

KAUA'I PLANNING COMMISSION
SUBDIVISION COMMITTEE MEETING
November 26, 2018

The regular meeting of the Planning Commission Subdivision Committee of the County of Kaua'i was called to order at 8:30 a.m., at the Līhu'e Civic Center, Mo'ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

Mr. Roy Ho
Mr. Kimo Keawe

Absent and Excused:
Mr. Sean Mahoney

The following staff members were present: Planning Department – Director Michael Dahilig, Chance Bukoski, and Duke Nakamatsu; Office of the County Attorney – Deputy County Attorney Jodi Higuchi Sayegusa

CALL TO ORDER

Subdivision Committee Chair Ho called the meeting to order at 8:30 a.m.

ROLL CALL

Mr. Ho: Mr. Bukoski, would you start us with our roll?

Staff Planner Chance Bukoski: Thank you, Chair. Chair Ho.

Mr. Ho: Here.

Mr. Bukoski: Commissioner Mahoney. Commissioner Keawe.

Mr. Keawe: Here.

Mr. Bukoski: We have two present and one absent.

APPROVAL OF AGENDA

Mr. Bukoski: Moving on to Item C, Approval of the Agenda.

Mr. Keawe: Move to approve the agenda as written.

Mr. Ho: Second. The motion on the floor is to approve our agenda. All in favor? (Unanimous voice vote) Motion carries 2:0.

Mr. Bukoski: Thank you, Chair.

MINUTES of the meeting(s) of the Subdivision Committee

Meeting of November 13, 2018

Mr. Bukoski: Moving on to Item D, Minutes of the Meeting of the Subdivision Committee for November 13, 2018.

Mr. Keawe: Move to approve the meeting minutes of November 13, 2018.

Mr. Ho: Second. The motion on the floor is to approve the minutes of the meeting of November 13th. All in favor? (Unanimous voice vote) Motion carries 2:0.

Mr. Bukoski: Thank you, Chair.

RECEIPT OF ITEMS FOR THE RECORD (None)

Mr. Bukoski: Moving on to Item E, Receipt of Items for the Record. Seeing none.

HEARINGS AND PUBLIC COMMENT

Mr. Bukoski: Moving on to Item F, Hearings and Public Comment. Is there anyone in the audience that wants to testify on any items on the agenda? Seeing none.

GENERAL BUSINESS MATTERS (For Action)

Modification of Final Subdivision Map Approval and Restated Subdivision Agreement

Subdivision Application No. S-99-49; ASSOCIATION OF APARTMENT OWNERS OF KULANA; 23-lot Subdivision; TMK: (4) 4-3-003:005; Kapa'a, Kaua'i.

Status of Subdivision Application

Subdivision Application No. S-2002-25; ASSOCIATION OF APARTMENT OWNERS OF KULANA; 3-lot Consolidation; TMK: (4) 4-3-003:005 (Portion); Kapa'a, Kaua'i

Mr. Bukoski: Moving on to Item G, General Business Matters for Action. Modification of final subdivision map approval and restated subdivision agreement – Subdivision Application No. S-99-49; Association of Apartment Owners of Kulana; 23-lot subdivision; TMK: (4) 4-3-003 Parcel 005; Kapa‘a, Kaua‘i.

Planning Director Michael Dahilig: Good morning, Commissioners. This is an unusual request that’s coming before the Subdivision Committee and let me give some background as to why...and I know this is probably the second of these strange agreements that have come up in the past few weeks, and a lot of this, really, relates to, in this particular circumstance, the facilitation of a settlement that was agreed to between the County surety company that was doing the surety bond, as well as the Association of Apartment Owners of Kulana. I’m not sure if many of you are familiar with the Kulana Subdivision, but it is near the twin reservoir area – up in that area – and I’ll say about 12...well, more than 15 years ago they tried to break it up into an agricultural subdivision. During the 2008 global financial crisis, that particular subdivision failed and there was a number of sureties that were on the property that were trying to be pulled at the time, which didn’t work its way out. So it left the subdivision partially finished where you had a number of lots that were already sold via the bond that was in place that facilitated the ability for these lots to be sold, and yet, a number of apartment owners that were there that were left hanging as a result of lots that they were not able to actually build on because the subdivision improvements were not completed. And therefore, we could not provide them the ability to say that, okay, you’ve met your obligation under the subdivision agreements to actually complete the subdivision. Mr. Bracken, who is here, represented the County as part of that lawsuit.

