

SPECIAL MEETING

MARCH 21, 2007

The Special Meeting of the Council of the County of Kaua'i was called to order by the Council Chair at the Council Chambers, Historic County Building, 4396 Rice Street, Room 201, Lihu'e, Kaua'i, on Wednesday, March 21, 2007 at 9:13 a.m., after which the following members answered the call of the roll:

Honorable Tim Bynum
Honorable Jay Furfaro
Honorable Shaylene Iseri-Carvalho
Honorable Ronald Kouchi, from 9:24 a.m.
Honorable Mel Rapozo
Honorable JoAnn A. Yukimura
Honorable Bill "Kaipo" Asing, Council Chair

Chair Asing: Thank you, please note that Councilmember Kouchi is here, he stepped out of the room and should be back shortly.

APPROVAL OF AGENDA:

Mr. Furfaro moved for approval of the agenda as circulated, seconded by Ms. Iseri-Carvalho, and unanimously carried.

Chair Asing: Can we have the County Attorney up please?

There being no objections, the rules were suspended.

MARK VICKNAIR, DEPUTY COUNTY ATTORNEY: Good morning, Mark Vicknair, Deputy County Attorney for the County of Kaua'i. And at this time, ES-262 Pursuant to Haw. Rev. Stat. §§92-4 and 92-5(a)(4), the purpose of this executive session is to consult with legal counsel, including the Administration, on the court's findings and determinations contained in the Order Granting Defendant Mandalay's Renewed Motion for Summary Judgment in the matter of County of Kaua'i v. Mandalay Properties Hawai'i LLC, et al., Civ. No. 05-00052 KSC (U.S. District Court); Mandalay Properties Hawai'i LLC v. County of Kaua'i, Case No. 05-15383 (U.S. Court of Appeals, 9th Circuit); and related matters. The further purpose of this executive session is to deliberate towards and make a decision regarding these matters. This consultation involves consideration of the powers, duties, privileges, immunities and/or liabilities of the Council and the County as they relate to this agenda item.

Chair Asing: Thank you. With that, I'd first like to open it up to the general public. As you know the executive session is in regards to the County of

Kaua'i versus Manadalay Properties, so with that, I'd like to open up this portion of the meeting to the public before moving into executive session. Is there anyone in the public who wants to speak on this item? Mr. Taylor?

There being no objections, the rules were suspended.

KEN TAYLOR: Chairman, members of the Commission, my name is Ken Taylor. I would just like to take this opportunity to ask you please, please for the future of the young people of this island, appeal this decision and move forward with protecting openness to the beaches. Thank you.

Chair Asing: Thank you. Councilmember Yukimura?

Ms. Yukimura: Yes, Mr. Taylor, have you seen the Court's opinion on the...or decision?

Mr. Taylor: I've only had opportunity to read bits and pieces that have been sent to me, not the whole transcript.

Ms. Yukimura: Okay, because by the rules of judicial process, you know the Court looked at the matter from the light most favorable to the County, and found that the law was not sufficient to warrant a finding of public access. I mean it was a pretty...it was a pretty strong opinion against the finding of public access based on the land laws. So your position that we appeal would be that even though there doesn't seem to be a very strong likelihood of prevailing on appeal, we should appeal anyway?

Mr. Taylor: I make my comments based on some information that was sent to me, and again, as I said, I haven't read the appeal or the opinion, but it was my understanding that there was a number of people on island that had used this access many times during the timeframes of consideration, and they were not called as witnesses to the court hearing or proceedings, so I believe that with that kind of information that could be brought forth, that there is a potential for taking another look at it.

Ms. Yukimura: If by the law that type of testimony is a use for or allowed, you know...

Mr. Taylor: And that's what I certainly based my comments on.

Ms. Yukimura: Okay, thank you.

Chair Asing: Councilmember Iseri-Carvalho?

