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LAND USE COMMISSION

STATE OF HAWAI'I

ACTION

A06-771 D.R. HORTON-SCHULER HOMES, LLC)  
\_\_\_\_\_)

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for a Public Hearing  
at Conference Room 405, 4th Floor, Leiopapa A  
Kamehameha, 235 S. Beretania Street, Honolulu,  
Hawai'i, commencing at 9:35 a.m. on Friday, October 7,  
2011, pursuant to Notice.

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

COMMISSIONERS:  
KYLE CHOCK  
THOMAS CONTRADES  
RONALD HELLER  
NORMAND LEZY (Chairman)  
CHAD McDONALD  
JAYE NAPUA MAKUA  
NICHOLAS TEVES, JR.

EXECUTIVE OFFICER: ORLANDO DAVIDSON  
ACTING CHIEF CLERK: RILEY HAKODA  
STAFF PLANNERS: BERT SARUWATARI, SCOTT DERRICKSON  
DEPUTY ATTORNEY GENERAL: DIANE ERICKSON, ESQ.  
AUDIO TECHNICIAN: WALTER MENCHING

Docket No. A06-771 D.R. HORTON-SCHULER HOMES, LLC

For the Petitioner: BENJAMIN KUDO, ESQ.  
CAMERON NEKOTA, ESQ. Horton-Schuler

For the County: DAWN TAKEUCHI-APUNA, ESQ.  
Deputy Corporation Counsel  
RANDY HARA, DPP

For the State: BRYAN YEE, ESQ.  
Deputy Attorney General  
MARY LOU KOBAYASHI  
Director Office of Planning

Intervenor Friends of Makakilo: DR. KIONI DUDLEY

Intervenor Clayton Hee: ERIC SEITZ, ESQ. (via  
conference call)

Intervenor Sierra Club: TATIANA CERULLO, ESQ.

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1                   CHAIRMAN LEZY: (Gavel) Good morning. This  
2 is a meeting of the state of Hawai'i Land Use  
3 Commission. The first item on the agenda is adoption  
4 of the minutes. Commissioners, any revisions?  
5 Hearing none, do I hear a motion?

6                   COMMISSIONER CHOCK: So moved.

7                   COMMISSIONER HELLER: Second.

8                   CHAIRMAN LEZY: All in favor?

9                   (Voting) Aye.

10                  All opposed? Thank you. Dan, will you  
11 please give us the tentative meeting schedule.

12                  MR. DAVIDSON: Thank you, Chair. You have  
13 the meeting schedule indicating the items through  
14 December through the calendar year. And as always if  
15 you have any questions or concerns please contact  
16 either me or Riley. Thank you.

17                  CHAIRMAN LEZY: Thank you. The next item on  
18 the agenda is an action meeting on docket matter  
19 A06-771 D.R. Horton-Schuler Homes, LLC, a Delaware  
20 Limited Liability Company, d.b.a. D.R. Horton-Schuler  
21 Division, Honouliuli, Ewa, O'ahu, to amend the  
22 Agricultural Land Use District Boundary into the Urban  
23 Land Use District for approximately 1,525.516 acres of  
24 land at Honouliuli, Ewa District, O'ahu, Hawai'i, Tax  
25 Map Key Nos.: (1)9-1-17:4 059 and 072; (1)9-1-18:001

1 and 004 to consider Intervenor Senator Clayton Hee's  
2 Motion for Reconsideration.

3 Parties, please identify yourselves.

4 MR. KUDO: On behalf of the Petitioner, Ben  
5 Kudo. And with me is Cameron Nekota from  
6 Horton-Schuler.

7 CHAIRMAN LEZY: Morning.

8 MS. TAKEUCHI-APUNA: Good morning. Deputy  
9 Corporation Counsel Dawn Takeuchi-Apuna for the  
10 Department of Planning and Permitting. Here with me  
11 today is Randy Hara.

12 CHAIRMAN LEZY: Morning.

13 MR. YEE: Good morning. Deputy Attorney  
14 General Bryan Yee on behalf of the Office of Planning.  
15 With me is Mary Lou Kobayashi from the Office of  
16 Planning.

17 CHAIRMAN LEZY: Good morning.

18 DR. DUDLEY: Good morning. Dr. Kioni Dudley  
19 from the Friends of Makakilo.

20 CHAIRMAN LEZY: Good morning.

21 SENATOR HEE: Good morning. Clayton Hee.

22 CHAIRMAN LEZY: Good morning.

23 MS. CERULLO: Good morning. Tatiana Cerullo  
24 for Sierra Club.

25 CHAIRMAN LEZY: And I understand that

1 Senator Hee's attorney Mr. Seitz is appearing by  
2 telephone in this matter. Mr. Seitz, can you hear us?

3 MR. SEITZ: Yes. I can hear you. I am here  
4 as well.

5 CHAIRMAN LEZY: Thank you very much. Let me  
6 update the record relative to this matter. On  
7 September 9, 2011 the Commission granted Senator  
8 Clayton Hee's Petition to Intervene in his individual  
9 capacity and issued its Order on September 20, 2011.

10 On September 16, 2011 the Commission  
11 received a Substitution of Counsel Notice from Eric A.  
12 Seitz for Intervenor Senator Clayton Hee.

13 On September 21, 2011 the Commission  
14 received Intervenor Senator Clayton Hee's Motion for  
15 Reconsideration and Exhibits A through C.

16 On September 28, 2011 the Commission  
17 received the City and County's Opposition to  
18 Intervenor Senator Clayton Hee's Motion for  
19 Reconsideration; Office of Planning's Response to  
20 Intervenor Senator Clayton Hee's Motion for  
21 Reconsideration; Petitioner's Statement of No Position  
22 on Intervenor Senator Clayton Hee's Motion for  
23 Reconsideration.

