



SECOND ANNUAL PANEL DISCUSSION OF THE COUNTY PLANNING DIRECTORS

Land Use Research Foundation of Hawaii (LURF)
with
Associated Builders and Contractors, Inc. (ABC) – Hawaii Chapter
Building Industry Association (BIA) – Hawaii
Hawaii Developers’ Council (HDC)
National Association of Industrial and Office Properties (NAIOP) – Hawaii

Renaissance Iikai Waikiki Hotel, September 15, 2005, 8:30 a.m. - 12:30 p.m.

Remarks of the Planning Directors

LURF Executive Director Dean Uchida announced that this year’s panel discussion has a significantly higher attendance, over 200 registered to attend, compared to 170 last year. He acknowledged the support of the sponsoring organizations named above.

The topics of the panel discussion are:

1. Based on Judge Ibarra's decision in the *Hokulia* case in Kona, what are each of the Counties doing with regard to existing and proposed subdivisions in the Agricultural District?
2. How are the Counties treating “gated community” developments?
3. What suggestions does each Director have regarding: (a) how shoreline certifications should be done; and (b) how shoreline setbacks should be calculated?
4. What are the Counties doing to encourage more affordable housing construction?

Henry Eng, City and County of Honolulu

Henry Eng has 35 years in land use planning, permitting and development, having worked for the City and County of Honolulu Office of Council Services and Departments

of Planning and Land Utilization; for the Estate of James Campbell as Community Development Manager; and as a private consultant. He attended Columbia College and is a graduate of Pratt Institute, Brooklyn, New York. He is a Fellow of the American Institute of Certified Planners.

Hokuli`a. Agricultural subdivisions are not a major problem on Oahu. Refinements have been made over the years to requirements [in the City’s Land Use Ordinance (LUO)] to ensure that farming will occur. For example, the City asks for Department of Agriculture (DOA) review of proposed subdivisions, and sometimes asks for more information regarding what constitutes farming (the *owner* must do it). The delay in getting the *Hokuli`a* case resolved in the Hawaii Supreme Court extends the limbo. It is difficult to administer land use laws under uncertainty – the consequences could bankrupt the County. Land use policies should not be decided by the courts – in particular, the courts cannot legislate “viability”. Mr. Eng is disinclined to review past decisions [of his Department]; he presumes that the rules followed were valid.

Gated communities. Shoreline access is required through the Special Management Area (SMA) provisions of the State’s Coastal Zone Management (CZM) Act. Mauka access is imposed on an *ad hoc* basis through unilateral agreement conditions on zoning amendments. Is a gated community different from a gated lot? If not, it is difficult to administer – what is “public” access for pedestrian/bicycle/utility purposes? It requires balancing the public right of access with the landowner’s right to exclude. It also requires parking lots – but the government is reluctant to accept liability and responsibility for maintenance.

Shoreline certification. The Department of Planning and Permitting (DPP) lacks expertise to certify shorelines, which current law specifies shall be at the upper reaches of the wash of the waves [as marked by the vegetation or debris line; HRS § 205A-1]. What is “natural” vegetation? Is it okay for a bird to spread seed and fertilize natural vegetation, but not for humans to do the same? How does one track the debris line? A *fixed* shoreline would provide a uniform setback line; a *variable* shoreline based on erosion would be harder to measure, but more scientific. Chip Fletcher is under contract to the City to update coastal erosion hazards. With erosion, the landowner loses land; with accretion, the State claims it – is this equitable? Should private owners be liable for public access?

