

LAND USE COMMISSION

STATE OF HAWAII

HEARING AND ACTION)
)
A87-617 DW 'Aina Le'a)
(Bridge 'Aina Le'a))
_____)

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for a Public Hearing
& Action meeting at Ali'i Room #3, Waikoloa Beach
Marriott Resort, 69-275 Waikoloa Beach Drive,
Waikoloa, Hawaii, commencing at 2:15 p.m on Thursday,
January 20, 2011 pursuant to Notice.

REPORTED BY: HOLLY M. HACKETT, CSR #130, RPR
Certified Shorthand Reporter

1 A P P E A R A N C E S

2 COMMISSIONERS:

KYLE CHOCK

3 THOMAS CONTRADES

VLADIMIR DEVENS (Chairman)

4 RONALD HELLER

CHARLES JENCKS

5 LISA M. JUDGE

DUANE KANUHA

6 NORMAND LEZY

7

EXECUTIVE OFFICER: ORLANDO DAVIDSON

8 ACTING CHIEF CLERK: RILEY HAKODA

STAFF PLANNERS: SCOTT DERRICKSON

9 DEPUTY ATTORNEY GENERAL: DIANE ERICKSON, ESQ.

10 AUDIO TECHNICIAN: WALTER MENCHING

11

12 Docket No. A87-617 DW 'Aina Le'a (Bridge 'Aina Le'a)

13 For the Co-Petitioners ALAN OKAMOTO, ESQ.

BRUCE VOSS, ESQ.

14

15 For the County:

WILLIAM BRILHANTE, ESQ.

Deputy Corporation Counsel

16

BOBBY JEAN LEITHEAD-TODD

17 For the State:

BRYAN YEE, ESQ.

Deputy Attorney General

18

MARY LOU KOBAYASHI

Acting Director,

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Office of Planning

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1 CHAIRMAN DEVENS: This meeting is called
2 to order. Good afternoon to you all. This is a
3 meeting of the Land Use Commission. We are here today
4 in Kona, Hawai'i. Today is January 20th, 2011.

5 We'll get started with the preliminary
6 matters on the agenda while we await the arrival of
7 one of our fellow Commissioners. At this time first
8 item of business is the adoption of the minutes. Are
9 there any corrections or changes to the minutes that
10 we have before us? Hearing none, is there a motion to
11 adopt?

12 COMMISSIONER CONTRADES: Move to
13 approve.

14 COMMISSIONER HELLER: Second.

15 CHAIRMAN DEVENS: Motion's been
16 seconded. Any discussion? Hearing none, all those in
17 favor say aye.

18 COMMISSION VOTING: Aye.

19 CHAIRMAN DEVENS: Unanimous. It's
20 adopted. Next item is the update on our meeting
21 schedule. Mr. Davidson, you want to update us.

22 MR. DAVIDSON: Thank you, Chair. You
23 have the tentative meeting schedule before you. Let
24 me mention just one item. For February 2nd we are
25 adding a status report from Waimanalo Gulch Landfill

1 on account of the recent spill. So that will be at
2 1:30 on February 2nd. We'll try to finish Tropic Land
3 in the morning that day. Then, of course,
4 February 3rd is the site visit and hearing on Molokai
5 IAL. As always, any questions or conflicts contact
6 either Riley or myself. Thank you.

7 CHAIRMAN DEVENS: Thank you, Dan. The
8 next item on the agenda is the DW 'Aina Le'a, Bridge
9 'Aina Le'a matter. This is a hearing and action
10 meeting regarding alpha 87-617 DW 'Aina Le'a
11 Development, LLC, Bridge 'Aina Le'a regarding the
12 following: Pending Order to Show Cause, Bridge 'Aina
13 Le'a's Motion regarding Order to Show Cause filed
14 November 12, 2010; the Office of Planning's Motion for
15 Order to Show Cause filed December 23, 2010.

16 The fourth item on the agenda it was DW
17 'Aina Le'a's Motion to Amend Conditions 1, 5 and 7
18 that was filed on August 31st, 2010. That particular
19 motion will be deferred from this agenda.

20 The parties will note their presence for
21 the record please starting with Petitioners.

22 MR. VOSS: Good afternoon, Chairman and
23 members of the Commission Bruce Voss on behalf of
24 Co-Petitioner Bridge 'Aina Le'a, LLC.

25 MR. OKAMOTO: Good morning, Mr.

1 Chairman, members of the Commission. Alan Okamoto
2 attorney for DW Development LLC.

3 MR. BRILHANTE: Good afternoon,
4 Mr. Chair. William Brilhante, deputy corporation
5 counsel county of Hawai'i, along with Ms. Bobby Jean
6 Leithead-Todd, planning director county of Hawai'i.

7 MR. YEE: Good afternoon. Deputy
8 Attorney General Bryan Yee on behalf of the Office of
9 Planning. With me is Mary Lou Kobayashi acting
10 director of the Office of Planning.

11 CHAIRMAN DEVENS: Good afternoon to you
12 all. Let me update the record as follows: On
13 November 22, 2010 the Commission received written
14 correspondence from Bob Stern regarding the proposed
15 Project.

16 On December 23, 2010 the Commission
17 received OP's Motion for Order to Show Cause, and
18 attached Exhibits A through C.

19 On December 28, 2010 the Commission
20 mailed to the parties a Notice of Hearing on January
21 20, 2011 regarding the above referred items on the
22 agenda today.

23 On December 30, 2010 the Commission
24 received Hawai'i County's progress report on the
25 proposed Project.

1 On January 6, 2010 the Commission
2 received OP's opposition to Bridge 'Aina Le'a's Motion
3 Regarding Order to Show Cause. Let me correct that
4 date.

5 It should be "on January 6, 2011 the
6 Commission received OP's opposition to Bridge 'Aina
7 Le'a, LLC's Motion regarding Order to Show Cause."

8 On January 7, 2011 the Commission
9 received DW 'Aina Le'a Development, LLC's Supplemental
10 Memorandum in Support of Motion to Amend Conditions 1,
11 5 and 7; a Memorandum in Opposition to Office of
12 Planning's Motion for Order to Show Cause; and a
13 memorandum on the Pending Order to Show Cause.

14 On the same day the Commission received
15 Bridge 'Aina Le'a, LLC's Memorandum in Opposition to
16 Office of Planning's Motion for Order to Show Cause
17 filed December 23rd, 2010.

18 On January 13, 2011 the Commission
19 received the following: Bridge 'Aina Le'a, LLC's
20 Reply to Office of Planning's Opposition to Bridge
21 'Aina Le'a, LLC's Motion Regarding Order to Show Cause
22 and the Office of Planning's Reply to Petitioner's
23 Memorandum in Opposition to Office of Planning's
24 Motion for Order to Show Cause, Office of Planning's
25 Memorandum in Response to DW 'Aina Le'a Development,

1 LLC's Memorandum on the Pending Order to Show Cause;
2 and the Office of Planning's Response to DW 'Aina Le'a
3 Development, LLC's Supplemental Memorandum in Support
4 of Motion to Amend Conditions 1, 5 and 7; and the
5 attached Affidavit of Robert J. Wessels.

6 In addition today we received the
7 following written testimony from Representative Cindy
8 Evans, Michael Fisher, Steven Cradler, and Adam
9 Atwood.

10 Our procedure for today will be as
11 follows: "We will first take public testimony. For
12 those of you who wish to give testimony in this matter
13 we have a sign-up sheet. We'll call you in the order
14 that you've signed up. We will then swear you in and
15 you can provide testimony on the record.

16 If you have testified before we ask that
17 you limit your testimony to new testimony because the
18 testimony you've given before is already made part of
19 the record.

20 After the public testimony we will hear
21 arguments on the following matters: The pending Order
22 to Show Cause, Bridge 'Aina Le'a's motion regarding
23 Order to Show Cause filed on November 12, 2010, and
24 the Office of Planning's Motion for Order to Show
25 Cause filed December 23rd, 2010.

1 As I stated earlier DW 'Aina Le'a's
2 Motion to Amend Conditions will be deferred from this
3 agenda. Since the issues are related each party will
4 be given a maximum of 30 minutes to present oral
5 argument on the matters. The Petitioners and the
6 Office of Planning may reserve a portion of this time
7 for rebuttal.

8 One thing we do ask is that -- we have
9 received all the pleadings, they're very extensive,
10 they're very well argued -- we ask you to highlight
11 the arguments and there would be no need to repeat
12 what's already contained in the pleadings.

13 At the conclusion of the oral argument
14 and after questions from the Commissioners and answers
15 thereto the Commission will conduct its deliberations.

16 Are there any questions from the parties
17 regarding our procedures for today? Mr. Okamoto.

18 MR. OKAMOTO: Mr. Chairman, I must note
19 that the argument I prepared today was going to
20 address everything including the Motion to Amend.
21 Because I had not been heard before on the Motion to
22 Amend because that was out of order at the November
23 meeting, I basically devoted the bulk of the argument
24 to the Motion to Amend.

25 I will do the best I can today but I

1 would have to note that my -- that the argument that I
2 outlined basically has to be redone. And I'll do the
3 best I can in the time available. And I do not
4 contest the Commission's right to defer items on the
5 agenda. It's just where I am right now.

6 CHAIRMAN DEVENS: Understood. Thank you
7 very much. Other than that any other questions from
8 the parties regarding today's procedure? Hearing none
9 we'll start with the public testimony. We are going
10 to limit the testimony to 3 minutes for those who have
11 not testified before. For those who have testified
12 before there will be a 2-minute limit. Dan, can you
13 call our first witness, please.

14 MR. DAVIDSON: We have 20 signed-up
15 witnesses. First, Robert Meierdiereks followed by
16 Jessica Arruda followed by Nichole Heath.

17 CHAIRMAN DEVENS: Mr. Meierdiereks, if I
18 can swear you in please.

19 ROBERT MEIERDIEREKS
20 being first duly sworn to tell the truth, was examined
21 and testified as follows:

22 THE WITNESS: I do.

23 CHAIRMAN DEVENS: If you would please
24 state your name and address.

25 THE WITNESS: My name's Robert

1 Meierdiereks. I live at, reside at 83-5397C Mamalahoa
2 Highway, Captain Cook, Hawai'i. And I have testified
3 before, but I'm testifying just as an update to let
4 you know from the construction industry -- I've been
5 in the construction industry 40 years here in West
6 Hawai'i -- and the construction industry is still the
7 highest unemployed in the state in West Hawai'i. And
8 this Project will give it some boost if it goes
9 through and it it hires the local trades people and
10 pays area standard wages. Thank you.

11 CHAIRMAN DEVENS: Thank you for your
12 testimony. Let me see if the parties have any
13 questions? Parties? No questions. Commissioners?
14 None. Thank you very much. Next witness.

15 MR. DAVIDSON: Jessica Arruda.

16 CHAIRMAN DEVENS: Ms. Arruda, if I can
17 swear you in, please.

18 JESSICA ARRUDA,
19 being first duly sworn to tell the truth, was examined
20 and testified as follows:

21 THE WITNESS: Yes.

22 CHAIRMAN DEVENS: If you could state
23 your name and address, please.

24 THE WITNESS: My name is Jessica Arruda.
25 My address is 47 Hanohano Street, Hilo, Hawai'i 96720.

1 Aloha and good afternoon. My name's Jessica again.
2 And I'd like to thank you for allowing me this time to
3 speak in favor of the Project.

4 I lived here all my life. I lived here
5 on the Big Island practically my life and I've had a
6 chance to experience the growth of our communities
7 throughout the islands. I have also witnessed delays
8 of promises from state and county government and other
9 developments needed to enrich our families' lives.

10 In regards to the 'Aina Le'a Project I
11 believe it will be a critical asset in supporting the
12 development of family life and family services. And
13 in doing so will be a great addition to the South
14 Kohala Coast region.

15 I commend this Commission for getting
16 the land in the hands of a developer who cares and is
17 working to meet our needs. According to the newspaper
18 this developer did not meet your delivery deadline of
19 385 affordable homes by November 2010. I applaud the
20 developer for attempting to follow your criteria.

21 However, it is my understanding that the
22 environmental impact study approval was so close to
23 this November 2010 deadline that no developer could
24 have met that criteria.

25 At this time I would like to focus on

1 what the developer has done. First of all, the
2 developer has started the Project in a very big way.
3 Second they have included many of our residents in the
4 planning and building of this community and housing.
5 These are both positive moves at this time on this
6 island and in this economy.

7 So I've come to you today to request
8 that you and this developer DW 'Aina Le'a move forward
9 and find an agreeable deadline for the completion of
10 the Villages of 'Aina Le'a which will enhance the
11 family lives of so many of our residents. Thank you.

12 CHAIRMAN DEVENS: Thank you. Parties
13 have any questions for this witness? Hearing none,
14 Commissioners? None. Thank you very much.

15 MR. DAVIDSON: Nichole Heath followed by
16 Shawn O. Kelly and then Alethea Lai.

17 CHAIRMAN DEVENS: May I swear you in.

18 NICHOLE HEATH
19 being first duly sworn to tell the truth, was examined
20 and testified as follows:

21 THE WITNESS: Yes.

22 CHAIRMAN DEVENS: Your name and address.

23 THE WITNESS: Nichole Heath. My address
24 is P. O. Box 189 Kailua-Kona, Hawai'i 96740. Good
25 afternoon, Commissioners. I just wanted to really ask

1 for your approval on the request that DW move forward.
2 I've lived here on the Big Island for many years. I
3 have my children here, my family. And I own a
4 business here as well.

5 And knowing the Project and following
6 the Project what they have tried to do and implement
7 educating the community to a better lifestyle, has
8 been just enormous for all of us that are involved and
9 tryin' to get into buying these units.

10 I have a daughter that's currently
11 working on getting qualified to buy these when they're
12 available. So, you know, I've been following
13 everything that's been going on. And I just really
14 feel that this is the best developer that's come out
15 to the Big Island. He's not by any means a
16 fly-by-night developer.

17 He's taken into consideration how he can
18 educate all of us that are meaning to getting into
19 these homes and to have a long-term lifestyle that we
20 appreciate and that we need.

21 It fits our communities' needs and we
22 need it here on the Big Island. And everything that
23 he has done has included everybody here on the Big
24 Island tremendously.

25 I have a letter also from a vendor that

1 he contributed their economy crisis that they were
2 going through over the holidays. And he's done it to
3 numerous vendors throughout the island by bringing
4 then businesses from our contacts that we have
5 locally. And they said here that, "These purchases
6 that DW has made that significantly boosted the
7 revenue for their businesses.

8 We appreciate their business that 'Aina
9 Le'a has provided. And we look forward to a long-term
10 continued business relationship with them for years to
11 come."

12 So it's not just about selling the units
13 and bringing this development. But they are
14 contributing to our economic crisis here on the Big
15 Island. So I'm just asking you please, please be in
16 favor of letting them go forward. Thank you.

17 CHAIRMAN DEVENS: Thank you. Parties
18 have any questions for this witness? Hearing none,
19 Commissioners? None. Thank you very much.

20 MR. DAVIDSON: Shawn O'Kelly.

21 THE WITNESS: All right.

22 SHAWN O'KELLY
23 being first duly sworn to tell the truth, was examined
24 and testified as follows:

25 THE WITNESS: I do.

1 CHAIRMAN DEVENS: Please state your name
2 and address.

3 THE WITNESS: My name is Shawn O'Kelly
4 1629 Ruth Place, Honolulu, Hawai'i 96816.

5 CHAIRMAN DEVENS: Go ahead.

6 THE WITNESS: I'm here today to discuss
7 the opportunities I have to work with a developer
8 specifically with regards to affordable housing and
9 financing programs and those types of opportunities to
10 maximize the opportunity for low to moderate income
11 folks to own property here at 'Aina Le'a specifically.

12 We've worked together now for about 14
13 months specifically with downpayment assistance
14 programs, developing additional programs that would be
15 available and using the resources at Bank of America
16 home loans to actually go out there and bring
17 additional expertise and opportunity to development of
18 this Project.

19 Specifically some of those we worked on,
20 the opportunity to work on phases as they apply to the
21 rules that have been provided with regards to the
22 owner occupants restriction for 120 days.

23 We've been able to come up with an idea
24 to provide multiple-phases, 27 to be exact, that will
25 provide the 120-day window each time an actual phase

1 is rolled out to the public that will ensure the
2 opportunity for local folks in particular to have that
3 opportunity throughout not just the initial rollout
4 period of 120 days, but through that period over a
5 great deal of time.

6 The phases, in addition, will allow us
7 to more specifically sell the product sooner rather
8 than later when we have to allow absorption to catch
9 up with the Project to meet the highest loan-to-value
10 financing possibilities. Thank you.

11 CHAIRMAN DEVENS: Thank you. Parties
12 have any questions for the witness? None.
13 Commissioners? None. Thank you, sir, for your
14 testimony.

15 MR. DAVIDSON: Alethea Lai followed by
16 Brooke Derby.

17 ALETHEA LAI,
18 being first duly sworn to tell the truth, was examined
19 and testified as follows:

20 THE WITNESS: I do.

21 CHAIRMAN DEVENS: If you would please
22 state your name and address.

23 THE WITNESS: Alethea Lai. I live at
24 66-1455 B Ala Kahakai, Kamuela, Hawai'i 96743. Thank
25 you. I've been a resident of the Puako area since

1 1998. And I've seen lots of developments occur over
2 the last 12 years. I have a master's in geography and
3 I have a keen interest in sustainable development.

4 I believe this development is trying to
5 adopt a sustainable model that supports the triple
6 bottom line which is people, profits and the planet.