24 Let me briefly run through our hearing  
25 procedures for today. I will first call for those

1 individuals desiring to provide public testimony on  
2 Intervenor Senator Clayton Hee's Motion for  
3 Reconsideration to identify themselves. All such  
4 individuals will be called in turn to testify.

5           After completion of the public testimony  
6 Intervenor Senator Clayton Hee will make his argument.  
7 We'll receive any argument from Petitioner, the City  
8 and County of Honolulu, the State Office of Planning,  
9 and Intervenor Friends of Makakilo and Intervenor the  
10 Sierra Club.

11           After we have received arguments from those  
12 parties and any rebuttal from Senator Clayton Hee, the  
13 Commission will conduct its deliberations. Are there  
14 any questions on our procedures for today?

15           MR. SEITZ: No.

16           CHAIRMAN LEZY: Thank you. Are there any  
17 individuals desiring to provide public testimony? I  
18 understand there is none.

19           MR. DAVIDSON: No signups.

20           CHAIRMAN LEZY: Hearing none, Mr. Seitz, are  
21 you prepared to proceed?

22           MR. SEITZ: I am. Thank you.

23           CHAIRMAN LEZY: Please do.

24           MR. SEITZ: It was always Senator Hee's  
25 intention to appear and participate in his capacity as

1 a senator and member of the Hawai'i State Legislature.  
2 I have reviewed briefly what transpired earlier and I  
3 think there was some confusion.

4 But Senator Hee is here because as a senator  
5 and a leader in the Hawai'i State Legislature he has  
6 been a party for many years to the development of  
7 policies affecting developments and in particular  
8 agriculture in Hawai'i.

9 And he has long-held and very deep concerns  
10 about aspects of the proposal before you which he  
11 believes he can contribute in the course of these  
12 proceedings.

13 He also believes that it's important where  
14 appropriate for officials in all branches of  
15 government to weigh in if they have something to add  
16 even if their participation might be politically  
17 unpopular in some certain venues.

18 We contend it's an artful distinction to  
19 refer to him as an individual or as a senator because  
20 in fact he's going to address these proceedings as  
21 Senator Hee. And his role and his desire to appear  
22 here is in his capacity based upon the office that he  
23 holds. There are no independent reasons why he should  
24 not be allowed to participate as a senator. There's  
25 really no real or practical opposition.

1           The memo filed by Corporation Counsel which  
2 argues that there's some violation of separation of  
3 powers, in my view is, frankly, irrelevant and absurd.  
4 There's no authority for that whatsoever. No  
5 authorities were cited and that's because there are  
6 none.

7           In fact, as all of us know just from common  
8 sense, legislators regularly go to court in their  
9 capacity as legislators. Executive members and  
10 judiciary members appear before the Legislature and  
11 nobody complains in those circumstances that it's  
12 inappropriate for them to do so.

13           Senator Hee is not here before you and is  
14 not seeking to appear before you to extend or exercise  
15 legislative authority, or to in any way participate in  
16 a quasi-judicial role.

17           What he's there to do is simply to  
18 contribute because he has views and experience that he  
19 believes will enable you as Commissioners to make the  
20 best and most astute decisions in this matter.

21           And our Corporation Counsel really has no  
22 standing to object to him participating in this  
23 proceeding as a state senator. If there were  
24 standing it would be with the State Senate itself and  
25 perhaps with the Attorney General's Office, and no one



1 has weighed in in opposition to his request from  
2 either of those places.

3           So in short there is really no reason not to  
4 allow him to participate in his capacity as a State  
5 Senator. The public for intents and purposes will be  
6 regarding his participation as such. And we think  
7 that it would be erroneous and unfortunate for you to  
8 preclude him to participate in his capacity as a  
9 member of the Hawai'i State Senate. Thank you.

10           CHAIRMAN LEZY: Petitioner.

11           MR. KUDO: The Petitioner takes no position  
12 on the Senator's Motion for Reconsideration. However,  
13 we reiterate our concern that if he is to appear in  
14 his official capacity as senator that this not be a  
15 reason for delay of the hearings or rescheduling of  
16 hearings caused by his responsibilities to the State  
17 Legislature. This was a concern that we had raised at  
18 the earlier hearings. If we can get affirmation of  
19 that from Senator Hee, then we'd be fine with it.

20           CHAIRMAN LEZY: County?

21           MS. TAKEUCHI-APUNA: DPP opposes Clayton  
22 Hee's Motion for Reconsideration for several important  
23 reasons. First, this Commission should not hear  
24 Clayton Hee's motion because it already duly heard the  
25 arguments for and against Clayton Hee's intervention

1 as a senator. And previously determined on  
2 September 9th, 2011 that Clayton Hee shall be admitted  
3 solely as an individual.

4           Importantly, the arguments made in Clayton  
5 Hee's Memorandum in Support of this Motion for  
6 Reconsideration are substantively no different than  
7 nor do they provide any new arguments than those that  
8 were in the original Petition to Intervene. To  
9 reconsider this motion would be redundant, needless  
10 and a waste of time for all those involved.

11           Furthermore, Clayton Hee believes this  
12 motion should be granted under the guidance of Hawai'i  
13 Rules of Civil Procedure, rule 60(b). That rule  
14 provides that a court may relieve a party from a final  
15 order for the following reasons: Mistake,  
16 inadvertence, surprise, excusable neglect, newly  
17 discovered evidence, fraud, misrepresentation, or any  
18 other reason justifying relief from the operation of  
19 the judgment.

20           Though DPP believes that rule does not apply  
21 here, Clayton Hee has not provided this Commission any  
22 reason why it believes this motion should be granted  
23 or even reconsidered.

24           Secondly, Clayton Hee suggests that because  
25 the Attorney General made no objection to his

1 intervention in his capacity as a state senator, such  
2 an intervention is therefore constitutional. This  
3 reasoning is flawed.

4           There are many plausible reasons for the AG  
5 to file a new objection such as the AG not identifying  
6 the same issue that DPP has or that the AG wishes to  
7 avoid the potential for litigation.

