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LAND USE COMMISSION  
STATE OF HAWAI'I

ORAL ARGUMENT & DECISION MAKING )  
A10-789 A&B PROPERTIES, INC. (Wai'ale)

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TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for Oral Argument and Decision making at Maui Arts & Cultural Center, Alexa Higashi Meeting Room, One Cameron Way, Kahului, Maui, Hawai'i, commencing at 10:15 a.m. on May 21, 2012, pursuant to Notice.

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

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## A P P E A R A N C E S

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

INTERIM EXECUTIVE OFFICER: BERT SARUWATARI  
CHIEF CLERK: RILEY HAKODA  
DEPUTY ATTORNEY GENERAL: SARAH HIRAKAMI, ESQ.

AUDIO TECHNICIAN: HOTAI ZERBA

Docket No. A10-789 A&B Properties, Inc. (Wai'ale) Maui

For the Petitioner: BENJAMIN MATSUBARA, ESQ.  
CURTIS TABATA, ESQ.

For the County: MICHAEL HOPPER, ESQ.  
Deputy Corporation Counsel  
DANNY DIAS, Staff Planner

For the State: BRYAN YEE, ESQ.  
Deputy Attorney General  
RODNEY FUNAKOSHI, OP  
ROBYN LOUDERMILK, OP

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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 the  
4 adoption of minutes from the May 3, 2012 meeting.  
5 Commissioners, any revisions? Do I hear a motion?

6 COMMISSIONER HELLER: Move for approval.

7 COMMISSIONER McDONALD: Second.

8 CHAIRMAN LEZY: All in favor. (Aye). All  
9 opposed? Mr. Saruwatari, the tentative meeting  
10 schedule.

11 MR. SARUWATARI: Just like to remind the  
12 Commission that the next set of meetings will be on  
13 Maui/Oahu split. June 7 we'll be on Maui again and  
14 June 8th we'll be on O'ahu. That's all.

15 CHAIRMAN LEZY: Thank you. Next item on  
16 the agenda is oral argument and decision-making in  
17 Docket No. A10-789 A&B Properties, Inc. Wai'ale  
18 Petition to Amend the Agricultural District Boundary  
19 into the Urban District for approximately  
20 545.229 acres at Wailuku and Waikapu, county of Maui,  
21 state of Hawai'i, TMK 3-8-05: portion of 23 and 37,  
22 3-8-07:71, portion of 101 and 104. Parties,  
23 appearances?

24 MR. MATSUBARA: Good morning Chairman Lezy,  
25 Members of the Commission. Ben Matsubara and Curtis

1 Tabata on behalf of A&B Properties. With me today is  
2 Grant Chun, vice president of A&B Properties and  
3 Daniel Yasui, director of planning and development.

4 CHAIRMAN LEZY: Good morning.

5 MR. HOPPER: Good morning, Mr. Chair.

6 Michael Hopper with Maui County Department of  
7 Corporation Counsel representing the department of  
8 planning. With me is Danny Dias staff planner.

9 CHAIRMAN LEZY: Good morning.

10 MR. YEE: Good morning. Deputy Attorney  
11 General Bryan Yee on behalf of the Office of Planning.  
12 With me a Rodney Funakoshi and Robyn Laudermilk from  
13 the Office of Planning.

14 CHAIRMAN LEZY: Good morning. Allow me to  
15 update the record on this docket. On April 4, 2012  
16 the Commission received Maui County's Second Amended  
17 List of Witnesses and Exhibit 8.

18 On April 13, 2012 the Commission received  
19 Maui County's List of Exhibits.

20 On April 25, 2012 the Commission received  
21 Petitioner's Proposed Findings of Fact, Conclusions of  
22 Law, and Decision and Order for a State Land Use  
23 District Boundary Amendment.

24 On May 2, 2012 the Commission received  
25 State Office of Planning's comments and objections to

1 Petitioner's Proposed Findings of Fact, Conclusions of  
2 Law and Decision and Order.

3           On May 4, 2012 the Commission received Maui  
4 County's Statement of No Objections to Petitioner's  
5 Proposed Findings of Fact, Conclusions of Law and  
6 Decision and Order.

7           On May 7, 2012 the Commission received  
8 Petitioner's Response to State Office of Planning's  
9 comments and objections to Petitioner's Proposed  
10 Findings of Fact, Conclusion of Law and Decision and  
11 Order.

12           This morning, May 21, 2012, the Commission  
13 received written testimony from Ray Shimabuku,  
14 business representative for the International  
15 Brotherhood of Electrical Workers; from Peter Ganaban,  
16 the business manager and secretary/treasurer for the  
17 Laborers' International; Leimomi Johnson, field  
18 representative and organizer for Maui, also for  
19 Laborers International, and Clyde T. Hayashi, director  
20 of Hawai'i LECET.

21           Allow me to describe our procedure for  
22 today. First, I'll call those individuals desiring to  
23 provide public testimony to identify themselves. All  
24 such individuals will be called in turn to our witness  
25 box where they will be sworn in prior to their

1 testimony.

2           Following public testimony each party will  
3 be afforded 20 minutes to present oral argument in  
4 support of its respective position. At the conclusion  
5 of oral argument the Commission will deliberate and  
6 render a decision on this docket matter. Are there  
7 any questions regarding our procedures for today?