But what this particular subdivision agreement does is it winds back the clock where we are now phasing in the subdivision improvements for construction. So that agreement that is before you in this restated subdivision is an attempt to provide...and I don’t know if you’ve seen Exhibit E, and let me get you the page. Exhibit E, where you’re looking – this is on page 58 of the PDF this morning – where the units that are identified are broken up into 2 different phases. This wasn’t the circumstance in the prior subdivision agreements between this commission and the developer. And I do want to point out that the AOA was actually in place of the developer, so the developer had defaulted, no developer as such exists, and the Association of Apartment Owners – because lots were sold already as part of the marketing plan for the original developer – already...they’ve had to come together and actually assume the responsibility of trying to finish up the subdivision. So that’s why you are seeing the Association of Apartment Owners being the one that is now sitting at the table, asking for this subdivision agreement to be restated in this manner. So the action is, in a sense, meant to facilitate, again, the settlement that was executed between the County, between the surety company – which was Travelers – as well as the Association of Apartment Owners, and is meant to, I guess, allow for this new method of trying to complete the subdivision requirements in a phase form.

Mr. Graham and Mr. Bracken are here. They are able to explain a little bit more in-depth as to the technicalities behind this particular request, but in effect, it’s meant to, as stated, allow for the final completion of the subdivision by the year 2021, and that is what is on the table at this point.

Chair, if Mr. Graham or Mr. Bracken would like to add anything to that, it’s for the Commissioners’ edification.

Mr. Keawe: Yes, that would be good. A lot of us have heard about the subdivision, but we don't know anything about the details, you know, going back 15 years and the original sale, and then all of a sudden, you know, you got into all kinds of issues. So it would be good to just kind of get a chronological timeline of where we are to this point.

Mr. Ho: Chair calls Mr. Graham, Mr. Bracken. Would you please come forward?

Mr. Max Graham: Does everyone have a copy of the agreement?

Mr. Dahilig: Yes.

Mr. Keawe: Yes.

Mr. Ho: Yes.

Mr. Graham: Well, good morning, Subdivision Committee. I am Max Graham and I represent the applicant, which is the Association of Apartment Owners of Kulana. This is Matt Bracken. He is a deputy county attorney and he was responsible for the litigation in this matter. I'll try to take you back in time and tell you what's been happening with this. I tried...in the recitals that you have on the first...took six pages just to go through things, but let me go through it.

This whole thing started in 1999 with the subdivision of this Kapa'a 382 property, and "382" was meant to reflect the approximate acreage, so it was a 382-acre Ag lot. It is across Hauiki Road from the twin reservoirs. It was actually two lots that were owned by LP Company and at that time, the 99 LP Company, Lihu'e Plantation, was selling off its...it was part of Amfac, so it was selling off all of its assets. The original developers who formed this Limited Liability Company, which they called "Kapa'a 382, LLC," bought the property with the intent of creating a 19-lot subdivision, so it was a subdivision of Ag lots. The State Land Use Commission District is the Ag District, and then we have a mix of CZO Ag and Open within the property. The Open pretty much follows the stream that goes through the property.

So this went through the normal subdivision process and it was finally approved in 2004. After it was approved, what the owner/developer did was to create a condominium property regime on the property – all of the new subdivided lots. Currently, there are about 100 condo units that make up the Kulana Condominium, which has been established on the Kulana Subdivision lots. The lots had density because they were large lots for...it varied, actually, from three to seven units per lot, but it had enough density for the 100 units. So the condominium got placed on top of the subdivision and then the...going back into history – if you recall, one of the investors was Jim Lowe, who was accused of running a pyramid scheme involving loans to people secured by mortgages and anyway... That scheme fell apart...

Mr. Dahilig: And he drove off a cliff.

