I don't know that you would want to take this out of the hands of the court, who historically have made these decisions, and put it in the hands of the Hearing Officer.

Mr. Keawe: Madame Chair?

Chair Apisa: Kimo.

Mr. Keawe: I have a question. Can you pull the mic up so I can hear you?

Ms. Sasaki: Oh, I'm sorry, yes.

Mr. Keawe: Introduce yourself again and tell us who you are and what you do.

Ms. Sasaki: Sure. I am Maryann Sasaki.

Mr. Keawe: Maryann Sasaki?

Ms. Sasaki: Yes, hi. I work for the County of Kaua'i.

Mr. Keawe: Yes.

Ms. Sasaki: I am the new Deputy Attorney.

Mr. Keawe: Okay.

Ms. Sasaki: And I've asked for paragraphs 52 and 53 (to be) deleted from the report because I believe they exceed the Hearing Officer's authority to determine a constitutional issue that belongs, rightfully, in the hands of the court according to the separation of powers doctrine,

Supremacy Clause, and I think they lack subject matter jurisdiction as well, but that's questionable.

Mr. Keawe: So it was your request to delete these two items?

Ms. Sasaki: Yes.

Mr. Keawe: Okay, now I got it.

Ms. Sasaki: Okay.

Mr. Keawe: Thank you.

Mr. Ho: In your request to delete this, does this invalidate the Hearing Officer's opinion?

Ms. Sasaki: No, I just would like to reserve this issue in case there is an appeal to a court. I would like to reserve this issue for the court; that was my goal when I deleted these two paragraphs. Because these are matters that are better sited by...constitutional interpretation rightfully belongs in the hands of the judiciary and not an administrative body.

Ms. Higuchi Sayegusa: And you are in agreement with the rest of the conclusions related to forfeiture...

Ms. Sasaki: Yes.

Ms. Higuchi Sayegusa: And the abolishment of the right by way of the renewal not being filed timely?

Ms. Sasaki: Yes.

Ms. Higuchi Sayegusa: Okay.

Ms. Sasaki: Because it is within the purview of the Hearing Officer to make those decisions.

Chair Apisa: Any other questions?

Mr. Ho: Does...oh, I'm sorry.

Mr. Keawe: Go ahead, Mr. Ho.

Mr. Ho: Does this leave a hole in the Hearing Officer's findings?

Ms. Sasaki: Excuse me?

Mr. Ho: By eliminating this, does that leave room for argument from the Petitioner?

Ms. Sasaki: No, no, I don't think so because he is basing his opinion on the rules and the Code; I mean, that's sufficient with respect to making his case. To be frank, I mean, maybe in some very slight way there is a constitutional argument remaining for the opposing side, but that is a very slim...that is a very hard row to hoe to make a constitutional argument. He's got better facts and better Conclusions of Law than the constitutional argument.

Chair Apisa: Mr. Keawe.

Mr. Keawe: So it was specifically Items 52 and 53. Is that correct?

Ms. Sasaki: Correct.

Mr. Keawe: Okay.

Ms. Higuchi Sayegusa: So again, it is up to you folks; whether you want to adopt the Hearing Officer's report and recommendation as is, or adopt it as recommended by the Deputy representing the Planning Department.

Mr. Keawe: One last question. Any downside to adopting it without the amended section to take out 52 and 53?

Ms. Sasaki: Let me just clarify your question and repeat it. Is there any downside to the Building Department, or any downside in general?

Mr. Keawe: No, no, any downside...again, to reiterate what Mr. Ho said, is there any downside as far as our responsibility in either amending or accepting the Hearing Officer's report by amending it, taking out 52 and 53? Is there any recourse that someone could come back and say, "Hey, that shouldn't have been taken out."?

Ms. Sasaki: I don't think so. The analogy is sort of a football game and opposing counsel is losing by, let's say, 24 points. But if you leave those arguments in, then he's losing by 30 points. It just pushes the Findings of Fact and Conclusions of Law into an area that he really shouldn't be opining on and it doesn't undo the essential holding of the case.

Mr. Keawe: So you are just running up the score?

Ms. Sasaki: That's right. The constitutional argument is running up the score; that's exactly right.

Mr. Keawe: Plain English, right?

Chair Apisa: In sports-English.

Ms. Sasaki: I don't know.

Mr. Ho: Last question. If it was to be challenged, is there someone that has a greater burden of proof in this argument?