8           MR. MATSUBARA: No questions.

9           MR. HOPPER: No questions.

10          MR. YEE: No questions.

11          CHAIRMAN LEZY: Mr. Saruwatari, the public  
12 witnesses?

13          MR. SARUWATARI: We have seven signed up  
14 for today. The first is Leimomi Johnson.

15          CHAIRMAN LEZY: Morning.

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

19           THE WITNESS: Yes, sir.

20          CHAIRMAN LEZY: Please state your name,  
21 your address and proceed.

22           THE WITNESS: My name is Leimomi Johnson.  
23 I live in Paia, 291 Waokanaka Avenue. My name is  
24 Leimomi Johnson. I am the field representative  
25 organizer for the Hawai'i Laborers Union, Local 368.

1 The Hawai'i Laborers Union represents 400 Maui  
2 members. I'm testifying in strong support of granting  
3 A&B's request for a reclassification of approximately  
4 545.229 acres currently in the Agricultural District  
5 to the Urban District of Wailuku and Waikapu county of  
6 Maui, state of Hawai'i.

7 I've lived my entire life on Maui. And my  
8 family calls Maui home. I share the same desire that  
9 many local residents have to see affordable housing  
10 built so that they and their children can stay and  
11 live on Maui. This project gives us that hope and our  
12 opportunity.

13 This Project will also create needed  
14 construction jobs and other jobs. The Project will be  
15 built in phases and this will help keep Maui workers  
16 employed for a long time. We have many members still  
17 not working and many others who want to keep working.  
18 We all want to be able to support our families. And  
19 this Project will allow many Maui workers to do so.  
20 Thank you very much for this opportunity to testify in  
21 support of this Project.

22 CHAIRMAN LEZY: Parties, questions?

23 MR. MATSUBARA: No questions.

24 CHAIRMAN LEZY: Commissioners, questions?

25 Thank you for your testimony.

1 MR. SARUWATARI: Peter Lee followed by  
2 Clyde Hayashi.

3 PETER LEE

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

6 THE WITNESS: I do.

7 CHAIRMAN LEZY: Please state your name,  
8 your address and proceed.

9 THE WITNESS: Peter Lee, 94-1012A Kekepa  
10 Street, Waipahu, 96818. I'm testifying on behalf of  
11 Clyde Hayashi who could not be here. I'll just read  
12 his testimony.

13 "Aloha, Chair Lezy and Members of the State  
14 Land Use Commission. My name is Clyde Hayashi. I'm  
15 the director of Hawai'i LECET. Hawai'i LECET is a  
16 partnership between the Hawai'i Laborers' Union Local  
17 368 and our union contractors.

18 "I am testifying in strong support of  
19 granting A&B's request for reclassification of  
20 approximately 545 acres currently in the Agricultural  
21 District to Urban District at Wailuku and Waikapu,  
22 county of Maui, state of Hawai'i.

23 "The need for affordable housing is  
24 increasing. And this Project will help meet some of  
25 that need. The Hawai'i Laborer's Union Local 368, has

1 over 400 members and retirees who live in Maui. These  
2 members and their families will benefit from the  
3 affordable housing provided by the Wai'ale Project.  
4 Our union contractors who helped build and maintain  
5 Maui will also benefit from this Project. Many of  
6 them have been struggling since the economic downturn.

7 "This Project will create needed jobs for  
8 Maui, Hawai'i Laborers Union Local 368 members who are  
9 still not working and many members who hope to  
10 continue to keep working will benefit. Maui families  
11 benefit. Thank you for your opportunity in support of  
12 this request."

13 CHAIRMAN LEZY: Parties, questions?

14 MR. MATSUBARA: No questions.

15 CHAIRMAN LEZY: Commissioners, questions?

16 Thank you.

17 MR. SARUWATARI: Bill Kamai?

18 CHAIRMAN LEZY: Morning.

19 THE WITNESS: Good morning.

20 BILL KAMAI

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

23 THE WITNESS: I do.

24 CHAIRMAN LEZY: Please state your name,  
25 your address and proceed.

1           THE WITNESS: My name is Bill Kamai. I  
2 reside at 117 Kaulana Na Pua Circle in Wailuku.  
3 Aloha, Chairman Lezy and Commission members and staff.  
4 Welcome to Maui. My name is Bill Kamai. I am a  
5 service representative for the Hawai'i Regional  
6 Council of Carpenters Maui Office, formerly known as  
7 the Hawai'i Carpenters Union. I would like to ask  
8 this board to approve this district boundary amendment  
9 from ag to urban.

10           The Wai'ale master planned community by A&B  
11 Properties has a mixed-use of light industrial area,  
12 an affordable component, both single and multi-family,  
13 a regional park, a county park, an area designated for  
14 a middle school, a planned community center, which I  
15 think should be a requirement for all development over  
16 X amount of houses. I think we've been spoiled by  
17 using the nearby schools, but they have restrictions  
18 regarding daytime uses and nighttime uses. So I like  
19 that community center idea.

20           They also have a designated cultural  
21 preserve area for any historic and archaeological  
22 finds that the developer may encounter.