Mr. Graham: He committed suicide. He drove off a cliff accidentally, or otherwise – I don't know. Basically, the developer didn't have the funds to complete the subdivision. So the developer had done some work within the subdivision, but it was...the water improvements were

not completed, the water tank – was actually built but not completed – some of the roads were put in, the main water line that ran across the property was not completed. They ran out of money and then everyone turned around to the bonding company, Travelers, thinking, okay, we have a bond. We'll call the bond up and get the bonding company to complete the subdivision, but the bonding company said...I'll let Mr. Bracken now... So my participation up to this point was I was representing the developer to get the subdivision done. They had another attorney do the condominium and I was not involved in any of the litigation, so Mr. Bracken can tell you about the details. But basically, the bonding company, Travelers, said, you know, we don't agree as to how much money it will take to complete this project and besides, County, you need to complete the project and then come back to us to try to call the bond.

First Deputy County Attorney Matthew Bracken: That's accurate.

Mr. Graham: Yes, that was it. Well, the County wasn't in any position to take on this project. Part of the problem was that there were additional expenses to complete the project created by the creation of the condominium, so it would've cost a certain amount of money to complete the subdivision with the...basically, 19 Ag lots. There's a reservoir lot that doesn't have density in the middle of it because of the old LP company reservoir on the property, and a couple others – a road lot and some road-widening lots.

But anyway, the cost of completing the subdivision was less than the additional cost created by the creation of the condominium because the condominium units all needed access on roads, they all needed utilities, so there was a dispute over, actually, how much the bonding company should eventually be responsible for in any case. And as you can imagine, eventually it just wasn't...actually, the case went up to the Court of Appeals, came back down, then everybody settled; it just wasn't worth litigating. So the bonding company agreed to pay a certain amount into court for its exposure. Did they pay any more than the half million?

Mr. Bracken: No.

Mr. Graham: No. So they paid a half a million dollars where the projected expenses run into the millions. Anyway, so that was the settlement, and then the parties entered into this settlement agreement. The settlement agreement basically says how we are going to try to...you know, what the parties will do and be responsible for in terms of settling the litigation and then, as between the County and the developer, who will be responsible for what and under what circumstances.

Now, by this time, Kapa'a 382 had gone out of...well, it is still in existence, but it was no longer in charge and as part of the settlement, the Association of Apartment Owners – the Kulana Association – took over all of the rights, duties, and responsibilities, pretty much, of the Kapa'a 382 Limited Liability Company. So in effect, the Association has now assumed control of the project and is responsible for completing the subdivision, and that's why I am here, now, representing the Association before you.

One of the things that was important in this agreement was that the County agreed that Kulana could complete the subdivision in two phases, so we have a Phase I that covers a certain number

of units and Phase II, which covers the remainder, and that will allow at least the first part of the subdivision to be completed; the roads will be completed, the water will be completed for that Phase I. And at that point...I'm not sure if you have any experience doing phase subdivisions since you've been on the Commission, but it's been done in the past. Basically, Phase I will be complete and that means the owners of those units will be able to get building permits because right now nobody can get a building permit. And then after Phase I gets complete, then the second phase will be completed.

In order to show that phasing and because of some non-substantial changes to the subdivision map, because some of the roads have been realigned a little bit, a lot of the interior roads are easements – they are not actually road lots – and those easements had to be readjusted to actually match the work that had been done on the ground, so we needed to make some changes to the map. What the Association agreed to do with the County was to come up with this new restated subdivision agreement, and the point of the restated subdivision agreement, really, is to try to incorporate and summarize everything that I've been talking to you about so that it's very clear; we can go to one document that says what needs to be done now in order to complete the subdivision. One of the things in terms of timing is that the Association had five years from the settlement of the litigation to complete the subdivision that was written into the settlement agreement, so the Association has until September 13, 2021, to complete Phase I and Phase II – do all the improvements.

So anyway, that's all incorporated in this agreement now. I don't think the agreement does anything that wasn't...it does a little extra, but I'll get to that. Pretty much, though, it incorporates the provisions of the settlement agreement – the court settlement agreement – and we bring it down to the Commission level so the Commission has the document that it can follow. If you approve this, then we will be able to proceed per the agreement and also, we have submitted the amended final subdivision map – an amended map – that shows the changes I discussed with you.