8           Regardless, this Commission's definitive  
9 order on the Motion to Intervene clearly set forth its  
10 ruling that Clayton Hee shall not be admitted in his  
11 capacity as a state senator despite the prior "no  
12 objection" filing of the AG on that motion.

13           Thirdly, DPP reaffirms its stance that  
14 Clayton Hee's participation as an Intervenor in this  
15 matter in his capacity as a state senator would  
16 unconstitutionally offend the Separation of Powers  
17 Doctrine as an excessive encroachment by a legislator  
18 into executive matters.

19           In his capacity as a senator, Clayton Hee  
20 would be here to oversee and interpret the Important  
21 Ag Lands legislation. He mentioned this in his first  
22 Motion to Intervene that he's here to implement and  
23 interpret these laws. This is problematic because  
24 proper statutory interpretation does not allow for the  
25 influence of an individual legislator.

1            Clayton Hee's involvement with legislation  
2 stops at drafting legislation. He should not  
3 participate in the implementation, execution or  
4 interpretation of those laws at these proceedings.

5            Fourthly, Clayton Hee states that the very  
6 fact that communication among the branches of  
7 government is necessary for the efficiency of  
8 government alone supports Senator Hee's position.  
9 This statement is overly simplistic.

10           Individuals like legislators are not-- are  
11 never called upon by judges to provide their  
12 interpretation or intent of a statute, though it may  
13 be deemed more efficient. Similarly they should not  
14 be allowed to intervene at quasi-judicial hearings  
15 such as this to provide their interpretation of  
16 legislation for this Commission.

17           Lastly, Clayton Hee does not speak for or  
18 represent the entire Legislature's interest, let alone  
19 the entire Senate's interests. At the Motion to  
20 Intervene hearing State Senator Will Espero with the  
21 backing of Senate President Shan Tsutsui testified  
22 that the senate does take not a position on this  
23 petition.

24           Therefore Clayton Hee would be acting  
25 counter to and in defiance of the State Senate to

1 intervene as a state senator in opposition to this  
2 petition.

3 And, again, this Commission has already  
4 ruled that Clayton Hee be admitted solely as an  
5 individual. For these reasons DPP strongly opposes  
6 Clayton Hee's Motion for Reconsideration. Thank you.

7 CHAIRMAN LEZY: Thank you. Office of  
8 Planning?

9 MR. YEE: The Office of Planning takes no  
10 position on the Motion for Reconsideration. Rest on  
11 its pleadings.

12 CHAIRMAN LEZY: Thank you. Friends of  
13 Makakilo.

14 MR. DUDLEY: The Friends of Makakilo is not  
15 prepared to say anything in a legal way but just as a  
16 personal view. It seems to me that Senator Hee has  
17 really experienced things as a senator over the last  
18 great number of years that he's been in the senate.  
19 And that his whole approach will be coming as a  
20 senator.

21 And so it seems to me that, you know, you  
22 can't separate the senator from the man. And I don't  
23 really see any problem with this. The Friends of  
24 Makakilo supports his motion.

25 CHAIRMAN LEZY: Thank you. Sierra Club?

1 MS. CERULLO: Sierra Club supports Senator  
2 Hee's Motion for Reconsideration.

3 CHAIRMAN LEZY: Mr. Seitz, any rebuttal?

4 MR. SEITZ: No. I just simply want to  
5 assure all of you that unlike the Corporation Counsel  
6 we're not going to burden these proceedings. We're  
7 not going to waste anybody's time. And there will  
8 certainly be no delays because of any other  
9 conflicting duties that Senator Hee may have.

10 We have already indicated that by  
11 stipulating to procedural requests that have been made  
12 by the Petitioner, and we will continue to do  
13 everything we can to cooperate with you and also with  
14 the other parties.

15 CHAIRMAN LEZY: Thank you. Commissioners,  
16 questions? Discussion?

17 COMMISSIONER HELLER: Question?

18 CHAIRMAN LEZY: Commissioner Heller.

19 COMMISSIONER HELLER: Yes. This is  
20 primarily a question directed to Senator Hee, but if  
21 any of the other parties have a view on it I'd be  
22 interested. My question is: Can you see any evidence  
23 or arguments that would be proper for Senator Hee to  
24 offer if he intervened as a senator, but would not be  
25 proper for him to offer as an intervenor, as an

1 individual? In other words, would it make any  
2 difference what he can present?

3 MR. SEITZ: I don't see any arguments of any  
4 sort or any distinction. I really don't see any  
5 conflict of interest of any sort in terms of his two  
6 roles. And, again, to us it makes common sense. He's  
7 there because he occupies a position.

8 Unless there were to be some constitutional  
9 impediment in him participating because of who he is  
10 and the role he plays in the community, I don't really  
11 think there's any reason not to afford him the  
12 opportunity to appear before you in his capacity as a  
13 senator.

14 COMMISSIONER HELLER: My question was not so  
15 much about conflict of interest, as to whether there's  
16 any limitation on what he can offer that would exist  
17 as an individual that would somehow go away if we  
18 allowed him to intervene as a senator.

19 MR. SEITZ: We don't believe so.

20 COMMISSIONER HELLER: Thank you.

21 MR. SEITZ: Until and unless the senate in  
22 some manner were to raise some concern which would  
23 either arise under its rules or policies, we don't  
24 believe basically that there's any impediment of any  
25 sort that would restrict him where it would cause any

1 concern.

2 SENATOR HEE: Mr. Chairman, may I respond?

3 CHAIRMAN LEZY: Yes.

4 SENATOR HEE: Commissioner Heller, part of  
5 my desire for reconsideration as was originally  
6 intended, was because of the public policy issues that  
7 are raised annually, monthly, if you will, at the  
8 state capitol with regard to issues of governance.