23           This Project has several phases that would  
24 ensure long-term employment over the course of several  
25 years. The developer has committed to using local

1 building trades labor for all phases of this Project.  
2 For those of us in the construction industry we have  
3 been in a slump for the past several years. If this  
4 Project is approved it would mean more work for  
5 longer-term jobs, more employment opportunities that a  
6 project like this would afford us. So I humbly ask  
7 for your approval of this application. Mahalo.

8 CHAIRMAN LEZY: Parties, questions?

9 MR. MATSUBARA: No questions.

10 CHAIRMAN LEZY: Commissioners, questions?

11 Thank you for your testimony.

12 MR. SARUWATARI: Bruce U'u.

13 BRUCE U'U

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

16 THE WITNESS: Yes.

17 CHAIRMAN LEZY: Please state your name,  
18 your address and proceed.

19 THE WITNESS: Aloha. My name is Bruce U'u.  
20 My address is 249 Kupa'a Street, Paia, Maui. Good  
21 morning, everyone. Thank you for this opportunity to  
22 testify. My name is Bruce U'u. I'm the  
23 apprenticeship coordinator for the Hawai'i Regional  
24 Council of Carpenters, formerly the Hawai'i Carpenters  
25 Union. Also I'm a lifelong resident here on Maui and

1 with kids who need some homes.

2 I support the district boundary amendment  
3 from Agricultural District to Urban District. The  
4 highlights for me about this Project would be job  
5 creation. That would be one. And the creation of  
6 affordable homes which is needed on island. I know I  
7 testified prior that were 30,000 hidden homeless at  
8 one point statewide. Hidden homeless were adults  
9 living with their parents. And I qualify for that. I  
10 have three adult children who are living with me at  
11 the time. Any time we have job creation with  
12 affordable housing I think will be a good marriage  
13 hand in hand.

14 Also I like the use, VMX concept use,  
15 village mixed-use concept in building. I think it was  
16 a thing of the past where you had the towns like Paia  
17 and Wailuku Town, Lahaina, the live-work area. I  
18 think we got away from that and we started zoning  
19 commercial light use which were separated by asphalt.

20 So I like the concept where you can bring  
21 it all in a bundle and create the old time charm like  
22 the Wai'ale Project consists of. And I also like to  
23 thank you for letting me testify. Mahalo.

24 CHAIRMAN LEZY: Parties, questions?  
25 Commissioners, questions? Thank you.

1 MR. SARUWATARI: Hannah Bernard. Morning.

2 HANNAH BERNARD

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

5 THE WITNESS: I do.

6 CHAIRMAN LEZY: Please state your name,  
7 your address and proceed.

8 THE WITNESS: Hannah Bernard. My address  
9 699 Hana Highway Paia, Maui. Once again I'm speaking  
10 as president of Hawai'i Wildlife Fund, a non-profit  
11 conservation organization dedicated to recovery of  
12 Hawai'i's native wildlife and also as a mother of two  
13 sons who also live here and also need housing.

14 I, once again, would like to affirm my  
15 desire to see the final Maui Island Plan maps be  
16 incorporated into this proposed development because  
17 not only does it include the Urban designation but it  
18 includes a substantial open space heritage area.

19 So this is a place where we could easily  
20 protect the remaining burials, traditional cultural  
21 sites and the endangered species habitat for the  
22 Blackburn's Sphinx Moth.

23 So if we could get the language to be more  
24 directive for these issues. I know it's quite  
25 directive in regards to certain other issues that the

1 active verb "shall" is used for specific requirements  
2 and conditions. But it's not used necessarily for  
3 the endangered species habitat consideration. Just  
4 assuming that the federal and state governments will  
5 be consulted, that's just following the law.

6 So to go it a step further and to include a  
7 plan, a conservation plan and a similar recovery for  
8 them, through the forest like Art Medeiros is  
9 conducting up an auahi and to set aside at least 1/5  
10 of an acre of habitat per 100 acres of the proposed  
11 development.

12 Again, this fits right in there with that  
13 open space heritage park area in protecting both the  
14 significant cultural sites and the endangered species'  
15 habitat.

16 And, again, supporting a conservation  
17 easement with the full ethnobotanical study of the  
18 area in consultation with OHA and anyone else who  
19 wishes to be consulted. Thank you.

20 CHAIRMAN LEZY: Parties, questions?  
21 Commissioners, questions? Thank you.

22 MR. SARUWATARI: Clare Apana.

23 CLARE APANA

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

1 CHAIRMAN LEZY: Good morning.

2 THE WITNESS: Yes, I do.

3 CHAIRMAN LEZY: Please state your name,  
4 your address and proceed.

5 THE WITNESS: Clare Apana. I live in  
6 Wailuku, Maui. Do you want the street address?

7 CHAIRMAN LEZY: Please.

8 THE WITNESS: 260 Halenani Drive.

9 CHAIRMAN LEZY: Thank you. Please go  
10 ahead.

11 THE WITNESS: Thank you. It's so nice to  
12 see so many more kanaka out testifying today. I feel  
13 wholeheartedly for you. I'm wondering, you know,  
14 there's a project that's not being done that's already  
15 an affordable housing project that this developer said  
16 they weren't going to do because they're just not  
17 going to do it now. That would put you online right  
18 now.