7 I really believe this is the direction
8 that all future development on the Big Island needs to
9 be working towards. So I support this Project in its
10 efforts to do right by the community, for the
11 environment and for the positive effects it's going to
12 have on our economy. Thank you.

13 CHAIRMAN DEVENS: Any questions for this
14 witness? None from the parties, none from the
15 Commissioners, thank you very much.

16 MR. DAVIDSON: Brooke Derby followed by
17 Irene Britton.

18 THE WITNESS: Hi. My name's Brooke
19 Derby.

20 BROOKE DERBY,
21 being first duly sworn to tell the truth, was examined
22 and testified as follows:

23 THE WITNESS: Yes.

24 CHAIRMAN DEVENS: Tell us your address,
25 please.

1 THE WITNESS: I reside at 55-420 Hoesa
2 Road, Honolulu, Hawaii 96719.

3 CHAIRMAN DEVENS: Go ahead.

4 THE WITNESS: Having lived and worked in
5 property management and real estate on the Kohala
6 Coast for the last 7 and-a-half years, I feel there's
7 a great need for more environmentally friendly and
8 affordable housing. I'm very interested in the
9 sustainable community. And I think this development
10 would be a positive addition to the Kohala Coast.

11 And this Project is heading in the
12 direction of the future. I support this Project and
13 its efforts to do right for our island community and I
14 ask for your support as well. Thank you.

15 CHAIRMAN DEVENS: Any questions for this
16 witness? There are none from the parties or the
17 Commission. Thank you very much.

18 MR. DAVIDSON: Irene Britton followed by
19 Anika Glass.

20 IRENE BRITTON,
21 being first duly sworn to tell the truth, was examined
22 and testified as follows:

23 THE WITNESS: Yes. My name is Irene
24 Britton, P. O. Box 38462 Waikoloa 96738. I'm listed
25 as future buyer for 'Aina Le'a townhome. I'm

1 currently working as a property manager at Mauna Kea
2 Resort. And I've lived on the Big Island since 1990.
3 It's always been my dream to own a piece of property
4 near the resort. And the 'Aina Le'a development has
5 afforded me to do so.

6 I've seen resort land develop over a
7 long time and I have heard promises that we will have
8 a community in a resort and for the Hawaiian
9 residents.

10 I was concerned when I read that DW
11 'Aina Le'a had purchased the Villages of 'Aina Le'a
12 land. I paid attention to the environmental impact
13 report stating that the DW planned to build the
14 property.

15 We have heard promises before. However,
16 DW 'Aina Le'a Development have initially delivered
17 with a major start of their planned community to our
18 market. Whether it was the threat of the Commission
19 or the DW states their commitment, in either case
20 we're getting a family community in the resort area
21 with parks and recreation services that will be a
22 benefit to many Kohala Coast area residents and
23 surrounding communities like Waikoloa.

24 I'm excited to have the opportunity to
25 live there having preregistered and seen the units

1 firsthand. Give the DW the time and continue to plan
2 and build our community. Thank you.

3 CHAIRMAN DEVENS: Thank you. Any
4 questions for this witness? There are none, thank
5 you.

6 MR. DAVIDSON: Anika Glass followed by
7 Dan Fosso.

8 ANIKA GLASS
9 being first duly sworn to tell the truth, was examined
10 and testified as follows:

11 THE WITNESS: I do.

12 CHAIRMAN DEVENS: Please state your name
13 and address.

14 THE WITNESS: My name is Anika Glass. I
15 live in Waikoloa. And I'm representing myself. I am
16 against extension of this permit to keep continuing
17 with the development unless over today and tomorrow
18 very grave concerns are addressed in this session that
19 I have.

20 I would like to say that for Waikoloa
21 this Project is an eyesore and has been from the
22 beginning, and has not gotten better, and chose really
23 limited progress towards becoming better. There's no
24 road or gate or anything.

25 I believe that there are

1 misrepresentations of the development made by
2 advertisements in our local papers that imply that
3 certain features and things of the development are
4 already built. And that all of those features will be
5 available to the residents of these current low-cost
6 housing units that have been developed.

7 I doubt that they have access to 17
8 swimming pools, for example. I believe that they have
9 not advertised what the cost of the units will be or
10 what the financing requirements will be so that a
11 person could understand if they could afford to buy a
12 unit here.

13 I do know that there's many homes in
14 Waikoloa, single-family homes, that are under
15 \$300,000, well under. And that there are many homes
16 under \$200,000, some of them condominiums that are as
17 low as \$125,000.

18 I also believe they're misrepresenting
19 Hawai'i and the nature of our real estate laws to
20 their Asian investors, speculative investors, small
21 investors. And that selling a portion of a single
22 condominium is very odd, to say you own a little
23 portion, a specific portion like that particular land.

24 I do -- (pausing) I haven't seen them
25 make visible progress in months. I'm sure something

1 could be going on up there. As far as I know they
2 have no sewers, electricity, occupancy permits, roads,
3 parking, things that would make it possible for them
4 to be granted occupancy permits. Those things are all
5 readily available already in Waikoloa.

6 MR. DAVIDSON: 30 seconds.

7 THE WITNESS: Thank you. I would like
8 to say that I have nothing against the idea of this
9 Project, but I don't believe that this Project at this
10 point in time can be successful. Thank you.

11 CHAIRMAN DEVENS: Any questions for this
12 witness? Hearing none, thank you very much.

13 MR. DAVIDSON: Dan Fosso followed by
14 Frank snow.

15 DAN FOSSO
16 being first duly sworn to tell the truth, was examined
17 and testified as follows:

18 THE WITNESS: Yes, I do.

19 CHAIRMAN DEVENS: Your name and address
20 please.

21 THE WITNESS: Dan Fosso, 77-206 Kapukapu
22 Street in Kona, 96740. I have resided here about
23 eight years in June. I chose this island after
24 growing up on an island in Washington State. I love
25 this island. West Hawai'i is my home. And I want

1 this island to be developed carefully and in a way
2 that makes this island the best it can be.

3 I'm in favor of this Project because I
4 have followed this Project since the time I moved here
5 because the Project intrigued me as a complete planned
6 community with the village concept that would allow
7 Kohala residents to live, work, shop in their own
8 beautiful community and in a location that makes sense
9 for development.

10 As opposed to a lot of the piecemeal
11 projects that brings little or no community benefit or
12 infrastructure, this Project has stood out as one that
13 is a good long-term Project for the area. It has
14 planned parks, schools, community center, its own
15 sewer treatment plant, roads with lots of varied areas
16 for different types of residents as well.

17 Additionally, the planned commercial
18 area is a great enhancement with the theaters and
19 stores that are planned that would encourage complete
20 contained area where Kohala residents can get services
21 without having to drive all the way to Kona or Waimea
22 for such services.

23 I've seen village-type developments
24 before and the hidden benefits is less road and
25 highway miles, less accidents, less fuel used, gas,

1 less time wasted for those who live in such areas.

2 It appears that 'Aina Le'a is uniquely
3 suitable for more pedestrian and bike traffic as well
4 in this area, again lessening the use of automobiles.

5 Now we find ourselves in tough economic
6 times. And yet unlike the previous 'Aina Le'a
7 principals who did nothing but make drawings and get
8 entitlements on paper, these developers are moving
9 forward with vertical construction despite odds and
10 the time when this island needs good jobs for locals
11 as well as homes to be used by people who work in the
12 nearby hotel resorts and other places in South Kohala.

13 I'm respectfully requesting that this
14 Commission give them the chance to go forward with
15 this Project. The county and this Commission have
16 already directly evaluated the area as a sensible
17 location for this village development under the
18 long-term plan.

19 Again, this is just not another condo
20 project. Not only is it designated as affordable
21 community for local residents, it also brings lots of
22 community benefits over the long term to make Kohala a
23 better place to live and work without depending on
24 long drives to Kona and Waimea.

25 Reverting it to agriculture would help

1 no one at this point. And this developer has
2 proceeded in good faith to comply with deadlines that
3 were imposed before they ever inherited the Project.
4 They should not be punished for the slowness and lack
5 of any construction by the previous developer. This
6 Project is a good fit for the community over the long
7 term. I'd ask that you please dismiss the Show Cause
8 and give these developers a chance to finish the
9 Project. Thank you.

10 CHAIRMAN DEVENS: Any questions for this
11 witness? There are none, thank you.

12 MR. DAVIDSON: Frank Snow followed by
13 Rob Shallenberger.

14 FRANK SNOW
15 being first duly sworn to tell the truth, was examined
16 and testified as follows:

17 THE WITNESS: I do.

18 CHAIRMAN DEVENS: Your name and address.

19 THE WITNESS: My name's Frank Snow. I
20 live at 64 Puako Beach Drive, Kamuela, Hawai'i. I've
21 been a full-time resident of South Kohala the last 31
22 years. I've been living in Puako full time for the
23 last 11. I would like to advocate strongly to the
24 Land Use Commission that they deny DW 'Aina Le'a's
25 Motion to Extend the Construction Deadline.

1 just not a good fit. The previous testimony, the
2 woman who lives in Waikoloa, if you drive from
3 Waikoloa Village and then drive down to the Queen K
4 you see something that's a bit of an aberration.

5 And that visual reality coupled with
6 everything that I've read in the media and trying to
7 be a good neighbor and understanding the needs of all
8 of Hawai'i Island, it just does not strike me as being
9 something that should be allowed to be carried forward
10 over and above the fact that the Commission has
11 suggested deadlines that have not been met.

12 So it just doesn't seem to be something
13 we need to move forward on. You guys have -- the
14 Commission, you have the power to do something about
15 it. I think most of the viewplanes are still
16 available for all to enjoy. It's a tremendous
17 coastline. It's got tremendous resources for all of
18 us. And if we stop it now I think it's going to be
19 the very, very best way for the island.

20 CHAIRMAN DEVENS: Any other questions
21 for this witness? There are none, thank you, sir.

22 THE WITNESS: Thank you.

23 MR. DAVIDSON: Rob Shallenberger
24 followed by George Fry.

25 CHAIRMAN DEVENS: Let me swear you in.

1 ROB SHALLENBERGER

2 being first duly sworn to tell the truth, was examined
3 and testified as follows:

4 THE WITNESS: Yes, I do.

5 CHAIRMAN DEVENS: Your name and address?

6 THE WITNESS: My name is Rob
7 Shallenberger. I currently live in Kamuela but I have
8 a home at Puako, at 123 Puako Beach Drive.

9 CHAIRMAN DEVENS: Go ahead, sir.

10 THE WITNESS: I really have two issues
11 to raise here. The first relates to the process. I
12 strongly support the planning office's motion that the
13 LUC should direct the developer here to show cause as
14 to why this shouldn't revert to the ag designation.

15 I think that the failure to do so sets a
16 bad precedent as does the establishment of conditions
17 that aren't enforced. And I encourage the Commission
18 to work in that direction. I think that allowing the
19 Project to go through under those circumstances makes
20 as mockery of the process.

21 On a separate but also important track,
22 I think we have seen evidence that this developer does
23 not fully understand the kinds of impacts associated
24 with this Project. I think the Draft EIS was woefully
25 deficient in documenting or proposing to mitigate

1 impacts that will surely occur, not the least of which
2 is to add another 5 to 6,000 people going to the
3 coastal areas of Kohala that are already overused and
4 abused.

5 Other impacts that weren't adequately
6 addressed in that EIS include the competition for
7 domestic water sources, a serious concern that we have
8 seen during these drought periods, impacts on the
9 Puako transfer station.

10 And perhaps most importantly a serious
11 consideration of viable Project alternatives including
12 a substantially reduced housing density. Those are my
13 comments.

14 CHAIRMAN DEVENS: Any questions for this
15 witness? There are none. Thank you, sir.

16 MR. DAVIDSON: George Fry followed by
17 Gretchen Lambeth.

18 GEORGE FRY,
19 being first duly sworn to tell the truth, was examined
20 and testified as follows:

21 THE WITNESS: I do.

22 CHAIRMAN DEVENS: Your name and address,
23 please.

24 THE WITNESS: George Fry. I live at 137
25 Puako Beach Drive, Kamuela 96743. I would just like

1 to state to the Commission that I feel you do have a
2 responsibility to sustain the guidelines you presented
3 that haven't been met by the developer. I find that a
4 serious offense by the developer. They've agreed or
5 they were party to these guidelines and they haven't
6 been met.

7 There are a few things about the EIS
8 that I also found deficient. I think the impact on
9 the Puako community will be great by this development
10 and those were not addressed in their EIS.

11 I think the problem of water is another
12 issue that has to be addressed that hasn't been. But
13 primarily I think -- I'm wondering why we're having a
14 meeting when you set pretty firm guidelines, and it's
15 very clear to everybody that reads them.

16 If you don't meet them I think you
17 shouldn't go forward. So that's my position. Thanks
18 very much for letting me speak.

19 CHAIRMAN DEVENS: Any questions for this
20 witness? There are none. Thank you, sir.

21 MR. DAVIDSON: Gretchen Lambeth followed
22 by Byron Harris.

23 CHAIRMAN DEVENS: Let me swear you in.

24 GRETCHEN LAMBETH,
25 being first duly sworn to tell the truth, was examined

1 and testified as follows:

2 THE WITNESS: I do.

3 CHAIRMAN DEVENS: Your name and address.

4 THE WITNESS: Gretchen Lambeth, P. O.

5 Box 5076 Kailua-Kona, Hawai'i, 96745. I'm a 20-year
6 resident, and thank you for allowing me to testify. I
7 have three things that I'd like to highlight.

8 One. Everywhere in the United States is
9 trying to find money to start roads and other projects
10 to jump-start their construction communities to get
11 the economics going. We're one of the few places
12 that's trying to turn the money away. That doesn't
13 make a whole lot of sense to me.

14 We have people out of work. This
15 Project wants to pay people to work. And because they
16 have missed a couple of deadlines, which I agree are
17 important but not the whole crux of the Project.

18 We're trying to put people back to work
19 in Kona. And this Commission is considering turning
20 that free money away in order to meet some deadlines.

21 The other thing is the Hawai'i County
22 General Plan, as a previous testifier pointed out, is
23 for this area to be developed the way it is already
24 approved and permitted and planned for. So nothing
25 they're doing is out of line with what the land is

1 scheduled to be used for. The only thing we're
2 talking about here is deadlines.

3 The other thing is the county plan also
4 talks about short commutes for highway issues, for
5 other future development of roads that we won't have
6 to build if we build our workforce housing close to
7 our work.

8 It also encourages stronger families
9 because parents are available to go to baseball games
10 and other things that their families can do if they
11 live and work in the same geographical area. So it's
12 in line with all of what we want for West Hawai'i.

13 The other thing is the use -- how do you
14 say this -- the appropriateness of the Project is not
15 in question. But at this point in time the only thing
16 is the completion dates. And I keep coming back to
17 the idea of how crazy is that.

18 I've been in development off and on for
19 20 years. We never make our construction contract
20 dates, almost never. I dare anybody that in this room
21 that works in construction to think they actually make
22 the dates.

23 So having to come back to the Land Use
24 Commission to move what it is probably an artificial
25 date to start with, is kind of crazy and not a good

1 use of your time.

2 I understand it's been in the law. But
3 we need to expand and allow this developer to move
4 forward so that we can take his money and put it to
5 work in West Hawai'i.

6 If you guys don't approve this, the
7 people that lose are the citizens of West Hawai'i.
8 The county of Hawai'i loses if you don't approve this
9 Project. I ask you to please reconsider and approve
10 this Project today. Thank you.

11 CHAIRMAN DEVENS: Thank you. Any
12 questions for this witness? Hearing none, thank you,
13 ma'am.

14 MR. DAVIDSON: Byron Harris followed by
15 Philip Harris.

16 BYRON HARRIS
17 being first duly sworn to tell the truth, was examined
18 and testified as follows:

19 THE WITNESS: I do.

20 CHAIRMAN DEVENS: Your name and address
21 please for the record.

22 THE WITNESS: My name is Byron Harris,
23 73-4356 Waipahi Street, Kailua-Kona, Hawai'i 96740.

24 My family's lived in Kona for about 20
25 years. We're in with the construction industry. In

1 fact we're also assisting the developer in integrating
2 a pretty ambitious solar project on the property. In
3 fact, when it's all said and done it will be the
4 largest PV farm, solar farm in the state, especially
5 in areas where we have the highest electricity rates
6 in the country.

7 So in conjunction with that it brings so
8 many benefits to the community as far as offsetting
9 dependency on using some fossil fuels as well as
10 spurring the economy, keeping some jobs.

11 One other point I wanted to make was the
12 fact that I've heard some concerns about the look of
13 the Project, having it up on the side of a hill. I
14 think any project in mid-stream is never attractive.
15 But once it's complete is when you finally get an
16 opportunity to see what it will offer and what it will
17 be able to look like at the end of the day.

18 Now, of course I would hope that the
19 Commission grants the extension for the developer
20 because if you don't like the look of the development
21 Project now, if it's denied you're going to be looking
22 at this Project in its current state for many years to
23 come. And that's all I have to share. Thank you.

24 CHAIRMAN DEVENS: Any questions for this
25 witness? I had one question. And I may have misheard

1 you. Did you say there was a solar farm that was
2 being put in?