Ms. Iseri-Carvalho: Yes, I do have a copy of the order granting the defendant Mandalay's renewed Motion for Summary Judgment, so you can take a look at my copy. And I think once you review that copy, you will find that there really isn't any basis to appeal the decision in light of the evidence that our office presented, the County Attorney's office presented at the hearing. And when...you know there are certain rules that apply in Court, that when there is a hearing on a motion you are required to be prepared to present all of the evidence that supports your position. And based on the evidence that was presented by the County, basically what they found is that this case wasn't even enough to go to trial, none the...and not only not enough to go to trial, but we didn't even have any genuine issue of material fact as to ownership of that road. So there...it's a very clear decision. I think based on the evidence that was presented and that is your one (1) shot, know you're basically there at the hearing to present as much evidence that you find to support your position. And in light of all of the evidence, and in light of looking at all of the evidence in support of the County, they found that there was no issue as to ownership of the road or access. So, you know it's unfortunate that we do have that decision, but that decision was made by a Judge after considering all of the evidence that the County presented as well as the defendant Mandalay presented. So it's real important to review the facts first, all of the facts that were considered in the judgment and order. And once you review the issues that were raised I think it would become clear to you as well as to the many other people that had considered or considered requesting the County Attorney to appeal the Judge's decision will arrive at a different conclusion. So I do have that here. Like I say it's unfortunate, but it is what it is, and that is what the facts that we present and you know it's sad because I think beach access is very, very, very important and maybe what we should have done if there are other evidence that should be have been presented, then they should have been called at the time of the hearing. But we don't get a second chance at this point, you are there, you are ready to go, and that's it. And I think the evidence that was presented was insufficient as how the Judge ruled, you know that it was insufficient, but it tells you what exhibits it relied on in making his decision. And so it is contained here, and hopefully you as well as others who have some concerns about why appealing this particular case may not be in the best interest of the County in light of our prospect, or likelihood of success. So I appreciate it, I think everyone should be concerned, because hopefully when there are other issues that arrive or arise because of beach access, because it's so precious to everyone here that we would consider being much more prepared in the presentation of the evidence at the hearing.

Chair Asing: Thank you. Any other...go ahead Tim?

Mr. Bynum: Good morning Mr. Taylor, thanks for coming today and offering your input. You know I just want to...my understanding is that this isn't a decisionmaking for the Council. The Council is not going to decide whether to appeal or not. We asked for this to be on the agenda so we could get the best information we can, because I'm disappointed that we're not at this point resolving

access to Pāpa'a Bay through this method. For me, that doesn't mean the issue is closed, you know that access to Pāpa'a Bay is an important thing for our island and for the future as you mentioned. And you know I want to get information, the best I can about this particular lawsuit, whether it should be appealed or not, but then I want to follow up immediately with what our other options to obtain access to Pāpa'a Bay. So I don't think this is the end, but I want the public to be clear that that some of the communication I got was like please vote to do this, and I don't think it's a Council decision that makes that decision. What we're doing is seeking information to do the best job we can to be the community's advocate for finding a resolution to this issue one (1) way or another. If this isn't the vehicle, then I certainly want to explore other vehicles you know to get what I believe...

Mr. Taylor: And that's certainly appreciated and I know you'll do the best job possible. I just thank you very much.

Chair Asing: Okay, thank you. Is there anyone else who wants to speak on this item? Loke? Good morning.

LOKE PERREIRA: Good morning, I'm Loke Perreira from Moloa'a. This problem we having with Pāpa'a, I can remember all what was taking place and the hard work that was done with the group I was with. But when we heard the decision made by the Judge at the time, we were very disappointed, so now the next block we go to, since we got our answer from Honolulu, maybe you can think of other ways to correct that problem, and that is another way to go to Pāpa'a. And I understand there's...you can condemn a road that would take people safely. Right now, the course they make it...they can...just to get to that beach you have to go over rocks, and our family at that time when we were in use of that place, and had permission from the owners at that time, allowed all of us to go gathering and fishing and what have you and enjoy the beach with the family. So, my grandson does a lot of going to surfing, so does all his friends, and going through, walking through, right now they have to walk through another property just to go down to...go down safely. And they would not put...our friends would never...family would never put our family in harms way just to get to the beach, it seems so ridiculous that a...so if possible there's...have another option to take care of that problem.