19 If you have so many things that you're  
20 trying to get and have maybe you cannot complete the  
21 ones that would put people in jobs right now. They  
22 testified to that. So I'd just like to say, you know,  
23 if a request came to your house and said, "I'm going  
24 to build affordable housing on your land now where  
25 you're living, where you own," how would you feel?

1           This is true of this land. This land does  
2 not belong to the people who are bringing this forth.  
3 This land belongs to the Kuihelani family. I have  
4 received permission from the majority family owners of  
5 that family to take care of the burials. I and  
6 Mr. Michael Lee have received that permission from  
7 this family.

8           I want you to take that into extra  
9 consideration when you're making your conditions for  
10 the Project. And I want you to consider that sand  
11 mining -- this area has been sand mined. This area  
12 has places that have not been sand mined. You could  
13 make a determination that would allow that sand mining  
14 to stop.

15           You, this body, the Land Use Commission,  
16 allowed sand mining permits to go on. And so many  
17 tons of sand were taken out of this area. And we have  
18 never received the monitoring reports from your 2000  
19 permit.

20           We have had illegal sand mining producing  
21 17 royal burials which has still not been clearly  
22 identified so that I would know is this plan actually  
23 protecting that area. I know that you are very  
24 familiar with the karst and cave systems. And that is  
25 no different than this area. This is the exact same

1 area, the same kind of geographic area as seen in the  
2 1940 water report of Sterns and McDonald.

3           So I hope that you will, in your  
4 conditions, take that into consideration. Because if  
5 they break into those, the karst systems as we are now  
6 in the known burial areas, then who suffers? The  
7 whole island as the water dries up. In one day the  
8 Willows' pond was gone when the developer hit it when  
9 they were building a condo.

10           Please remember that. The easiest way to  
11 protect my rights as a cultural practitioner of this  
12 area, under article XII, section 6 and 7, would be to  
13 identify clearly the sand dunes that are still there,  
14 the sand dunes that have been infringed upon. And to  
15 prohibit any further sand mining.

16           Any sand that is to be taken out of this  
17 place should be screened carefully because as this  
18 area has shown they miss a lot of burials, a lot of  
19 burials. Seventeen burials in one pile of sand is a  
20 lot to miss.

21           And thirdly, I want to tell you just one  
22 thing more. I know it is your duty to find out what  
23 are the cultural impacts to the native practitioners.  
24 And I have to say that I never knew the full impact to  
25 me until the shopping center that's being built in

1 this very same sand dune, but only a block away from  
2 my house.

3           And I have not been able to get better  
4 archaeology, better ways of finding the burials and  
5 identifying them so that they can be better protected.  
6 I have not been able to get anyone to see that this is  
7 the best management. In this way when these people  
8 are working they don't have to be worried so much that  
9 they are going to plow through the ancestors.

10           This is the best management. We use our  
11 best technology. We don't take the sand out. This  
12 sand belongs here. It was brought here by a very  
13 important geological event and that was the tidal in  
14 the year 1000 to 1050 which covered Kaho'olawe and  
15 washed all the sand up. I don't think it could have  
16 been blown there with all the shells that I found in  
17 there stuck to rocks. No. This is a very, very  
18 historical place.

19           If you don't believe the battle came  
20 through here and that they flew over the top of  
21 Waikapu and through this land into Wailuku, well, this  
22 is another piece of history that we will lose if we  
23 lose the sand. And this bothers me, yes. This  
24 affects me.

25           And what happens when they start digging,

1 digging with the big shovels, with the big bulldozers  
2 making big pits in the land and then they find  
3 burials? Then they hit the burials.

4           By my house where the Safeway store is  
5 supposed to go, there have been 11 burials found  
6 underneath the pad. There's been a layer where  
7 children's bones were found. And is this the best  
8 practice? Is this the best practice? I don't think  
9 so. We can do better than that. Give us the  
10 protection so that we can have smart development, that  
11 we can have the burials protected and respected.

12           And I do my very best to see that no one is  
13 hurt as I go to the site where the Safeway's being  
14 built now. And I used to have the greatest fear for  
15 the ancestors and the bones there. But now I have  
16 greater -- equally great fear for the people who are  
17 working on that site because they have not stopped to  
18 respectfully take care of the ancestors or to  
19 respectfully allowing me to do my practice to take  
20 care of the them.

21           I have seeded so much into the testimony  
22 and I hope that you will take me seriously. Actually  
23 I demand you take me seriously and look at what I have  
24 already given you. And I'm asking you as a cultural  
25 practitioner that you recognize me, as the family who

1 owns this property has recognized me, and allow me to  
2 do my kuleana.

3           Allow me to work with people so that they  
4 can work in safety, keep the sand in place. Do not  
5 allow another sand mining to go on when you give a  
6 designation of urban, they can get a grubbing, grading  
7 permit and sand mine away. That's what they did here.  
8 They just took out 40 feet of vertical height in their  
9 grading.

10           This is what happens on Maui. This is what  
11 happens. 1980 \$2 a ton. What's it worth to them?  
12 What's it worth to me? I have to go and look at that  
13 puka with the burials. I have to hear those machines  
14 scraping the ground knowing the burials are there.