Affordable housing. In this area, the needs are substantial, and require public-private partnerships, City programs, and regulatory measures such as HRS § 201G-118 and unilateral agreement conditions. Available programs and measures include planned unit developments, conditional use permits, housing assistance, block grant (CDBG) funding, the HOME program, rehabilitation loans, elderly referrals, Section 8 multifamily tax exempt bonds, real property tax exemptions, and VISTA projects with tax credits and CDBG funds. Section 201G-118 allows for zoning exemptions, for which nonprofit corporations are eligible as long as they do not jeopardize public health, safety and welfare. Unilateral agreements can also provide affordable housing that varies project by project. The City Council is considering what is “affordable,” and to whom such housing

should be targeted – households with no more than 100 percent of median income? or up to 140 percent (the State threshold)? or between 80 and 120 percent (as specified in many unilateral agreements)? The Mayor has an Affordable Housing Working Group looking at establishing a new City housing policy. Is the purpose to provide shelter to a targeted group, or to assist the “gap group” into the mainstream?

Mr. Eng then made a powerpoint presentation that first outlined DPP’s organization, staffing, budget, and website resources, then focused on the future of West Oahu. DPP plans to meet supply and demand, for example the needs of a graying population. The planning process starts with General Plan policies and growth rate projections by Development Plan (DP) area. The DPs are to be reviewed and revised every five years. The Ewa (1997) and East Honolulu (1999) DPs were the first of the conceptual plans under the current City Charter, that set forth common themes and special themes and leave the specifics of land use regulation to zoning maps. Ewa is forecast to have a population of 125,000 by the year 2020; the planning focus is on infrastructure to meet this growth. In Waianae, by contrast, the focus is on restoring existing resources and infrastructure to sustain a stable population. A connectivity study is currently being prepared for Ewa, to develop block and lot guidelines with examples of “place making.” The Estate of James Campbell has committed to dedicating lands for public buildings and uses. This dedication requires government commitment of funding to construction prior to 2007 as a pre-condition to land transfer. The Ewa traffic and roadway impact fee supports six specified highway projects. Kapolei Town Center will be the focus of the region’s population, dwellings, businesses, and jobs.

Michael Foley, County of Maui

Michael Foley has over 40 years of experience as a Planning Director, planning consultant, and public agency planner, previously in the cities of Davis, Napa, Sausalito, and Woodside, California. He has degrees in architecture, urban geography, and community planning and urban design.

Mr. Foley began, “DPP’s organization chart looks like Maui’s permit process.” He has meetings on the “friendly” island of Molokai, where they feel very strongly about protecting their heritage. “No one comes to Maui to see buildings.” What will happen with three to four times the number of people?

Hokuli`a. Maui County hasn’t changed its procedure for agricultural subdivisions. With 1,500 agricultural lots, this is a very popular land use. Maui has had a “sliding scale” ordinance since 1998: for a 500-acre original parcel, the number of lots allowed is reduced from 250 to 14, severely controlling the *number* of lots while maintaining the two-acre minimum lot size. A subdivision agreement is required with a written guarantee of farming activity. The County checks CC&R’s so that they don’t prohibit farming. A farm plan is required with 51 percent of the area dedicated to farming or conservation, which has to be implemented *before* a building permit is issued for a second dwelling. This has generated a new business opportunity for farmers who take care of five to ten different properties. Identification of important agricultural lands (IAL) will now be

required under House Bill No. 1640 from the 2005 Session, as well as under the pending General Plan revision. Of Maui's total land mass, 52 percent is in the Agricultural District, but much of that is unsuitable for agriculture.

Gated communities. Planning staff and the Planning Commission generally discourage gated communities, which prevent people from traveling freely. The main concern is public access; they want gates on individual lots, not on the roads. As a compromise, however, they will allow entry gates that are set back from the highway frontage.

Shoreline certification. This is done by the State, which is fine with Mr. Foley. Maui County has led in defining setbacks by erosion rates, thanks to Chip Fletcher. This seems to work well so far, based on historic air photos, and seems to be pretty well accepted. One challenge is with strangely shaped lots. Another is with lots on a cliff.