3 THE WITNESS: Yes. There's going to be
4 about 2.4 megawatts of solar on the carports on the
5 Project.

6 CHAIRMAN DEVENS: In the petitioned
7 area?

8 THE WITNESS: Correct.

9 CHAIRMAN DEVENS: Thank you.

10 MR. DAVIDSON: Philip Harris followed by
11 Brent Butcher.

12 PHILIP HARRIS,
13 being first duly sworn to tell the truth, was examined
14 and testified as follows:

15 THE WITNESS: Yes, I do.

16 CHAIRMAN DEVENS: Your name and address,
17 please.

18 THE WITNESS: My name is Philip Harris.
19 I reside at least P. O. Box -- at least in Captain
20 Cook. But my mailing address is P. O. Box 709,
21 Captain Cook, Hawai'i 96704. Obviously I echo the
22 things that my son has said. But I want to point out
23 the fact that this Project is just not a residential
24 Project, that there are a variety of things that will
25 be in play with this Project such as a possibility of

1 a research hospital.

2 We have parks and recreation facilities
3 that will take place. There's a school I believe that
4 is scheduled to be built on this Project. Along with
5 that, before DW 'Aina Le'a took possession of the land
6 we represented -- or I represented a church group that
7 had an escrow, a piece of property for a future
8 church. Because of the growth of the area we
9 anticipate that there will be a number of people that
10 belong to the church group that I belong to. So we
11 had that piece of property in escrow.

12 And because of DW 'Aina Le'a taking over
13 it fell out of escrow. So we're hopeful that at some
14 point that there still will be an opportunity to enter
15 into another arrangement where there will be a church
16 available for our community in Waikoloa.

17 So you have commercial, you have
18 possible hospital, you have schools and then you have
19 the opportunity for possible churches in the
20 community. Thank you.

21 CHAIRMAN DEVENS: Thank you, sir. Any
22 questions for the witness? Hearing none, thank you.

23 MR. DAVIDSON: Brent Butcher followed by
24 Robert Jack.

25 BRENT BUTCHER

1 being first duly sworn to tell the truth, was examined
2 and testified as follows:

3 THE WITNESS: Yes.

4 CHAIRMAN DEVENS: Name and address.

5 THE WITNESS: My name's Brent Butcher.
6 I live at 69-555 Waikoloa Beach Road, Waikoloa,
7 Hawai'i 96738. I've been involved in the construction
8 and development business for over 40 years all over
9 the United States. I live here now. I choose to live
10 here now.

11 I find it astounding that the developer
12 is doing as much as he does, and has the drive he
13 continues to have given these very unusual economic
14 times that we're in. A lot of developers, I believe,
15 would just roll up the carpet and close the door and
16 leave.

17 But DW 'Aina Le'a has chosen to stay
18 here, provide a Project that's necessary for the
19 public, necessary for the families here, that's green
20 for the environment, and that will be a major impact
21 on the economy.

22 I believe that the Land Use Commission
23 should proactively support the reasonable development
24 of this Project in a manner that has a timetable that
25 will match the absorption that is available on the

1 island. And I thank you for allowing me to speak on
2 this. Thank you.

3 CHAIRMAN DEVENS: Thank you, sir. Any
4 questions for this witness? There are none. Thank
5 you.

6 MR. DAVIDSON: Robert Jack followed by
7 George Robertson.

8 ROBERT JACK,
9 being first duly sworn to tell the truth, was examined
10 and testified as follows:

11 THE WITNESS: I do.

12 CHAIRMAN DEVENS: Your name and address.

13 THE WITNESS: Name's Robert Jack, 146
14 Puako Beach Drive, Kamuela, 96743. And I just want to
15 say that the history of this Project is very long
16 going back to the days of the Signal Oil Company.

17 And there have been a lot of promises
18 made that this is going to be a green Project; that
19 we're going to have solar energy, we're going to have
20 a research hospital, we're going to have affordable
21 housing.

22 Affordable housing is something this
23 island desperately needs. But 'Aina Le'a has not
24 shown that they can build attractive affordable
25 housing in this location.

1 I think my main feeling is that 'Aina
2 Le'a has made commitments. And if they are allowed to
3 get away with not following through on their
4 commitments, following through on their bond because
5 they're not interested or because they're
6 underfinanced, then this approval should not go
7 forward. And I support you in saying no to any
8 extension given to this developer. Thank you.

9 CHAIRMAN DEVENS: Any questions for this
10 witness? There are none. Thank you.

11 MR. DAVIDSON: George Robertson followed
12 by Peter Hacksteade.

13 GEORGE ROBERTSON,
14 being first duly sworn to tell the truth, was examined
15 and testified as follows:

16 THE WITNESS: I do.

17 CHAIRMAN DEVENS: Name and address.

18 THE WITNESS: George Robertson, P. O.
19 Box 44490, Kamuela, Hawai'i 96743. I've testified
20 before. I'll try to keep this short. First of all, I
21 want to introduce some minutes from the South Kohala
22 action committee, planning committee which refutes a
23 statement made by Mr. Wessels.

24 The action meeting for the South Kohala
25 Planning Plan, South Kohala Community Development,

1 does not support the 'Aina Le'a Project. Mr. Wessels,
2 I believe, made a statement that he received support
3 from the action committee. It's not true. That's in
4 the minutes. I'll deliver those to you.

5 CHAIRMAN DEVENS: Do you want to go
6 back -- you want to make that part of the record?

7 THE WITNESS: Sure.

8 CHAIRMAN DEVENS: When you're done you
9 give a copy to Mr. Hakoda. We'll make that a part of
10 the record.

11 THE WITNESS: Thank you. Just a matter
12 of history. As some of you may recall this Project
13 originated with Nansay with a thousand affordable
14 units being required as part of the development. Of
15 course Nansay disappeared from the scene.

16 The property was essentially in
17 bankruptcy and acquired by Bridge 'Aina Le'a and then
18 DW 'Aina Le'a. I believe it was Bridge that came
19 forward and asked to modify the number of affordable
20 units from a thousand to 385.

21 And you allowed that. But you made a
22 very, very strict condition. And that was that they
23 were to complete 385 units by November 17th, 2010 and
24 Certificates of Occupancy would have to be available,
25 and everything that went along with that, sewer, the

1 intersection at Mamalahoa Highway.

2 MR. DAVIDSON: 30 seconds, sir.

3 THE WITNESS: So that condition was not
4 met. And that's really what we're here about. So the
5 Puako Community Association is extremely concerned
6 about, as I said before, your credibility and
7 integrity and the meaning of the conditions that you
8 place on developers. This was an absolute deadline in
9 return for reduction of units. So what do we get back
10 if they don't make it? Thank you.

11 CHAIRMAN DEVENS: Any questions for this
12 witness? There are none. Thank you.

13 MR. DAVIDSON: The final two signed up
14 witnesses: Peter Hacksteade and John Hoover.

15 PETER HACKSTEADE,
16 being first duly sworn to tell the truth, was examined
17 and testified as follows:

18 THE WITNESS: Yes.

19 CHAIRMAN DEVENS: Your name and address
20 please.

21 THE WITNESS: My name is Peter
22 Hacksteade and I live at 69-1955 Puako Beach Drive.
23 I'm also the president of the Puako Community
24 Association. I think if we just basically look at the
25 facts, they have not met any of their deadlines. If

1 we see what's going on here, they just keep on asking
2 for extension after extension after extension. From
3 what I hear here and what I read in the paper sounds
4 like two different things. Everything's great with
5 what's going on when it's really not.

6 This Christmas we had probably one of
7 our biggest rejuvenation of people visiting the area,
8 vacationing at Christmastime. And the Puako area was
9 inundated with a lot of people from all over just
10 because of the big surf and everything like. But that
11 Puako area, if that were to be with 300 more homes up
12 there on a fulltime basis where people would be living
13 there fulltime, I don't think the area would be able
14 to handle just that amount of people.

15 And down at Poniau where everybody goes
16 to surf, the great surf spot down there, there's no
17 bathrooms down there. It's things like this they
18 haven't looked at in the environmental impact study
19 they did, the effects it will have on Puako.

20 Beach 69, you know, that's a crowded
21 spot where everybody comes down. Everybody comes up
22 from Kona to go up there and go surf. And so it just
23 can't handle a Project like this, this size without
24 bathrooms, things like that, the things that we need,
25 you know.

1 I think seeing's they missed all of
2 these deadlines on these things it's a moot point. I
3 think you should definitely stick to your guns on this
4 and make them up with -- promises which all the
5 promises have been broken in the past, it's hard to
6 trust. I understand. Thank you.

7 CHAIRMAN DEVENS: Questions for this
8 witness? Hearing none, thank you.

9 MR. DAVIDSON: John Hoover.

10 JOHN HOOVER,
11 being first duly sworn to tell the truth, was examined
12 and testified as follows:

13 THE WITNESS: I do.

14 CHAIRMAN DEVENS: Please state your name
15 and address.

16 THE WITNESS: My name is John Hoover. I
17 live at 67-3761 Manahua Places in the Village of
18 Waikoloa. I have lived in Waikoloa since 1989 and
19 served as the pastor of the Hokuloa Church in Puako.

20 I've been around since there was Signal
21 Puako, and there was Nansay and there were plans
22 passed around of a development with walking paths and
23 community centers and even churches and recreational
24 facilities, integrated housing programs with different
25 sizes of homes at different prices throughout the

1 development.

2 What we have now it seems like is a
3 reduced quality program. It seems like we have an
4 increase in liability to other areas of the island.
5 What has been advertised as affordable housing is
6 certainly not low income housing. It might be
7 affordable for someone.

8 It seems to me that the appearance, no
9 matter what's been said, the appearance of the
10 development at this point, the development looks like
11 nothing but something like a modern version of an
12 urban ghetto.

13 I have a question. If the developer has
14 all this money, are the vendors now being paid? It
15 seems to me like we have the opportunity to do the
16 right thing today by insisting on meaningful housing
17 contribution to South Kohala, with respect to the
18 culture and the environment and agreements that have
19 been made before this body. Thank you.

20 CHAIRMAN DEVENS: Any questions for this
21 witness? There are none. Thank you, sir. Are there
22 any other witnesses that would like to give public
23 testimony? You can come up.

24 THE WITNESS: Aloha.

25 CHAIRMAN DEVENS: If I may swear you in.

1 KO CORREIRA

2 being first duly sworn to tell the truth, was examined
3 and testified as follows:

4 THE WITNESS: I do.

5 CHAIRMAN DEVENS: Please state your name
6 and address.

7 THE WITNESS: My name is Ko Correia,
8 64-5259 Pu'ukapu Street up in Waimea. I'm a realtor
9 first. I'm also -- I had to, like, compose all these
10 things last minute. I was on the charter school
11 Kaioka'aia, Board of Land Commission also. I worked
12 with Punanaleo O Waimea and O Kona. I'm also with
13 Kulakai Aupuni. That's an immersion program here in
14 Waimea. And most of all I'm a mom. And I support a
15 lot of sports organizations here on the island.

16 You know, as I was listening back here,
17 born and raised in Hawai'i talking about sharing,
18 talking about keeping it to your own grounds, I hear a
19 lot of people from Puako saying that it's an eyesore
20 or, you know, it might infringe onto their benefits.
21 If all Hawaiians felt that way about infringing upon
22 benefits we would not be able to open up our lands to
23 anyone at all.

24 So Hawaiians always opened it up to
25 people who were going to take care. That's number

1 one. Number two, as I was standing back there and I
2 was listening to a lot of people either talking in
3 their opinion pros or cons, I'm for this Project. I'm
4 going to tell you why. Because it has a lot of
5 benefits that can help many people, not just the rich,
6 not just the rich, but for every ordinary person that
7 is willing to purchase here in Hawai'i Nei.

8 You know, we don't have to have the
9 viewplanes. If we thought that way Puako wouldn't be
10 developed because there were villages which were
11 fishing villages originally. But we opened it up and
12 now what they call -- not eyesore -- maybe eyesore for
13 someone else's opinion, you know what I mean, for the
14 old Hawaiians that were here? The changes that occur
15 little by little.

16 But all I'm saying is that this would
17 help a lot of people here in Hawai'i. And it's not a
18 ghetto, like I'm sure the pastor kinda, like,
19 mentioned just right before me. And I was kind of
20 appalled that he said something like that. Because if
21 you believe in God you would help anyone who needs
22 help.

23 I don't care if it's from the poorest
24 person to the riches person it doesn't matter. That's
25 what Hawai'i was based on and that's what we opened up

1 our hearts and ourselves to for people to make it
2 right.

3 And I'm glad that lady actually spoke
4 about being a good neighbor because a good neighbor
5 also extends their hand to help out other people who
6 need the help. Because not everyone can afford
7 certain homes in certain areas. They can't go to
8 Waimea when they work over here and their children
9 goes to school down here.

10 You know, the encumbrance of driving a
11 half an hour to an hour sometimes just taking away
12 from their time with their family with their children
13 which this company, 'Aina Le'a, is trying to do. Is
14 to make a new village here for a lot of different type
15 of people: Rich, poor, small, old, the parks which
16 would help our county in the long run.

17 MR. DAVIDSON: Excuse me, 30 seconds.

18 THE WITNESS: Thank you for making me
19 rush because I'm just so excited. No, I really
20 believe wholeheartedly as someone who has been here
21 all my life and worked all my life here in the islands
22 in support of DW 'Aina Le'a to continue and give an
23 extension for the timeframe that they need to. That's
24 all.

25 CHAIRMAN DEVENS: Any questions for this

1 witness? There's no questions. Thank you, ma'am, for
2 your testimony. Right now we'll take a short a break
3 for the court reporter.

4 (Recess was held 3:15-3:30)

5 CHAIRMAN DEVENS: We are going to go
6 back on the record. We've concluded the public
7 testimony in this matter. We will now move into the
8 oral arguments from the parties starting with the
9 Petitioner. I understand, DW, you wanted to go first
10 with the oral argument.

11 MR. OKAMOTO: Yes, sir.

12 CHAIRMAN DEVENS: Just to restate. We
13 have all the pleadings. They're very extensive, very
14 well argued. Commissioners are fully aware of the
15 record and the evidence and the testimony in this
16 matter. So we would appreciate if the arguments are
17 contained to highlighting the points that you want to
18 reiterate. Mr. Okamoto.

19 MR. OKAMOTO: Thank you, Chair Devens.
20 I put up on the wall there a map of the entire area.
21 One of the things that I think has become apparent is
22 we feel very strongly the Commission should be
23 considering the Order to Show Cause and the Office of
24 Planning's Motion for another Order to Show Cause in
25 context of what's really going on here in this area,

1 and the effects of the land use.

2 When all is said and done if you look at
3 this area we have the two major resort areas, Waikoloa
4 Resort and Mauna Lani. And just up the road a bit we
5 have the Mauna Kea Beach Hotel complex. Really what
6 has happened here is these have become a major
7 employment area for this island. And it's become also
8 a major contributor to our economy.

9 Whatever anybody thinks about this
10 Project at this stage what it looks like, the reality
11 is everybody who's come in here recognizes we need to
12 have housing for people who are making a normal
13 living, not for the wealthy people who have been very
14 fortunate to come here and live. That's fine.
15 There's a place for them too. But there is a need for
16 more affordable housing and preferably I think in this
17 area rather than out in Honoka'a or North Kohala or
18 even down in Kona.

19 That is something I think this
20 Commission needs to consider even when it's looking at
21 things like a reversion. The needs are there.
22 They're not going to go away.

23 We also know from looking at the
24 situation here, if you just look at the map, we have
25 one major state highway, which is Queen Ka'ahumanu

1 Highway, running through here. And I've been around
2 so long I remember when they built that thing. It was
3 a brand new road. There was hardly anybody on it.
4 Well, that's not the case any longer, as you know.

5 We also have the Waikoloa Road coming
6 down from mauka. What we're seeing here is the area
7 has now developed to a point where there is a real
8 need to provide some additional services, to tie in
9 the transportation system so things work better for
10 the residents.

11 Waikoloa Village, we have all heard
12 about the brush fires and the problems they had, but
13 it's not just that. They've got to go a long way to
14 go to a normal shopping area to get basic needs. They
15 have to go a long way to get healthcare. And when
16 they do that they've got to either get up on the mauka
17 road or get onto Queen Ka'ahumanu and go all the way
18 down to Kona. That's a long way for a working family.

19 If we look at the General Plan, the
20 General Plan has recognized this for a long, long
21 time. That's the reason the county pretty much has
22 said to us, "Okay, get going. Get this going."

23 It's not that they're that found of DW
24 or Bridge 'Aina Le'a, it's just that the need is
25 there.

1 Mr. Yee and I, we have many, many
2 disagreements, but even the Office of Planning
3 recognizes that this land is really suitable for urban
4 uses. Nobody seems to be saying, because it's just
5 not true, this is not agricultural lands. The soils
6 are basically lava. It's very dry, and there is no ag
7 water. You cannot do commercial agriculture on this
8 property.

9 So if the Commission reverts this land
10 basically nothing is going to happen to this land.
11 Just like nothing is happening to a great many of the
12 areas around it. So we're not going to get any
13 resolution of the needs of the residents of this area.

14 Now, we've outlined for the Commission
15 the efforts that DW has made to get this Project
16 underway, to get it going. And there were 15
17 points -- and I can hardly read the board, so it's in
18 our Memorandum in Opposition to the Office of
19 Planning's Motion for Order to Show Cause. It starts
20 on Page 3 and finishes on Page 5.

21 They're basically 15 points. But what
22 this shows is a major, major effort on the part of DW
23 to move this thing, to make it happen. It's an effort
24 on many fronts, some of which you can see. I mean
25 there's 40 acres cleared out for the first phase

1 multiple family units. There's buildings up.

2 But equally important we're working on
3 many of the other features that are needed. We've had
4 problems with the EIS. We've worked through that
5 process. We have not gotten the State DOT approvals
6 on the intersection, but that's also been worked on.
7 The sewage treatment plant's on its way.