9 This particular issue is very important in  
10 terms of setting, in my opinion, public policy with  
11 respect to the intervention of a working farm. This  
12 intervention has to do with food security which was  
13 one of the cornerstones of The New Day. These are  
14 issues that are brought before the senate.

15 And although I could not separate myself as  
16 an individual and as a member of the senate, the  
17 original intent remains. That these issues were  
18 brought by me to this forum as a member of the senate.

19 CHAIRMAN LEZY: Commissioners, any other  
20 questions? Mr. Seitz, I have a question following up  
21 on a point that was raised by the County. As I read  
22 the Motion for Reconsideration it essentially tracks  
23 the original Motion to Intervene.

24 So I don't see that there has been an issue  
25 raised that would provide a basis for reconsideration.



1 It appears to me this is simply the motion being  
2 reargued and request being made for a different  
3 outcome.

4 MR. SEITZ: Well, let me just respond in  
5 this way: My understanding is that Senator Hee  
6 initially moved to intervene in his capacity as a  
7 senator. Basically the comment said, "Well, would you  
8 be satisfied we just allow you to intervene but just  
9 as an individual?" And at that time I think without  
10 sufficient deliberation he said, "Yes," and it was  
11 sort of like a compromise. There was no real ruling  
12 that he could not intervene as a senator. It was  
13 just, I think, a mistake that was made based upon the  
14 spur of the moment.

15 So if you had denied him the opportunity to  
16 intervene, which I don't see any order saying as a  
17 senator, then you're right, he might have a problem  
18 procedurally.

19 But in this case basically we're asking for  
20 reconsideration based upon what I think was some  
21 confusion that arose at the time. And I don't think  
22 it's prejudicial in any way for us to ask you to  
23 consider this, especially since your own lawyers have  
24 really not found any defect with the process.

25 CHAIRMAN LEZY: Then if I can I'd like to

1 ask a follow up question to the point that  
2 Commissioner Heller raised and maybe put a little bit  
3 of a finer point on it. If Senator Hee's intervention  
4 status goes forward as an individual versus in the  
5 capacity as a senator, will his role as an intervenor  
6 be prejudiced in any way?

7 MR. SEITZ: I don't think it will be  
8 prejudiced except in so far as some sort of artificial  
9 distinction potentially could be made by whomever  
10 chooses to make that, that somehow he's appearing here  
11 personally because he doesn't want to appear or  
12 doesn't want to accept the political consequences of  
13 taking positions that other people might object to.

14 And I think it's more what other people will  
15 attribute to this situation as well as in our view,  
16 the importance of allowing him to speak in the  
17 capacity of who he is and what he represents. He  
18 represents a long period of time as a public servant  
19 and leader. And we can't just liquidate that, I don't  
20 believe. And I don't think it's appropriate to do so  
21 by just simply saying, "Well, you're here as an  
22 individual. And we're going to forget the fact that  
23 you're a member of the State Senate."

24 Unless there's a real reason for doing so --  
25 and I don't see or perceive and haven't heard one --

1 he is who he is. And I think it would be much more  
2 appropriate for everybody to simply recognize that and  
3 go on from there. We're not going to overburden the  
4 proceedings. He's not going to pull rank on anybody.

5 It's basically a question in my view more of  
6 common sense than anything else in so far as he's  
7 appearing before you because of certain experience and  
8 certain understanding of the history of things that he  
9 has because of where he's been and what's he done.  
10 And that's really all we're seeking to acknowledge.

11 CHAIRMAN LEZY: Thank you. Commissioners,  
12 further discussion? Do I hear a motion?

13 COMMISSIONER CHOCK: Move to reconsider,  
14 Chair.

15 COMMISSIONER TEVES: What's the motion?  
16 Sorry.

17 COMMISSIONER CHOCK: Move to reconsider.

18 COMMISSIONER TEVES: Second.

19 CHAIRMAN LEZY: For clarification purposes,  
20 Commissioner Chock, are you moving to grant the motion  
21 to reconsider?

22 COMMISSIONER CHOCK: Yes.

23 CHAIRMAN LEZY: Discussion? Commissioner  
24 Heller.

25 COMMISSIONER HELLER: Yes. I share the

1 Chair's concern about whether it's proper to have a  
2 Motion for Reconsideration when there's really no new  
3 evidence and no arguments being made that were not  
4 made previously.

5 I also note that at least my recollection of  
6 what happened before is not that we denied the Motion  
7 to Intervene as a senator but that Senator Hee  
8 basically withdrew it, in effect. That he said he  
9 only wanted to intervene as an individual. And we  
10 granted what he asked for at that time.

11 CHAIRMAN LEZY: Further discussion? Hearing  
12 none, Mr. Davidson, please poll the Commission.

13 MR. DAVIDSON: The motion is to grant  
14 Senator Clayton Hee's Motion for Reconsideration.  
15 Commissioner Chock?

16 COMMISSIONER CHOCK: Yes.

17 MR. DAVIDSON: Commissioner Teves?

18 COMMISSIONER TEVES: Yes.

19 MR. DAVIDSON: Commissioner Heller?

20 COMMISSIONER HELLER: No.

21 MR. DAVIDSON: Commissioner McDonald?

22 COMMISSIONER McDONALD: Yes.

23 MR. DAVIDSON: Commissioner Contrades?

24 COMMISSIONER CONTRADES: No.

25 MR. DAVIDSON: Commissioner Makua?

1 COMMISSIONER MAKUA: Yes.

2 MR. DAVIDSON: Chair Lezy?

3 CHAIRMAN LEZY: No.

4 MR. DAVIDSON: The motion fails 4 to 3,  
5 Chair.

6 CHAIRMAN LEZY: Thank you. The next item on  
7 the agenda relative to Docket A06-771 is consideration  
8 of Hannah Miyamoto's Petition for Leave to Intervene.  
9 Parties, will you please again identify yourselves.