15           Thank you very much for listening to me.  
16 And thank you for your kind attention. I know that  
17 you can consider these facts that I have brought forth  
18 to you as well as other practitioners and other  
19 kanaka ma'oli.

20           I am totally in support of having a  
21 preserve that's worked upon by myself and other people  
22 who are related to this area and to preserve the  
23 burials in the best way that we can. Thank you very  
24 much.

25           CHAIRMAN LEZY: Parties, questions?

1 Commissioners, questions? Thank you for your  
2 testimony, Ms. Apana. Bill Frampton.

3 THE WITNESS: Bill Frampton.

4 BILL FRAMPTON

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

7 THE WITNESS: Yes, I do.

8 CHAIRMAN LEZY: Please state your name,  
9 your address and proceed.

10 THE WITNESS: My name is Bill Frampton. I  
11 live up in Kula at 56 Paliuli Place, Kula, Hawai'i,  
12 96790. Good morning, Commissioner members. I thank  
13 you for the opportunity to provide testimony this  
14 morning. I'm testifying on regarding the Wai'ale  
15 Project document number A10-789.

16 I was blessed to be raised here on the  
17 island of Maui with my family. We've been here over  
18 on Maui for over 40 years. And I've been in land use  
19 and planning, consulting development for over half my  
20 life now.

21 I wanted to bring up three items related to  
22 this Project. The first was touched upon earlier by a  
23 testifier relating to the values and principles that  
24 are being used to guide their Project. The land use  
25 principles of Smart Growth, traditional neighborhood

1 design is fantastic.

2           And I commend A&B for doing that here and  
3 for trying to go away from our typical pattern of  
4 sprawl which is based upon the automobile-based zoning  
5 code that's dominated this island for a period of  
6 time.

7           It's neat to see that. Instead of sprawl,  
8 which is single, isolated use zoning, they're bringing  
9 in mixed-use. They're bringing in, building  
10 communities where you can live, work and play in one  
11 neighborhood where you can get your goods and  
12 services. If you need the use of pedestrian sheds for  
13 example, they're identified on their Master Plan if  
14 you look at that. It's a fantastic concept.

15           It's not the same old, same old development  
16 pattern that we've been experiencing. It's very  
17 reflective of the Island of Maui, the history of Maui  
18 being an island of small towns and rural communities  
19 that were distinct and distinct and separate. And the  
20 use of the green space surrounding these areas  
21 including the preservation heritage areas will help  
22 identify those sense of place.

23           Secondly, I am -- would like to just note  
24 that how much I'm aware of A&B's commitment and care  
25 to Maui and to the residents of Maui and all that they

1 have given. This Project isn't being done just for  
2 the heck of it. I believe it's being done instead for  
3 the values and principles for the care of Maui and our  
4 ohana and our families, providing opportunities for  
5 living as well as jobs.

6           And jobs aren't the sole driving force of  
7 this Project. It's a fantastic component, will put a  
8 lot of our families back to work but it's also driven  
9 by, I believe, the care for Maui. It's shown by all  
10 of these components and elements of the Project  
11 including community centers, parks, jobs. It's well  
12 thought out.

13           Lastly, related to the iwi kupuna that was  
14 talked about earlier, the burials in this area, I just  
15 finished serving on the Maui/Lanai Island Burial  
16 Council as an eight-year member. And I think what the  
17 previous testifier brought up is extremely important.  
18 We absolutely have to demonstrate the care and respect  
19 for these resources, valuing and cherishing those  
20 which came before us.

21           A&B *has* been doing work in this area. When  
22 I was the councilmember on the Maui/Lana'i Island  
23 Burial Council from my perspective as an individual, I  
24 was always appreciative of how they approached this.  
25 It is an area that is known on the island of Maui to

1 have iwi kupuna as well as a lot of other areas on  
2 this island. But A&B does have solid archaeological --  
3 an archaeologist on board. They have cultural  
4 consultants.

5           And I believe we need to be able to find a  
6 way to balance growth and yet still respect these  
7 resources. A&B can do so as long as there's  
8 conditions that can be placed upon it. Working with  
9 the State Historic Preservation Division, requiring  
10 monitoring plans, even cultural education for the  
11 project team, construction team. I know A&B is aware  
12 of this.

13           I'm sure they would be -- it's probably  
14 part of their program more than just doing an  
15 archaeological study, putting it aside or doing a  
16 monitoring plan, checking it off your requirement  
17 list, take it a step further with cultural education.  
18 The workers that are out there you can do prayers and  
19 blessing before you start work. There are things you  
20 can do. And I believe A&B would be committed to that.

21           And thank you for this opportunity to  
22 testify this morning.

23           CHAIRMAN LEZY: Parties, questions?  
24 Commissioners, questions? Thank you for your  
25 testimony. Is there anybody else who would like to

1 provide public testimony? Step forward please.

2 AUDIENCE MEMBER: Do we sign in somewhere?

3 CHAIRMAN LEZY: No. (pause) We are going  
4 to have you sign.

5 AUDIENCE MEMBER: Okay.

6 CHAIRMAN LEZY: If there's anybody else who  
7 wants to provide public testimony I'd ask you to step  
8 up, please now and take a seat.