8 All of these things I think are solid
9 that we have substantial commencement of this Project.
10 And in that light, in light of all the briefing that
11 we've done, I would say to you that if you're lookin'
12 to see what representations really count, the Project
13 that DW's undertaken is basically the Project that was
14 submitted to this Commission. And I believe the
15 basics of the Project even before Bridge 'Aina Le'a
16 was involved. It is a residential Project. It has
17 strong supporting commercial for the neighborhood. It
18 has connectivity to road systems. It's going to have
19 the tie-ins to help the water system.

20 I think those of us who remember when
21 Mauna Lani was a dream, we can remember the problems
22 in getting water into these areas. Basically all of
23 the three big areas went private including Waikoloa
24 Village. In fact that's where the water came from for
25 the resort areas.

1 As time as gone on the water supply, the
2 Water Department for the county has expanded out the
3 system. You can see some of that. I saw their new
4 water tank in Waimea today as we were driving over
5 here. But it's still not quite connected up.

6 This Project has a commitment it's going
7 to have to develop the O'ouli well field over by
8 Ka'ahea Road. It's going to get the water all the way
9 over to 'Aina Le'a which means it really has a
10 potential to help tie these systems together.

11 It's alarming on the Big Island when you
12 have one pump fail and nobody has water for a week.
13 It's happened in North Kohala. These are the things I
14 think which the Project can help with. It's not going
15 to do it all by itself, but it's in place. This is
16 one of the reasons we really feel that the Commission
17 in making its determination of the Order to Show Cause
18 has to look at these things.

19 I realize there's a great deal of
20 frustration over the past, over what was said and what
21 was not done. I'm not here to tell you that DW does
22 not have a lot of challenges. It does it. Really
23 does. It's not easy. Nobody else is moving on
24 construction right now.

25 If DW had the choice it may not either

1 but it has no choice. Your condition, Condition 1,
2 especially, was very effective. It worked. It got
3 this Project off the ground. When I first became
4 involved I looked at the transcripts from the
5 proceedings before the first one I showed up with.
6 And I could see that in the transcript that there was
7 a concern that it's just a bunch more promises.

8 I think at that point Commissioner Wong
9 even was entertaining the idea: "Well, let's make
10 them put up some real money."

11 The amount, if I recall correctly, was
12 \$10 million. These people have put in more than 20 at
13 this point. They're going to have to put in more.
14 They're still here. They've not given up. What I'm
15 asking you to do is allow them to proceed. If they
16 succeed, then the whole community benefits. If they
17 partially succeed the whole community benefits.

18 If they fail, there is no public money
19 involved in their activities. Okay. This is money
20 that the developer and the investors are putting up in
21 good faith to help our community become a better place
22 to live.

23 We all know that if the construction
24 activity stops the economic benefits to that stop.
25 The jobs are not there and some of the most skilled

1 people that we have on this island are still going to
2 be out of work. We'd very much like to give them a
3 chance to keep working here, keep supporting their
4 families.

5 We also know that if this is
6 reclassified it's a real question as to when, if ever,
7 the Mauna Lani intersection will be fixed. We're all
8 familiar with that intersection. It is a problem. It
9 needs to be done. And in this context because DW's
10 where it is, it's committed, it's going to have to do
11 that to make this Project go. And that has been a
12 part of the plan from the very beginning for DW.

13 And, lastly, what I have to say is if
14 you look at the promises, there were lots of promises.
15 If you look at balance sheets, there were -- there
16 were owners of this Project who had just fantastic
17 balance sheets.

18 But what I have to ask you at this
19 point, a year and-a-half down the road, is look at
20 what DW did. It's not just promises anymore. They
21 have got a good, solid start. They have really been
22 working at this.

23 I don't think the economy can get any
24 worse. I certainly hope it's going to get better for
25 all of our sakes. And I think if that happens then,

1 yes, we can move forward faster. But at this point
2 this is a developer who's really committed to trying
3 to make this thing work. I can only ask that you take
4 that into consideration in the decision on the Order
5 to Show Cause.

6 There's been so much paper I'm not sure
7 if all of it sinks in after a while. But the other
8 thing we need to let you know is we can't really
9 continue indefinitely with the Order to Show Cause in
10 place. It is creating some major problems in trying
11 to lock down financing.

12 And I suppose if I was sitting somewhere
13 with the money I'd be very concerned that somebody
14 might take away my Project. So we would very much ask
15 you please take a look at the situation, take a look
16 at what DW's done and we would like to work with you
17 to let this Project go forward.

18 I realize, Chair Devens, I cannot
19 address the Motion to Amend Conditions, but I would
20 like to have that chance at some point. Thank you.

21 CHAIRMAN DEVENS: Thank you for your
22 argument, Mr. Okamoto. Just to confirm: You did
23 attend the November hearing that we had last on this
24 matter of last year?

25 MR. OKAMOTO: Yes, I did.

1 CHAIRMAN DEVENS: And you had an
2 opportunity to present any additional evidence and to
3 call any witnesses you wanted in response to the Order
4 to Show Cause?

5 MR. OKAMOTO: We did at that time. And
6 I was also given an opportunity to submit further
7 briefs after that.

8 CHAIRMAN DEVENS: Okay. Is there
9 anything else you want to present in terms of other
10 arguments other than what's contained in your
11 pleadings that you filed with the Commission?

12 MR. OKAMOTO: No, sir.

13 CHAIRMAN DEVENS: Thank you very much.
14 Mr. Voss.

15 MR. VOSS: Thank you, Chairman. Sitting
16 here I'm reminded of the famous advice of Yogi Berra.
17 Yogi said, "When you come to a fork in the road take
18 it." And with all due apologies to Yogi, members of
19 the Commission, today we are at that proverbial fork
20 in the road.

21 Down one road you can kill this Project.
22 If you do that there will be a lengthy, costly,
23 painful litigation. It will be a clear message to
24 investors and lenders across the country, "Stay out of
25 Hawai'i; that your money is always at risk here."

1 It will also be a clear message to all
2 of the people who testified in support of this Project
3 that "Your voice doesn't really count." That's one
4 path.

5 The other path is you can give this
6 Project a reasonable chance to succeed. You can
7 establish some reasonable timeframes for the
8 production, sale of affordable homes that are
9 consistent with the market and absorption.

10 Down that road there's a chance for
11 people to build homes. There's a chance for people to
12 buy homes. And as many of the people in this
13 community here today said there's a chance to create a
14 new type of community here in Kohala, an exciting, new
15 unique community. Yes, perhaps one Pohako Community
16 Association doesn't like but everyone else seems
17 excited about that opportunity.

18 Now, there's one thing that this
19 Commission absolutely can't do today and that is do
20 nothing. This can't be deferred any longer. There
21 must be some decisive action.

22 All you members of the Commission are
23 experienced, credible business people. You all know
24 in your heart of hearts this Project is never going to
25 get long-term financing so long as there's an Order to

1 Show Cause and threat of reversion hanging over its
2 head. That's just financial reality.

3 Every day this Order to Show Cause
4 continues the Project dies a little more, and the
5 claim damages increase as well. As Alan said there's
6 a ton of paper here. And you are totally excused if
7 you got lost in some of the lawyer speak, because I
8 certainly did.

9 But when you have all of this huhu and
10 paper and allegations back and forth, what we lawyers
11 like to do is try to focus on the undisputed facts
12 because at the end of the day that's what courts
13 usually make their decisions on.

14 So very briefly I'd like to go over what
15 I see are eight facts that really cannot be reasonably
16 disputed here. First fact, as Alan very clearly and
17 eloquently said, this property is not appropriate for
18 agricultural use. And it is appropriate for urban
19 use. Everyone, including OP, acknowledges that.

20 Second fact: There has been substantial
21 commencement of the use of the land. There's been
22 substantial site work. Forty-eight housing units have
23 been built to the roof. Many other pads have been
24 done. The Final EIS has been approved. By any
25 definition that any court would use there's been

1 substantial commencement of the use of the land.

2 Third fact: This Commission has never,
3 and I emphasize never reverted the classification of
4 any land when there has been substantial commencement
5 of use of the land by the Petitioner. Never happened
6 before.

7 Fourth fact: Under Hawaii Revised
8 Statutes 205-16 all action by this Commission, that's
9 what the statute says, all action by the Commission
10 must conform to the Hawai'i State Plan without
11 exception. And in this proceeding there's no evidence
12 anywhere that reverting this property, this 'Aina Le'a
13 property, to agricultural use would conform to the
14 Hawai'i State Plan, because it simply doesn't.

15 Fifth fact: When this Commission issued
16 the original Order to Show Cause in late 2008, it
17 stated that it would conduct a hearing in accordance
18 with the requirements of chapter 91 and subchapter 7
19 of the Commission's rules. That's what the OSC said
20 and indeed that's what the rules require.

21 Sixth: With all due respect, again, I
22 know this is somewhat painful to hear, this Commission
23 has not conducted the hearing on the Order to Show
24 Cause in full compliance with the requirements of the
25 chapter 91 and subchapter 7.

1 In particular the Commission has not
2 followed the rules regarding Notice of Hearing,
3 regarding the decision-making, and regarding the
4 length of the hearing, among others.

5 OP's position is, well, those rules only
6 apply where applicable. And because in OP's views
7 none of the rules are applicable, effectively no rules
8 apply to a contested case hearing on the Order to Show
9 Cause.

10 When you go to deliberate, and when you
11 listen to OP in just a few minutes, I ask you to ask
12 yourselves: Is that a credible position? Is that a
13 position that furthers the integrity of the
14 Commission's decision-making process? I respectfully
15 say no it does not.

16 Seventh fact. This Commission has
17 treated this Project differently and less favorably
18 than other projects. We cited those in our briefs.
19 They include Kaloko Heights, Waikoloa Heights,
20 Kuilima, Royal Kunia, among others.

21 OP says: Well, there's no differences
22 between those projects and it doesn't really --
23 doesn't really prove anything. But here's what's not
24 disputed. In all of those projects it was many years,
25 in some cases decades, and there was no work on the

1 project, no progress, no affordable homes built,
2 nothing and this Commission never acted to revert
3 anyone's classification of land.

4 This proceeding here today, this truly
5 is under the law a class of one.

6 Eighth, and perhaps most importantly,
7 there's the public testimony. Other than a group, a
8 relatively small group, of Puako residents who have
9 tried to stop this Project for the better part of 20
10 years, there's been overwhelming support for this
11 Project from all over the island, from contractors,
12 from realtors, from community members, from people who
13 want to buy a house here.

14 You know, I've been to many of these
15 proceedings myself. And I know it's easy to get
16 cynical about public testimony and say, "Ah, it
17 doesn't really matter." You know what? It does
18 matter. You know why? This is not my community. And
19 for most of you it's not your community. But it is
20 their community and their voice deserves some weight
21 here. You may be skeptical of DW. You may be
22 skeptical of this Project. But they believe this
23 Project deserves a chance.

24 So that's the facts as I see it, the
25 eight undisputed facts upon which -- the record upon

1 which this Commission will be ruling today. Yes, that
2 is also the record that any court who reviews this
3 later would make its decision on.

4 As an attorney I'm seldom fazed by what
5 I read in the opposing party's papers. I'd like to
6 think I've seen it all. But I have to tell you I was
7 shocked by what I read in the OP's papers leading up
8 to these proceedings. I never thought I'd see the day
9 where a state agency takes the position that
10 effectively no rules apply to a contested case
11 hearing. It's just amazing.

12 And as we said in our papers it's really
13 a function of OP taking the position, the
14 extraordinary position of win at any cost, that we
15 can't let Bridge and DW win. That we gotta set an
16 example here that Bridge's loss will be an example to
17 all Petitioners.

18 In the heat of the battle that's the
19 moment when you have to take a step back and take a
20 deep breath and say: Wait a minute. This isn't about
21 who wins or who loses. This isn't a prize fight.
22 We're not giving a lei to a winner here. This isn't a
23 popularity contest to decide whether Bridge is lovable
24 or hateable. I think most people would agree Bridge
25 is hateable.

1 This is about the Land Use Commission
2 fulfilling its role and responsibilities under the
3 statute and the rules. Fundamentally, under the law,
4 the Commission's role is to determine whether a
5 project is consistent with long-term good land use
6 planning and the Hawai'i State Plan and to determine
7 whether a project's projected benefits outweigh its
8 potential harms.

9 Once the Commission has made that
10 determination and reclassified land, it is the
11 County's role to oversee and administer the project
12 going forward through the County's zoning and land use
13 processes. That is the way the Hawai'i land use
14 system is designed and that's how it's supposed to
15 work.

16 So in conclusion, let's take a look at
17 what we have here on those three factors. You have a
18 project, an urban land use classification that
19 undeniably conforms to the Hawai'i State Plan for the
20 reasons Alan said.

21 Second. You have a project that will
22 provide substantial, significant community benefits:
23 Jobs, houses, roads, utilities, parks, intersections,
24 all benefits this community's needs.

25 And you have a county administration

1 under Mayor Kenoi and planning director which not only
2 is willing to administer this Project but is willing
3 to assist this Project to help it succeed, to provide
4 the jobs and the houses that the people here say they
5 want.

6 At this fork in the road today the two
7 paths are really quite clear. I respectfully hope
8 that you choose the path that gives this Project a
9 chance to succeed. I thank you very much for your
10 time and attention.

11 CHAIRMAN DEVENS: Thank you for your
12 argument, Mr. Voss. I also want to confirm with you
13 you did attend that last hearing we had in the matter
14 in November of last year, is that correct?

15 MR. VOSS: I did, Chair.

16 CHAIRMAN DEVENS: And did you also have
17 a full and fair opportunity to present any additional
18 arguments, witnesses and evidence that you wanted to
19 at that time in response to the Order to Show Cause?

20 MR. VOSS: We were given an opportunity
21 to present evidence, yes, Mr. Chairman.

22 CHAIRMAN DEVENS: Is there anything else
23 you want to present at this time?

24 MR. VOSS: Not at this time.

25 CHAIRMAN DEVENS: Thank you very much.

1 Mr. Brilhante.

2 MR. BRILHANTE: Thank you, Mr. Chair.

3 The county reaffirms and stands by its previous
4 testimony in this matter. The county supports the
5 Project. Whether it be DW 'Aina Le'a, Bridge 'Aina
6 Le'a or any other developer, the current urban
7 classification of this land is appropriate.

8 If this Commission were to revert back
9 and reclassify this land as agriculture, that
10 classification would be inconsistent with the
11 environmental conditions currently present for the
12 entirety of this parcel of land.

13 Urban classification is the appropriate
14 classification.

15 Just to clarify the record. Previous
16 public testimony stated that there's a community
17 development plan which is not in favor or does not
18 support the Project. Generally when there's a
19 discrepancy between the General Plan and a community
20 development plan, the General Plan controls,
21 especially in this case where the parcel in question
22 has already received the appropriate zoning or it's
23 current.

24 Now, if DW 'Aina Le'a had been the
25 original developer in this matter, if we step back and

1 take that snapshot from two years ago when they became
2 involved in this Project, today we'd be sitting there
3 and we would be marveling at the progress that was
4 made in such a short period of time.

5 And that is why -- those are part of the
6 reasons why the county supports the Project and the
7 county reaffirms its previous testimony. Thank you
8 very much.

9 CHAIRMAN DEVENS: Thank you,
10 Mr. Brilhante. I also want to confirm with you,
11 confirm that the county had a full and fair
12 opportunity to present additional evidence, arguments,
13 witnesses at the last hearing in this matter that was
14 held in November of last year.

15 MR. BRILHANTE: That's correct.

16 CHAIRMAN DEVENS: Is there anything else
17 you want to add at this time?

18 MR. BRILHANTE: Nothing further. Thank
19 you very much.

20 CHAIRMAN DEVENS: Thank you for your
21 argument. Mr. Yee.

22 MR. YEE: Thank you. The Office of
23 Planning believes that the 2008 Order to Show Cause
24 should be granted, and the Petition Area should be
25 reverted; that the Bridge 'Aina Le'a's Motion

1 regarding Order to Show Cause should be denied.

2 The Office of Planning's Motion for
3 Order to Show Cause was submitted simply as a response
4 to the procedural questions or concerns raised by
5 Bridge 'Aina Le'a and only as a procedural response.

6 If you are satisfied with the procedural
7 posture of the 2008 Order to Show Cause, there is no
8 particular reason to grant the Office of Planning's
9 motion. So we just want to make clear to you that the
10 motion, our Motion for Order to Show Cause was
11 certainly not intended to delay this action.

12 But it seemed to us that where Bridge
13 'Aina Le'a says that there were procedural problems,
14 then the solution is: Then fix the procedural
15 problems. They seem to be taking contrary positions
16 where they are telling you, "We want a decision today,
17 but we don't want" -- but there are procedural notice
18 problems which prevent you from issuing a decision
19 against them.

20 So for us it's either one or the other.
21 If you think there's a procedural problem, in which
22 case fix it. Or you don't think that there's a
23 procedural problem and you can make your substantive
24 decision today or tomorrow.

25 With respect to all three of these

1 motions I think the essential question is what should
2 the Land Use Commission do when a petitioner is unable
3 to develop as it originally believed, makes
4 representations in order to get relief from the
5 original conditions, gets an amended order with
6 conditions to ensure compliance with the
7 representation, over several years is repeatedly told
8 about how important that condition is, and where the
9 petitioner repeatedly says that compliance will occur
10 and then the petitioner violates the condition.