Affordable housing. This is the real crisis on Maui. The median sale price of single-family homes is around \$700,000. However, numerous projects are under construction with affordable units, some voluntary. The policy is to mix in affordable housing with larger master-planned projects, such as by Alexander & Baldwin, Maui Land & Pineapple, Stanford Carr. Other smaller projects include condominiums and senior high-rise housing. The frustration level among the public and on the County Council is very high. The Council is grappling with a new housing policy, to raise the affordable housing percentage and look at employee housing for visitor industry workers, who make low wages. Part of the housing problem is inadequate incomes, which is why they are trying to diversify the economy with higher paying jobs. It is difficult to recruit new employees because of the housing costs. Also, the County can only hire State residents unless exempted. The "learning curve" for new residents is pretty lengthy.

Maui has had mixed experience with the 201G process. The most recent project was extremely controversial. The process allows applicants to completely ignore County plans and regulations, and propose substandard projects using agricultural lands. The abbreviated hearing process allows little public input and bypasses the Planning Commission, and allows only one up/down vote at the Council. One recent project was denied because of traffic impacts, since the Housing and Community Development Corporation of Hawaii (HCDCH) [which certifies eligible 201G projects] is not interested in kuleana lots. The Sterling Kim project had many Hawaiian issues. The Council doesn't want any more 201G projects until the process is improved with longer review times.

The present General Plan contains only general policy statements, and no map. The County relies on its Community Plans, although many are becoming out of date. The General Plan update will be long and arduous under the new process adopted by the Council in 2004. The Planning Department is now doing population and employment projections and land use forecasts. They will try to ensure consistency of the Community Plans in the future; currently, some of them prohibit water transfers, and don't agree on where the roads are. The new General Plan will have urban growth boundaries – also controversial. The Council has well supported the Department's planning efforts, and

new staff have a lot of enthusiasm. But there are vacancies among the permit processors, where the work is stressful and poorly paid. He would like to eliminate reviews of minutiae.

The Department is also developing a geographic information system (GIS) to allow spatial forecasting of infrastructure. This assumes that money will be available if they can show where the infrastructure (such as schools) is needed. Mr. Foley would rather the County take over the schools, or at least control where and when they get built. The problem is even worse with highways – the Department of Transportation (DOT) is proposing traffic signals where they already exist and are not needed, by engineers who infrequently visit the island. The County can make better decisions, but will require creative financing for all new infrastructure. In short, it is frustrating dealing with the DOT and the Department of Education (DOE).

Christopher Yuen, County of Hawaii

Christopher Yuen is an attorney who, while in private practice, was a member of the Board of Land and Natural Resources. He has also worked as Deputy Corporation Counsel for the County of Hawaii, and as a National Park Service Interpretive Naturalist. He has degrees from Stanford University (human biology), State University of New York (master's degree in environmental science), and the William S. Richardson School of Law.

Mr. Yuen began with a powerpoint presentation, which he characterized as a “light-hearted look at buzzwords and policies.” It showed, among other things, a hotel setback *in* the water; important agricultural land on the Big Island (a fern growing out of lava); a farm dwelling (palatial second home); affordable housing (a chicken coop); and a public hearing on the Big Island (the death of Captain Cook at Kealakekua Bay).

Hokuli`a. He'd really rather not talk about this issue – he and Mayor Harry Kim came into office after the lawsuit had been filed in 2000 – “the bed was already on fire when he lay down in it.” However, the court decision by Judge Ibarra is fundamentally unfair. Hawaii County follows minimum lot size zoning to guide the subdivision process. The Hokuli`a project sought a change from Ag-5 (five acre minimum) to Ag-1 (one acre minimum), after the developer had reduced the original scale of the project. The zoning change was complete in 1997, allowing one-acre lots around a golf course. The subdivision applications were approved in 1999 and 2000, at which point the developer began construction of infrastructure. The litigation began in 2000 on other issues, and was later amended to include the alleged violations of the Land Use Law [HRS Chapter 205]. The judge enjoined the defendant parties in 2003. The unfairness arises in that the suit could have been filed anytime from 1997 on, but instead the plaintiffs waited until 190 employees were working, \$40 million had been spent, and over 100 lots were sold.