10 MR. KUDO: On behalf of the Petitioner, Ben  
11 Kudo. And with me is Cameron Nekota from  
12 Horton-Schuler.

13 MS. TAKEUCHI-APUNA: Deputy Corporation  
14 Counsel Dawn Takeuchi-Apuna on behalf of the DPP.  
15 Here with me today is Randy Hara.

16 MR. YEE: Deputy Attorney General Bryan Yee  
17 on behalf of the Office of Planning. With me is Mary  
18 Lou Kobayashi from the Office of Planning.

19 DR. DUDLEY: Dr. Kioni Dudley from the  
20 Friends of Makakilo.

21 CHAIRMAN LEZY: Mr. Seitz?

22 MR. SEITZ: Yes. Eric Seitz representing  
23 Senator Hee.

24 MS. CERULLO: Tatiana Cerullo for Sierra  
25 Club.

1 MS. MIYAMOTO: Hannah Miyamoto for herself.

2 CHAIRMAN LEZY: Good morning, Ms. Miyamoto.

3 Let me update the record on this matter. On September  
4 12, 2011 the Commission received Hannah Miyamoto's  
5 Petition for Leave to Intervene.

6 On September 20, 2011 the Commission  
7 received the Office of Planning's Statement of No  
8 Position to Hannah Miyamoto's Petition for Leave to  
9 Intervene.

10 The City and County's Statement of No  
11 Objection to Hannah Miyamoto's Petition to Intervene;  
12 Petitioner D.R. Horton-Schuler Homes, LLC's Statement  
13 of No Objection to Hannah Miyamoto's Petition for  
14 Leave to Intervene; Intervenor Friends of Makakilo's  
15 Objection to Acceptance of Hannah Miyamoto as an  
16 Intervenor; Intervenor Sierra Club's Response to  
17 Hannah Miyamoto's Petition to Intervene.

18 No submission was received from Intervenor  
19 Senator Clayton Hee.

20 On September 30, 2011 the Commission  
21 received Hannah Miyamoto's Memorandum in Support of  
22 her Petition to Intervene.

23 Let me again briefly run through our hearing  
24 procedures on this matter. First, I will call for  
25 those individuals desiring to provide public testimony

1 on Hannah Miyamoto's Petition for Leave to Intervene  
2 to identify themselves. All such individuals will be  
3 called in turn to testify.

4 After completion of the public testimony,  
5 Ms. Miyamoto will make her arguments. After the  
6 completion of Ms. Miyamoto's arguments we will receive  
7 any arguments from Petitioner, the City and County,  
8 the State Office of Planning and Intervenor Friends  
9 of Makakilo, the Sierra Club and Senator Clayton Hee.

10 After we've received arguments from the  
11 Petitioner, the City and County, the State Office of  
12 Planning and Intervenor, we'll take any rebuttal  
13 argument from Ms. Miyamoto, and the Commission will  
14 then conduct its deliberations.

15 Are there any questions on our procedures  
16 for today?

17 MR. KUDO: No questions.

18 CHAIRMAN LEZY: Are there any individuals  
19 signed up?

20 MR. DAVIDSON: No sign-ups.

21 CHAIRMAN LEZY: Is there anybody who wishes  
22 to provide public testimony on this motion? Hearing  
23 none, Ms. Miyamoto, are you prepared to proceed?

24 MS. MIYAMOTO: Yes, I am, Your Honor --  
25 Counsel.

1                   CHAIRMAN LEZY: Please do.

2                   MS. MIYAMOTO: I, of course, have submitted  
3 an extensive argument, I think, on the matter. I  
4 think the key points to remind you people is that by  
5 my count I think I filed ten days after the last  
6 possible legal date to intervene -- also -- 10  
7 business days I should say -- 10 business days. Also,  
8 of course, as I point out that my Petition was  
9 prompted by your decision to admit Sierra Club and  
10 particularly Dr. Dudley.

11                  No. 2 is that the only objections brought,  
12 of course, have been on the grounds of timeliness  
13 which I think presumes that all other objections have  
14 been waived. And that's why now, my memorandum, of  
15 course describes -- answers those issues of  
16 timeliness.

17                  I think the reasoning of the Tenth Circuit  
18 Court of Appeals in Utah Association vs. Clinton  
19 particularly their acceptance of Sierra Club's  
20 Petition to Intervene, I think over two years after,  
21 which I think is instructive because the Tenth Circuit  
22 gives a very good, reasoned explanation for why  
23 intervention -- permissive intervention should be  
24 freely granted.

25                  Of course, the rules actually state that.



1 It says "freely granted". It's not -- it's quite  
2 clear that it's not some kind of strict deadline or  
3 that you need to present some sort of extraordinary  
4 case for intervention. And otherwise I qualify for  
5 intervention with a particularly unique position.

6 Of course I, by the way, have brought  
7 forward a list of exhibits which should be before I  
8 think I'm actually required to do so. But that is to  
9 demonstrate my ability and willingness to litigate  
10 this fully and will assist the Commission, which I  
11 believe will be able to assist the Commission with a  
12 proper environmental approach that's in favor of the  
13 Amended Petition.

14 CHAIRMAN LEZY: Thank you. Petitioner?

15 MR. KUDO: The Petitioner has no objection  
16 to the admittance of Hannah Miyamoto to these  
17 proceedings with one caveat. And that is I'll  
18 reiterate again. I've had a discussion with  
19 Ms. Miyamoto, and I understand that she's a student at  
20 the University of Hawai'i I believe in the Ph.D.  
21 program there.

22 And our concern was that, again, similar to  
23 Senator Hee, that her class schedule, et cetera, not  
24 be something which prevents these proceedings from  
25 moving forward as efficiently as possible. With that

1 assurance we would have no objection to her being  
2 admitted.

