

WINDWARD PLANNING COMMISSION
COUNTY OF HAWAII

HEARING TRANSCRIPT
NOVEMBER 6, 2009

A regularly advertised hearing on the PLANNING DIRECTOR'S PROPOSAL TO AMEND CHAPTER 25, HAWAII COUNTY CODE, BY REQUIRING A USE PERMIT FOR TELECOMMUNICATION ANTENNAS AND TOWERS was called to order at 12:12 p.m. in the County of Hawaii, Aupuni Center Conference Room, 101 Pauahi Street, Hilo, Hawai'i, with Chairman Rell Woodward presiding.

PRESENT: Rell Woodward
Takashi Domingo
Andrew Iwashita
Zendo Kern
Shelly Ogata
Wallace Ishibashi

Brandon Gonzalez, Deputy Corporation Counsel
BJ Leithead Todd, Planning Director
Norman Hayashi, Planning Program Manager
Jeff Darrow, Staff Planner
Maija Cottle, Staff Planner

And 2 people from the public in attendance.

INITIATOR: PLANNING DIRECTOR

Amendment to Chapter 25, Hawaii County Code 1983 (2005 Edition, as amended) by requiring a Use Permit for telecommunication antennas and towers situated within the Residential and Agricultural (RA), Family Agricultural (FA), Agricultural (A) and Intensive Agricultural (IA) zoned districts.

WOODWARD: Next item is Agenda Item No. 4, a Planning Director initiated amendment to Chapter 25 of the Hawaii County Code relating to telecommunication antennas and towers. Maija.

COTTLE: Thank you, Mr. Chairman. The Planning Director is initiating this amendment to the Zoning Code because the State law was recently changed to allow telecommunication antennas and towers as a permitted use within the State Land Use Agricultural District. And in order to afford the public an opportunity, surrounding property owners, to provide input on proposed antennas and towers on applications that come before us the Director is recommending that a Use Permit be required. So this is just a change to the Zoning Code to provide for that.

And I also just want to add that we overlooked another portion of the Zoning Code. There are actually about four sections that talk about telecommunication towers. And so we would want to amend one more section along with this, this bill that's transmitted to Council. This is Section 25-2-61, No. 11. And currently it reads that a use permit is required for telecommunication antennas and towers in the RS, RD, R and RCX zoned districts, and then we would just want to add the RA, the SA, the Ag, A, and IA districts to that. Are there any questions?

WOODWARD: Madam Director.

LEITHEAD TODD: This is basically as a result of some State legislation which occurred which the prior Planning Director did not think impacted our County Code. Upon reviewing it and checking with the other counties and looking at the language of the State legislation and also conferring with Corporation Counsel in fact it did impact and basically legalized telecommunications towers in State Ag lands without getting any kind of a Use Permit from the County. And while, you know, we have not officially taken that position, this is meant to take care of that in the event that somebody were to contest and say that they could just build it without a permit. This would require at least a use permit; and then that gives us the opportunity to review, as well as the neighboring property owners an opportunity to come in and list any objections that they may have. Otherwise, without this legislation there is a possibility that a telecommunications provider could go ahead, build something and say that they didn't need a special permit; and then it's a strong likelihood that they would prevail in court.

WOODWARD: Thank you. Commissioner Domingo?

DOMINGO: Thank you, Mr. Chairman. Since we're addressing telecommunications antennas, and I think this item has come up for the sole purpose as emphasized by the Planning Director, can we address the issue of residential areas?

LEITHEAD TODD: Well, that's why we're adding all of this in, is basically there are different types of residential uses that weren't necessarily included when we looked at that and we looked at the fact that Family Ag and, you know, some of these areas are more like residential, but we expanded it. And we're basically trying to say that anywhere you want to put it in you've got to come in and get some kind of a use permit from us.

With the exception of the first set, I'm sorry, okay, in Resort and Commercial areas it's permitted. Okay? It's going to need a Use Permit in the Residential and Agricultural and Rural areas.

WOODWARD: Commissioner Iwashita.

DOMINGO: Mr. Chairman?

WOODWARD: Oh, yes.

DOMINGO: Can you just omit having telecommunication antennas in Residential properties?

