

## Department of Education Told to Adhere To LUC Conditions of Kihei High School

Deputy attorney general Stuart Fujioka lobbed a sandbag at the members of the Land Use Commission when it met on October 27.

And the commissioners were not pleased.

The LUC is a quasi-judicial body, with procedures governed by a set of strict rules. Much like a judicial proceeding, timetables are set for production of documents and lists of witnesses. Witnesses are subject to cross-examination by other parties to the commission's proceedings. Lawyers for parties involved draft briefs and reply memoranda and are also able to call rebuttal witnesses.

The commission met on that day to decide on a request by Fujioka's client, the state Department of Education, to delete a condition set on the construction of a high school in Kihei, Maui, back in 2013, when the LUC approved a boundary district change that allowed plans for the school to move forward. The condition requires the department to build a grade-separated pedestrian crossing — an underpass or overpass — to allow students to walk safely to the school site, which lies immediately mauka of the busy Pi'ilani Highway.

The DOE seems to have ignored the condition for the next six years. At no time did it request capital-improvement funds from the Legislature to build either a pedestrian bridge across the highway or reconfigure one of two already existing drainage channels under the highway to accommodate walkers.

Finally, in August 2020, the DOE petitioned the commission to have the condition deleted and replaced with language calling for further studies — and a commitment to build the grade-separated crossing only if those studies show it is warranted.

The commission held off action on the petition for most of a year, during which time it was hoped the DOE, Maui County, and the Kihei Community Association could reach some agreement on another way to provide safe access to the school.

Despite several community meetings and engagement with the county Planning Department, the rift between the KCA and Maui County, on the one hand, and the DOE, on the other, only seemed to grow. The DOE gave up on that effort and, in July, asked the commission to issue its decision, hoping this would settle the matter in the DOE's favor.

The LUC scheduled the first hearing in August, but that was delayed when the DOE sought to have LUC chair Jonathan Scheuer disqualified. The hearing was rescheduled to September. At that time, as *Environment Hawai'i* reported last month, the DOE representative, Brenda Lowrey, and Fujioka attempted to portray the DOE as helpless to move

final construction, before a GSPC could be in use.

Tanaka was grilled on what he acknowledged were "misleading" representations to the Maui County Planning Department.

At the September hearing, the DOE's Lowrey stated that the decision to go with an at-grade crossing was made in 2019 by an employee, Jonathan Chun, who has since retired. Yet documents that Maui County submitted to the LUC on October 14 show clearly that the DOE represented to the county in the spring of 2020 that it was committed to building a GSPC.

On March 23, 2020, when the DOE was seeking county approvals of building permits for the school, Tracy Okumura, in the DOE's Facilities Development Branch, informed Planning Director Michele McLean that the DOE "is committed to moving forward with the design of the pedestrian overpass" and that "design of the pedestrian overpass has already been started." A timeline attached to his letter suggested the overpass would be completed by June 2023, after the school had been open a full year.

Given this commitment, Okumura wrote, "the HIDEOE is requesting approval of five building permits... Your early and favorable approval will be greatly appreciated."

McLean responded on April 3, pointing out that "the specific language of the conditions of approval by the state Land Use Commission and the Maui County Council call for the overpass (or underpass) to be constructed, not just designed. ... [T]he overpass (or underpass) must be completed and useable before or at the same time that the school buildings are ready for occupancy.

"If you can provide us with a letter that documents your commitment to constructing the overpass (or underpass) and having it ready for use before or when the buildings are ready for occupancy, then we can conditionally approve the building permits. Please note that we will withhold approval of any certificate of oc-



PHOTO: DEPARTMENT OF EDUCATION

Kihei High School under construction.

forward with the grade-separated pedestrian crossing (GSPC) because the state Department of Transportation would not allow it. The commissioners indicated their displeasure with the DOE but did not have the time that day to complete their deliberations.

The hearing resumed on October 27. By this time, more than 350 members of the public had commented on the DOE's request, with nearly all of them opposed.

Fujioka had two witnesses: Ed Sniffen, head of the Highways Division of the state DOT, and Russell Tanaka, assistant superintendent in the DOE's Office of Facilities and Operations. Sniffen repeated his earlier testimony that the DOT did not veto the idea of a GSPC, and, if the DOE provided the funds for it, the DOT would build it. However, Sniffen added that it would take about three years, from initial design through

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cupancy until the overpass (or underpass) is constructed and useable.”

On April 14, 2020, Okumura provided just that, stating that the DOE “is committed to the design and construction of the pedestrian overpass and will insure that it is ready for use when the high school opens for students.” The permits were issued.

Under questioning from commissioner Dawn Chang, Tanaka acknowledged that the DOE never requested funds to build the grade-separated crossing.

