

MINUTES

PUBLIC WORKS COMMITTEE August 20, 2008

A meeting of the Public Works Committee of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Councilmember Mel Rapozo, Chair, at the Historic County Building, Room 201, Lihu'e, Kaua'i, on Wednesday, August 20, 2008, at 9:07 a.m., after which the following members answered the call of the roll:

Honorable Shaylene Iseri-Carvalho
Honorable Tim Bynum
Honorable Ron Kouchi
Honorable JoAnn A. Yukimura
Honorable Jay Furfaro, Ex-Officio Member
Honorable Daryl W. Kaneshiro, Ex-Officio Member

There being no objections, the meeting was recessed at 9:08 a.m. The meeting was called back to order at 12:06 p.m., and proceeded on its agenda item as follows:

PW 2008-2 Communication (4/7/2008) from Committee Chair Rapozo, requesting that the County Engineer provide for discussion purposes an action plan, timeline, and cost proposal for the repair, removal, and/or maintenance of the seawall fronting the Pono Kai Resort in Kapa'a.
[This item was deferred.]

MEL RAPOZO, PUBLIC WORKS COMMITTEE CHAIR: At this time I will suspend the rules and would ask if there's anybody in the audience that wants to testify on this matter.

There being no objections, the rules were suspended.

Mr. Rapozo: I see Mr. Sit. If not, then I know Donald is on his way. I don't know what his estimated time of arrival is but... No one in the audience wants to testify?

There being no one wishing to testify, the meeting was called back to order.

Mr. Rapozo: Yeah, we'll just take a short recess. Stay in your seats because I know he's on his way. So, he's just a couple of minutes. So, short recess, BC. Thanks.

There being no objections, the meeting was recessed at 12:07 p.m. The meeting reconvened at 12:09 p.m., and proceeded as follows:

There being no objections, the rules were suspended.

DONALD FUJIMOTO, County Engineer: Anyway, we sent over a communication and basically right now we are in the process of performing the EA (Environmental Assessment). And the EA should provide all of the answers that I think we're all looking for. And so, we'd like to defer any comments until such time that the EA is finalized.

Ms. Iseri-Carvalho: Okay. The last time we were proceeding, there was a question about whether or not the seawall outside of Pono Kai was legal. Now, the last statement that you had made was that it was legal, that you had a Governor's exemption for that project. Is that the truth or not?

Mr. Fujimoto: Again, well, because of issues, I guess, liability issues, I would like to defer statements on anything until the EA is done. The EA should reveal all legal issues, yeah.

Ms. Iseri-Carvalho: Well, that's not a legal issue, Donald.

Mr. Fujimoto: Yeah, let me, let me clarify that. First of all, I did make a statement or alluded to the fact that the wall was legal based on information provided to me from the State. Since then, we have done some investigation, you know, in the process of trying to get all the right permits. And since then, we have found that that issue is now in question. I cannot say whether it is legal or if it's illegal. I can say that right now, we do not have information on any permits on that wall.

Ms. Iseri-Carvalho: I guess my question is, okay, you received information from the State and that's why you said that the wall was legal. Okay, so what was that information?

Mr. Fujimoto: Again, as you mentioned, the information was that that wall would have been legal under the Governor's Declaration, but since then I've been looking at the Declaration. It did not address the wall.

Ms. Iseri-Carvalho: Well, and, you know, I guess for me it's really bothersome because we had raised this issue many, many times about that wall being illegal because we had received information from the State that it was...not, that there were no permits for the wall. And that's what I'm talking about. The legality has to do with whether or not there were permits that were issued by that wall. And basically you informed us that there were no permits, but because...they didn't have to have permits because there was this Governor's exemption for that project. I mean, that was the statements that you made. So, that's why we're waiting for that Governor's exemption for the project. So, which State official told you that this project was exempt based on the Governor's...

Mr. Fujimoto: It was DLNR.

Ms. Iseri-Carvalho: And who was that there?

Mr. Fujimoto: At that time, it was Sam Lemmo because again, he did not find any permits; however, he did qualify his statement that it would probably...You know, his statement was it would probably have been exempt by a declaration. And his assumption, again, was that the reason the wall was not addressed sooner was because of that so-called assumption.

Ms. Iseri-Carvalho: Okay, so then the question I have now is that in light of the fact that we don't have anything proving that that wall was legal, right, I mean that would be the only way that it could be legal. We don't have permits and so the only other way is that there's an exemption that sometimes the Governor gives under emergency situation. And we know that option is no longer available. So, what else option would we have to indicate that wall is legal?