Is the Hokuli`a project a legal land use? The Land Use Law says that the Counties set agricultural lot size, with a one-acre minimum. Golf courses are a permitted use of marginal lands [class C, D and E soils]. So why not one-acre lots along a golf course?

The bulk of Judge Ibarra's decision rests on his interpretation of "farm dwelling." Act 199 in 1976 – the last major revision of Chapter 205 – set land use restrictions on class A and B lands, and required farm dwellings henceforth on such lands (previous residential lots were grandfathered). Farm dwellings are defined as located on and used in connection with a farm, *or* where agricultural activity provides income to the family [there is no requirement of how *much* income]. By rule of the Land Use Commission (LUC), farm dwellings are also a permitted use on class C, D and E lands. In Hawaii County, there are some 80,000 pre-1976 residential lots grandfathered in the Agricultural District, although another 3,000 such lots were created *after* 1976, when all homes were supposed to be farm dwellings.

The Hokuli`a developer was prepared to require that 20 percent of the project area be dedicated to agricultural use as a coffee farm touching each lot. Hundreds of similarly situated lots around the State have *no* farming. Single family residences were listed as a permitted use of agricultural lots in the Hawaii County Zoning Code until 1996. The 3,000 such lots are owned and occupied by ordinary citizens, most on marginal land with no viable agricultural use. Why should a court order force people into uneconomic ventures, or deprive their land of practically all economic value?

What are the solutions to the *Hokuli`a* case? Briefing of the case on appeal in the Hawaii Supreme Court was completed several weeks ago. Hopefully the decision will be rendered sooner than in the *Save Sunset Beach Coalition* case [which took five years]. Attempts to mediate have been and are ongoing. 1250 Oceanside Partners has made extraordinary offers to settle. If the plaintiffs game plan is just to stop the project, it is doubtful that will be the ultimate outcome. As far as a legislative remedy, Hawaii County wound up playing defense with House Bill No. 109 in the 2005 Session, to try to make sure it didn't make the whole situation worse. Laws have to be clear and enforceable. The previous LUC Executive Officer, Esther Ueda, didn't think *Hokuli`a* needed to go to the LUC. Courts need to respect how administrative agencies interpret the laws. But where the law is not clear, a question such as whether a disguised antenna needed a special permit led to a three/two split decision. *Hokuli`a* is not going to the LUC for now – the hearing process would be long and acrimonious.

Hawaii County is now doing things differently in zoning, but not because of the *Hokuli`a* decision. In the last four and a half years, only 80 more small agricultural lots have been allowed by rezoning, and mostly in urban expansion areas. The Planning Department would support rezoning of areas in Kona that are urban in the General Plan and zoned A-5a. For new subdivisions in the State Land Use Agricultural District, they issue a "cover your ass" letter to applicants suggesting they seek their own counsel. The County is already likely to be sued by the Hokuli`a lot buyers. Big Island Country Club and Kamehameha Investment are going to the LUC for their projects. The new General Plan now has a policy not to rezone IAL in lots too small for viable agriculture.

Gated communities. Mayor Kim wants to discourage gated communities, even where he lives, because they send a message of "we don't want you." But he is not supporting legislation to regulate them, and a bill to do so died in Council. Constitutional issues

were raised [by LURF] regarding the forced opening of private roads to the public. The County will, however, continue to require mauka and makai access.

Shoreline certification. The Big Island has subsidence in some areas rather than erosion. Artificially rooted planting should not be allowed to define the vegetation line for shoreline boundary purposes. The County should have administrative discretion to establish the time that the setback line would be valid without recertification. One idea is to use detailed aerial photographs for shoreline certification purposes. The County will waive the certification requirement where there is a high cliff.

Affordable housing. Both cost and location are issues in affordable housing. What is affordable is far from jobs, so people commute long distances, which is becoming more a time issue with increasing congestion. Continued automobile dependency is not sustainable. The County is starting “kokua zones” for its bus system, to take the cost element out. Resorts without nearby housing are having trouble recruiting employees.