9 MS. APANA: Can I tell you that there's a  
10 meeting that you're conflicting with in the county  
11 council on the exact same area as this Project. And  
12 people are trying to get down here right now.

13 CHAIRMAN LEZY: Okay. We will take the  
14 public testifiers who stepped forward and see where we  
15 are when we're done with them.

16 MS. APANA: They called me and they're on  
17 their way down.

18 THE WITNESS: I'll speak slowly. My name  
19 is Dr. Janet Six.

20 CHAIRMAN LEZY: I'm sorry, I need to swear  
21 you first.

22 JANET SIX  
23 being first duly sworn to tell the truth, was examined  
24 and testified as follows:

25 THE WITNESS: Yes, I do.

1                   CHAIRMAN LEZY: Please state your name,  
2 your address and proceed.

3                   THE WITNESS: My name is Janet Six,  
4 Dr. Janet Six. My address is 2675 Kaupakalua in  
5 Haiku. I have a Ph.D. in Archaeology. I teach at  
6 the -- I want to say 'community college' but it's  
7 UHMC. I teach a heritage class. And my students have  
8 done extensive work in this area. I've read the  
9 reports. And I believe that good archaeology had been  
10 done. I believe they found numerous burials, I  
11 believe over 70. But I think there's probably a  
12 chance there's going to be more.

13                   I think it's important, as we heard from  
14 Bill and other people, to talk about cultural heritage  
15 and preservation. This is an area that's, you know,  
16 whether you believe it's a cemetery, an isolated  
17 cemetery, I don't know if we've done, the  
18 archaeologists have found the perimeter of that  
19 cemetery, but we believe there's over 800 warriors  
20 buried there. And that's in other historical  
21 documents.

22                   So the idea, if you do a probabilistic  
23 study and you already have 70 bodies, you're probably  
24 going to find more, especially in the sand areas,  
25 especially when there's oral history and written

1 history stating that in recent battles in 1730, not  
2 ancient, ancient times which is hard to account for.

3 I'd like to see students learn about areas  
4 and preserving those areas and creating jobs not just  
5 in development, not just in contractors.

6 THE REPORTER: Excuse me. Could you slow  
7 down just a smidge.

8 THE WITNESS: I'm sorry. I only had one  
9 cup of coffee. I'm not against development. I like  
10 when my film develops, used to. I'm not against  
11 development. I'm for Smart Development. I'd like to  
12 see areas preserved so that people can study there and  
13 learn there with Palauea Cultural Preserve and other  
14 examples. I understand that there's been changes in  
15 the zoning there to look at putting housing in an area  
16 we know are very culturally sensitive. And we don't  
17 understand them yet.

18 CHAIRMAN LEZY: Ma'am, you're gonna drive  
19 our court reporter crazy. We'll give you plenty of  
20 time.

21 THE WITNESS: Okay. This is how I just  
22 normally talk.

23 CHAIRMAN LEZY: If you could just slow down  
24 a little.

25 THE WITNESS: I think it's important to

1 understand the site further. I'm not against  
2 development. I'm not anti-development. I'm pro-Smart  
3 Development. I moved to Maui in 1978. I went to Maui  
4 Community College where I learned about culture. I  
5 went to New York University. I have a degree in  
6 Anthropology and Classical Civilization. So I've seen  
7 a lot of bad archaeology done around the world. I  
8 have a Master's from Columbia University and Ph.D.  
9 from University of Pennsylvania. I work in public  
10 archaeology specifically which is a challenge in  
11 Hawai'i 'cause it's often very controversial.

12           We have unique burial laws here and in New  
13 Mexico, are the only two states and we have specific  
14 things. I work at the Hyatt in Ka'anapali. They  
15 didn't move the Japanese burials. They built the  
16 hotel next to them. I know they did move the burials  
17 at the Sheraton, 120 burials. The idea is living with  
18 people. We have a word called *palimpsest*. It means  
19 layers. We are just here for 80 years if we're lucky,  
20 our legacy left behind.

21           I understand there's going to be a Target  
22 close by for these people to shop at. Well, I'm  
23 horrified by that. I'm for Smart Growth. And we need  
24 some places so that we can discover the history that's  
25 not mine, I'm Native American. I'm not Hawaiian. But

1 I respect iwi kupuna. And they have every bit as much  
2 value as any other burial.

3 I can't move to Pennsylvania, buy a Quaker  
4 burial ground and build on it. I can't. Why can we  
5 do it here? These are cemeteries. People were put to  
6 rest there, laid to rest. If it was just a  
7 battlefield I can understand re-interring people. But  
8 it's -- they're humans. And we need to remember that.

9 And we need to respect all culture, not  
10 look at historical particularism where these graves  
11 are okay and these graves are unmarked so they're not  
12 important.

13 So just understand that this area is close  
14 to the campus. We'd love to volunteer to do research.  
15 We've worked at Makula. We've worked at Lohiloa in  
16 'Iao Valley. I always offer services to Aki Sinoto in  
17 Waialea 670 from happening. But let's really  
18 understand the sites. If it needs more archaeology I  
19 would like to advocate that an offer to help. But  
20 again I'm not against development. I want Smart  
21 Development. And I'd like to see an area set aside  
22 for the future, not just mine. That is all. Did I  
23 speak slow enough?