Mr. Fujimoto: Yes, we don't...

Ms. Iseri-Carvalho: We don't. I mean...

Mr. Fujimoto: Well, the thing is nobody has stated to the effect in either direction.

Ms. Iseri-Carvalho: Try repeat that again? I mean, you're saying that... Do we have permits or not? I mean, in order to build a wall next to the ocean...

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: You need a permit, right?

Mr. Fujimoto: Right.

Ms. Iseri-Carvalho: I mean, it doesn't even have to be next to the ocean...

Mr. Fujimoto: Okay.

Ms. Iseri-Carvalho: ...but because it's next to the ocean...

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: ...you also need to get SMA permits, and all of that, right?

Mr. Fujimoto: Right, right.

Ms. Iseri-Carvalho: Okay, so is there permits at all in any kind of capacity for the construction of that wall?

Mr. Fujimoto: We are presently trying to do whatever it takes to get the permits necessary to repair that wall.

Ms. Iseri-Carvalho: Okay, so you're saying you're doing after-the-fact permitting? That you construct one illegal wall and then now you're trying to validate it to make it legal, how many years later? I mean, when was that wall constructed?

Mr. Fujimoto: In 1993, I believe.

Ms. Iseri-Carvalho: So, we're talking now 15 years? So, 15 years later, we can go back to the State and ask them to legalize an illegal wall?

Mr. Fujimoto: Again, we are trying to do the...get through that process to...yes.

Ms. Iseri-Carvalho: So, the State can do that?

Mr. Fujimoto: Well, again I'm not sure. The EA will provide all the information that you're asking me.

Ms. Iseri-Carvalho: I guess, it doesn't need to be an EA. I mean, it's either... Does the State have that authority to legalize an illegal action?

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: Because the last... We have a resolution and my understanding in talking to DLNR...

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: ...is that they have a zero-tolerance policy, right? That any structures...and we also have a zero-tolerance policy here.

Mr. Fujimoto: Right.

Ms. Iseri-Carvalho: A resolution that was passed unanimously that stated that if there is an illegal structure, then the structure has to be removed.

Mr. Fujimoto: I'd like to clarify that. My understanding is that that policy, zero-tolerance, was in effect from 2000. They're saying that any structure after 2000 needed to be removed prior to any kind of consideration. However, if the structure was built before 2000, there is a possibility of going for an after-the-fact permit.

Ms. Iseri-Carvalho: That came from Sam Lemmo?

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: And that's your option now? But I guess my question is, didn't we obtain State funds in order to help pay for this or other government funds to help pay for this...

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: ...wall?

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: And so the State is not going to require us to pay them back even if we constructed an illegal wall?

Mr. Fujimoto: Again, I'm not the expert to say that.

Ms. Iseri-Carvalho: Well, have we informed the State?

Mr. Fujimoto: We will find out through the process. As we go through the process, that will be brought out.

Council Chair Furfaro: Councilwoman, may I add something to your train of thought? Donald, just as a lead for you, when we went through the recent audit, I went through the Public Works finance records and you may want to check with Clint Saiki. There's an audit trail of payments, some from the State and some from the federal government under Federal Emergency Management Act. You may want

to use those checks to audit the, you know, the federal payment records because that could lead you to an emergency permit number. I just wanted to offer that as...but I was able to reconcile that amount from an accounting standpoint.

Mr. Fujimoto: And yes, thank you.

Ms. Iseri-Carvalho: So, it appears we've received funding from both the feds and the State.

Mr. Fujimoto: No, not from the federal government.

Ms. Iseri-Carvalho: Oh, just the State.

Council Chair Furfaro: Yeah, it went from fed to State, State to us, if I recall.

Mr. Rapozo: I get one question. Donald, the EA that is being done is for what purpose? What triggered the EA?

Mr. Fujimoto: Okay, the EA is triggered by the SMA permit.

Mr. Rapozo: For?

Mr. Fujimoto: Actually by any work along the coastline, shoreline setback, I understand...the SMA. Because this issue... During the process, again, there was a lot of assumptions and a lot of, you know, things that were brought out during this process. Initially, yes, the assumption was this wall was all okay and it would be a real simple process. However, as we went through the requirement of the shoreline certification, the State DLNR, their sub-boards came back to us and said we cannot certify this until you confirm, you know, this wall, the status of this wall.

Mr. Rapozo: So the SMA permit that triggered the EA was for what?

Mr. Fujimoto: Well because we're actually repairing this so-called revetment along the shoreline.

Mr. Rapozo: You mean the actual seawall itself? The seawall in question?