I wrote something else into this agreement and it is noted on the agenda, and that is adjacent to the Kulana Subdivision was a lot that was going to be used to realign Hauiki Road; Hauiki Road is the County road that runs by the subdivision. And the purpose was...if you look at the maps, Hauiki Road has a kind of funny alignment through this section of the roadway. The idea was to realign it so it was a single, easy curvature through there. The first part of the road is on the subdivision; it's Lot 22. The second part of the road is on a separate lot that is separated from the subdivision by a State ditch, which the State, in the past, has claimed it owns in fee simple. So we had to do a separate subdivision for that property and the idea was to create a subdivision where we'd have a road lot that matches up to Lot 22 on the Kulana Subdivision, and on the top there would be a lot and on the bottom, a second lot that could be used for...the intention is they'd be Ag lots – one unit density for each one of them. That subdivision, which was called the Hauiki Road Subdivision, when everything was happening with Kulana, it was the same group that was doing the Hauiki Road Subdivision – same ownership group although, technically, not owned by Kapa'a 382, LLC. But in any event, no further work was done on that after it got preliminary subdivision approval from the County. And then the then-Director sent a letter to the subdivider saying because the subdivision had not been completed within one year of the approval of tentative subdivision, the application was being canceled and voided. I

don't...my recollection is that that was not anything that the Planning Commission approved and certainly, I do know that the Planning Commission...I think in order to do that now we would say we have to go to the Planning Commission rules, we have to file an OSC...or the Planning Department would have to file an OSC to cancel the subdivision, and that was not done.

So in my opinion, that tentative approval is still good and because it is part of this overall subdivision that we are trying to clean up, as a condition of the subdivision agreement...or as a provision of the subdivision agreement, we are saying that that letter is being withdrawn so that we have tentative approval and we can go forward and try to complete the Hauiki Subdivision as well.

Did I get it?

Mr. Bracken: Yes. I think that's exactly right. The restated subdivision agreement does accurately reflect the settlement and the Planning Department was in support...as it is in support of the completion of the project.

Mr. Ho: Mr. Bracken, could you touch on that letter again – the letter of cancellation from Mr. Costa?

Mr. Bracken: As part of the...basic part of the settlement agreement, it would be withdrawn and they are basically allowed to go through this restated subdivision agreement, restated maps to allow them to do the phasing to complete the project.

Mr. Ho: Is that part of the court settlement?

Mr. Bracken: You know, it would be. The court settlement – it is actually attached as exhibits to this agreement. Part of the settlement – the Planning Department agreed to this process of allowing the restated subdivision in multiple phases, so it is part of the court settlement.

Mr. Ho: Mr. Keawe.

Mr. Keawe: I guess, Max, the question is are there enough homeowners in that association to...because they are going to have to special assess, or whatever, how they are going to do it to complete these improvements. Are there enough active owners that are willing to participate in this settlement?

Mr. Graham: That's a good question. But my understanding is yes, that the Association has been successful in obtaining the money through assessment to at least get through Phase I and then they are still collecting for Phase II, and we have some reps here from the Association. Is there anything we need to add to that?

Mr. Russell Boyer: I can just say that–

Mr. Keawe: Wait, wait.

Ms. Higuchi Sayegusa: Sorry–

Mr. Keawe: You got to come up.

Mr. Graham: This is Russ Boyer.

Mr. Ho: Could you introduce yourself, please?

Mr. Boyer: My name is Russell Boyer. I am one of the owners of the lots in Kulana. I have Lots 13A, 13B, and 13C. I am also on the Board of Directors. Speaking to the...what was called an assessment is actually, technically, a subdivision fee – very little difference – but the subdivision fee was called in November. We have about 70 owners. We have collected from, or have received, payment schedules from all but three. We have enough to cover all of Phase I and the vast majority of Phase II.

The other major asset that the owners have is 15 lots that we received in the settlement agreement; they were the unsold lots. We have received those from the developer. We just now have received a public report which will enable us to market those lots. The marketing of those lots will give us funds to more than complete the subdivision with the subdivision fees that have already been collected.

Mr. Keawe: So the combination of the existing ownership plus the settlement of the 15 lots which are going to be...obviously going to be transferred to the AOA, so you will have the ability to go ahead and market those and generate more income to try to finish off the improvements. Is that correct?

Mr. Boyer: That is correct.

Mr. Ho: Mr. Boyer, the deadline for this is 2021; that's three years out. Is that going to happen – the completion for it?

Mr. Boyer: Yes. I hesitated a little bit because I had to recall the long history of Kulana for a moment. But everything seems to take longer than (inaudible), but it is moving along at a good pace. We have actually already started some of the activity in Phase I. The tank lot that's going to be dedicated to the County for the Water Department to help solve the water problems in Kapa'a is being recoated right now as we speak, and the water line testing is almost totally complete, or retesting I should say. So those are part of the Phase I improvements that we are doing.