24 CHAIRMAN LEZY: Parties, questions?  
25 Commissioners, questions? Thank you for your

1 testimony.

2 MR. SARUWATARI: Lucienne deNaie.

3 CHAIRMAN LEZY: And no need to draw your  
4 testimony out. We'll take a break after this briefly  
5 to allow the other folks who wish to provide public  
6 testimony to arrive.

7 LUCIENNE deNAIE

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

10 THE WITNESS: I do.

11 CHAIRMAN LEZY: Please state your name,  
12 your address and proceed.

13 THE WITNESS: Lucienne deNaie, P. O. Box  
14 610, Haiku, 96708. I've been before you folks  
15 testifying on this same matter. As you probably  
16 recall I did serve on the citizens panel that reviewed  
17 all the different developments that were proposed as  
18 part of the update of our General Plan. I'm kind of a  
19 history buff. And I went back and looked at the  
20 original planning document for this area, 1972. This  
21 was the federally financed Wailuku-Kahului General  
22 Plan Study.

23 I just thought, oh, well, it'd be curious  
24 way back in the day what the characteristic of this  
25 particular area was seen as. And what it was seen as:

1 A nice habitat for wildlife. Isn't that interesting?  
2 Whereas we're told oh, no, no wildlife, no need. Big  
3 area here great for ground nesting birds and local  
4 birds.

5           How times change. Now it's a great place  
6 for village mixed-use. Have any of you been to a  
7 village mixed-use? There's to "village" in a village  
8 mixed-use. It's a bunch of big overwhelming buildings  
9 that have no human scale. And we're building one  
10 right now watching it at Maui Lani.

11           And I guess that's Smart Growth. Maybe  
12 it's smart because it takes less land but it certainly  
13 doesn't really include people, either past or present  
14 people.

15           I would like to ask you today to respect  
16 our process. Right now our county council is hearing  
17 from folks about what should be in and out of the  
18 growth lines of the Maui Island Plan. You've heard  
19 from the Planning Department that they support there  
20 being a development at Wai'ale, but they do not take  
21 the vote on this. The council does.

22           Our council has not taken a vote and yet  
23 you folks are probably set to make a decision later  
24 today or tomorrow on something that they haven't even  
25 had a chance to discuss whether they would recommend

1 to you or not.

2           You've heard from one arm of our county  
3 government. You haven't heard the other. Let me  
4 tell you they don't always agree. I don't think that  
5 will come as a surprise to anybody.

6           Our council is going to be hearing from  
7 people about various things about this Project.  
8 Number 1 is when it came to the GPAC and the Maui  
9 Planning Commission and was recommended by the  
10 Planning Department, it was 50 percent affordable  
11 housing.

12           I know Mr. U'u's lauding the fact that it  
13 has affordable housing. Well, 25 percent is  
14 affordable housing plus the land that's donated to the  
15 county for the county to build affordable housing. So  
16 total of 34 percent.

17           Basically we are back in the numbers we had  
18 in the 1990s and 1980s. So we haven't made much  
19 progress on the affordable housing component here. So  
20 you're taking land that has traditional cultural place  
21 use and is surrounded by industrial uses. So not your  
22 best land, not your prime land, not prime ag land.

23           And you're giving us 25 percent affordable  
24 housing, giving the county 50 acres and the rest can  
25 be market priced. And you can destroy whatever is

1 there. That's kind of what's being put before you  
2 here.

3           You're also being told that there's plenty  
4 of water for this development, but you're not being  
5 given the big picture. My understanding is that the  
6 best shot that this Project has for water is  
7 partnering with Mr. Atherton for the wells that exist  
8 on *his* property. But Mr. Atherton has said in public  
9 that he wants to deal with the county and not any  
10 private agreements. So I take him at his word. He's  
11 not here to speak for himself so maybe this isn't  
12 fair.

13           But if the county is partnering with  
14 Mr. Atherton on the wells, that means any of the  
15 10,000 units proposed for Central Maui or any of the  
16 6,000 units proposed for South Maui or are already  
17 entitled, has an equal shot at that water. It doesn't  
18 mean there's something reserved for A&B.

19           That is not made clear in the information  
20 that is given to you because you only hear from their  
21 consultants. It's really unfortunate there was not a  
22 contested case here where you could really hear from  
23 experts on both sides.

24           As for the way that these promises were  
25 made, I remember when A&B Business Park was being

1 heard by this body. They told us, I think, that their  
2 water was coming from some wells out toward the north  
3 end of Waihe'e, Kahakuloa. It's now been decided  
4 those wells aren't practical. So now their water is  
5 coming from on *this* Project site which was never  
6 reviewed by anybody.

7           Also the idea that there's so much more  
8 water in these local aquifers. I checked with the  
9 Water Commission staff. They said they are not  
10 recommending that projects count on large amounts of  
11 additional water beyond the sustainable yield that is  
12 set for these aquifers.