Mr. Fujimoto: Yes, yes, it's not exempt.

Mr. Rapozo: Fronting Pono Kai?

Mr. Fujimoto: Based on our exemption list, seawalls are not exempt.

Mr. Rapozo: Correct. So, you're trying to get an SMA permit. That triggered the EA? And that is the EA that is being done right now?

Mr. Fujimoto: Yes.

Mr. Rapozo: And that EA was started when?

Mr. Fujimoto: In May, I believe.

Mr. Rapozo: And when do we expect that EA to be completed?

Mr. Fujimoto: We're hoping by the end of this year.

Mr. Rapozo: And that EA will tell us what?

Mr. Fujimoto: It will... My understanding is that this EA will provide all of the information, the legalities, the options, the various options that we have to repair this and what the least impact to the environment and, you know, our community will be.

Mr. Rapozo: And what does that do to the shoreline certifications that were utilized for the other projects along that coast.

Mr. Fujimoto: It does not do anything.

Mr. Rapozo: It doesn't.

Mr. Fujimoto: No.

Mr. Rapozo: It's a valid shoreline certification?

Mr. Fujimoto: Yes. My understanding is that everything that was already pre-approved, you know, they cannot go back and retrofit and say, well, you know, we take it back. That what they approved...The projects relied on their approval to proceed and some of these projects were already done. So, you know, it's almost like saying that even though if they made a mistake, then everything that they did was no longer valid and everybody gotta redo all their stuff. And that questions everything. That questions the whole integrity of the system. If they made a mistake here, oh, you know, how can it be that they cannot make a mistake elsewhere?

Mr. Rapozo: That is my concern because that shoreline certification should have never been granted with an illegal structure in the water. So, I think you hit it right on the head. The integrity of the system is a concern because you would think that in the process, through the EA process that we all rely so much on, that those issues would have been...and that's why I'm concerned that you're saying the EA going expose all of these issues, but I'm concerned because the last EA we did in that area, which was for the bike path, never caught that and that is a concern.

Mr. Fujimoto: Right. And you know, when you look at the things in perspective, the bike path covered over 4 miles of oceanfront. And so the level of scrutiny in any one particular area was not the same as what we're doing now, which is actually looking at trying to repair this particular wall in this particular place. And that's why the flags came up. It's because when you do that level of scrutiny, then they're gonna require, you know, certain things.

Mr. Rapozo: I think the flags came up earlier. It just was ignored. You know, now because we got some issues, we got Pono Kai asking questions now because of the encroachment on their property potentially. So, it's a big issue and I'm not sure what the EA will show, but, you know, just like you said,

man, it just, to me, it affects the integrity of the system of shoreline certification and it's horrible when we're dealing with a precious resource such as the shoreline. Any more questions for Donald?

Council Chair Furfaro: I would suggest that he try and follow up on the audit trail left by the check numbers and the reimbursables.

Mr. Fujimoto: Yes and...

Council Chair Furfaro: It just might be...

Mr. Fujimoto: Okay.

Council Chair Furfaro: ...worth pursuing.

Ms. Iseri-Carvalho: And I guess for me, the question is, you know, we don't... We want to be assured that the State people know, I mean, that we're being honest with them and telling them that the money that they gave for a structure that of course, and I think we gotta sign off of something saying that, you know, this is approved or authorized or in accordance with law. I mean...

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: I think they wouldn't give us money to pursue an, you know, illegal project.

Mr. Fujimoto: Well, again, at that time my understanding is you're right.

Ms. Iseri-Carvalho: But now we have garnered new information.

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: So, I think, you know, again, talking about the integrity of the system, if we made a mistake, then we should let them know. Because I think if they find out by themselves, they're going to say, hey, you guys didn't come tell us, yeah, now you guys better pay us back for that.

Mr. Fujimoto: Yes and I'm not sure if we did make a mistake, so I would like some time to do the audit as Council Chair suggested.

Ms. Iseri-Carvalho: The mistake I'm talking about is not getting permits for building a structure that I believe...There's no other option. Either you have to ha...I mean, you gotta have permits. That's...

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: So, we don't have permits, one, right? I mean, this is simple. We don't have permits, right?

Mr. Fujimoto: Well, not that we've found so far.

Mr. Rapozo: And you're not going to find them, Donald.

Ms. Iseri-Carvalho: When are you going to find it? We've been...We had this thing on the agenda for like two years.

Mr. Fujimoto: Yeah and again it's just based on information that I have that, yes, you're right. And I am qualifying this because six months ago, I said the complete opposite based on information I had at that time. I thought it was okay. And so I'd just like to say that based on the information I have right now, you're right.