The affordable housing ordinance was changed in 2005 to increase the number of units required from 10 to 20 percent, and to plug a loophole in the fee in lieu provision. A ten percent density bonus was added for affordable units, and trading credits will be allowed. The County is trying its own affordable project at Waikoloa on donated land.

The General Plan was also revised in 2005 to add an IAL provision, and remove some areas designated for coastal development. They are working to keep the island’s unique character – small towns, open space. They want development to encourage housing for first-time buyers, as well as housing that is more functional for the aged and infirm.

Ian Costa, County of Kauai

Ian Costa, although committed to attend, did not appear. He later apologized but offered no explanation.

Question and Answer

1. To Michael Foley: “Please address your ‘Maui doesn’t need more tourists’ stance as set forth in letters you have sent to the media.”

Foley: Tourists do have an impact, but I was misquoted in *Pacific Business News*.

2. To Henry Eng: “How does the City intend to handle the solid waste generated by all of this growth?”

Eng: By other landfills and by alternative means such as recycling.

3. To Christopher Yuen: “Is the agriculture designation a default identity for lack of a greater need, or is it to maintain either farmland or green space for all to enjoy? In other words, if we are saying that one-acre residential lots are OK because the

land is not suitable for agriculture, is that a violation of the intent to preserve open space?”

Yuen: The Agricultural District has been a default area for non-agricultural uses. We have to be honest about the purpose of land use control of agricultural lands. For example, the *Hokuli`a* issue is not really about “farming.”

4. “What steps can you take in the next year or so to increase affordable housing in your County?”

Eng: The City is looking at it vigorously. The Mayor’s task force is just starting. There will be more to report next year.

Foley: Maui has projects under construction, but it takes longer than one or two years to get started. The Council may have a new housing policy in a few months.

Yuen: The State and the Counties need to get back to making “sites, ready to go.” How much subsidy is the policy question. The Territory used to improve lots and auction them off. There are so many steps to get raw land ready – government has to accept more responsibility.

5. “Since each of the Counties are understaffed to review, process and approve subdivision and building permit applications for primary housing, what are your thoughts on having developer, architect, and engineer self-certification of master-planned communities that will take years to complete and will continue to be subject to regulatory inspections for compliance of all rules and codes?”

Eng: Self-certification already exists at the City, but the consultants have been reluctant to use it. They have third party review and ten people certified to do it, but no one wants to be first. Meanwhile, a number of his senior building inspectors have retired, adding to the permitting backlog.

Foley: He supports making minor permits faster. On Maui the consultants are too overwhelmed to take on self-certification. Also, the County faced a big lawsuit and had to buy a \$5 million house where the builder got bad advice from consultants regarding the shoreline location.

Yuen: They had four times the number of applications for new residential building permits last year as in 1998. It’s hard to ramp up staff that fast. Under Hawaii County’s new affordable housing policy, a project that voluntarily commits to 10 percent or more affordable units (in excess of any requirement) goes to the “top of the stack.” Use of self-certification is uncertain on the planning side – it’s more appropriate for building permit applications than for subdivisions. The architects are not that interested.

6. “How has the *Hokuli`a* case impacted how your process agricultural subdivisions, or has it? In your opinion, how can such challenges be avoided?”

Yuen: As stated earlier, Hawaii County issues a “warning letter” when issuing the tentative approval letter for subdivisions in the Agricultural District. They don’t make up what’s not there. The Land Use Law needs to be clearer. If the Legislature wants to require economic feasibility, that’s fine, but that requirement is not there now, unless established by a definitive ruling in *Hokuli`a* on appeal.

Eng: The City is not doing anything different. Public officials are always subject to lobbying for faster action – does anyone lobby the courts? – several years of delay in decision making is unacceptable.