11 Some would argue, Bridge is apparently
12 one of them, would say, "Do nothing. Let the county
13 dealt with it." But this is an LUC order being
14 violated. The LUC has an interest in seeing that its
15 orders are respected and that the process in which the
16 public and that these parties have spent many hours
17 has a meaning and a purpose.

18 The LUC has a role to play and a job to
19 do. Although county's role is certainly important, it
20 is not a substitute for the LUC. DW 'Aina Le'a says
21 that if it didn't comply with the condition then the
22 condition should be changed.

23 We want to remind you first that DW
24 'Aina Le'a executed the amended and restated purchase
25 and sale agreement in 2009. So it was aware of the

1 condition, of Condition 1. It was aware of the
2 financial market. It was aware of the pending 2008
3 Order to Show Cause.

4 So DW 'Aina Le'a is not an innocent
5 purchaser. It is a sophisticated and informed
6 commercial entity which decided to take the business
7 risk of purchasing at least 61 acres of the Petition
8 Area. Having taken the risk they have to be prepared
9 to take the economic consequence.

10 Second. Conditions run with the land.
11 The obligations of the original petitioner follow
12 through to all subsequent owners. It sets a dangerous
13 precedent if one were to say that the conditions are
14 somehow less applicable to subsequent purchasers.

15 This would only encourage landowners to
16 come to you, make representations, agree to
17 conditions, believe that they can later sell the
18 Petition Area to someone else against whom the LUC may
19 be less willing to apply those same conditions.

20 Now, one alternative which has not been
21 suggested by the parties, but which I feel people must
22 be aware of and must be thinking of to themselves so I
23 thought I would just confront it here.

24 One alternative is that you could revert
25 the Petition Area except for the 61 acres upon which

1 the affordable housing units are being built and which
2 DW 'Aina Le'a has currently purchased. Let me take a
3 moment to tell you that under the current record DW
4 'Aina Le'a has only purchased 61 acres.

5 The amended and restated purchase
6 agreement gave them the option of purchasing the
7 remainder of the property. But the deadlines for that
8 purchase have passed. And while it's possible that
9 those deadlines may have been extended, there's
10 nothing in the record to indicate that.

11 Furthermore, the financing for the
12 purchase of the remainder of the acreage was,
13 according to Mr. Wessels' testimony at the last
14 hearing, was going to come from Exim Corporation. In
15 their latest filing they're now saying that Exim
16 Corporation is not providing financing.

17 So the money that DW 'Aina Le'a was
18 going to use to purchase the remainder of the Petition
19 Area, that is the property other than the 61 acres, is
20 apparently no longer available to them.

21 And that the only current source of
22 funding that I could identify that they have is from
23 Capital Asia, which at their current rates seems to be
24 perhaps sufficient to move forward with some of the
25 development but certainly not over the thousand acres.

1 In any case, the Office of Planning
2 believes that the reversion of everything except the
3 61 acres would be a compromise of a principle. And we
4 would support reversion of the entire Petition Area.
5 But we will acknowledge the practical advantages of
6 the alternative, including probably, most importantly,
7 avoiding nonconforming uses from the property.

8 As a side benefit it would also give DW
9 'Aina Le'a and the individual Singapore investors some
10 recovery on their investments, allow the current
11 construction to move forward.

12 DW 'Aina Le'a would need to scale back
13 its development plans apropos new conditions
14 applicable to the 61 acres. And assuming that the
15 remainder of the Petition Area was not purchased by DW
16 'Aina Le'a, Bridge 'Aina Le'a would presumably then
17 have to create an updated and realistic development
18 and financial plan and resubmit as a new petition for
19 a district boundary amendment.

20 I would note that many of the witnesses
21 appear to be referring to the benefits of the current
22 construction that's going on the 61 acres. But there
23 is no indication that there will be any work on the
24 remainder of the 1,060 acres in the Petition Area.

25 The alternative that the Office of

1 Planning supports a reversion of the entire Petition
2 Area is because we believe this is the correct and
3 principled response. The requirements to obtain
4 certificates of occupancy for 385 affordable dwelling
5 units by November 17, 2010 was not simply a condition.
6 It was the condition that you inserted into the
7 amended D&O.

8 In 2005 the Petitioner made its case to
9 you. And we provided you a variety of representations
10 that were made in 2005, all of which were part of how
11 they were going to come and build and provide jobs,
12 provide housing and they were going to do it soon.
13 They were going to do it fast. It was almost
14 immediate. And you inserted a condition to ensure
15 that these representations were followed.

16 So this was not just one of the
17 conditions. It was the most important condition that
18 you imposed on them. And if the LUC will not revert
19 for violating this condition, it will be difficult to
20 conceive of another condition for which the LUC would
21 ever revert property.

22 Furthermore, Petitioners did not simply
23 violate the condition. It has not come close to
24 complying. DW 'Aina Le'a lists 15 points that they
25 say they have accomplished. But what we have noticed,

1 as developers often do, they will list the things that
2 they have done but not tell you all the remaining
3 things that are undone.

4 You have seen this in the past in prior
5 status hearings with Bridge 'Aina Le'a giving you all
6 the things that they've done, all the money they've
7 spent but not telling you what else remains undone.

8 They have not come to you -- they have
9 not simply -- at this point there are apparently 16
10 units for which vertical construction is done, but for
11 which no utility connections have been established.

12 There are, perhaps, I believe, another
13 16 units in differing levels of vertical construction.
14 That is a far cry from Certificates of Occupancy for
15 385 units. So they didn't simply fail to meet the
16 deadline. They are not close to meeting the deadline.

17 You can tell this, although we're not
18 arguing today, you can tell this by the fact that
19 they're asking you to amend Condition 1 to delete any
20 deadline by which the affordable units are going to be
21 built.

22 At prior hearings we have spoken about
23 the efforts made by the Office of Planning to ensure
24 that appropriate conditions are imposed. The exhibits
25 we reviewed, the witnesses we questioned, the facts we

1 gathered, the judgments we made both with respect to
2 the conditions to be imposed as well as the conditions
3 that should not be imposed.

4 We make this kind of effort because we
5 believe the results mean something. But if we say
6 that essential conditions can be violated without
7 consequence, what is the purpose of this effort? In
8 order to give meaning and purpose of the land use
9 entitlement process, the Office of Planning believes
10 that the Petition Area should be reverted for
11 violation of Condition 1.

12 We have submitted to you -- in light of
13 the admonition from the Chair I'm not going to go
14 through the timeline in any detail. We were going to
15 point out to you the lengthy history that we have had
16 in this case. Let me just highlight a few points.

17 In 2005 the Commission amended the D&O.
18 In 2006, 2007, 2008 you had a status conference or
19 status hearings in which they would come to you and
20 you would ask them, "Where are you?" They would tell
21 you. You would tell them, "You're far away. I'm
22 concerned about this." They would make various
23 statements. They would say, "We have financing for
24 Bridge Capital. And we are in negotiations with
25 Skelton Realty." Nothing happened after that.

1 Well, Bridge Capital will be able to do
2 the entire project initially. Then they later said
3 only enough to do Phase I. But, again, they didn't
4 use that money and begin construction.

5 They then sold it to DW 'Aina Le'a who
6 came to you and said, "Well, we'll get it from Capital
7 Asia." That was, as you remember, a significant basis
8 for the county to come to you and say, "We think..."
9 the county at that time said, "We think this Project
10 can go forward because we think they have financing."

11 And Capital Asia as it turns out is not
12 producing enough money quickly for them to construct.
13 They then said, "Well, we'll have Exim Corporation
14 financing. And Exim Corporation is aware of the
15 pending Order to Show Cause. And we have executed
16 some documents but the money's not in escrow yet, but
17 we think it's going to be closing soon." Then their
18 latest filing indicates that's not going to be an
19 option either.

20 So the history of this case is a history
21 of them coming to you saying they're going to do
22 things, then having each of these representations turn
23 out to be incorrect.

24 I want to just comment briefly on some
25 of the undisputed points that Bridge 'Aina Le'a has

1 talked about. I'm not going to go through all of them
2 because I think many of them were covered in our memo.

3 But it is not undisputed that there are
4 any procedural violations either by chapter 91 or by
5 chapter 15-15. They talk about how that no
6 development has ever been reverted after substantial
7 commencement has occurred. Quite frankly, I'm not
8 aware of how many cases that have ever been reverted.
9 So it's difficult to draw any kind of conclusion from
10 this.

11 But with respect to the cases they cited
12 to you, which have not been reverted, let me just as a
13 general matter note that in all of those cases either
14 there was no deadline, and therefore you could not
15 revert for failing to follow a deadline, or if there
16 was a deadline, the deadline has not yet passed.

17 So the argument for differential
18 treatment or argument somehow they are a class of one
19 simply doesn't follow when you look at the facts of
20 the case.

21 They also said that the Office of
22 Planning said that no rules apply. And that's not
23 accurate. The Office of Planning specifically cited
24 to you the rule regarding motions. So when they said,
25 "Well, when certain things have to be filed," we

1 pointed out there's a rule that talks about when, when
2 documents have to be produced under your motions
3 practice. So that certainly, we think, is a rule that
4 applies.

5 So we've never said no rules apply.
6 What we've said is the rules that they're citing as
7 being violated, those don't apply. Many of them just
8 didn't make sense. And I won't go over them all.

9 But our position is very clear that we
10 think that the procedural posture is now that --
11 there's been no procedural violations and that you may
12 move forward with a decision on the substance and
13 merits of the case today.

14 Finally, this is not an issue of a
15 popularity contest for us. It's not -- we're not
16 doing this because we like or don't like anyone. Not
17 doing this because Bridge 'Aina Le'a or DW 'Aina Le'a
18 is or is not popular. We're doing this because we see
19 this as a significant and major principle that we hope
20 the LUC will see fit to follow.

21 For these reasons the Office of Planning
22 urges you to revert the Petition Area. Thank you.

23 CHAIRMAN DEVENS: Thank you, Mr. Yee,
24 for your argument. I also ask you to please confirm
25 and affirm that you were given a full and fair

1 opportunity on behalf of the Office of Planning to
2 present any additional argument, witnesses and
3 evidence at the last hearing we had in this matter on
4 the OSC in November of 2010.

5 MR. YEE: Yes.

6 CHAIRMAN DEVENS: Was there anything
7 else you'd like to add to the record at this time as I
8 asked the other parties?

9 MR. YEE: Nothing further. Thank you.

10 CHAIRMAN DEVENS: Thank you for your
11 argument. Any rebuttal argument, Mr. Voss,
12 Mr. Okamoto, that you would like to make at this time?

13 MR. VOSS: Just very briefly on the one
14 point raised by Mr. Yee about whether or not there
15 could be a partial reversion; that the Commission
16 could somehow do that.

17 And with all due respect that proposal
18 both defies common sense and the law. There is no
19 provision anywhere in chapter 205 or your rules for a
20 partial reversion. For the reasons stated in our
21 motion, with all due respect, the existing Order to
22 Show Cause is void. It could not be modified at this
23 time for a partial reversion.

24 And even if it was authorized under the
25 law, which it is not, if that is something that the

1 Commission wants to entertain it would need to be an
2 entirely new Order to Show Cause. But, again, I
3 believe that would be ineffectual because there's no
4 legal authority for the Commission to do that in the
5 first place.

6 That's why petitioners propose
7 integrated projects, projects such as this with
8 shopping centers, with parks, with other types of
9 housing. The affordable housing component with the
10 61 acres is obviously just one piece of this Project.

11 Just to be clear, one other point. Any
12 reversion under chapter 205-4 does require six
13 affirmative votes of the Commission. I apologize for
14 not making that point earlier. Alan, anything to say?

15 CHAIRMAN DEVENS: Mr. Okamoto.

16 MR. OKAMOTO: Yes. In response to the
17 statements by Mr. Yee about reverting the 61 acres
18 only, if you look at the number of units that we
19 produced on this property which are committed to the
20 affordable component, it's 385. And if we get to do
21 nothing else it is going to be a disaster for the
22 Project. Okay. We're going to have an 80 percent
23 affordable housing requirement on this property.

24 And, frankly, you don't make money on
25 affordable housing projects, no matter what kind of

1 projects they are. You do it because it's the right
2 thing to do. You do it because the county ordinance
3 requires you do it. And these folks have stepped up.
4 And they've done more than the minimum. They've come
5 in to try to provide family housing, not one-bedroom
6 or studio apartments.

7 I would really urge you not to go down
8 that path. That is going to be a disaster. We also
9 are not going to be able to provide the other benefits
10 that we've been talking to the neighbors about.

11 The costs are huge. I think those of
12 you who are in the business community you recognize
13 that this is hard stuff to develop. Every square foot
14 you develop out there you do not use a rake, you don't
15 use hand labor. You use the biggest machines you can
16 get. A D-9 in many cases is not enough out there.
17 You need a D-11 and you need dynamite.

18 So in terms of this Project, please,
19 when you consider this, if we're going to end up with
20 60 acres or 40 acres in the middle of the lava field
21 that is not good land use. I believe the Commission
22 needs to look past that, look at this area, look at
23 the needs in this area.

24 So, much as I appreciate that thought in
25 going through that process, I really don't think that

1 is a viable alternative at this point. We are
2 certainly open to -- if we get past this stage -- to
3 looking at conditions. We don't have a magic answer.
4 We don't foresee the future. We just want to have a
5 fair chance to get this thing forward, get these
6 houses on the ground and get our local people into
7 those units. Thank you.

8 CHAIRMAN DEVENS: Thank you for all of
9 the --

10 MR. OKAMOTO: Oh, I'm sorry. One more,
11 Chair Lezy (sic). You know, I'm not sure where
12 Mr. Yee got his conclusions about the Exim program.
13 But I think Mr. Wessels would be somewhat surprised
14 that it's gone. Mr. Wessels submitted a memorandum as
15 part of our supplemental memorandum in support of the
16 Motion to Amend Conditions.

17 I understand I'm not to address that.
18 But in that affidavit that's attached on Page 3, there
19 is an acknowledgment that Exim is not funded. As far
20 as I know it's not dead. We just can't get them to
21 hand over the money. Thank you.

22 CHAIRMAN DEVENS: Thank you very much
23 for all of the arguments from the parties and the
24 excellent briefings in this matter.

25 Mr. Yee, I had a few questions for you

1 if I may. And I agree with Mr. Voss in terms of we
2 need to look at what's undisputed and kind of work our
3 way from there in terms of trying to weigh the
4 credible evidence in this case.

5 And I want you to walk through with me
6 on this and see if we've got the background facts
7 correct. Based on the record that we have the
8 original boundary amendment was granted in January 17
9 of 1989, is that correct?

10 MR. YEE: Yes.

11 CHAIRMAN DEVENS: It was approximately
12 22 years ago.

13 MR. YEE: Yes.

14 CHAIRMAN DEVENS: It was amended from
15 agriculture to urban.

16 MR. YEE: Yes.

17 CHAIRMAN DEVENS: The initial conditions
18 that came with that boundary amendment required
19 approximately 2,760 housing units. Of those
20 60 percent were required to be affordable.

21 MR. YEE: I don't remember the number of
22 total units but it was 60 percent affordable units.

23 CHAIRMAN DEVENS: There was an amendment
24 in 1991 for the minimum affordable units was changed
25 to a thousand units, is that correct?

1 MR. YEE: I'm sorry, I don't remember.

2 CHAIRMAN DEVENS: Bridge acquires the
3 property in approximately 1999?

4 MR. YEE: I believe so.

5 CHAIRMAN DEVENS: Then in 2005 Bridge
6 filed a Motion to Amend the affordable housing
7 requirement.

8 MR. YEE: Yes.

9 CHAIRMAN DEVENS: It was granted to the
10 extent that the number was reduced to 385 affordable
11 units, is that correct?

12 MR. YEE: It was reduced to 20 percent,
13 a minimum 385 I believe.

14 CHAIRMAN DEVENS: That became part of
15 the Amended Decision and Order.

16 MR. YEE: Yes.

17 CHAIRMAN DEVENS: At that time
18 representations were made, were they not, under oath
19 that that requirement could be reached within three
20 years, worst case scenario?

21 MR. YEE: Yes.

22 CHAIRMAN DEVENS: That was in 2005?

23 MR. YEE: Yes.

24 CHAIRMAN DEVENS: Were representations
25 also made in 2009 that they had the financial

1 wherewithal to get the units completed no later than
2 November of 2010?

3 MR. YEE: Representations in 2005 were
4 made.

5 CHAIRMAN DEVENS: And 2009 again?

6 MR. YEE: Representations were made at
7 various times. In 2006 they said Bridge Capital could
8 provide sufficient financing.

9 CHAIRMAN DEVENS: Do you remember in
10 June of 2009 Mr. Wessels made the representation they
11 could have a hundred units ready to go by January,
12 February 2010, a year ago?

13 MR. YEE: Yes, yes. I'm sorry, thank
14 you.

15 CHAIRMAN DEVENS: You also remember that
16 same period a representation was made that they had no
17 intent to come back and amend any more of the
18 conditions?

19 MR. YEE: Yes.

20 CHAIRMAN DEVENS: Is there any evidence
21 that any of the Certificates of Occupancy have been
22 issued for a single unit on the petitioned property?

23 MR. YEE: No.

24 CHAIRMAN DEVENS: Can you tell this
25 Commission what conditions have been met over the last

1 22 years that this boundary amendment has been
2 granted?

3 MR. YEE: Because none of the
4 construction has been completed or done the only
5 condition that could have been met was --

6 CHAIRMAN DEVENS: I want to know what
7 has been met, not what could have been met. What has
8 been met at this point in time?