LEITHEAD TODD: The concern over that is because of Federal legislation that a blanket denial of telecommunications antennas in Residential areas might be viewed as running afoul of Federal legislation protecting them. The other thing is what you do sometimes in Residential areas is that you can require that it be put on an existing building, you know, as opposed to a free-standing, also are requirements that the distance from, you know, neighboring properties. Those are the kinds of things you can do in Use. The difficulty in providing towers is because you have to have a certain radius of service. And so sometimes the only place that you can put it may be in a Residential area in order to have the service. But by requiring a Use Permit it means that the Planning Commission has the opportunity to review it and determine whether it's appropriate.

WOODWARD: Commissioner Iwashita.

IWASHITA: Thank you, Mr. Chair. I just want to get a clarification that this change in our County Code is not going to, I don't know, is there any conflict of law issue with the State law?

LEITHEAD TODD: This, the State law now permits telecommunications towers in State Land Use Ag. But what the other Counties have is regulations within their own County Ag and other areas that say you have to come in and have a use permit. And what occurred at the State Legislature -. This is a bill that kind of slipped under the radar as far as the County of Hawaii was concerned. I think possibly because the former director did not think it was going to impact our lands. And the testimony was primarily from City and County, and I believe it was maybe Maui County; and they had no objection. But the reason they had no objection is they were already requiring Use Permits under their County Zoning. So even though the State passed the legislation it didn't impact their counties. We were the only one that said that, our current language said that they were permitted; and we were only requiring the special use permits because they weren't a permitted use in the State Land Use Ag.

WOODWARD: All right, thank you. We do have one person signed up to testify from the public. If there are no further questions for staff, Danette Mettler. Good morning, actually good afternoon.

METTLER: Good afternoon.

WOODWARD: If you'll raise your right hand. Do you swear or affirm to tell the truth today before the Windward Planning Commission?

METTLER: I do.

WOODWARD: Very good. If you'll give us your name and address and then you may begin your testimony.

METTLER: My name is Danette Mettler. My address is 76-6357 Kololia Street, Kailua-Kona, Hawaii. I represent Verizon Wireless as an outside consultant and I have been

doing this type of work, been doing planning for telecommunications since 1995. I've reviewed this Code change and I've also sent it out to all the other consultants that I could think of and asked for their opinion. They wanted to be here today but with this short notice, I received the notice of this being on the agenda on Tuesday, they couldn't make it and wanted me to ask if there was any way where we could continue this on to your next meeting to give them an opportunity to come. If that's not possible, I did get, take notes from the people I spoke to and I'll go over that with you.

I don't think any of the carriers have any issue to providing some sort of public notice for a new tower. That just seems to be common sense. The Code includes, it says an antennae or tower shall be permitted provided that its use is not hazardous or dangerous to surrounding area and it has a use permit.

The County and the Commission has typically tried to encourage co-location on the different towers. We don't want to see towers all over the island. So the recommendation would be to maybe allow antennas in these areas as long as they are attached to an existing structure. We felt, when I read that Act 171, I thought that that's what it was saying. I thought it was saying that it allowed antennas on any existing structure. But if you wanted a new tower you'd still have to come in for a permit; and that made sense to me. So if you're trying to promote co-location on an existing structure, if you could make more of an easier path for the carriers to take that route, and trying to make that work as opposed to erecting new towers, it just makes sense to me that you would want to do that. Also, the way this appears to be written, if a tower has a special permit on it that was granted and antennas were added, if you were to want to add additional antennas to it, you would have to come back and get a use permit. And I don't know if you all want to go back and rehash towers that are already existing just to bring it into conformance.

WOODWARD: If I might just address that. We have in the past, when we've given use permits for antennas, stated you can have up to "x" number of antennas. And the only thing that would require another permit is if you're talking about a taller tower or something of that nature, rather than putting more, actual antennas on it. That's just my understanding. Is that correct?

LEITHEAD TODD: Yeah, and I actually have no objection to an amendment that would allow co-location on an existing tower to be a permitted use so long as there was, you know, it was included in the plan approval, you know, so that we could be assured that the tower could support the additional weight or the additional structure.

METTLER: That's right. There still is that. But I'm not talking about just towers. I'm talking about any structure. I'm talking about a building, or windmill, anything. So -.

IWASHITA: Can I, Mr. Chair?