If we do something about it for this, for Pāpa'a, other areas that's being threatened, farmers, I mean...I talked to a lot of people, especially fishermen, because I come from a fishermen family, and they feel threatened that a lot of beaches are being occupied, and a big (inaudible) on going through the property. And it's really uncomfortable when you have to be confronted by no trespass I mean all these names and then other things that take place in the...on the beach is worse, like planting and doing things just to prevent the public to walk on the beach.

I also got involved with Moloa'a, which we walked to that, and I hope some good will come out of that, because to me they taking away the...what the public should enjoy and every educational for your young people, for the future. They have to go walk through there so they can see how beautiful that area is, and should be protected from having to stop the public to use the trail to Moloa'a or to any entrance to the ocean. So that's all I'm asking, if you can consider all of that, keep that in mind that if whatever you take care of or help protect our public to enjoy that for me it should be your time to make that commitment to the public.

Chair Asing: Thank you.

Ms. Perreira: Thank you.

Chair Asing: With that, what I'd like to do is...we have the Mayor here, and he has a very tight time schedule. What I'm going to do is I'm going to call this session into executive session. We'll do that first, and then when we get out of executive session, we'll give the public an opportunity again to testify. So, with that, thank you very much everybody, I'm going to call this meeting into executive session. We will have that first. We will come back out of executive session, and the public is welcome to participate at that particular time again after we get through with the session. So with that, thank you very much.

Ms. Perreira: Thank you.

Mr. Furfaro: Thank you Loke.

Chair Asing: Thank you very much.

The meeting was called back to order and proceeded as follows:

Chair Asing: With that, I'd like to ask for a motion to move into executive session.

Ms. Yukimura moved to go into executive session for ES-262, seconded by Mr. Rapozo and unanimously carried.

Chair Asing: Thank you very much everybody.

The Chair called a recess at 9:28 a.m. to go into executive session.

The meeting was called back to order at 10:03 a.m. and proceeded as follows:

(Change to side B of tape 1)

Chair Asing: Good morning again everybody, we're back into session. On the executive session we're through with that portion, we'll open it up now to the public. With that, the rules are suspended.

There being no objections, the rules were suspended.

Chair Asing: Is there anyone else in the public who wants to speak on the executive item which was the County of Kaua'i versus Mandalay Properties project? Is there anyone who wants to speak on that item? No? Going once, going twice, thank you very much.

The meeting was called back to order and proceeded as follows:

Chair Asing: With that, can I have a motion to...

Mr. Furfaro: Yes Mr. Chair, I'd like to refer...

Mr. Rapozo: No, before...can I make a real quick comment to the public before we make the motion to defer?

Chair Asing: Sure.

Mr. Furfaro: Go ahead.

Chair Asing: Go ahead.

Mr. Rapozo: Thank you. Defer. It'll be, yea, defer. Just simply you know in the last two (2) days we received close to 30 written testimonies asking this Council to proceed with an appeal. And I don't know if any of you are in the audience, but for those of you, and this is not even on camera, but the fact of the matter is it's not up to this Council whether or not we appeal. You know that decision will be made by the County Attorney's office. Some of the testimony that I read asks us to present more information, more evidence at an appeal, and that is just not part of the process. We're not able to go in and try again with new witnesses or new evidence. We've put out the best case we had, we lost, we lost quite embarrassingly to be honest. If any of you have not read the order, I would recommend you go get a copy and read it, because basically what the Court said, and it wasn't the Ninth Circuit as I'm led to believe, that somebody sparked this request for the testimony because it all references the Ninth Circuit opinion, which is not the case, it was the District Court, U.S. District Court opinion, not the Ninth Circuit. But the reality is, the Judge gave us the benefit of the doubt, and still we could not prove the fact that we had access down this land. So I'm not an attorney, we going to wait to see what the County Attorney recommends, but I think the public needs to know that we had our shot, we lost, there are other options, but the fact is, we cannot go in as if it's round two (2), with some more witnesses, some

more maps, it's done. We presented the best case we had, we thought we had, and we lost, so that's just a clarification Mr. Chair. And in fact anybody that wants to submit the testimony, it should actually be addressed to the County Attorney or the Mayor, and as well as our Open Space Commission, because I think they are the commission that has been set aside to examine possible options as far as condemnation or recovering public land. I think that's the process that we've set up as the Open Space Commission, that is the commission that should be considering that and not this body, although we also have an opportunity to express our concern and support for either the appeal or the adverse possession of any kind of lands. So I just wanted to make that clear Mr. Chair, thank you.