Ms. Iseri-Carvalho: Well and I can tell you, Donald, you know, I wouldn't have asked that question if I never know the answer. We had sent over communications, we talking with the personnel. Nobody could come up with the permit. And it was at that time that I told you that you guys didn't have permits and you guys came back and said, you're right we don't have the permits so our other option is that...and then you gave me another excuse, and then you came back and then you said, yeah, we don't have the permits, but now actually, you know, the Governor actually exempted this project.

Mr. Fujimoto: Well that was, that was what I was alluded to. That was what the information that I gave is that if it was permitted, it would have been under that condition.

Ms. Iseri-Carvalho: Okay. So, right now, we're looking at a bridge that was constructed 15 years ago, I mean a wall that was constructed 15 years ago. You have absolutely no evidence to show that this wall is legal.

Mr. Fujimoto: That's right.

Ms. Iseri-Carvalho: Okay, so then I suggest that we let the State know that we don't have the evidence because I can tell you they assume that we do.

Mr. Fujimoto: No, they don't. They...I think they've acknowledged this.

Ms. Iseri-Carvalho: The State that gave us the money to build this wall now says, oh, it's okay. I mean, so they're aware and they're saying it's okay that we had use their money to build an illegal project?

Mr. Fujimoto: Again, the process is to go for an after-the-fact permit to right the wrong because I agree with you. There may have been a wrong that was done, intentionally or unintentionally, I don't know. And I'd like to think it was unintentional, that it was you know, and mistakes happen. So, we're trying to right that. And in the process, if we can, then we do not have to pay the State back.

Ms. Iseri-Carvalho: And I said part of that process of doing it right is to inform the State that we have no evidence that this wall is legal.

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: Because we don't want them to then come back and then we have to pay them back.

Mr. Fujimoto: That's right.

Ms. Iseri-Carvalho: I mean I think if we're up front, which we haven't been...

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: ...on this issue for years that...

Mr. Fujimoto: Yeah and again, it's only being exposed now.

Ms. Iseri-Carvalho: Not now today. It's been like a year and a half when we've been raising this issue about exposing this because we wanted to be honest and that's why we kept raising this issue on and on and on. And we did the research and we did the due diligence and we did talk to all the State officials. So, you know, I mean, it's not something new. But you know this after-the-fact permitting, what does that consist of?

Mr. Fujimoto: My understanding is that, you know, again, we have to do an EA and if the EA finds that there's no significant impact...

Ms. Iseri-Carvalho: Is that part of the permitting process?

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: To do the EA?

Mr. Fujimoto: It is, yes.

Ms. Iseri-Carvalho: So the first step is to do the EA and then you're saying that in this EA they're going to go look whether or not we have permits or not have permits and all of that and whether or not it's legal, illegal or...

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: That's what the EA does?

Mr. Fujimoto: Well, no. It more addresses the impact to the environment and to the community.

Ms. Iseri-Carvalho: No, but, Donald, you just said from this EA we're going to learn whether or not the wall was legal. I mean, they're going to address all these legal questions. That's what you just said earlier.

Mr. Fujimoto: Well, again, I'm not sure to what level... My understanding of the EA is to more address the environmental issues.

Ms. Iseri-Carvalho: But that's not what you just said. So, you're saying that they are going to address the legal issues?

Mr. Fujimoto: Well, I stand corrected.

Ms. Iseri-Carvalho: So who's going to address the legal issues?

Mr. Fujimoto: We're hoping that with the help of the County Attorney, we are going to look at the legal issues.

Ms. Iseri-Carvalho: So, you guys are in consultation with the County Attorney?

Mr. Fujimoto: Yes.

Ms. Iseri-Carvalho: And I guess then put it on executive session so that we know what's going on with respect to these discussions and our liability with the County Attorney.

Mr. Rapozo: I believe that's what Donald wanted initially and...

Ms. Iseri-Carvalho: No, not as far as discussing whether the wall is illegal or legal.

Mr. Rapozo: Right.

Ms. Iseri-Carvalho: I'm talking about whether or not we gotta pay the State back or not and what is our course of action.

Mr. Rapozo: Correct.

Ms. Iseri-Carvalho: Because, again, like I said, it wasn't as if it wasn't raised because we've raised this issue, I believe, for now a year and a half.

Mr. Fujimoto: Yes and you're right. I mean, I'm not the person to tell you whether we need to or not.