Ms. Sasaki: In a takings argument?

Mr. Ho: Yes.

Ms. Sasaki: Well, there are standards for them, so it depends on what standard is applied by the court. And typically, if you don't...the worst argument is that you've deprived the property of all economic value, right? That's the real loser, but that's not the case here. They've just deprived them of the ability to do this very specific TVR thing, this very specific Transient Vacation Rental. So I would say they...I don't think that their argument is a strong argument; I think it is weak.

Ms. Higuchi Sayegusa: There are additional 51 conclusions, and the other major portion of the report and recommendation is based on the analysis of (Section) 8-17.10 and the distinction of forfeiture, so there is a substantial amount of other conclusions that, really, essentially, if you are considering taking out 52 (and) 53, that's really what is basing your folks' decision.

Mr. Mahoney: Okay.

Chair Apisa: Do we have a motion?

Mr. Keawe: Yes. I move to accept the Hearing Officer's report as submitted.

Mr. Mahoney: Are you...

Mr. Keawe: Without the amendments.

Ms. Higuchi Sayegusa: Okay.

Chair Apisa: It looks like we have some more questions coming.

Ms. Higuchi Sayegusa: I would just make sure...is there a second?

Chair Apisa: Is there a second on the table? If not, then—

Ms. Nogami Streufert: I second.

Chair Apisa: Okay, so we do have a second, so we are now open for discussion. Otherwise, the motion would have not—

Mr. Keawe: The concerns, Sean.

Mr. Mahoney: Well, I mean, all these points have just been brought up for an appeal already. I think we have a sufficient amount of evidence in there without these two amendments, and in

fairness to everyone, and if they didn't agree, they still have the opportunity to appeal. But I think we are kind of giving them...we are making an argument for that by saying these two don't belong, but I think there is overwhelming conclusions and evidence that are already in the report without those two amendments. So I would think we could eliminate them; that's just my thought.

Chair Apisa: So do we have...oh.

Mr. Ho: I agree with Mr. Mahoney. I think the case is strong enough to go forward on the attorney's recommendation that perhaps we could delete it and still have a strong case to (inaudible).

Chair Apisa: Anyone else care to give any comment on this? Or do we have a new motion on the floor?

Mr. Keawe: I guess if you feel that the advice is strong enough to go forward and allow for any potential further action, then I would withdraw my motion.

Chair Apisa: I think it was withdrawn for...oh, no, no, we have a second.

Ms. Higuchi Sayegusa: You have a motion and a second.

Chair Apisa: That's right; we have a second, so we could just vote on it and...

Ms. Higuchi Sayegusa: You could vote on it, or you could-

Chair Apisa: We just vote on it or-

Mr. Keawe: Okay.

Chair Apisa: Maybe we need a timeout here.

Ms. Higuchi Sayegusa: But your wish is to withdraw your motion?

Mr. Keawe: Yes. I don't think it would be necessary, I think, if the...based on what I've heard.

Ms. Higuchi Sayegusa: Okay.

Ms. Nogami Streufert: I withdraw my second.

Mr. Keawe: Yes.

Ms. Higuchi Sayegusa: Okay.

Mr. Keawe: Can we do that?

Chair Apisa: All right. So the motion is off the table.

Ms. Higuchi Sayegusa: Okay. So the second and the underlying motion has been withdrawn.

Chair Apisa: Any other discussion on this?

Ms. Sasaki: May I?

Chair Apisa: You want to add a comment?

Ms. Sasaki: I just would say that the Hearing Officer in this matter, in my view, exceeds his authority. I mean, that's almost...those two paragraphs are almost a nullity because he doesn't really have the authority to determine the constitutional issue, so that is just my last argument.

Chair Apisa: Okay. Commissioner Ho.

Mr. Ho: Members of the board, I think what she just offered is just an opinion, in my view. I think what is before us, written, is what is to be considered – no offense.

Ms. Sasaki: Oh, no, it's fine.

Mr. Ho: No offense.

Ms. Nogami Streufert: I move to accept the Hearing Officer's report and recommendation with the exceptions as noted by the Planning Department.

Mr. Mahoney: Second.

Chair Apisa: And just for clarity, that is paragraphs 52 and 53.

Ms. Nogami Streufert: That's correct, as determined by the Department.

Mr. Mahoney: And that's a second.

Chair Apisa: Okay. Everyone clear on that? All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 7:0. Thank you very much for your help.