3 CHAIRMAN LEZY: City and County?

4 MS. TAKEUCHI-APUNA: The City has no  
5 objection to Ms. Miyamoto's intervention.

6 CHAIRMAN LEZY: Office of Planning?

7 MR. YEE: I am going to take a few minutes.  
8 The Office of Planning noted that the parties have  
9 either filed statements of support or in opposition in  
10 this. But, frankly, we didn't see much analysis by  
11 anyone. So I did want to take a few moments to at  
12 least give the analytical framework for the motion.

13 Because the Office of Planning's interest is  
14 regardless of what you decide, we want it to be based  
15 on the right requirements. The last thing we would  
16 want is to go through this entire process and have it  
17 reversed by any side because, you know, the wrong  
18 standard or something was used.

19 So I just want to take a few moments to go  
20 through the intervention process for the LUC Rules.  
21 The first question you have to ask yourselves is  
22 whether the Petition to Intervene is timely. If so,  
23 then the intervention is fully granted unless one of  
24 two conditions exist. And I'll get to those  
25 conditions later.

1                   But if the Petition to Intervene is  
2    untimely, then the intervenor must demonstrate good  
3    cause for the filing. I wanted to note for you that  
4    the analysis of timeliness under the LUC Rules is not  
5    the same as the analysis of timeliness under the  
6    Federal Rules of Civil Procedure.

7                   Although she does cite the Tenth Circuit  
8    case, the rules under the LUC is that a Petition is  
9    untimely if a party fails to file within 15 days after  
10   the Notice of Hearing is published.

11                  In federal court a Petition to Intervene is  
12   untimely based upon three factors: The stage of the  
13   proceeding at which the Applicant seeks to intervene,  
14   the prejudice to the parties, and the reason for and  
15   length of the delay. Put differently, timeliness is a  
16   more flexible concept in federal court. Under the LUC  
17   Rules timeliness is a specific date. So it's clear in  
18   this Petition that Ms. Miyamoto's Request to Intervene  
19   is untimely.

20                  Now, the analysis on timeliness under  
21   federal court rules may have some similarities but  
22   they're not identical to the analysis of good cause  
23   under the LUC Rules.

24                  I just did want to note and acknowledge that  
25   there may be some parts of her analysis that you could

1 apply to the question of good cause. I'm not saying  
2 that discussion is irrelevant. But I did want to note  
3 that the case itself is not directly applicable to the  
4 question of good cause.

5           And in looking at that issue of what is good  
6 cause, and there were really no magical definitions,  
7 Black's Law Dictionary describes "good cause" as "a  
8 substantial reason amounting in law to a legal excuse  
9 for failing to perform an act required by law."

10           Similar language regarding a substantial  
11 reason does exist in other Hawai'i State cases. Last  
12 night I happened to find one which was Doe vs. Doe,  
13 98 Hawaii 144 in 2002.

14           But the term's clearly a relative one. It's  
15 one that has to be looked at in the individual case  
16 under the circumstances as you find them in relation  
17 to the requirements of that particular rule.

18           With respect to this issue for this case  
19 Ms. Miyamoto argues that she didn't want to make the  
20 investment of time to request intervention until the  
21 Sierra Club and Senator Hee's Motions to Intervene  
22 were granted. She also argues that although she was  
23 late she was not very late. OP will defer to you as  
24 to the determination whether that constitutes good  
25 cause.

1           If you find good cause exists, then you need  
2 to determine, then, basically intervention is freely  
3 granted unless one of two conditions exist. Those  
4 conditions are either (1) Whether the position of  
5 intervenor is substantially the same as one of the  
6 existing parties or (2) Whether the admission of  
7 intervenor would render the proceedings inefficient or  
8 unmanageable.

9           The Office of Planning's primary interest as  
10 we noted in our pleading is to ensure that these  
11 proceedings are not unduly delayed because of the  
12 additional intervention. In this regard we did note  
13 that the September 26, 2010 deadline for submission of  
14 exhibits and witnesses and witness lists has passed.

15           She has informed us in her pleadings that  
16 she would file -- she said she did file on October  
17 6th. I just haven't received the documents yet so I  
18 can't comment on those exhibits.

19           Ms. Miyamoto has stated she has no witnesses  
20 and she would have no witnesses. I assume that will  
21 be borne out by her filing yesterday.

22           We do want to note that a position statement  
23 should also be filed. And those should be submitted  
24 as soon as possible. We would be uncomfortable  
25 agreeing to any extension of this hearing because one

1 or more of the parties wanted more time to prepare  
2 based on Ms. Miyamoto's Petition.

3           Quite frankly, we do have some concerns that  
4 given the number of people involved, these proceedings  
5 may last longer than the average case. So we want to  
6 avoid the situation where, let's say, one of the other  
7 Intervenor says, "I just got the exhibits. The  
8 exhibits are late. I need more time. I want to  
9 continue the hearing." We'd be very uncomfortable  
10 with that.

11           The Office of Planning would certainly  
12 prefer these proceedings proceed much more smoothly  
13 and not be delayed because of that.

14           We would also -- and then finally, we would  
15 also oppose any effort -- and I don't think she  
16 would -- we would oppose any effort by Ms. Miyamoto if  
17 she wanted to disturb the procedural stipulation on  
18 evidence and witnesses already entered by the parties  
19 on September 20, 2011.

20           With that, however, the Office of Planning  
21 defers to the Land Use Commission as to whether  
22 intervention should be granted under the facts and  
23 circumstances of this case. Thank you.

24           CHAIRMAN LEZY: Thank you. Friends of  
25 Makakilo?

1                   DR. DUDLEY: The Friends of Makakilo does  
2 object to Ms. Miyamoto's acceptance as an intervenor.  
3 Ms. Miyamoto this morning says that she is applying to  
4 become an intervenor because of the Sierra Club and  
5 Dr. Kioni Dudley being Intervenor. This differs from  
6 her stance she's applying because of the Sierra Club  
7 and Senator Hee.