9 MR. YEE: Really, none of them with the
10 possible exception of the submission of annual
11 reports.

12 CHAIRMAN DEVENS: Okay. I'm going to
13 ask the fellow Commissioners if they have any
14 questions for the parties. Thank you for answering my
15 questions, Mr. Yee. Commissioner Kanuha.

16 COMMISSIONER KANUHA: Thank you, Chair
17 Devens. I don't know who to address this to, I guess.
18 What I have is a series of questions which I believe
19 are undisputed facts relating to this Petition Area.
20 And I guess I'm just looking for some acknowledgment
21 that these are true facts from, you know, all of the
22 parties at the table.

23 And I guess at some point in time this
24 property was rezoned by the County of Hawai'i to a
25 zoning that allowed the proposed uses. Is that a

1 disputed fact from any of parties?

2 MR. OKAMOTO: That's my understanding.

3 COMMISSIONER KANUHA: Perhaps I should
4 just try address this to the county if that's the
5 case.

6 MR. BRILHANTE: No, that fact is not
7 disputed at this time.

8 COMMISSIONER KANUHA: At some point in
9 time were other permits for subdivision, grading,
10 construction, were those kinds of approvals issued for
11 the Petition Area?

12 MR. BRILHANTE: Yes, they were.

13 MR. YEE: I'm sorry. Chair, could I
14 just note my understanding, and I'd be happy to defer
15 to the county, but although there was, I believe, a
16 consolidation and subdivision grants by the county, I
17 don't know that they have done the kind of subdivision
18 you may be thinking of where a discretionary consent
19 was given and individual lots were made out.

20 So just to be clear on what's meant by
21 the "subdivision". As I said I'd be happy to defer to
22 the county on that. I have a recollection it was an
23 issue on the EIS as to what could the county agree or
24 not agree to. They could agree to consolidation of
25 subdivision where there was not a significant change

1 in the total number of lots. But I don't know that --
2 I don't know -- you know how subdivisions you do for
3 the entire development. I don't know whether or not
4 that's been granted or not.

5 COMMISSIONER KANUHA: County, can you
6 answer that?

7 MR. BRILHANTE: Commissioner Kanuha,
8 I'll allow Ms. Bobby Jean Leithead-Todd, the county
9 planning director, to address that question.

10 MS. LEITHEAD-TODD: Mr. Yee is correct
11 in the sense that we did not do a subdivision that
12 created multiple individual lots. What we did is we
13 did kind of a large lot subdivision to create the lot
14 for the affordable units to be built on, with the
15 understanding that when the buildings were completed
16 they would be doing basically a CPR, which would be a
17 state action not require the county.

18 So you would have a lot that, where you
19 would have common areas. Then you would have
20 individual CPR units which would go through the state
21 agencies for that.

22 As to the other permits, yes, the county
23 has issued grading permits. It has issued building
24 permits for the units that are under construction.

25 COMMISSIONER KANUHA: Are there any

1 completion notices for any of those permits?

2 MS. LEITHEAD-TODD: It's my
3 understanding that some of the buildings have been
4 completed, but we have not issued Certificates of
5 Occupancy. And that's because they have not completed
6 some of the other things. You have to be able to hook
7 it up to a wastewater system. And that required an
8 entirely different process.

9 COMMISSIONER KANUHA: What exactly are
10 the requirements to get a Certificate of Occupancy?

11 MS. LEITHEAD-TODD: The buildings have
12 to be complete and basically ready. So you've got to
13 have parking spaces, you've got to have -- if there's
14 in our planning approvals if we had landscaping,
15 you've got to be able to see that. And obviously they
16 have to be hooked up to utilities.

17 COMMISSIONER KANUHA: Who issues those
18 permits?

19 MS. LEITHEAD-TODD: Those are issued by
20 the county.

21 COMMISSIONER KANUHA: If this property
22 is reverted, what happens to the zoning and all of
23 those entitlements that were given by the county?

24 MS. LEITHEAD-TODD: Mr. Brilhante and I
25 were discussing that. And I am not sure. Because

1 generally when we look at properties, and once we've
2 issued what we consider the last discretionary permit,
3 which would have been the subdivision to create the
4 lot, and after that we're doing ministerial permits
5 like a building permit, I don't know that we could
6 undo the zoning legally without having to -- and I
7 don't want to put the county in a position of -- let
8 me just say it would be a situation in which we would
9 have to confer with counsel as to county's liabilities
10 and obligations.

11 COMMISSIONER KANUHA: Okay. County
12 zoning, how is that and who grants that? How is it
13 granted and who grants it?

14 MS. LEITHEAD-TODD: County council.

15 COMMISSIONER KANUHA: So that's -- what
16 kind of action is that?

17 MS. LEITHEAD-TODD: It's a legislative
18 action. Well, first what happens is a recommendation
19 is made by the department. It goes to the planning
20 commission. The planning commission then makes a
21 recommendation to the county council.

22 County council typically has at least
23 one public hearing in committee and then two public
24 hearings at the council level before they pass an
25 ordinance.

1 The ordinance then has to be forwarded
2 to the mayor who has an opportunity to either sign or
3 veto. My recollection of the, of this is that it went
4 to -- I don't recall any vetoes occurring. So I would
5 assume that in the normal process it would have been
6 signed by the mayor.

7 COMMISSIONER KANUHA: Is the Land Use
8 Commission or the Office of Planning in any way
9 involved in that legislative process?

10 MS. LEITHEAD-TODD: No. Other than, you
11 know, if they want to submit testimony.

12 COMMISSIONER KANUHA: Regarding the
13 zoning for the Petitioned Area granted by the county,
14 did that zoning have a condition requiring affordable
15 housing?

16 MS. LEITHEAD-TODD: My recollection, and
17 I don't have the ordinances in front of me, it would
18 have had a requirement to comply with the county
19 housing policy. And the housing policy in the county
20 has changed over time. At one point I think we were
21 doing 60/40.

22 At the time -- at one point it went down
23 to 10 percent. And a number of properties I believe
24 that came in and amended to the 10 percent, I'm trying
25 to remember if it was Kohanaiki in particular. And

1 then we subsequently amended the policy to bring it
2 back up to 20 percent. And I believe it was
3 20 percent at the time that the amendments were being
4 made to Bridge's conditions.

5 COMMISSIONER KANUHA: So if that's the
6 case then the percentage reduction that was granted by
7 the Commission from 60 percent to 20 percent, is
8 consistent with that condition of the county zoning,
9 is that correct?

10 MS. LEITHEAD-TODD: It's consistent with
11 the County's current housing policy as established in
12 the Hawai'i County Code.

13 COMMISSIONER KANUHA: Who establishes
14 that policy?

15 MS. LEITHEAD-TODD: The Hawai'i County
16 Council.

17 COMMISSIONER KANUHA: And, again, that's
18 by legislation, correct?

19 MS. LEITHEAD-TODD: Yes, it is.

20 COMMISSIONER KANUHA: Thank you.

21 Mr. Chair, that's all the questions I have.

22 CHAIRMAN DEVENS: Thank you,
23 Commissioner Kanuha. Any other questions?
24 Commissioner Jencks.

25 COMMISSIONER JENCKS: Thank you,

1 Mr. Chairman. I'd like to ask the county a couple
2 questions if I may. Ms. Leithhead-Todd, when the large
3 lot subdivision map was processed for the affordable
4 housing site, certain provisions would have to be
5 provided for such as access, utility service, and
6 those kinds of things.

7 Did you require a bond for that
8 subdivision so that the buildings could commence?

9 MS. LEITHEAD-TODD: We normally require
10 bonds for subdivision improvements. In all honesty,
11 without the files in front of me I can't recall
12 exactly what happened with this.

13 COMMISSIONER JENCKS: But in any case
14 they wouldn't be able to occupy until all these
15 infrastructure elements are complete?

16 MS. LEITHEAD-TODD: Typically that's how
17 we handle these.

18 COMMISSIONER JENCKS: I believe the
19 access right now is to the state highway, correct?

20 MS. LEITHEAD-TODD: Yes. And we would
21 want to see that completed.

22 COMMISSIONER JENCKS: Okay. That's a
23 fairly significant element of the infrastructure.
24 Would you say -- the county accepted the EIS, correct?

25 MS. LEITHEAD-TODD: Yes, we did.

1 COMMISSIONER JENCKS: Okay. Would you
2 say that that EIS was a complex document?

3 MS. LEITHEAD-TODD: Yes.

4 COMMISSIONER JENCKS: Would you say that
5 it had a significant amount of agency comments -- and
6 I'll be kind here -- delay in getting comments
7 resolving issues in the completion of that document?

8 MS. LEITHEAD-TODD: Yes.

9 COMMISSIONER JENCKS: Would you say that
10 it took an inordinant amount of time to get completed?

11 MS. LEITHEAD-TODD: I don't know that I
12 want to say inordinant, but it did take longer than
13 many people had anticipated.

14 COMMISSIONER JENCKS: And the completion
15 of that document, based upon my familiarity with the
16 process, is that a lot of review by other state
17 agencies cannot be initiated or completed until that
18 document is accepted. For example, the State
19 Department of Transportation.

20 MS. LEITHEAD-TODD: Yes, that's true.

21 COMMISSIONER JENCKS: Thank you. Could
22 you tell me, based upon your knowledge of this portion
23 of the island, how many other projects right now are
24 actively in play in terms of hiring people and have
25 construction underway?

1 MS. LEITHEAD-TODD: In terms of private
2 development projects I'm not aware of any current
3 activity. The current activity on this side is either
4 state projects, the county project for the mid-level
5 road. And Palamanui is kind of moving forward with
6 some projects, but it's primarily the University of
7 Hawai'i who fronted the money for the road that was a
8 condition of Palamanui. And instead Palamanui will
9 contribute money towards the construction of a
10 classroom building for West Hawai'i Community College.
11 But I don't think that there's anything significant on
12 this side that I'm aware of.

13 COMMISSIONER JENCKS: So it's fair to
14 say that the bulk of construction on this island is
15 most probably capital improvement or government-funded
16 construction.

17 MS. LEITHEAD-TODD: Yes. With the
18 exception of the east side of the island which we're
19 seeing a Safeway and a Target. We had Longs and some
20 other projects. Those were private. But it's mainly
21 on the east side.

22 COMMISSIONER JENCKS: But no significant
23 housing.

24 MS. LEITHEAD-TODD: Surprisingly we have
25 some apartment buildings on the east side that have

1 been built in the last couple years. But I'm not sure
2 if there's anything -- I believe we had some building
3 permits pulled for apartments. Again, it's more on
4 the east side.

5 COMMISSIONER JENCKS: Thank you.

6 CHAIRMAN DEVENS: Commissioner Heller.

7 COMMISSIONER HELLER: Another question
8 for the county. Just to confirm my understanding that
9 the county has to some extent changed its position on
10 this matter since 2009. I wasn't at the hearing in
11 April of 2009, but I've looked at the transcript.

12 And am I correct at that point that the
13 county basically said back in April of '09, "Let's
14 give 'em until November of 2010 and see if they can
15 actually meet this condition. And if they can't then
16 it's appropriate to revert it to agriculture"?

17 MS. LEITHEAD-TODD: I think the position
18 we took back then is essentially that. And the
19 position that we've taken all along, and I want to
20 clarify I think what Mr. Brilhante says, the county
21 has always maintained that this area is appropriately
22 classified urban because of its location between
23 Waikoloa Village and the Waikoloa Resort area.

24 This is irrespective of whether it's
25 Bridge 'Aina Le'a, DW 'Aina Le'a or some other

1 developer. That this is an appropriate place to
2 create, you know, what I think we've always envisioned
3 as kind of a middle class housing here as opposed to
4 high-end units that you tend to see along the
5 coastline.

6 And it has always been the desire of the
7 county to see workforce housing in the Waikoloa area
8 to allow people to be closer to the areas of
9 employment.

10 Generally as to whether the LUC feels
11 that the developer has met the conditions, the county
12 leaves that up to the Land Use Commission to determine
13 whether this particular Petitioner has met those
14 conditions.

15 But we still believe that whether it's
16 DW 'Aina Le'a or someone else, that this is an
17 appropriate area for urban classification because the
18 land is not suitable for agriculture. It doesn't have
19 the resources that put it into other classifications.

20 And so given the juxtaposition between
21 the village and the resort areas and the proximity to
22 where a significant sector of employment is on the
23 island, this is an area that we think is appropriate
24 for urban.

25 COMMISSIONER HELLER: Would it be a fair

1 summary to say that the County's position is that it
2 would be appropriate to build houses on this parcel?
3 Whether or not DW and Bridge are the right developers
4 to do it is a different question?

5 MS. LEITHEAD-TODD: Yes.

6 COMMISSIONER HELLER: Thank you.

7 CHAIRMAN DEVENS: Commissioner Jencks.

8 COMMISSIONER JENCKS: I have one for
9 Mr. Voss. At the last meeting I think it's fair to
10 say that based upon my questions to Mr. Wessels there
11 was really, I think, a lot of open questions as to
12 where the Project was in terms of the permits it
13 needed which were, I think, almost entirely
14 discretionary type of approvals were needed to compete
15 the portion of the Project we're talking about, this
16 affordable housing element which included wastewater,
17 included water, included the state highway connection,
18 PUC regulatory rule.

19 Do you have any update or any certainty
20 you can provide today as to what we discussed at that
21 meeting where you are in the process? Any firmer
22 grasp upon what needs to be done?

23 MR. VOSS: I think Alan's probably more
24 appropriate to answer that.

25 MR. OKAMOTO: Well, at this point we

1 have had some progress but we don't have the key
2 approvals at this point. We don't have the DOT
3 approval on the construction plans. And we do not
4 have the Department of Health approval on the package
5 plant designs.

6 COMMISSIONER JENCKS: But all of those
7 applications we discussed are now in process?

8 MR. OKAMOTO: Can I have Mr. Wessels
9 address this directly because I know he's been working
10 with his contractors to try and look at the
11 scheduling?

12 COMMISSIONER JENCKS: Sure. Look, I
13 just want -- for me I need to know the facts. Don't
14 tell me what you think I want to hear. I want to hear
15 the facts.

16 MR. WESSELS: Okay. All the --

17 CHAIRMAN DEVENS: Wait. Can we hang on.
18 Let me consult with our AG. I'm sorry, Mr. Jencks to
19 interrupt you. But let me just consult on the
20 propriety of opening it up to a witness giving
21 testimony if I may. We'll go off the record, take a
22 short break. Take a 5 minute break.

23 (Recess was held. 4:45)

24 CHAIRMAN DEVENS: We're going to go back
25 on the record. Mr. Okamoto, did you have a chance to

1 consult with your client?

2 MR. OKAMOTO: Yes, I did.

3 CHAIRMAN DEVENS: Can you respond to
4 Mr. Jencks' questions?

5 MR. OKAMOTO: As directly as I can. And
6 I understand the technical problem behind this, but
7 it's a little unsettling, of course. But I'm doing my
8 best in between.

9 From what understand the various permits
10 that are being applied for all fall under the
11 Goodfellows Brothers' design/build contract. It is
12 bonded for 35 million.

13 The permit applications have gone in.
14 The DOT plans have gone in. They have not gotten back
15 an approval yet. And I don't believe they have gotten
16 comments from DOT yet on the intersection.

17 The Department of Health, the plans went
18 in. And it's a 2-step process from what I understand.
19 So the plans for -- the package plant went in, and
20 comments have been received on that.

21 I believe that there's been a response
22 to those comments, but DOH has not said, "Go ahead and
23 install." Once Department of Health clears it then
24 Goodfellow can install it. And then DOH will have to
25 check it to make sure it operates properly. So it's a

1 2-step process there.

2 HELCO is in the process of designing
3 that overhead electrical line that was described to
4 you. That design/work is also part of the Goodfellow
5 Brothers' contract, and as is all of the engineering
6 work that's involved with the civil work to connect up
7 this Project.

8 COMMISSIONER JENCKS: Mr. Chairman, may
9 I ask a question?

10 CHAIRMAN DEVENS: Sure. Go ahead,
11 Commissioner Jencks.

12 COMMISSIONER JENCKS: Have you started
13 the PUC process for either water or wastewater?

14 MR. OKAMOTO: I understand there's an
15 attorney been retained to do it. If you could give me
16 a second I'll check where it is in the process.

17 (Pause) DW has retained Michael Lau to do the PUC
18 work. He has started, but there was a bit of delay.
19 He had to get a conflict of interest situation
20 resolved. But he's on board to do the work.

21 COMMISSIONER JENCKS: Are there any
22 other permits that are needed to facilitate getting a
23 Certificate of Occupancy from the county?

24 MR. OKAMOTO: I'm told there are a lot
25 of permits that have to be done, all of which will be

1 applied for by Goodfellows. There's been extensive
2 work been done on identifying tasks in the Project.
3 Right now it's something over 500 tasks. And they
4 have been plotting it out to see which one of 'em have
5 the potential to delay the Project.

6 COMMISSIONER JENCKS: So there are
7 additional permits that will have to be applied for
8 and completed before you can get CO's for these
9 buildings.

10 MR. OKAMOTO: That's what I understand.
11 Yes, sir.

12 COMMISSIONER JENCKS: Thank you.

13 CHAIRMAN DEVENS: Commissioner Lezy.

14 COMMISSIONER LEZY: Thank you, Chair.
15 Mr. Okamoto, DW 'Aina Le'a does not dispute the fact
16 that the first condition of the 2005 Amended Decision
17 and Order has not been satisfied, correct?