We (will) take a short break.

The Commission recessed this portion of the meeting at 9:45 a.m.

The Commission reconvened this portion of the meeting at 9:46 a.m.

Chair Apisa: We are back in session.

COMMUNICATION (For Action)

Mr. Dahilig: Madame Chair, we are on Item J. This is Communications for Action. We have none for this morning.

COMMITTEE REPORTS

Subdivision

Mr. Dahilig: Committee Reports under Item K.1. There was a committee report circulated for the Commission's review.

Mr. Keawe: Okay, the Subdivision Committee met this morning. We had three items – four items, excuse me. On one item, which was the tentative subdivision map approval for Item 2, S-2019-2, and this was Sunset Strip Properties, LLC and McBryde Sugar Company. The Subdivision Committee deferred this action to the November 13th meeting for the regular Planning Commission action on this particular item. I think it was determined that the Planning Commission rightfully needs to make a decision on this particular item. Is that right, Jodi?

Ms. Higuchi Sayegusa: (Inaudible)

Mr. Keawe: Okay. On the second item, which was S-2019-3, same owner – Sunset Strip Properties – and this was a tentative subdivision map approval; the approval was 3:0.

On the first one, the subdivision will comply with all requirements of the Department of Water prior to subdivision approval at final.

Two others – one was Desiree and Neil Fagarang, that was approved 3:0; and Joanne Robsen, that was approved 3:0. These were the lot boundary adjustment.

Any questions?

Ms. Nogami Streufert: On the bottom of mine it says the subdivider shall comply with all requirements of the Department of Water prior to final subdivision approval. Which–

Mr. Keawe: That was for Item 2.a.

Ms. Nogami Streufert: 2.a.

Mr. Keawe: Yes, the one that was deferred. Correct, Mr. Chair?

Mr. Ho: That's right.

Mr. Keawe: Okay. So I would move to accept the Subdivision Report that was given.

Mr. Mahoney: Second.

Mr. Dahilig: If I could just get a clarification, again, on action item for I.2.a. The deferral is to the...is it a referral to the full Commission, or is it a deferral to the Committee?

Ms. Higuchi Sayegusa: I think the request from the applicant was to the full Commission.

Mr. Dahilig: Okay, just want to make clear, so it's not a deferral, it's a referral.

Ms. Higuchi Sayegusa: Well, I'm sorry, it was a-

Mr. Keawe: Deferral to full Commission for action.

Ms. Higuchi Sayegusa: It was a deferral to the full Commission, but I think it is something that we might have to work in-house with-

Mr. Dahilig: I think it is more...it is a procedural question. It is not an issue of whether or not we place it back on the Subdivision Committee agenda for the 13th or they are bouncing it to us.

Ms. Higuchi Sayegusa: Just to clarify, that was for Item I.1.a.

Mr. Dahilig: I.1.a.

Ms. Higuchi Sayegusa: Yes.

Mr. Jung: I think I can help here. Ian Jung on behalf of-

Chair Apisa: There's no 1.a.

Mr. Keawe: It's 2.a.

Chair Apisa: It's 2.a.

Mr. Dahilig: 2.a.

Ms. Nogami Streufert: We only have 2.a.

Mr. Mahoney: 2.a., yes.

Mr. Keawe: 2.a.

Ms. Higuchi Sayegusa: Hold on, one second, let's just...I think the summary is wrong. I'm sorry - okay, yes, based on the Committee Report, it is Item I.2.a.; however, the agenda...I guess we were referring back to the Subdivision Committee meeting agenda, which was I.1.a. - Subdivision Application No. S-2019-2, that's the proposed 12-lot consolidation. This is involving TMK: (4) 2-4-016 Parcels 001, 020 through 031 in Kalāheo, Kaua'i.

Chair Apisa: Would you like to make a comment?

Mr. Jung: Yes. Ian Jung on behalf of the co-applicant, Sunset Strip Properties, LLC. Sorry for the confusion here. When Tom and I were discussing this with the Subdivision Committee, I think Tom just asked that it go to the full Commission, but the idea here – just to bring everyone up to speed – we have two subdivision actions that are actually...one of them is getting completely cancelled and voided; that's the 12-lot subdivision. The other one is being consolidated from 19 lots down to 2 lots with remaining water reservoir lot as Lot 14. So the idea was to propose a Stipulated Order to remove the entitlements to strip away the lot lines through a Stipulated Order to void the subdivision under Chapter 12. So that's why we were thinking probably best to put that document up first to clear the deck on the first subdivision, and then come in after with the tentative to the consolidation in the two and remaining third lot.