Commissioner Gary Okuda asked him specifically about the assurances given to the county. “We can conclude that the letter dated April 14, 2020, to the Maui Planning Department contains a misleading statement about the intentions of the Department of Education. That’s something we can conclude from these exhibits and Ms. Lowrey’s testimony. Do you agree?”

Tanaka agreed. “One could be misled by some of those” exhibits, he stated.

After Tanaka’s testimony, it was left to Fujioka to defend his client’s position.

“Do you believe the Department of Education should be consistent with its representations made to the Maui County Planning Department?” Okuda asked.

“Generally, yes,” Fujioka responded. “But situations change.”

What evidence has the Department of Education provided that shows the Land Use Commission can trust the representations it has made? Okuda asked. “What in the record shows us that we, as the Land Use Commission, should trust the representations and promises of the Department of Education?”

“You mean, as trust going forward?” Fujioka replied.

“Of course,” Okuda said. “My question is a simple question. What in the record demonstrates evidence that we as the Land Use Commission ... should trust the representations that the Department of Education is making.”

Fujioka: “I’m trying to get clarifications as to what you’re having difficulty believing or accepting at this point.”

Okuda repeated his question a third time.

Fujioka: “I think you should move on. That’s not something I think I can answer.”

Commissioner Dawn Chang challenged Fujioka on his response to the

county’s statement describing its reasons for opposing the DOE’s request. In it, Fujioka stated that the DOE “has reservations about the feasibility of the GSPC option [of an underpass] suggested at page 4 of the county’s filing. The suggestion requires the involvement of HDOT, which steadfastly opposes construction of a GSPC in the flood zone of Waipuulani Gulch. The county’s proposal does not address the grounds for HDOT’s disapproval of an underpass...”

After quoting that back to Fujioka, Chang reminded Fujioka that in his testimony earlier that day, Sniffen “didn’t steadfastly oppose this,” stating instead that if the DOE provided the funds, it could be done.

Fujioka responded by stating the DOE’s position “may have been inartfully formulated.”

Commissioner Lee Ohigashi asked Fujioka about the extent to which the DOE had made earnest efforts to plan for and design a GSPC.

Fujioka stated that there was “some design work initiated” in 2019, after the LUC confirmed the GSPC condition in response to a petition for a declaratory ruling from the county. But, Fujioka added, he didn’t have any documentation of that. “I don’t know if I could get ahold of anything,” he said. “We did not present documentation that design work for the overpass had commenced... It’s just not something that I looked for. Perhaps I should have.”

Maui County deputy corporation counsel Michael Hopper then described the reasons for the county’s opposition to the DOE’s motion. The DOE’s proposed language, he noted, “while allowing for additional study, puts off the requirement [to build a grade-separated crossing] and places it entirely in the hands of the petitioner rather than making it mandatory at some point in time. The way the county reads the Department of Education’s position, further study needs to be done but there’s no assurance that it’ll be built.”

Okuda, a lawyer, pointed out that the legal term to describe the situation is, “Things are screwed up.”

Given the situation, Hopper said, it would be difficult for the county to issue certificates of occupancy for the school buildings if there was no grade-separated crossing.

Chang posed the question to Hopper: “Wouldn’t you agree, if the school doesn’t open, that’s not an action from the Land Use Commission or the county? That’s really the action – or failure to act – of the petitioner.”

“Not having the school [open] would be terrible, but I think I would agree with you,” he said.

Ohigashi concurred that the county’s position “is not severe, not onerous. I think it’s reasonable. I don’t believe they ever intended to build any grade-separated pedestrian crossing. The evidence, the letters the county has provided really show that they appear to be trying to skirt the issue, trying to be able to build the school, place everybody in this particular position that we are in.” He went on to thank the county for filing its supplemental statement of position, “bringing to light the evidence that you attached.”

The sole party to the proceedings that supported the DOE request was the state Office of Planning and Sustainable Development. Alison Kato, the deputy attorney general representing the OPSD, was left to try to explain that to the commissioners.

Commissioner Nancy Cabral wanted to know how the OSPD came to its position. “Have you folks, as state agencies, met to discuss this matter? Did you have a group meeting? Or did you form that opinion on the basis of your research?”

Kato stated that OSPD positions “are largely based on reliance on state agencies and their expertise in their areas. . . . In this case, we did meet with the Department of Education and the Department of Transportation, and had discussions.”

When the commission reconvened after lunch, Fujioka informed them that, during the break, “Facilities [the DOE’s Office of Facilities and Operations] were able to pull up some preliminary sketches of GSPCs that were generated in the March 2019 time frame.” He then proceeded to display four renderings of what an overpass and underpass might look like.

Commission vice-chair Dan Giovanni, filling in for Scheuer, allowed the drawings to be entered into the evidentiary record.

The lawyers on the commission protested.