18 MR. OKAMOTO: Yes, sir.

19 COMMISSIONER LEZY: In light of that
20 undisputed fact, can you tell me why, given the
21 purpose and intent of the Show Cause Order that's
22 before the Commission today, why we should look past
23 that fact by itself in considering the Order?

24 MR. OKAMOTO: Because in any action
25 taken by this Commission it is my belief, based on the

1 years I've done this, that the Commission needs to
2 look at the suitability of the land for the
3 classification for which you're going to put it.

4 If you put this back to agriculture I
5 don't believe that fits the criteria that you would
6 normally consider for that class of land. It's not
7 suitable for agriculture.

8 And, Commissioner Lezy, I understand the
9 condition, we don't have 385 houses up and we don't
10 have Certificates of Occupancy. But many of these
11 things happen in the course of development.

12 You have seen substantial work done on
13 this Project. It is not sittin' there with a bunch of
14 promises and nothing happening. So that's the short
15 answer.

16 COMMISSIONER LEZY: Couldn't that
17 argument be made every single time a petitioner fails
18 to meet a condition?

19 MR. OKAMOTO: I think the Commission
20 needs to consider the suitability every single time
21 it's considering doing something like this. These are
22 very rare proceedings, I think we all would agree,
23 where the Commission's going to revert land. And I
24 think the Commission can look at conditions and decide
25 whether or not it's going to approve a change or not.

1 It could modify the conditions. We haven't gotten
2 there in this proceeding.

3 I did file a Motion to Amend Conditions.
4 We have never gotten to look at that. I would ask the
5 Commission to really look at this thing and take a
6 look at where we end up. I mean take a look at where
7 the Waikoloa area ends up if we put this back to
8 square one.

9 It's gonna take a long, long time for
10 anybody to get back in. And I'm not sure who's gonna
11 wanna get back in if they're going to have to risk a
12 problem, they come forward to the Commission with
13 reasons, they have their reasons, and ask the
14 Commission to take a look at this and look at what
15 makes sense under chapter 205.

16 COMMISSIONER LEZY: Thank you.

17 CHAIRMAN DEVENS: Commissioner Kanuha.

18 COMMISSIONER KANUHA: Thank you,
19 Mr. Chairman. I have some questions directed to the
20 Office of Planning. Bryan, when the Commission took
21 their action in 2005 to amend the housing condition
22 from 60 percent to 20 percent, I was there. Some of
23 us with there for these proceedings. But it escapes
24 me. What was the Office of Planning's position?

25 MR. YEE: The Office of Planning was in

1 support of the request to amend.

2 COMMISSIONER KANUHA: So it supported
3 the reduction from 60 to 20.

4 MR. YEE: Yes.

5 COMMISSIONER KANUHA: And now OP's
6 Motion for the Order to Show Cause -- well, let me
7 back it up a little bit. Can you represent that one
8 of the main reasons was the need for more affordable
9 housing? Or for more affordable housing to actually
10 be constructed? Was that one of the primary reasons
11 for supporting it, do you recall?

12 MR. YEE: You know, I have read the
13 transcripts. I don't recall the specific statements
14 from the Office of Planning. But it was certainly a
15 major argument that in the absence of a reduction no
16 work would be able to move forward, if that answers
17 your question. That was a major issue.

18 COMMISSIONER KANUHA: Can you tell us --
19 well, let me put it this way. Can you tell us whether
20 or not affordable housing, or making sure affordable
21 housing was done, was one of the priorities of the
22 Office at that time?

23 MR. YEE: I wasn't there. I think I had
24 started a little after that. In that time period I
25 certainly think affordable housing was, I'm not sure

1 what the word would be, but was a goal to be achieved.

2 COMMISSIONER KANUHA: Has that, based on
3 your understanding, has that changed at all?

4 MR. YEE: I think the Office of Planning
5 still supports the principle that additional
6 affordable housing is a good thing.

7 COMMISSIONER KANUHA: Now, getting back
8 to your motion. The Office basically points out that
9 a number of conditions that were imposed back then in
10 2005 were not, were not done or not, you know,
11 complied with. And it relates to certain kinds of
12 activities that the Petitioner represented they would
13 be doing.

14 What kind of experience does the Office
15 have in terms of making determinations on some of
16 these comments that you pointed out? In other words,
17 does the Office have any experience in joint venture
18 agreements or mass grading contracts, things of that
19 nature?

20 MR. YEE: The Office of Planning
21 obviously does not engage in construction. We,
22 however, do review developments in which construction
23 is to occur. So that would be, that -- without
24 getting in more detail does that answer your question?

25 COMMISSIONER KANUHA: Hypothetically

1 then -- well, maybe not hypothetically. Let me ask
2 you this. If affordable housing, making affordable
3 housing happen, you know, let's assume that it was a
4 priority of the state back then and it still is a
5 priority because it's a priority of the Commission.

6 If that was the case, does the Office of
7 Planning have the means to be proactive in making sure
8 that -- well, 'proactive' in terms of assisting
9 projects that actually go forward with it?

10 In other words, does the Office have the
11 ability to, and if they did, and if they do, have
12 they, for example, tried to coordinate issues with the
13 State Department of Transportation Highways for the
14 issues that this Project claims they've had in terms
15 of getting some decisions?

16 And the same thing with the State
17 Department of Health on the wastewater treatment
18 areas.

19 I guess what I'm trying to say is that
20 if that is, if affordable housing is a priority of the
21 state and the Office of Planning, does it have the
22 ability to, you know, be proactive in making, in
23 trying to move these kinds of projects forward?

24 MR. YEE: The Office of Planning is one
25 of many agencies within the state. So we have a

1 defined area of responsibility. There are certainly
2 other agencies in the state that are specifically
3 devoted to housing.

4 Within the Office of Planning's area of
5 responsibility I would point you to the Kamakana
6 Forest City case in which the matter came to you that
7 was not just a 20 percent affordable housing, but a
8 50 percent affordable housing project under 201-H.

9 In that case the Office of Planning
10 took, I think, the very proactive role in that in
11 making sure that it was both a good petition and
12 making sure that a good petition was approved.

13 You may recall, however, that although
14 affordable housing was a priority, the Office of
15 Planning did insist that the petition follow all the
16 requirements with respect to archaeology.

17 And so although it's correct that
18 affordable housing is a priority, I don't think I'd go
19 so far as to say it supersedes all other priorities in
20 the state.

21 The second issue I think I'd like to
22 note for you is that this is not an affordable housing
23 project. It's a 20 percent affordable housing to be
24 done, which is, as I understand, the same as all other
25 current projects approved by the county or approved in

1 this county.

2 So to say that what does the Office of
3 Planning do to support affordable housing, when you
4 define it in that sense you're asking what will the
5 Office of Planning do for all residential construction
6 projects. So I don't think the Office of Planning
7 takes, assists all residential construction in that.

8 We do, within our area of
9 responsibility, try to assist all applicants in
10 coordinating with the various state agencies,
11 sometimes more successfully than others, but certainly
12 made significant efforts in trying to get the
13 Department of Transportation, for example, to respond
14 in a timely manner to the TIARs and to come up to the
15 extent they can with an agreement as soon as possible,
16 sometimes even prior to the LUC approval.

17 I'm not sure I understand the purpose of
18 the question, so I think I've tried to answer it as
19 best I can.

20 COMMISSIONER KANUHA: In the whole
21 process what can the Office of Planning authorize or
22 approve or get involved in? Can you -- can the Office
23 approve anything? Or is their role primarily
24 coordination and recommendation?

25 MR. YEE: The land use division within

1 the Office of Planning has no role other than to
2 participate in these actions and to help coordinate
3 with other state agencies. There are certainly other
4 aspects to the Office of Planning.

5 For example, our federal consistency
6 program within the Coastal Zone Management which has a
7 role to play in regulation as well as the CZM
8 program's efforts on SMA applications. But my guess
9 is you're probably not asking about that aspect of the
10 Office of Planning.

11 The land use division's role is to be a
12 party to this case and to participate as a party to
13 this case. So we don't decide things, but we
14 certainly can make motions and ask for things. But
15 the decisions are ultimately yours.

16 COMMISSIONER KANUHA: What about
17 enforcement? Does the Office have any enforcement
18 abilities either for conditions of the Commission or
19 other state agencies?

20 MR. YEE: Not per se. We could come to
21 the Land Use Commission, make a Motion for Declaratory
22 Petition to determine whether a Decision and Order is
23 being violated.

24 We come to you and ask for an Order to
25 Show Cause. We could ask the county to move forward

1 with other enforcement actions. But we don't -- we
2 cannot ourselves make a decision and say, "You shall
3 do this."

4 COMMISSIONER KANUHA: One final
5 question. I had a series of questions earlier for the
6 county regarding their approval process, processes,
7 permits, things of that nature. Is there any reason
8 why none of that was acknowledged in your motion?

9 MR. YEE: Because none of that was
10 relevant to the bottom line question of did they
11 comply with Condition 1.

12 COMMISSIONER KANUHA: Far enough.
13 That's all the questions I have. Thank you.

14 CHAIRMAN DEVENS: Any other questions?
15 Let me ask one more thing of Mr. Okamoto if you don't
16 mind. Before you got involved in the case there was
17 an April 30th, 2009 hearing in this matter. And a
18 representation was made at that time on behalf of the
19 Petitioner as follows, quote, "Part of the whole
20 proceeding's to convince the Commission the fact that
21 as part of this transition we want to establish that
22 DW have the wherewithal, past experience, financial
23 capabilities to step into the place of Bridge 'Aina
24 Le'a, in fact meet the conditions that were set down
25 by this Commission in the amended Decision and Order.

1 That includes delivering 365 affordable units on site
2 at the 'Aina Le'a Project."

3 Were you aware that that representation
4 was made to us at that hearing?

5 MR. OKAMOTO: I believe I've read the
6 transcript to that effect, yes, sir. And I believe
7 that was DW's full intention to proceed on that basis.

8 CHAIRMAN DEVENS: Are you also aware
9 that another representative of the Petitioner also
10 told us under oath, quote, "We do have the
11 capabilities now to meet this timeline," closed quote?

12 MR. OKAMOTO: I'm not sure that I recall
13 looking at that in the transcript. But that would be
14 my understanding. I mean DW really did -- their plan
15 was to make the deadline.

16 CHAIRMAN DEVENS: Did you also read the
17 transcript of June 5, 2009 where Commissioner Lezy was
18 asking, I believe it was Mr. Wessels, if there's any
19 intent on the part of DW to come back and amend the
20 prior Decision and Order?

21 And he said, quote, "There's no intent
22 whatsoever to changing it," closed quote. Do you
23 remember that testimony being given to us?

24 MR. OKAMOTO: I can't remember the
25 specific testimony. There was no plan or intent at

1 that point to do so. The whole focus was on getting
2 the units done. And as I recall the expectation was
3 the environmental impact statement could be done a lot
4 sooner.

5 CHAIRMAN DEVENS: At that same June 5th,
6 2009 hearing Mr. Wessels made the statement under
7 oath, quote, "We'll have -- by January, February we'll
8 have close to a hundred units ready to go."

9 Do you remember that representation
10 being made to this Commission?

11 MR. OKAMOTO: I believe something to
12 that effect. I can't confirm it without the
13 transcript. But I believe there was a plan to have
14 units constructed by that point in time.

15 CHAIRMAN DEVENS: Thank you.
16 Commissioners have any other questions for the
17 parties? Okay. At this time I'm going to move to go
18 into executive session to consult with our attorney
19 general regarding the Commission's powers and
20 authorities. Is there a second?

21 COMMISSIONER JUDGE: Second.

22 CHAIRMAN DEVENS: Discussion? All those
23 in favor say aye.

24 COMMISSION VOTING: Aye.

25 CHAIRMAN DEVENS: Unanimous. We'll take

1 a short break.

2 (Recess was held 5:35)

3 CHAIRMAN DEVENS: We're back on the
4 record. Thank you for your patience. At this time
5 I'd like to confirm with the Commissioners if each of
6 you have had an opportunity to review the record
7 that's relevant to the OSC matter in this case. And
8 we'll have Mr. Davidson take a roll call confirmation.

9 MR. DAVIDSON: Commissioner Lezy?

10 COMMISSIONER LEZY: Yes.

11 MR. DAVIDSON: Commissioner Kanuha?

12 COMMISSIONER KANUHA: Yes.

13 MR. DAVIDSON: Commissioner Judge?

14 COMMISSIONER JUDGE: Yes.

15 MR. DAVIDSON: Commissioner Jencks?

16 COMMISSIONER JENCKS: Yes.

17 MR. DAVIDSON: Commissioner Heller?

18 COMMISSIONER HELLER: Yes.

19 MR. DAVIDSON: Commissioner Contrades?

20 COMMISSIONER CONTRADES: Yes.

21 MR. DAVIDSON: Commissioner Chock?

22 COMMISSIONER CHOCK: Yes.

23 MR. DAVIDSON: Chair Devens?

24 CHAIRMAN DEVENS: Yes. At this time the
25 Chair will entertain any motions on the pending

1 matters. Commissioner Jencks.

2 COMMISSIONER JENCKS: Mr. Chair, I'd
3 like to offer some comments if I may --

4 CHAIRMAN DEVENS: Sure.

5 COMMISSIONER JENCKS: -- before we get
6 into the deliberations.

7 CHAIRMAN DEVENS: Of course.

8 COMMISSIONER JENCKS: As I stated and
9 declared I have read the file, meeting minutes, and
10 all the documents provided by the Petitioner and the
11 Office of Planning and the State Land Use Commission.
12 Just a few comments, however, on the question with
13 regard to reversion that's before us today.

14 My background is in land development and
15 trying to finance projects. My comments will kind of
16 revolve around that experience and what I've heard in
17 these proceedings.

18 This Project, I would agree that this
19 Project is a logical extension of existing urbanized
20 land on the Kona Coast. And I agree with what the
21 planning director said about its potential use and its
22 existing, logical expansion of that existing
23 urbanization.

24 It's not, in terms of its size and its
25 complexity, it's not that much different than other

1 projects in the state of Hawai'i. I'm personally
2 working on a number of projects now that have had
3 district boundary amendments for going on 20 years.
4 And it's extremely difficult to finance and to plan,
5 to phase, to finance and create value in projects like
6 this.

7 There isn't any money in the marketplace
8 today. It's difficult to get a subdivision bond. You
9 don't have any buyers in the marketplace. If you're
10 in a condition to build housing, logically you want to
11 have buyers available to buy it, but you can't finance
12 it if there's no buyer to buy it.

13 And, frankly, listening at the last
14 meeting in November we were hearing about the
15 financing program that is underway for this Project
16 and financing the affordable housing component.
17 Frankly, there are a number of projects in this state
18 that would be envious of having some kind of financing
19 so they could build something. It's difficult today
20 to get any financing to build anything.

21 My concern is that given the timeframe,
22 we started in 2005 and this Commission provided
23 conditions that needed to be met by the developer in
24 2005, a key event occurred which has scarred many of
25 us that are in the development business. And that was

1 the failure of Lehman Brothers in June of 2007.

2 I personally had a number of projects
3 that were financed by Lehman. I was fortunate enough
4 to get out of Lehman prior to the collapse. But after
5 that collapse occurred, chaos prevailed. And this
6 Project, like many others in the state on the Big
7 Island, on Maui, on O'ahu, on Kauai, suffered because
8 of that failure. And it's affected everyone. It's
9 still affecting us to this day.

10 There's no question in my mind that,
11 based upon the discussion at the last meeting, that I
12 think this development team has a ways to go in
13 understanding what it is they need to do. I'm not
14 sure even today they understand what it is they need
15 to do to get Certificates of Occupancy. It's a
16 complicated process. It's difficult.

17 We were talking about the EIS. Certain
18 things have to happen in a logical progression. If
19 documents like an EIS are a part of that process, it
20 is incredibly unpredictable.

21 So coming into a Commission meeting
22 where -- and, frankly, I sat behind the table and been
23 scared to death to say the wrong thing, to make
24 promises and tell people what you think you want them
25 to hear is really the wrong approach. Making

1 commitments is a huge mistake especially, especially
2 in the environment we work in with regard to financing
3 and the ability to secure discretionary approvals that
4 are in many cases nearly impossible to get.

5 So I think the issue of commitments and
6 saying, "I'm going to build X number of units by this
7 date in time," is a very dangerous thing to do. And
8 basically you set yourself up for failure because of
9 all of the issues that can come up that you have
10 absolutely no control over.

11 The county supports this Project. This
12 Project is, in my mind, looking at the map that was
13 put up on the wall, it's a key component of the Kona
14 Coast. It seems to be a key part of their
15 urbanization plan. It provides the needs of this
16 community will need in the long term.

17 And as the planning director said there
18 aren't many other opportunities today for people to be
19 working on the Big Island.

20 I'm concerned a little bit about the
21 position that the Office of State Planning has taken
22 with regard to the Project. Commissioner Kanuha asked
23 some questions about grading permits and this and
24 that. I know they don't have the expertise.

25 But I'm not quite sure they understand

1 from a developer's point of view, from a financing
2 point of view how really difficult it is in today's
3 world, especially since 2005 to get anything done and
4 get anything built.

5 And I just would close. I think we all
6 have to carefully consider reversion in the context of
7 what's going on financially and in the business
8 environment in this state.

9 I know on the island of Maui we've had a
10 number of, at least one that I'm aware of, very large
11 projects that have district boundary amendments
12 awarded to them for years, perhaps a decade or more,
13 were purchased, went into foreclosure and now we have
14 a serious, serious issue with regard to employment and
15 income and property tax revenue and the possibility
16 that these projects -- this one is zoned, this Project
17 is zoned by the county -- gets subdivided out and then
18 gets sold off in little pieces. And you lose, you
19 lose the control of a large-scale planned development
20 under single ownership. You end up with chaos.