WOODWARD: Yes, Commissioner Iwashita.

IWASHITA: I guess the way I read the amendment is that a use permit, something that this body would have to approve, is only required in those designated Residential and Ag areas.

In the Commercial and those other areas, basically a plan is submitted to the Department and the Director reviews and signs off on it. It's not a, it's a real administrative process. And so I guess my reading of this is that's how it's done, you know, for the antennas that we see down in Keaukaha on the buildings and so forth. Those are basically just signed off administratively. We never saw anything on that. And I guess to me that's a reasonable way to go about it. I guess right now that's how it works, right?

METTLER: That's right.

IWASHITA: And so it works okay, right, that way?

METTLER: That's right.

IWASHITA: Yeah. So we're not changing that. All we're saying is that in Ag because the State law now allows antennas on State Ag property, right, that we needed to add -. Unlike Maui, I guess my impression is Maui and Oahu had already a permitting process for Ag and we don't have one for ours. Ours was done by a special permit, special use permit. So all we're doing is conforming to what Oahu and Maui has. So as long as Oahu and Maui is working okay for you guys, basically all we're doing is changing it to conform to that.

WOODWARD: It may be worthwhile to consider adding a sentence such as "Co-location of an antenna on existing tower or structure is exempt from the use permit," if that's acceptable for the Director.

LEITHEAD TODD: Well, I was going to suggest some language that perhaps at the end of this paragraph that says "Where there is an existing telecommunication tower, co-location of additional antenna or equipment will be permitted provided the Director has issued plan approval for such use."

METTLER: So would that just be for towers or any existing structure?

LEITHEAD-TODD: Well, it's intended for co-location as opposed to an existing structure.

METTLER: It says "tower" though, mine says -.

LEITHEAD-TODD: Yeah, but it's an existing telecommunications tower for co-location. And the co-location means that there's something there already, not that you're introducing a telecommunications antenna on something that doesn't currently have something.

METTLER: Is there a definition somewhere about what a tower means in -?

LEITHEAD-TODD: There is in the early part of the Zoning Code.

METTLER: So that would need to be amended as well, right?

IWASHITA: Mr. -?

WOODWARD: Okay, Commissioner Iwashita.

IWASHITA: Without looking at the definition of antenna or tower that first sentence of 25-4-12(a) basically, to me, any co-use, co-location use of a tower or any structure, that's an antenna, right? You're adding antennas for different providers, right? So it seems to me that we don't need any more language. I mean if there's a co-location that's going to be put in, that has to come for departmental approval, and that's all, you know, plan approval. And that's how it's done now, isn't it?

METTLER: Or maybe even an addition of a definition of co-location.

IWASHITA: No. What I'm saying is we don't have to define co-location. Because whenever you want to, if you have an existing structure, an existing tower that already has one provider's antennas on it, if another provider wants to come in and put antennas on it, he submits his plans to the Department, I'm assuming that this is how it is right now, he submits the plans to the Department, and the Department, the Director signs off plan approval, and it's done. That's how it's done now, right?

METTLER: I'm not clear about that. So just, you talk about co-location because there are already antennas there and you've got a second carrier. For this example, you go and a farmer has a barn that you could put antennas on the roof top, and there are no other antennas there, it's an existing structure, it's permitted, it's legal. Could you under these circumstances be able to put an antenna on that barn -?

IWASHITA: No, that's in an Ag -.

METTLER: And, and be able to get a plan approval, or would you have to go through a use permit?

IWASHITA: I see. Okay, I see what you're saying. So what she's asking for is that Ag, the Ag place, without the need of, if they're not asking for a tower, just putting antennas on an Ag building, can that be done by Departmental approval?

LEITHEAD TODD: I think you're asking for more than that, aren't you?

METTLER: No -.

LEITHEAD TODD: Cause you're asking like in other areas if there was some, just not the Ag but if in other areas -?

METTLER: Well, in all the areas, too.

LEITHEAD TODD: In, like Multiple Family if you wanted to put an antenna on top of the-?

METTLER: That's right.

LEITHEAD TODD: Apartment building or something like that -?

METTLER: Right, right, everything that was in here -.

LEITHEAD TODD: You would just be able to do it.