Mr. Keawe: Okay. Chair, I don't have any further questions. I think we've–

Mr. Ho: Mr. Bracken, could you step up to the mic one more time, please? Going through this, what is the County's liability in all of this?

Mr. Bracken: Currently...I mean, under the settlement agreement...the way the settlement agreement worked was Travelers, the bond company, paid the County \$500,000, and then

through the settlement, that was then passed to the AOA to help complete the infrastructure. So currently, the County has...I mean, under the settlement agreement, there is no liability exposure I guess. I mean, as long as the terms of the settlement are followed.

Mr. Ho: No liability?

Mr. Bracken: Yes, as long as we comply with the settlement agreement. The settlement agreement encompassed all the litigation, right? So at this point, I mean, the issues that arose in the past could no longer come up again; they are all encompassed in that one settlement agreement.

Mr. Ho: Mr. Keawe.

Mr. Keawe: Mr. Dahilig, so what is the action that this committee needs to take in order to move forward?

Mr. Dahilig: I guess the recommended action would be to approve the restated subdivision agreement and forward to the full Commission for its approval.

Mr. Keawe: For its approval. Now, going back to the agenda, Chance, does that include both Item 1 and 2 on the agenda?

Mr. Bukoski: I would believe so; just because they are correlating with the same subdivision agreement. So rather than separating each item, I'd rather just involve it into one item.

Ms. Higuchi Sayegusa: I think the purpose of having the status there was...I mean, this subdivision number as 2002-25 pertained to the Hauiki Road issue, and so it was more of a matter of...it is mostly a status – i.e. it was said to have been voided in the past, but yet, there is an issue of whether or not it was effectively voided – and it was more of a...the settlement agreement and then the restated subdivision agreement should incorporate both.

Mr. Keawe: So the restated subdivision agreement – would it be appropriate to state that it is Subdivision Application S-2002-25?

Ms. Higuchi Sayegusa: Well, I think most of the modifications and the map changes pertained to S-99-49. The S-2002-25 was more of a reengaging or just to update the Commission that it is going to get done. It is just–

Mr. Keawe: Okay. My question is more related to the motion.

Ms. Higuchi Sayegusa: There's no change in–

Mr. Keawe: So do we move to approve the restated subdivision agreement as stated?

Ms. Higuchi Sayegusa: Yes.

Mr. Keawe: That's it?

Ms. Higuchi Sayegusa: I think, really, the action should be...is most relevant to S-99-49.

Mr. Keawe: So if I need to...so Subdivision Application No. S-99-49?

Ms. Higuchi Sayegusa: Yes.

Mr. Keawe: Okay. All right. Chair?

Mr. Ho: One more time – are we combining the both of them?

Mr. Keawe: No, one was just a status, and so I think what we are saying is this restated subdivision agreement will cover what we need to do for both of these items. My concern was I just wanted to make sure I got the right numbers. So, I'm ready.

I move to approve the restated subdivision agreement for Subdivision Application No. S-99-49, the Association of Apartment Owners of Kulana.

Mr. Ho: Mr. Dahilig, before you leave us, could you...is that the motion on the floor? Could you give us the motion on the floor, please?

Mr. Dahilig: Yes. The motion on the floor would be to approve the restated subdivision agreement pertaining to Subdivision Application No. S-99-49.

Mr. Ho: All in favor?

Mr. Keawe: You need a second.

Mr. Ho: Second. I'm sorry. Second. All in favor? (Unanimous voice vote) I guess we're done. Motion carries 2:0.

Mr. Graham: Thank you very much.

Mr. Bukoski: Thank you, Chair.

UNFINISHED BUSINESS (None)

Mr. Bukoski: Moving on to Item H, Unfinished Business. Seeing none.

NEW BUSINESS (None)

Mr. Bukoski: Item I, New Business. Seeing none.

ADJOURNMENT

Mr. Bukoski: And lastly, Item J, Adjournment.

Mr. Keawe: Move to adjourn.

Mr. Ho: Second. All in favor? (Unanimous voice vote) Motion carries 2:0. We are adjourned.

Subdivision Committee Chair Ho adjourned the meeting at 9:02 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.