21 So, Mr. Chair, members of the
22 Commission, I ask you -- I know promises have been
23 made, commitments have been made to the Commission.
24 Many of us are in the development business that sit
25 here know that it's impossible in many cases to live

1 up to those commitments. And it's foolish to make
2 them.

3 People make them because they want to
4 please. They want to make sure that you understand as
5 Commissioners they have good intentions. Well, a lot
6 of things can happen. Like in said in 2007 we saw a
7 complete change in the ability to finance and make,
8 create value out of these projects. And that's not
9 going to turn around in the near term.

10 And I don't believe that reverting this
11 land is going to help that turn around in any fashion.
12 So, Mr. Chairman, that concludes my comments.

13 CHAIRMAN DEVENS: Thank you,
14 Commissioner Jencks, for your comments. At this time
15 is there a motion by the Commission?

16 COMMISSIONER LEZY: Chair?

17 CHAIRMAN DEVENS: Commissioner Lezy.

18 COMMISSIONER LEZY: Thank you, Chair. I
19 move that the Commission find that the Petitioner has
20 failed to show cause why the Petition Area should not
21 revert to its prior land use classification, and that
22 the Petition Area therefore be reverted to the
23 Agricultural District.

24 COMMISSIONER CONTRADES: Second.

25 CHAIRMAN DEVENS: There's a second on

1 the motion by Commissioner Contrades. Discussion?
2 Commissioner Kanuha.

3 COMMISSIONER KANUHA: Thank you,
4 Mr. Chairman. I'm going to be voting against this
5 motion. I was a Commissioner when the initial
6 representations were made back in 2005. I've seen
7 this Project go through all its different iterations.
8 But basically I'm a county guy. And from my
9 standpoint if this Petition Area had never been
10 rezoned, there were no entitlements by the county, it
11 would be a really, really easy decision for me to go
12 with this.

13 But given the fact that, you know, the
14 county has entitled this property and they have
15 continued to entitle it which indicates to me that,
16 you know, they're really supporting this. And I think
17 their statements today that, you know, whether it's DW
18 or Bridge 'Aina Le'a or Larry, Moe, and Curly Joe,
19 whoever it is, the opportunity to do this Project
20 which is factually consistent with everything, all the
21 planning documents of the county, makes it is very
22 difficult for me to support its reversion. That's my
23 bottom line. Thank you.

24 CHAIRMAN DEVENS: Any further
25 discussion? Commissioner Heller.

1 COMMISSIONER HELLER: Yes. With respect
2 to Commissioner Jencks and his experience, and I do
3 appreciate having somebody with that experience
4 sharing his viewpoint.

5 I think in terms of the financial
6 environment it's also important to remember that after
7 the Lehman collapse and after everybody kind of knew
8 where we stood in terms of the shape the economy was
9 in, and specifically in early 2009 additional
10 representations were made to this Commission about
11 meeting the goal of 385 units by November both from
12 the Petitioner and also the county at that point --
13 I'm referencing specifically the April of 2009
14 hearings -- the county basically said: It's
15 appropriate and reasonable to give 'em until November
16 of 2010. And if they don't perform by that time, cut
17 it off. Revert the land.

18 And that's exactly what happened. We
19 went past November of 2010. And they didn't perform.
20 It's in my view time to cut it off and revert the
21 land. I think it's a little bit unfortunate that kind
22 of the only tool we have in our tool box is a sledge
23 hammer.

24 But on the other hand, if we don't do
25 anything then what's the point of having conditions?

1 It doesn't make any sense to me to say that we're
2 going to put conditions on district boundary
3 amendments if there's no enforcement of the
4 conditions. That's it.

5 CHAIRMAN DEVENS: Thank you.
6 Commissioner Contrades.

7 COMMISSIONER CONTRADES: Thank you,
8 Mr. Chair. The first hearing that I heard as a Land
9 Use Commissioner concerned Bridge 'Aina Le'a. It was
10 one of the first things we had to do. At that time we
11 changed the conditions. They asked for conditions to
12 be changed. We changed the conditions because they
13 said they couldn't afford to give us a thousand units
14 or whatever it was. So we changed it to 385.

15 One of the things that they promised was
16 these 385 units was going to be integrated within all
17 the property, so that we wouldn't have -- and I'm
18 sorry, this is the way we discussed it -- we wouldn't
19 have put all the quote "low income people" in one
20 place. That this would be spread throughout this
21 property. So we agreed. We changed everything. They
22 were gonna do it. Nothing happened.

23 Then they came back and they wanted more
24 changes. Then they sold off part of this land. And,
25 Commissioner Jencks, I have to tell you this, we're

1 talking about 61 acres of land. They're already
2 splitting it up. It's not the whole property that
3 they're going to be developing.

4 Supposedly they have a condition that
5 they can purchase afterwards if they get through this.
6 So we've already seen that all the promises made to
7 take from a huge amount of units, take it down
8 smaller, we're going to integrate it, we're going to
9 build parks, we're going to build schools, do this, do
10 that, nothing ever kept. This Project has been going
11 on for over 20 years. Nothing ever happened.

12 Now, I like how people say, "Oh, there's
13 substantial work being done." How can you possibly
14 sit here and tell me after five and-a-half years of
15 being a Commissioner, after listening to all these
16 promises, after talking about a thousand acres, now
17 we're down to 61, that you consider that substantial.
18 I consider that insulting to say that to me. I really
19 do.

20 And someone said something, I think it
21 was Mr. Voss, said, you know: That if we do this, if
22 we take this road to revert think about those people
23 who testified in favor of this. What is the message
24 to them?

25 What's the message to the people who

1 voted, who came here and said don't do this? You
2 know? Two forks you talked about Yogi Berra uses.
3 It's a great thing to say, but, you know, it's not
4 something I would do.

5 What bothers me the most is -- my dad
6 was my hero. When I was a young boy he told me this.
7 And I've lived my life this way. He said, "When you
8 came into this world you had nothing. And when you
9 leave you will have nothing. There is only one thing
10 in your life that you truly own that is yours that you
11 can control and that is your word."

12 They gave us their word that they were
13 going to do this. We voted 7/0 to revert this a long
14 time ago. And they asked us to reconsider. And they
15 gave us their word that they were gonna do all of
16 these things. And I remember telling them, "Are you
17 sure? You sure you can do this? I don't think you
18 can."

19 "Oh, please give us a chance. I give
20 you my word we're gonna do it."

21 So we gave them a chance. In my opinion
22 when November came and they didn't get this done it
23 was over. Yet we still continued to give them the
24 opportunity to argue with us. I don't understand why.

25 And I agree with Commissioner Heller.

1 It's unfortunate it's a sledge hammer, but that's the
2 only thing we got. And if we're going to have
3 conditions and nobody has to live up to, then why do
4 we have a Commission at all?

5 If we're not going to live up to our own
6 conditions, and tell people, "If you don't do it I'm
7 sorry this is what happens," then why have us? What
8 are we for? It doesn't make sense.

9 And to sit there and say, you know, "It
10 doesn't make sense to revert it back to ag," that's
11 what it was! So naturally we have to revert it back
12 to what it was.

13 If you prefer, let's revert it back to,
14 oooh, conservation. That makes better sense to you.
15 But it was ag. It was changed and now that's where
16 you take it back. Common sense. It's not my fault
17 that it was ag. It was what it was.

18 So all these arguments that we
19 continuously hear about I find it really -- you're
20 telling me that, you know, "I'm really sorry. I tried
21 my best." I'm sorry. I gave you every opportunity.
22 I gave you a chance and I asked you pointedly and you
23 gave me your word. And it ain't done. As far as I'm
24 concerned it's over.

25 That's why I seconded the motion and

1 that's why I'm going to vote for it. Thank you.

2 CHAIRMAN DEVENS: Thank you,
3 Commissioner. Any other discussion on this matter?
4 Commissioner Lezy.

5 COMMISSIONER LEZY: Thank you, Chair,
6 just a couple of points. First, I'd just like to say
7 that the comments that Commissioner Jencks and
8 Commissioner Kanuha offered are well taken.

9 I will note, though, that with regard to
10 some of the points that Commissioner Jencks made,
11 particularly regarding the issues of financing and the
12 difficulties with financing, that that certainly
13 wasn't the thrust of the position that was taken by
14 the Petitioner here with regard to their failure to
15 meet the conditions.

16 To echo some of the comments that were
17 made by Commissioner Contrades and by Commissioner
18 Heller, in large part the reason that I made this
19 motion it has do with the point that I made back when
20 we originally acted to revert. And that has to do
21 with the integrity of the Commission.

22 And as Commissioner Contrades just
23 pointed out, that if we're not willing to make
24 difficult decisions on the decisions and orders that
25 we've issued in the past and the enforcement of the

1 conditions, then what real purpose is there for the
2 Commission?

3 When we acted on the reconsideration on
4 our original action on the reversion, I voted against
5 that. And at the time I said something to the effect,
6 I believe, of that I very much hoped that DW 'Aina
7 Le'a was going to prove the comments that I had made
8 wrong about the fact that I assumed that we were going
9 to be in the exact position that we are in today at
10 some point.

11 And unfortunately I wasn't proven wrong.
12 So I see no other course here except for the motion
13 that I've made.

14 CHAIRMAN DEVENS: Thank you,
15 Commissioner Lezy. Commissioner Kanuha.

16 COMMISSIONER KANUHA: Thank you, Chair.
17 I just had one more, something else that I wanted to
18 say that I think was, that I already covered. So I
19 want to make another statement here.

20 Commissioner Lezy in his last comments
21 just made a statement that to me, you know, is the
22 heart of the matter. And that statement is, "Well,
23 what's the real purpose for the Commission?"

24 You know, those of you who have been
25 involved in, by the county government, land use

1 into our decision and orders the more we are going to
2 get into this position where once it's out of our
3 hands we can still call it back. And in this case we
4 are going to revert it back, call it back all the way.

5 I really believe there's a role for this
6 Commission. But I think there's a point where, you
7 know, we can overstep what we're statutorily created
8 to do. And basically, you know, we're almost tending
9 to, in this particular case, this decision we make
10 basically has the effect of checkmating the counties.

11 Again, you know, I think one would ask:
12 Well, what is the real purpose of this Commission?
13 Because if that's the case, you know, why not have us
14 administer all these specific things that we condition
15 these people to do?

16 You know, we're talking about -- and
17 this is historical -- we're just looking at -- the
18 reason there's this stigma about this Commission is
19 because it's duplicative, you know. We got a state --
20 we're acting as a state zoning board similar to what
21 the county is doing. But is that the real role for
22 us? I just disagree.

23 I mean I've been a county guy for a long
24 time. One of the first things I've done is -- I've
25 appeared before this Commission in different

1 capacities. Having served on this I can understand
2 that there's a role for us. But to have petitions
3 with real specific representations come before us and
4 have to hold them to that after, you know, it's passed
5 through us, it's passed through the county with their
6 zoning and their ministerial approvals, I think it's
7 gonna, it's gonna -- it's gonna be really -- this is
8 going to be a really significant decision in my mind.
9 Thank you.

10 CHAIRMAN DEVENS: Thank you,
11 Commissioner Kanuha. Any further discussion? There's
12 none. Dan, take the vote.

13 MR. DAVIDSON: Motion to revert the
14 property as stated by Commissioner Lezy.

15 Commissioner Lezy?

16 COMMISSIONER LEZY: Yes.

17 MR. DAVIDSON: Commissioner Contrades?

18 COMMISSIONER CONTRADES: Yes.

19 MR. DAVIDSON: Commissioner Kanuha?

20 COMMISSIONER KANUHA: No.

21 MR. DAVIDSON: Commissioner Judge?

22 COMMISSIONER JUDGE: No.

23 MR. DAVIDSON: Commissioner Jencks?

24 COMMISSIONER JENCKS: No.

25 MR. DAVIDSON: Commissioner Heller?

1 COMMISSIONER HELLER: Yes.

2 MR. DAVIDSON: Commissioner Chock?

3 COMMISSIONER CHOCK: Yes.

4 MR. DAVIDSON: Chair Devens?

5 CHAIRMAN DEVENS: Yes.

6 MR. DAVIDSON: Motion to revert passes 5
7 to 3, Chair.

8 CHAIRMAN DEVENS: Given the result of
9 the vote the Commission asks, Dan, that you prepare
10 the appropriate findings of fact, conclusions of law
11 consistent with the decision.

12 Also on the agenda we still have the
13 Office of Planning's Motion for Order to Show Cause
14 and the Bridge 'Aina Le'a motion regarding Order to
15 Show Cause. Is there a motion from the Commission
16 regarding those two motions? Commissioner Heller.

17 COMMISSIONER HELLER: Move that both of
18 those two motions be denied as they're essentially
19 moot at this point.

20 CHAIRMAN DEVENS: Is there a second?

21 COMMISSIONER CONTRADES: Second.

22 CHAIRMAN DEVENS: Second by Commissioner
23 Contrades. Any discussion? Hearing none, the vote.

24 MR. DAVIDSON: Motion to deny the two
25 pending motions as moot.

1 Commissioner Heller?

2 COMMISSIONER HELLER: Yes.

3 MR. DAVIDSON: Commissioner Contrades?

4 COMMISSIONER CONTRADES: Yes.

5 MR. DAVIDSON: Commissioner Lezy?

6 COMMISSIONER LEZY: Yes.

7 MR. DAVIDSON: Commissioner Kanuha?

8 COMMISSIONER KANUHA: Yes.

9 MR. DAVIDSON: Commissioner Judge?

10 COMMISSIONER JUDGE: Yes, I guess.

11 MR. DAVIDSON: Commissioner Jencks?

12 COMMISSIONER JENCKS: Yes.

13 MR. DAVIDSON: Commissioner Chock?

14 COMMISSIONER CHOCK: Yes.

15 MR. DAVIDSON: Chair Devens?

16 CHAIRMAN DEVENS: Yes.

17 MR. DAVIDSON: Motion to Deny passes 8/0

18 on both, Chair.

19 CHAIRMAN DEVENS: Mr. Okamoto, if I can
20 ask you at this point, we have deferred your Motion to
21 Amend Conditions 1, 5 and 7. Given the decisions just
22 made by the Commission will you be withdrawing that
23 motion?

24 MR. OKAMOTO: No, sir.

25 CHAIRMAN DEVENS: So what do you want us

1 to do with that motion?

2 MR. OKAMOTO: It is up to the Commission
3 to dispose of the motion.

4 CHAIRMAN DEVENS: But isn't rendered
5 moot at this point given the Order to Show Cause
6 ruling?

7 MR. OKAMOTO: I'm sorry. Well, I've
8 been given an opportunity to argue on the other stuff
9 so I don't want to get duplicative. But to me there
10 is still a condition in place for that land use. I
11 believe that we should be heard on that motion.

12 CHAIRMAN DEVENS: I understand what you
13 want to do, but it's to amend conditions of something
14 that's no longer there.

15 MR. VOSS: With all due respect,
16 Chairman, chapter 205-4 is very clear and unambiguous
17 that any boundary amendment by this Commission
18 requires six affirmative votes of the Commission.
19 That's what the statute says.

20 Today there was five votes of the
21 Commission, not six. There has not been a reversion
22 today under the plain language of the statute.
23 Therefore this Commission is obligated as a matter of
24 law to hear the condition -- the motion to amend
25 conditions.

1 CHAIRMAN DEVENS: Well, whose motion is
2 it? Isn't it yours, DW? Isn't it yours,
3 Mr. Okamoto?

4 MR. OKAMOTO: Yes.

5 CHAIRMAN DEVENS: So what do you want to
6 do with it? The questions is being asked of you.

7 MR. OKAMOTO: We have filed a motion.
8 We ask that the Commission make a decision on that
9 motion, sir. And I happen to agree with Mr. Voss that
10 the Commission in changing the classification of land
11 requires six affirmative votes.

12 CHAIRMAN DEVENS: Okay. So, Mr. Yee,
13 did you want to add something to the argument?

14 MR. YEE: Only that this is not a
15 reclassification case. It's an Order to Show Cause.
16 So that particular statutory provision does not apply.
17 We will, of course, refer to your Deputy AG on the
18 issue.

19 With respect to the Motion to Amend, if
20 Mr. Okamoto insists on having it heard then we would
21 suggest that it simply be scheduled on another day and
22 heard. The Office of Planning will recommend it be
23 dismissed as moot.

24 CHAIRMAN DEVENS: Okay. We have
25 deferred the motion. I understand your position,

1 Mr. Okamoto and Mr. Voss, the arguments you're
2 presenting. We will schedule it the next appropriate
3 agenda and deal with it at that time. Is there any
4 other business? Hearing none, we will stand
5 adjourned.

6

7 (The proceedings were adjourned at 6:02 p.m.)

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1 C E R T I F I C A T E

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3 I, HOLLY HACKETT, CSR, RPR, in and for the State
4 of Hawai'i, do hereby certify;

5 That I was acting as court reporter in the
6 foregoing LUC matter on the 20th day of January 2011;

7 That the proceedings were taken down in
8 computerized machine shorthand by me and were
9 thereafter reduced to print by me;

10 That the foregoing represents, to the best
11 of my ability, a true and correct transcript of the
12 proceedings had in the foregoing matter.

13

14 DATED: This _____ day of _____ 2011

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17

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19 _____
20 HOLLY M. HACKETT, CSR #130, RPR
21 Certified Shorthand Reporter

22

23

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