METTLER: The V, CN, or, wait a minute, permitted in Residential Ag and Family Ag, right, the RS, RD, RM, RCX, RA, FA, A and IA.

LEITHEAD-TODD: Perhaps in the interest of expediting this, if the, if the Commission wanted to approve this with a recommendation that the Planning Department come up with a proposed amendment to allow for co-location of antennas on existing structures, then we could come up with some language that we would then take to the County Council.

IWASHITA: Okay. Because what I see is that, I guess the end result of what's being suggested is that only if a separate tower is being requested to be built, then it comes to this body for a use permit. If the antennas are going to be attached to an existing Ag building or Residential building they would like to just follow the Planning Department Director's approval process; and that seems reasonable. Yeah, so I, Mr. Chair, I would move that the -.

DOMINGO: Just -.

WOODWARD: I think Commissioner Domingo had a comment.

IWASHITA: Oh, sorry.

DOMINGO: Just one question. You know, Mr. Iwashita, you said if there's an Ag building and if they want to come and put an antenna, they can just do it without any permit application -?

IWASHITA: Right.

DOMINGO: Approval?

IWASHITA: So if my friend up at Sunrise Ridge wanted to make a deal with a telecommunication company to attach an antenna to their million dollar house that they could do so with basically Department's approval and not have to go through a use permit process with the Commission.

DOMINGO: I can't accept that, no way.

METTLER: But you still have your -. You know, plan approval makes sure that you comply with setbacks and height requirements; and it does talk, it does review the aesthetics of the application. And I think -.

LEITHEAD TODD: Perhaps we could move -.

DOMINGO: Those are all basics, those are all basics. What we're not -.

METTLER: Or perhaps maybe we could -.

LEITHEAD TODD: Perhaps we could move this along based on the existing language and then let the County Council and -.

IWASHITA: Yeah, the real power -.

LEITHEAD TODD: You know, discuss it. Because I'm sure that they will discuss this particular, because there's at least one Council Member I think who sued on the telecommunications tower next door. So I'm sure that it will be weighed into significantly.

METTLER: Well, I just thought that maybe we could do this beforehand. I would just urge you to consider even if you wanted to remove Residential out of those and just leave in -. So it would be similar to what we believe that the Act 171 was doing before we got the opinion. So in the Agricultural property, which is the majority of what we have here, on Ag land be able to permit antennas if they're on an existing legal structure. I think that, I understand where the concern is for Residential, keeping in mind too that we would have to come back to you for any time we were going to add an antenna on a tower that has a special permit, because you're now requiring a use permit. So every time we want to add an antenna we're going to have to come to you to get a use permit; and I don't think that that's really your intention.

WOODWARD: Well, Commissioner Kern.

KERN: Yeah, I think as far as having an existing building on a piece of Ag land and to be able to allow an antenna to go on top of that without a permit I disagree with. I think if there's an existing building with an antenna already on it, and it has already been approved to do a co-location on top of something that's already existing, it would be acceptable. To me with just saying that if there's a structure there and we can put it on top of that without a tower, it's just a loophole. I mean, let's build a barn and put an antenna on top of it instead of building a tower.

METTLER: Well, the way they had worded it is that there was a sentence that in no way does this, can you do that. If the barn is built for the purpose of putting an antenna on it then that's not, that should be covered. If we can say in no way does this, is this, is there an intention to permit any structure for the sole purpose of doing the, or not even for the sole purpose -. But there's got to be some way to word it.

KERN: Yeah. And what's the problem with getting a special permit on -?

METTLER: Special use permit?

KERN: Yeah.

METTLER: Well, it's really not that big of a deal except for the fact that what we've got now is we've got several towers already existing that have special permits on it. They've already come before the Commission, they already have approval. And now we want to go out and we want to change an antenna or add some antennas to it and we have to come in and get a reapproval on the use permit.

OGATA: It's still an existing tower.

KERN: Yeah, I agree that it's already existing, that there should be some flexibility there. But -. I'm done, thank you.

METTLER: Okay.

WOODWARD: Madam Director.

LEITHEAD TODD: Well, the language I had proposed earlier was that, "Where there is an existing telecommunication tower, co-location of additional antenna or equipment will be permitted provided the Director has issued plan approval for such use."