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## BOARD TALK

## Guidance for Water Leases May Face Legal Challenges, Legislative Tweaks

“We have to find a way forward somehow. Sometimes that way forward is very messy,” said state Board of Land and Natural Resources chair Suzanne Case as the board met on October 22.

At that meeting, the board narrowly rejected a contested case hearing request from Department of Hawaiian Home Lands director William Aila — himself a former Department of Land and Natu-

ral Resources director and Land Board chair — on a proposal from the DLNR’s Land Division on how appraisers should determine the value of water leases.

A number of individuals and entities that have been diverting water under revocable permits for years, or even decades, have fulfilled their environmental review requirements and are ready to secure long-term water leases.

In September, the Land Board ap-

proved the final environmental impact statement Alexander & Baldwin and East Maui Irrigation Company had prepared for the long-term water license they have been seeking for two decades. Other water permittees seeking long-term leases include the Kaua’i Island Utility Cooperative, the Hawai’i Electric Light Co., Kaua’i resident Jeffrey Linder, and farmers and ranchers in the Ka’u district of Hawai’i island.

While the Legislature expected their leases to be issued years ago, the DLNR has never before issued such a lease and is struggling to meet the requirements of the current legal framework.

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“I will lodge an objection to the introduction of these exhibits,” Chang said. “The petitioner had full opportunity to put on their case. These should have been shared with the public and the county. This is far past the eleventh hour. And the petitioners are bringing this to our attention only now? My objection is to this very last-minute, cavalier attitude of the petitioner. You should have made your case. It disappoints me that we are now taking this evidence.”

Ohigashi agreed, noting that the DOE had represented to the county in April 2020 that it was earnestly working on the design of the GSPC and even gave the county a time frame for its completion. “I don’t even know how this is relevant,” he said. “Great, you have nice drawings now.”

Ohigashi went on to make a motion to deny the DOE’s request. “I tend not to believe what the DOE has testified to. It’s clear on the record they made no attempt to even try to meet these conditions” requiring the GSPC. The county’s position was correct, he said. “If we deny this, it’s incumbent on the Department of Education to work on a solution with the county. Bring forth something that protects the public as well as satisfying the goal of opening the school.”

Cabral seconded the motion. “I’m gravely concerned about the process, or lack of process, lack of effort on the part of the Department of Education, and what appear to be their efforts to just do what they want to and not do what they have known since the beginning what they were supposed to do. ... Public safety

is paramount. The safety of children is even greater.”

Chang observed that the DOE “has not engaged in good faith with the community... The LUC delayed action [on the DOE petition] to give the petitioner the opportunity to engage with the community. Now they say they’ve set up a website and monthly meetings will be held. That is inadequate. ... The DOE has not shown good faith.”

Okuda joined in with the comments of the other commissioners, but added: “In our system of democracy, evidence matters, truth matters, and those of us in government, we owe it to the community to live up to our words. When we say something, we gotta stand behind what we say, and if we’re going to change what we’ve told other agencies, we have to make it clear with admissible evidence why there’s a change. We have a duty to keep and encourage trust in government. If we don’t respect the fact that we have to be straight and honest with the community and others, that faith just erodes away.”

Giovanni was the last to weigh in: “It’s a shame that this high school that’s almost built will not be opened on time with the grade-separated pedestrian crossing. But to me, the fault for that lies with the Department of Education. Not the Department of Transportation. And not the county of Maui, who have tried to find resolution, and not with the Land Use Commission. Therefore I will support the motion for denial.”

When the commissioners were polled, the final vote was unanimous.

What comes next?

The commissioners suggested that if

the county and DOE could work out an agreement on pedestrian access that was not a grade-separated crossing but still provided safety for students, the LUC could move expeditiously to amend the requirement for a GSPC.

Earlier in the hearing, Fujioka was asked what the DOE would do if the motion was denied.

The Department of Education, he said, would then have to decide “whether to just go ahead and do a grade separated crossing now, or do we ask the court to review the ruling, does nothing happen and construction stop? A number of alternatives would need to be discussed.”

Meanwhile, the DOE, as promised, has put up a website with information about the new Kihei High School. In a section describing “pedestrian access,” the DOT states that a “key issue is the means by which students walk to and from the school and cross the highway.”

“A grade-separated pedestrian crossing — such as an overpass or underpass — is a state Land Use Commission condition that the department is requesting being [sic] amended to allow the school to open without it. The department had interpreted the condition as required when warranted by a technical study. The DOE is committed to providing an updated traffic/grade separated pedestrian crossing warrant study.”

The DOE “is seeking to allow the school to open with a roundabout and on-grade crossing, with a commitment for future studies for providing a grade-separated pedestrian crossing, starting with a study one year after the school opens.” — *Patricia Tummons*