Chair Asing: Thank you. Any other comments Councilmembers? Councilmember Furfaro?

Mr. Furfaro: Yes, and again, I just want to point out that one (1) of the evaluations also will deal with Native Hawaiian as well as kuleana rights for that area in evaluating those Native Hawaiian issues as well. So, on that I would suggest that we defer to the...go ahead.

Chair Asing: Yes, hang on.

Mr. Furfaro: I thought there were no more comments, I'll hold off.

Chair Asing: Okay. Any more comments on this issue? If not, I'm going to have a motion...

Ms. Iseri-Carvalho: I do, I...

Chair Asing: Go ahead.

Ms. Iseri-Carvalho: And just for a matter of clarification, I as well received numerous comments from the public, and it appears that there was some information that had gone out to the public that may not have been entirely accurate. I do have before me the order granting the defendant Mandalay's renewed Motion for Summary Judgment. It is a 28 page order that is dated February 7, 2007, and it was signed by the United States Magistrate Judge Kevin Chang.

Several important points to make regarding this decision is that it does not impact your already given constitutional rights, and those constitutional rights are laid out in Article 7, Section 7, which is referred to as the Traditional and Customary Rights of Native Hawaiians. So it will not impact those gathering rights that are given by the Hawai'i State Constitution, and it's also in Hawai'i Revised Statutes, Section 71. So those rights for Native Hawaiians are protected, as they have always been under the constitution.

With respect to the decision and Civil No. 05-00052, and there were really three (3) issues that the Court had relied on in issuing its decision. One (1) was whether or not Mandalay or anyone else, the County, had established a title to the Wiedeman Reservation. Two (2) was whether or not there was an existence of a public road prior to 1892 that went down to the shoreline from the Wiedeman Reservation. And three (3) was whether or not the County could establish that there was a prescriptive easement. Prescriptive easement is one (1) that is acquired by use and occupation for a period of time provided by law, which is adverse to the true owner of the fee, or the true owner of that property. In order to establish a prescriptive easement, you need to have had the period much larger than 20 years as established by case law for a public right of way, and that right would only occur if the use was adverse, it was continuous, it was uninterrupted, it was open, notorious and exclusive, and with the knowledge and acquiescence of the (inaudible) owner for the prescriptive period, which is the larger than 20 year period. So really, those were the three (3) issues that the Court relied on.

There was also a stipulation or an agreement by the parties, the County of Kaua'i as well as Mandalay Properties, both parties stipulated on page 14 of that decision that the Court had before it, all of the available evidence. And so there was some testimony earlier that you know we could have maybe put forth other kinds of evidence. Clearly, based on the stipulation or the agreement between the parties all of the evidence that was presented on this issue was agreed to by Mandalay as well as the County of Kaua'i, and so there really wasn't any other evidence as the Court knew it that was going to be presented.

The Court ruled with respect to the title of the Wiedeman Reservation that the County had never at any time indicated that it was the owner of that property or had ownership to that Wiedeman Reservation, as the County had agreed to that in the decision. But it also had been collecting taxes from all of the prior parties that had owned that property up until the present point. And so there was really no dispute really as far as the title of the Wiedeman Reservation as the County has maintained that in fact Mandalay was the owner of that property.

The second issue was whether or not there was an existence of a public road prior to 1892, and in this respect there were four (4) pieces of evidence that the Court relied on. One (1) was the map of 1385, the second was the LC award of 7583. There was also a grant 6103, and those are again described in the order, and the fourth was the opinion that was given by an expert witness, which was a professionally licensed land surveyor by the name of Wagner. They also considered as part of the evidence, testimonial of Kalua and Wee, which was two (2) kama'aina residents regarding usage of that property. And basically what they found was that Mandalay had met its burden, that there was really no genuine issue of material fact as to the existence of a public road because there wasn't one (1). All of those evidence that was provided, which are historical records on file, indicated that there

was not a mauka or makai road that extended to the shoreline from Wiedeman Reservation, and therefore the Court found that the evidence that the County provided was speculative, conclusory, and unsupported by any evidence. And so we lost on that issue as well. So that was the second issue.