8                   I think that she is, you know -- we have  
9 many problems with her. We have problems in the past.  
10 She has passed herself off as an officer of the Sierra  
11 Club. She has appeared at a Rail meeting and at our  
12 Neighborhood Board meeting insisting that she was an  
13 officer opposing our position.

14                  She has taken the opportunity to really  
15 vilify me personally in many instances. And I  
16 think -- I don't think that these are going to be  
17 quiet hearings. We would back off further comments  
18 other than to say that the dates for applying to be an  
19 intervenor are really very specific.

20                  I met them, you know. I went to the Big  
21 Island for the hearing on my being an intervenor.  
22 It's hard to become an intervenor here. And we really  
23 should stick to those things.

24                  Ms. Miyamoto said that timeliness, the  
25 timeliness is the only problem that any people have

1   resented and there are no other problems.  I don't  
2   think that just because people mention timeliness that  
3   that's the only problem with her being accepted as an  
4   intervenor.

5               Finally, I'd just like to say that if she's  
6   accepted as an intervenor -- I was talking with Mr.  
7   Thad Sprague who's sitting back here, this morning.  
8   And he said he would like to apply to become an  
9   intervenor too.  So we have to ask how long is this  
10  going to go on?  Shouldn't we really just stick to the  
11  deadlines?  Thank you very much.

12              CHAIRMAN LEZY:  Thank you.  Mr. Seitz.

13              MR. SEITZ:  We did not file a position.  But  
14  I concur with the legal presentation that was just  
15  given to you.  But I also tend to agree with the most  
16  recent presentation on behalf of Friends of Makakilo.  
17  And my sense is that because this individual had ample  
18  opportunity to present public testimony, that at this  
19  point that should suffice, without causing additional  
20  burdens for either all of you or for all of us.

21              So my sense is that that's a role that she  
22  can certainly assume and she can present her views  
23  adequately.  And in light of the procedural  
24  requirements I think that's the role with which she  
25  should be consigned.



1                   CHAIRMAN LEZY: Thank you. Sierra Club?

2                   MS. CERULLO: Sierra Club objects to  
3 Ms. Miyamoto's Motion to Intervene on grounds of  
4 untimeliness. And we would echo the comments of  
5 Office of Planning, Dr. Dudley and Senator Hee.

6                   CHAIRMAN LEZY: Ms. Miyamoto, rebuttal?

7                   MS. MIYAMOTO: Sure. The first thing, of  
8 course, is, you know, yes, I have a class schedule but  
9 so does everyone else. I probably have more free  
10 time, I think and probably a more flexible schedule  
11 than most attorneys, frankly. And I have, in fact,  
12 undertook that I would, in fact, waive my rights to  
13 appear at any hearing if I am for some reason unable  
14 to appear.

15                   Second. While I recognize the abilities of  
16 the Attorney General's Office, I read nothing in the  
17 actual language. And I do remember the old judges  
18 said, "Read the statute, read the statute, read the  
19 statute when in doubt," right? And I read nothing  
20 here that says anything about good cause needing to  
21 be -- appear.

22                   I'm referring here to section 15-15-5(2)  
23 subpart (d). And in also, of course, relation to  
24 subpart (c). (c), of course, says "those who  
25 intervene upon timely application."

1           Then it says, "All other persons may apply  
2 for leave to intervene," which obviously implies all  
3 persons who apply after -- who are not petitioning by  
4 intervention by right. Yes? And, "It shall be freely  
5 granted provided," and then it gives the grounds. The  
6 grounds are, "The position of the applicant is  
7 substantially the same as position of the party  
8 already admitted into the proceeding and the admission  
9 of additional parties will render the proceedings  
10 inefficient and unmanageable."

11           The -- so I think that actually, you know, I  
12 should just point that out. That's what the law that  
13 I read says. And there's some case opinion.  
14 Otherwise I wasn't able to locate it. And I'm glad  
15 the Attorney General has. But that's what the law  
16 says.

17           Briefly, the position statement, my  
18 understanding was that I worked hard to develop a full  
19 and complete Petition for Intervention which included a  
20 position statement which, in fact, explained in great  
21 particularity three pages long my position, why it  
22 was, in fact, unique and unusual.

23           By the way, in response to Friends of  
24 Makakilo, as far as an additional intervenor, that  
25 kind of raises my point. I would have a hard time

1 believing there'd be another party who would wish to  
2 intervene on Mr. -- Dr. Dudley's side, the Friends  
3 side I should say. I misspoke when I said "Friends."  
4 Of course it was he, misspoke on procedural posture --  
5 the Friends' position because they could not have  
6 another person having a unique position. Their  
7 position is -- but this, my position, of course, is a  
8 unique position. There's no other party that reflects  
9 it.

10           One other thing I'll say as far as an  
11 officer of the Sierra Club. I guess I have to say I  
12 object to such bringing up such old laundry. But I  
13 will say that I was, in fact, an officer of the Sierra  
14 Club. I was within Sierra Club rules which I've known  
15 because I've been involved in the organization many,  
16 many years until I resigned.

17           And I was certainly officially  
18 transportation/energy chair for the Sierra Club O'ahu  
19 Group which makes me under the official blue, what we  
20 call blue sheets I was effectively a member. He  
21 wouldn't know. I don't think he was a member. He  
22 certainly wasn't a member at my level.

23           As far as the opportunity to present public  
24 testimony, I've presented a list of 22 exhibits. They  
25 concern data on soils, data on prehistoric occupation

1 of the area, data relevant to historic occupation in  
2 the area, data on Smart Growth, data on the State and  
3 County Plans, basically all kinds of data which I  
4 think is relevant.

5           And I'm actually additionally -- so -- and  
6 of course, I mastered most of this material. My goal  
7 had been to was cross-examine the witnesses in  
8 relationship to this information, of course, in  
9 addition to whatever else is in the field.