Mr. Rapozo: I know the EA is going to basically tell us if we need an EIS. That's the primary focus of the EA, is to determine if an EIS is required, a full-blown EIS. But the EA will also tell us about the impacts. Now I would assume, but then again I shouldn't assume because I just saw the EA for the bike path is not requiring an EIS, some more studies. But the, you would think that this one would because of the impact. This is a major impact to Pono Kai. If you remove that wall... If they require you to remove that wall, that's a huge impact to Pono Kai and the landowners along that coast.

Mr. Fujimoto: Yeah, unfortunately, the State does not look at the negative part of this.

Mr. Rapozo: Exactly and that's my point that, you know, it could be devastating what they tell us. We may have to shore up that shoreline with a massive seawall or embank...or...

Mr. Fujimoto: Or we may not be able to do anything.

Mr. Rapozo: Well, then I think we got some issues. Anyway, I know we gotta...

Council Chair Furfaro: So, Mr. Chairman, your intent is to put that legal question on regarding the potential liability that we might face with the State.

Mr. Rapozo: Correct and we'd, you know, we'd post both because I'm very concerned that we hide some of the issues that should not be in executive session in executive session. So, I want to make sure that if there's anything to be discussed in the open that we do that in the open and we have that opportunity to

go into executive session. So, if we could just, before I entertain the motion...Any more questions for Donald? I know we gotta break for lunch. Any more questions for Donald?

Council Chair Furfaro: I have one. I would also suggest to Donald that if, in fact, you get with Clint, please share the accounting activities of that account with the County Attorney's Office because equally, if the State authorized their reimbursement to the County, then at some point the State must have been satisfied, and if they try to challenge us for that money, we certainly can point out the fact that they reimbursed us. And so I would share the accounting portion of it with the County Attorney as well. Thank you.

Mr. Rapozo: Thank you. Any more questions for Donald? If not, thank you very much, Donald.

There being no further questions, the meeting was called back to order, and proceeded as follows:

Mr. Rapozo: Before I entertain a motion to defer, go ahead,
Mr. Kouchi.

Mr. Kouchi: Mine is quick. I concur with you, Mr. Chair, that especially if the legal issue was going to be about the lack of permit when Dolan Eversole and Chip Fletcher were here months ago, we had already talked about it. So whether it may have more appropriately been in executive session, we've started the discussion in the public. You can't unring the bell and so we're compelled to continue to discuss it in a public forum as it relates to that because it's already happened. You know, they need to show us if there is something else other than that issue that warrants an executive session. Otherwise, I don't see how you could warrant, you know, bringing it in once we've had it publicly. And we've had that discussion again today in the public forum. So, I just wanted to let you know I concur with your position.

Mr. Rapozo: Thank you. Any more comments? I am...we have discussed this, I think Councilmember Iseri-Carvalho said a year-and-a-half, maybe even longer. I think we've had this discussion on and off for at least a couple of years. Everything has been discussed in the open. So, to go back now, like you said, in fact the original request was to have this in executive session. As the Chair I said no, we're going to put it in the open because this issue is one that affects the public. And again, as you stated, you cannot unring the bell. We've already discussed it. I think it's no secret that the wall is illegal. It's...I shouldn't say illegal. It's unpermitted. Whether it's intentional or not, the fact of the matter is that it's a non-permitted structure. We know that for a fact. How that occurred, we don't know. I don't know why that wall was built, but I know that to remove that wall could have some devastating impacts and we'd probably have to go back and replace the wall. So, the illegal seawall is not an issue to be talked about in executive session. It's to be discussed in the open and we'll do that. So, I will ask for a motion to defer this item, as well as request a posting in executive session to discuss the legal issues pertaining to the wall.

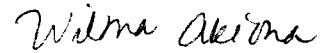
Council Chair Furfaro: Mr. Rosa, I see you raising your hand, but I want to point out, again, it was the Councilmember's choice. He asked for public testimony first. There was no public testimony. He then closed the meeting and that's at his discretion.

Mr. Rapozo: And we gotta break for lunch, so.

Upon motion duly made by Councilmember Kouchi, seconded by Councilmember Iseri-Carvalho, and unanimously carried, PW 2008-2 was deferred with a request for an executive session posting to discuss legal issues pertaining to the Pono Kai seawall.

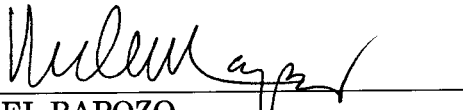
There being no further business, the meeting was adjourned at 12:32 p.m.

Respectfully submitted,



Wilma Akiona
Secretary

APPROVED at the Committee Meeting held on September 3, 2008:



MEL RAPOZO
Chair, Public Works Committee