The third issue that we tried to raise again was a prescriptive easement, and here we were again, required to show that there was adverse or continuous uninterrupted open and notorious and exclusive use of that property, with the knowledge of the owner for a period that was much larger than 20 years. Here again, the evidence that the hearings officer had was the testimony that was provided by two (2) kama'āina residents, and even in the testimony that they provided, they indicated that they had permission to go on the property and therefore there was no adverse possession. And secondly, they also testified that their use was only for a limited number of years, that it was sporadic, and it was with significant interruption (inaudible). And so even the evidence that the County had presented, did not establish the factors that we needed to establish. And there was...the Court had ruled, looking at all the evidence from the testimonies that were provided by the witnesses, as well as the maps that were provided by Mandalay, that it was undisputed that since 1958 there was no access by anyone.

And so in light of all the evidence that was presented, and the fact that the County as well as Mandalay had stipulated to all of the evidence that was presented at the hearing, that there was no other evidence to consider, it is clear that the Court did not have any other alternative but to rule against the County. And so you know, just as a matter of clarification. Again this order, I have a copy. It's real important for people to get the right information. It saddens me that we do lose public access in this manner, but we also learn from it, and we need to try to reevaluate all of the other properties that may be subjected to this kind of suit, so that we can protect our right to these kinds of special places. So thank you Chair, I just wanted to give some clarification in light of the tremendous amount of people that had written in, claiming also that this was at the Ninth Circuit. It had not reached at the Ninth Circuit. This was a decision that was done by the District Magistrate in Federal Court, and so should this case be appealed, then it would be appealed to the Ninth Circuit. Thank you.

Chair Asing: Thank you. With that, any...Councilmember Yukimura?

Ms. Yukimura: Yes. I think all of us were really distressed and saddened that the case did not come out in a way that affirmed our public access there. I want to make clear that it was not just the Mayor's office, but it was this Council that wanted to have this lawsuit to establish public access, and we supported and indeed even were part of initiating the request to the Administration to look into this. I...when we sued in Court to establish access, it was an act of courage and leadership to do that, because public access is not an easy thing to establish and the standards based on the laws of the land are difficult. And I think we found that we

didn't rise to the level required to establish public access. It doesn't mean that we shouldn't keep trying and that there may be other alternatives as Councilmember Bynum explained to establishing access. I think we need to exhaust all efforts to establish public access. We also need to recognize that in doing so it's not an access that we establish just for Kaua'i people, and for the surfers and fishermen and beachgoers, but it involves a million tourists a year who are on this island, and that can be a double edged sword.

Chair Asing: Thank you. Any further discussion? Councilmember Bynum?

Mr. Bynum: I just want to add that the County Attorney is still looking at this issue. They are going to give us more briefings. You know I just want to share personally, I'm a person who went to Pāpa'a Bay, you know parked at the top of the hill, and walked down a relatively easy access point to go to a very special place. And when this particular landowner came, that access was denied to us, so was denied years ago, was denied in a different way more recently, and whether this lawsuit is a way to obtain access or we need to go another way. It's not okay with me that I get met by a security guard at the top of the hill and told that that's a private beach that I'm not allowed to go to, and that's not what we're about. And so you know part of the request is if this lawsuit is not the avenue, what is, and where do we go next. So, I'm looking forward to the day where people can get reasonable access to Pāpa'a Bay, so...

Chair Asing: Okay, Councilmember Furfaro?

Mr. Furfaro: Unless anyone else is going to speak, I'm going to propose my motion to defer this to the March 28, 2007 meeting. Clearly public access, and that historical documentation has been shown to be very important, and those are the things that we need to continue to be briefed on, so, I'd like to defer this to the March 28, 2007 meeting.

Ms. Iseri-Carvalho seconded the motion.


Chair Asing: Any further discussion?

The motion to defer ES-262 to the March 28, 2007 Council meeting was then put and unanimously carried.

ADJOURNMENT:

There being no further business, the meeting was adjourned at 10:17 a.m.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Peter A. Nakamura', with a long horizontal flourish extending to the right.

PETER A. NAKAMURA
County Clerk

/ms