I will leave it up to you folks. If you want it in General Business Matter up to the full Planning Commission, we can do that. Or, if you want to do it through Subdivision Committee and then have the Commission ratify it – the full Commission ratify the Subdivision Committee Report as accepting of the Stipulated Order to void the subdivision – we can do it that way, too. So I apologize for the confusion in the subdivision.

Chair Apisa: So it could go back to the Subdivision Committee and then be approved by the Commission?

Mr. Jung: Right, that would work as well.

Chair Apisa: That would be a deferral then.

Mr. Dahilig: It is only because the language here says November 13th, the Planning Commission, versus Committee. I'm not...I just want to make sure we are clear on agenda postings for the 13th.

Mr. Keawe: That was the purpose of our discussion. We specifically talked about that in the Subdivision Committee and where it would be more appropriate for this particular item because it was an entire cancellation of the subdivision. And it was decided more appropriate in the regular meeting, but whatever works, works.

Ms. Nogami Streufert: Is it my understanding, also, that the applicant wants this to be heard by the entire Commission?

Mr. Jung: Well, we are co-applicants with McBryde. McBryde is on the other side and we have an agreement – because I represent the new owner that purchased it from McBryde – so the idea is...I mean, it will work both ways. It's just however procedurally you folks want to do it. I think what Tom Shigemoto was trying to suggest is that the Commission needs to take action on it. But by virtue of procedure, once you adopt the Subdivision Report, the full Commission accepts that Committee Report.

Ms. Nogami Streufert: So this is for Subdivision Application No. S-2019-2 as opposed to S-2019-3.

Mr. Jung: Correct; S-2019-2 is the cancellation, S-2019-3 is the consolidation.

Ms. Nogami Streufert: I have here S-2019-2 is a proposed 12-lot consolidation.

Mr. Jung: Right, but the map actually says cancellation and we corrected that with the Staff Planner prior–

Mr. Dahilig: But S-2019-2 has to leave before S-2019-3, so by accepting the report here, is this premature, then, at this point?

Mr. Jung: No, I think, because tentative will lay out the condition for S-2019-3 and then we still have to go proceed through to comply with the tentative conditions before we get to final on that.

Mr. Dahilig: But you are opening up a tentative on something that is incumbent on the action that is going to happen in S-2019-2, theoretically.

Mr. Jung: Theoretically, yes. But there is still no final map–

Mr. Dahilig: So is the Commission within its authority to then act on S-2019-3 if, right now, there is an existing subdivision that hasn't be cancelled yet.

Mr. Jung: Well, the two subdivisions are actually separate and distinct.

Mr. Dahilig: They are separate and apart, but there is a domino effect in terms of the overlap on those two subdivisions, right?

Mr. Jung: There would be, but we don't get to final map. If we get it cancelled – S-2019-2 cancelled – and move on to final later, then I think it would procedurally work, but if you guys have concerns, we could have them both deferred. It is up to you.

Mr. Dahilig: Madame Chair, I guess, given this, I would request from the Department that Items I.2.a. and b. be deferred to the 13th Planning Commission Subdivision Committee agenda first and then we can sort this out. We may need a do-over on this.

Chair Apisa: That seems logical to me that S-2019-2 come before S-2019-3, so I think it would be wise to defer both of them to the Planning Committee to make a decision and then the Commission could ratify or not.

Mr. Jung: That is fine with the applicant if that's the approach.

Chair Apisa: We would need to have a motion to modify that to amend the minutes. I guess we can't amend the minutes, but we can not adopt the recommendation.

Mr. Dahilig: Right, because the problem here is that you have Parcels 001 overlapping between both applications on this.

Mr. Mahoney: Okay.

Mr. Jung: That's true, correct.

Mr. Dahilig: So because you have Parcels 001 overlapping, you can't have the second one lead before the first one is resolved through a cancellation. So you are creating – not to make a pun – you are creating a Frankenstein out of this, so we need to re-sequence this appropriately.

Chair Apisa: Does everybody get what we are doing here?

Mr. Mahoney: Yes.

Chair Apisa: Would you like to make a motion?

Mr. Mahoney: I guess so. Move to – for Item S-2019-2 and Item S-2019-3 – to be remanded back to the Subdivision Committee's next meeting for...