7. “The reason there are so many agricultural subdivisions on Kauai and Maui is probably due to the time-consuming and onerous entitlement processes. This does nothing for the provision of affordable housing and in fact, creates inventory for the high-end market. Is this a concern for the Counties and what are your recommendations or suggestions to address this dilemma?”

Foley: Yes, the LUC process is very time-consuming. Also, Maui is an international market – lots are sold to those with no intention of working.

Yuen: It’s partially true – there is an area near Hilo zoned A-1a now in the subdivision process. He would prefer to see it urban and higher density, but there is a market for it as is. He would like an easier process for the County to take areas designated urban in the General Plan through the LUC without a contested case hearing.

Eng: He supports faster, easier conversion through the LUC.

8. “There is a move in some Counties to create more Rural Districts. With the housing crisis all Counties are confronted with, do you agree with this philosophy? Why or why not?”

Eng: The City does not have and does not need the Rural District.

Foley: Rural is just another word for sprawl. Maui will likely propose reclassification of agricultural land to Conservation to preserve open space, and use the Agricultural District for growth. There are many different definitions of rural: large lot zoning, marginal land. He wants towns designated urban, not rural.

Yuen: In the long run, the goal is to protect IAL for agriculture, and call other lands something else than agricultural. Rural District should not just be for large lots. In the short run, developers are trying to take projects into Rural because there is no farm dwelling requirement. Hawaii County does not have large areas where they would support such subdivision, but they will honor current applications.

9. “Often, shoreline property owners are faced with the dilemma of not being able to obtain building permits due to an inability to get a certified shoreline. In many cases, this is due to the inability to ascertain the legality or non-conforming status of a structure in the shoreline area. That determination is usually a County function. Do you have any recommendations on how to overcome this obstacle?”

Eng: The City DPP uses a margin of error, a setback greater than 40 feet.

Foley: It’s not a large problem. Usually the owner can come up with evidence such as affidavits that a seawall didn’t just “accidentally arrive.”

Yuen: Most times they can establish when a structure was built.

10. “Does each County have an affordable housing [*sic*] for new commercial or industrial development? If so, what is it? If not, what is the department’s view?”

Yuen: Yes, Hawaii County has a policy for resorts or industrial developments over 100 employees. For industrial parks, the policy is applicable to each employer. The policy does not apply to commercial projects.

Foley: Maui also requires affordable housing for resorts, and more recently for industrial, related to job creation. Also, the Planning Department would want to know the salary levels. There is a proposed ordinance change to allow more mixed uses.

Eng: The City has no such policy. In Kapolei they want more jobs where people already live.

11. “Regarding the County of Hawaii developing affordable housing in Waikoloa, why did the County decide to develop rather than allowing independent developers to build?”

Yuen: The County selected UniDev [an affordable housing developer] to build the project on County land.

Eng: The City might contract out such a project. But the days of the City as a housing developer are over.

Foley: Maui will not get into the contracting business.

12. “How do you determine prime agricultural land vs. marginal land, and who will make the determination?”

Yuen: Hawaii County will determine large areas of IAL based on soil and water.

Foley: Maui will also look at market feasibility and existing land use.

Eng: The City will do it through the General Plan/Development Plan process.

13. “Please explain the City and County of Honolulu’s interest in agricultural clusters on Oahu.”

Eng: They are waiting for someone to take advantage of this provision, but there is not much interest.

Foley: Maui has a subdivision designed like the spokes of a wheel, with most of each lot in coffee, cared for by one farmer.

Yuen: Hawaii County’s difficulty is how to get around the minimum lot size. People wanted a “little house on the prairie” until lifestyles changed. Years ago people lived in plantation camps; now those would have to be urban. So they have a planned unit development (PUD) provision for agriculture.

“Open Microphone”: “Didn’t three *Hokuli`a* attorneys say ‘go to the LUC’ – wasn’t that sufficient?”

Yuen: Those quotes in Judge Ibarra’s decision and order were taken out of context. There were no such statements *after* the project was changed to eliminate the half-acre lots in the original project concept.

Recorded by:

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