10           But as I emphasized I think my presence will  
11 assist the Commission in reaching a fair and reasoned  
12 decision, fully informed with the latest scientific  
13 knowledge. And that is what I do not believe I could  
14 achieve, you know, because it would take probably more  
15 time than would be granted to me. And I also don't  
16 think that a written testimony would necessarily be  
17 given the due regard.

18           Plus it wouldn't be -- if I did give written  
19 testimony it would not be under cross-examination. So  
20 I think the adversarial process demands that we have a  
21 full analysis from all perspectives. I think -- I  
22 certainly welcome any questions.

23           CHAIRMAN LEZY: Thank you. Commissioners,  
24 questions?

25           MR. YEE: Can I give a short citation in

1 response? Ms. Miyamoto suggested I was relying upon a  
2 case. Just for the Commission and the parties'  
3 information in LUC Rules 15-15--52(e) in the second  
4 sentence it reads, "An original and 15 copies of the  
5 Petition for Intervention, Proof of Service on all  
6 parties shall be filed with the Commission within 15  
7 days after the Notice of Hearing is published pursuant  
8 to section 15-15-51(c). Except for good cause shown  
9 late filings shall not be permitted."

10 I'm a little surprised because she actually  
11 has a section in her original Petition on good cause.  
12 So I did want to note for your information that  
13 citation.

14 CHAIRMAN LEZY: Thank you for that  
15 clarification.

16 MS. MIYAMOTO: Yeah, thank you for, thank  
17 you for clarifying that.

18 CHAIRMAN LEZY: Questions?

19 MS. MIYAMOTO: It's a hard rule to  
20 understand.

21 CHAIRMAN LEZY: Do I hear a motion?

22 COMMISSIONER CHOCK: Move to approve, Chair.

23 CHAIRMAN LEZY: Do we have a second? Do I  
24 hear a second for discussion purposes?

25 COMMISSIONER HELLER: I'll second for

1 discussion purposes.

2 CHAIRMAN LEZY: Any discussion?

3 COMMISSIONER CHOCK: Sure, Chair. I think  
4 that despite some of the issues that have been raised  
5 by Office of Planning, I think the past practice of  
6 this Commission has always been to freely allow for  
7 intervention from all interested parties.

8 I do believe Ms. Miyamoto adds to our record  
9 sufficiently in terms of some of the issues that she  
10 raised in her brief, a brief that I read cover to  
11 cover. And I found quite compelling and as good as  
12 any other brief that any other attorney who's been  
13 before this body has submitted in the past. So I'd  
14 like to move to approve.

15 CHAIRMAN LEZY: Other discussion?

16 COMMISSIONER HELLER: Yes, Mr. Chair.

17 CHAIRMAN LEZY: Commissioner Heller.

18 COMMISSIONER HELLER: I seconded the motion  
19 for discussion purposes, but I am opposed to it. I  
20 think it would set a bad precedent to grant  
21 intervention in this case because it's an admitted  
22 fact that the Motion for Intervention was untimely.

23 And basically as I understand it the reason  
24 that she's asserting why it was untimely is that she  
25 waited to see who else was allowed to intervene first,

1 and then decided to make her motion.

2 I don't think we want to set the precedent  
3 that a party can wait and see who else is allowed to  
4 intervene and then decide to submit an untimely Motion  
5 to Intervene.

6 CHAIRMAN LEZY: Further discussion?  
7 Mr. Davidson, if you'd poll the Commission please.

8 MR. DAVIDSON: We have a motion to approve  
9 Hannah Miyamoto's Petition for Leave to Intervene.  
10 Commissioner Chock?

11 COMMISSIONER CHOCK: Yes.

12 MR. DAVIDSON: Commissioner Heller?

13 COMMISSIONER HELLER: No.

14 MR. DAVIDSON: Commissioner Teves?

15 COMMISSIONER TEVES: No.

16 MR. DAVIDSON: Commissioner McDonald?

17 COMMISSIONER McDONALD: No.

18 MR. DAVIDSON: Commissioner Contrades?

19 COMMISSIONER CONTRADES: No.

20 MR. DAVIDSON: Commissioner Makua?

21 COMMISSIONER MAKUA: No.

22 MR. DAVIDSON: Chair Lezy?

23 CHAIRMAN LEZY: No.

24 MR. DAVIDSON: Motion fails 1-6, Chair.

25 CHAIRMAN LEZY: Thank you. Ms. Miyamoto,

1 let me just say this to you. Obviously your concerns  
2 seem very genuine. And would encourage you to  
3 continue to participate in the process which you can  
4 certainly do via submission and public testimony.

5 COMMISSIONER HELLER: Mr. Chair, if I could  
6 just be allowed to make a brief comment.

7 CHAIRMAN LEZY: Commissioner Heller.

8 COMMISSIONER HELLER: I did find the  
9 submissions from Ms. Miyamoto to be interesting and  
10 well prepared. And I would encourage her to remain  
11 involved as a public witness in this proceeding. I  
12 think she may have interesting insights to contribute.  
13 And I didn't mean by opposing the motion to in any way  
14 suggest otherwise.

15 CHAIRMAN LEZY: Thank you. Now we finally  
16 have the players set. And so I would encourage all  
17 the parties as we start the substantive portion of the  
18 proceedings to please work carefully together,  
19 Intervenor together, parties together, everybody  
20 together to try to keep the proceedings as efficient  
21 and economical as possible because I believe that will  
22 serve everybody's interests.

23 Please avail yourselves of the staff so that  
24 that goal can be accomplished. And with that we stand  
25 adjourned. (Adjourned at 10:25 a.m.)



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## C E R T I F I C A T E

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

6

7 That I was acting as court reporter in the  
8 foregoing LUC matter on the 7th day of October 2011;

8

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

11

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

14

15 DATED: This \_\_\_\_\_ day of \_\_\_\_\_ 2011

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20 \_\_\_\_\_  
21 HOLLY M. HACKETT, HI CSR #130, RPR  
22 Certified Shorthand Reporter

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--oo00oo--

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