Chair Apisa: For recommendation.

Mr. Mahoney: For recommendation, to go before the full Commission for ratification.

Mr. Keawe: Second.

Chair Apisa: All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 7:0.

Mr. Dahilig: I would request one more motion, Madame Chair, concerning the final subdivision map approvals for S-2017-8 and S-2018-17, given Commissioner Mahoney's motion.

Chair Apisa: Yes, that is correct. Since we didn't accept the full report, we do need to address Item 3 on our agenda [sic] here.

Mr. Jung: Thank you, Commissioners.

Chair Apisa: Thank you. So we need another motion regarding final subdivision map of S-2017-8 and S-2018-17.

Mr. Keawe: Okay, I will do them. I move to approve final subdivision map approval for S-2017-8, Neil and Desiree Fagarang and S-2018-17, Joanne Robsen.

Ms. Ahuna: Second.

Chair Apisa: All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 7:0. Thank you.

Mr. Dahilig: Thank you, Madame Chair.

UNFINISHED BUSINESS (For Action)

Mr. Dahilig: We are now on Item L, Unfinished Business. We have none for action this morning.

NEW BUISNESS

Mr. Dahilig: Item M – no New Business for Action due to the deferral of Item F.2.a.1., concerning Moloa‘a Irrigation Cooperative.

ANNOUNCEMENTS

Topics for Future Meetings

Mr. Dahilig: Item N.1. – Topics for Future Meetings. We have circulated the on deck sheets for the next few meetings, Madame Chair. I would note that the November 27th meeting is actually November 26th; we are moving it to a Monday. So those should say November 26th.

I, again, would like to remind the Commissioners that probably on the 13th and the 26th meetings, they are going to be very heavy meetings. We do anticipate eight Contested Case returns relating to TVR hearings on the 13th, as well as the schedule that’s set by the Commission concerning the Kaua‘i Springs matters on the 13th and the 26th, so I would expect those items to also be popping up around then given some timelines. So this is just for pending applications.

So the other General Business Matters, those other items, will likely be coming up on those meetings on the 13th and the 26th. Hopefully we don’t hit dinner meetings, but I would... It has only happened twice since I’ve been Director, but I would just be prepared that they could be pretty heavy given the subject matters on these items.

Chair Apisa: The 13th and the 26th?

Mr. Dahilig: The 13th and the 26th.

Mr. Keawe: Just a clarification, Mike. So we are getting a lot of the TVRs coming back? Is that the concern? Each of them have to be done individually?

Mr. Dahilig: I will let the attorney, I guess, weigh in on that. We just know that we have eight.

Mr. Keawe: Eight?

Mr. Dahilig: Eight that came back from the Hearing Officer to act on.

Mr. Keawe: So we have eight Hearing Officer’s reports, basically.

Ms. Higuchi Sayegusa: Right. I think if you recall – not to get too deeply into it – but how it was left was that the Department’s attorney and the Petitioner would submit their versions of requested Findings of Fact, Conclusions of Law.

Mr. Keawe: Right.

Ms. Higuchi Sayegusa: So you folks will have to make a decision on each of those cases.

Chair Apisa: Individually?

Ms. Higuchi Sayegusa: Yes.

Mr. Keawe: Individually.

Ms. Higuchi Sayegusa: I think it is probably best (for) clarity of the record.

Chair Apisa: Okay. Any other matters to be brought before the Commission today?

The following regularly scheduled Planning Commission meeting will be held at 9:00 a.m., or shortly thereafter at the Lihu’e Civic Center, Moikeha Building, Meeting Room 2A-2B, 4444 Rice Street, Lihu’e, Kaua’i, Hawai’i 96766 on Tuesday, November 13, 2018.

Mr. Dahilig: Just an announcement that the next scheduled meeting will be here in this room on November 13, 2018, at 9:00 a.m.

Chair Apisa: Thank you all very much.

ADJOURNMENT

Chair Apisa: A motion to adjourn?


Mr. Mahoney: Move to adjourn.

Ms. Nogami Streufert: Second.

Chair Apisa: All in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 7:0. Meeting is adjourned.

Chair Apisa adjourned the meeting at 10:00 a.m.

Respectfully submitted by:



Darcie Agaran,
Commission Support Clerk

() Approved as circulated (add date of meeting approval)

() Approved as amended. See minutes of _____ meeting.