WOODWARD: Sounds good to me. Is everybody happy with that one? I don't know if you're happy with it but that's all you're getting, I'm afraid.

IWASHITA: Well, Mr. Chair?

WOODWARD: Yes, go ahead.

IWASHITA: I'm prepared to make a motion.

WOODWARD: All right.

METTLER: Does tower mean then structure? That's what I'm, I was just trying -.

LEITHEAD TODD: Yeah, it means -.

METTLER: It does mean structure?

LEITHEAD TODD: A telecommunication tower.

METTLER: A tower could be anything. It could be a structure of any kind.

LEITHEAD TODD: Yeah, we can always ask for more later. There are things that -.

METTLER: Yeah, no, no, that's fine. I just want a clarification because it says tower. In my mind a tower is a self-supporting structure -.

LEITHEAD TODD: Yes.

METTLER: For the sole purpose of antennas. And if there's an apartment building that has already got a permit -.

LEITHEAD TODD: Basically this is on the floor and it's basically designed to try and take care of co-location on an existing tower, something that has already been approved for, you know, putting telecommunications equipment. You know, if you want to argue additional language I think that the appropriate venue is going to be the County Council; and I recommend coming in with a proposed change -.

METTLER: Okay.

LEITHEAD TODD: That's written out.

WOODWARD: Commissioner Iwashita.

IWASHITA: Yes. As to I guess Item 4, yeah, 4, amendment to Chapter 25, Hawaii County -.

METTLER: Excuse me, can I say one more thing before you start? I had one other issue that I wanted to bring up.

WOODWARD: Okay, briefly.

METTLER: So sorry. In here it says that the telecommunication antenna or tower shall be permitted in whatever districts, provided that the antenna, tower and its use are not hazardous or dangerous to surrounding area and director -. I know that it says that it is, that this is currently in the Code where it says "and its use is not hazardous or dangerous." I just wonder if having the word "antenna" in there, and the Federal Communication Act recognizes the impact of "hazard" from antennas, and I'm wondering -.

WOODWARD: Right, this does not circumvent the Telecommunications Act of 1996.

METTLER: Okay. It appears to, I just wanted to bring it up.

WOODWARD: No, it can't because the Telecommunications Act specifically says no state or local jurisdiction can have any, to circumvent -.

LEITHEAD: Yeah, this mainly goes to whether the structure is built to a certain hurricane resistance standard more than anything else.

METTLER: Okay. But it does say antenna on it. I just wanted to bring it up.

LEITHEAD TODD: Well, if the antenna is going to fall off at an 80-mile per hour wind then it's hazardous.

METTLER: Okay.

WOODWARD: Okay.

METTLER: Sorry.

WOODWARD: Commissioner Iwashita?

IWASHITA: Yes.

WOODWARD: Where were we? As to Item No. 4, Amendment to Chapter 25, Hawaii County Code 1983 (2005 Edition, as amended) by requiring a Use Permit for telecommunication antennas and towers situated within the Residential and Agricultural (RA), Family Agricultural (FA), Agricultural (A) and Intensive Agricultural (IA) zoned districts, I move that the proposed amendment be forwarded to the County Council with a favorable recommendation, including the additional language proposed by the Director on the record.

KERN: Second.

WOODWARD: All right, very good. It has been moved and seconded. Any discussion? All right, seeing none, Maija.

COTTLE: Thank you, Mr. Chairman. I'd like to ask, is that also including the language that I discussed in the very beginning of -?

WOODWARD: Yes.

COTTLE: Okay, thank you. Commissioner Iwashita?

IWASHITA: Yes.

COTTLE: Commissioner Kern?

KERN: Aye.

COTTLE: Commissioner Domingo?

DOMINGO: Aye.

COTTLE: I'm sorry, could you repeat that.

DOMINGO: Aye.

COTTLE: Commissioner Ishibashi?

ISHIBASHI: Aye.

COTTLE: Commissioner Ogata?

OGATA: Aye.

COTTLE: And Mr. Chairman?

WOODWARD: Aye.

COTTLE: Okay, motion was approved six-zero.

WOODWARD: Okay.

METTLER: Thank you.

WOODWARD: Thank you.

The discussion ended at 12:40 p.m.

Respectfully submitted,

Sharon M. Nomura, Secretary
Windward Planning Commission