13           I checked with USGS. I said, "So, do your  
14 studies of 2007 really show there's all this extra  
15 water?" They said, "Well, you know, we are redoing  
16 those studies because rainfall is dropping. And we're  
17 not sure if it's gonna get the recharge that we saw."

18           None of this is brought forward to this  
19 body. So you're approving a project that's going to  
20 need a lot of water. And maybe it will eventually be  
21 scaled down.

22           But meanwhile it's like the approval  
23 itself, the urbanization itself allows sand mining to  
24 take place on what is now ag land. When it's ag land  
25 it needs a special use permit. And that's an extra

1 step that has discouraged more sand mining on it.

2           When it's not ag land, when it's urban it's  
3 just part of grubbing and grading. And the dunes that  
4 actually exist there that are intact, that are just  
5 covered with light vegetation that are 30 and 40 feet  
6 high and they're likely burial dunes, will have the  
7 same fate as the one dune that's being preserved.  
8 That dune is not preserved because of good  
9 archaeology.

10           In fact I guess Mr. Frampton wasn't on the  
11 Burial Council when the discussions of that were  
12 taking place. But if you look at the minutes, that  
13 one dune again and again Mr. Vicente came and asked  
14 the Burial Council to move most of the burials on the  
15 dune to some convenient place.

16           There was never any intention to preserve  
17 that one -- even that one dune. It was to kind of get  
18 everything in one place and get it out of the way.  
19 That was not made clear to you either. But it's in  
20 the minutes of the Burial Council. And the Burial  
21 Council was very disturbed. And they held the line.  
22 They said, "No, we're not going to do that."

23           So now they're thrilled that one dune is  
24 being preserved. However, the other dunes have not  
25 had adequate archaeological work. The burials in the

1 one dune, the 70 burials that were found, were found  
2 by bulldozers. They weren't found by archaeology.  
3 They were found when grading was taking place. And so  
4 many of the burials are in fragments because that's  
5 the condition when a bulldozer hits a burial.

6           So all of this is missing information in  
7 your decision. What should you do? Well, I would  
8 suggest that if you added to your conditions a  
9 prohibition against further sand mining of the quote  
10 unquote "degraded dunes" which are not degraded at  
11 all, until thorough archaeological testing can be done  
12 on them. They've barely been tested because it's  
13 hard. It's expensive and it's hard to test those  
14 dunes.

15           That's why in every project that has  
16 significant dunes, whether it's the Grand Wailea Hotel  
17 where 300 burials have been found on 36 acres, almost  
18 all of them inadvertent, none found, very few found  
19 from archaeology research or Maui Lani where 300  
20 burials have been found and none were found through  
21 archaeological research, or this Project where a total  
22 of five burials have been found through archaeological  
23 research. And the other 85 or whatever, have been  
24 found by bulldozers.

25           Unless you invest the time you can't say

1 you're not going to disturb burials. The prudent  
2 thing would be to respect the map that was adopted by  
3 the GPAC, and the Maui Planning Commission, and is at  
4 least still put forward by Maui County in their latest  
5 May maps for this area.

6           And let there be a natural preserve. Let  
7 the cultural descendents come in and have a say.  
8 Don't try to control everything so that some foregone  
9 conclusion can be reached and the burials can be  
10 pushed aside later on under no scrutiny.

11           When they're inadvertent they have very few  
12 rights. And the Burial Council can't even really say  
13 for sure what should be done. There's one person at  
14 the State Historic Preservation that makes that  
15 decision.

16           So I do thank you for putting the 300-foot  
17 buffer on around the old dump site. I think that's  
18 very prudent. And it certainly is fair because it was  
19 what was done with the other project, the Maui Lani  
20 VMX.

21           And as far as the wildlife habitat and the  
22 cultural impacts here there is an organization called  
23 the 'Aha Moku Council. It has very knowledgeable  
24 people who have not been consulted on this Project.  
25 And they really should be consulted. The Maui Island

1 Plan has written into the language of it that  
2 decisions shall be made on resource and cultural  
3 issues in consultation with the 'Aha Moku Council.  
4 That language is still in the plan.

5 This is a group that's recognized by the  
6 state. And perhaps a further condition should be  
7 added, so I'm suggesting two conditions:

8 1. To prohibit further sand mining on the  
9 existing dunes that have not been sand mined. (sic)  
10 And 2. To require consultation with the  
11 'Aha Moku Council as the archaeological review for  
12 this proceeds. I don't think either of those  
13 conditions would do any harm. And they *could* save a  
14 lot of our heritage. This is a traditional place that  
15 has value to many.

16 And it shouldn't just be written off as a  
17 nice place for compact Smart Growth. They're people  
18 already living here. They just happen to be dead.  
19 Thank you.

20 CHAIRMAN LEZY: Parties, questions?  
21 Commissioners, questions? Thank you for your  
22 testimony. Is there anybody else who wishes to  
23 provide public testimony? Step forward, please.  
24 Anybody who desires to provide public testimony who's  
25 in the audience please step up and take a seat next to

1 the public testifier's box. The three witnesses who  
2 stepped forward then are the last three witness.

3 Ms. Apana, is that...

4 MS. APANA: I think maybe one more.

5 CHAIRMAN LEZY: Let's go ahead then.

6 KANILOA KAMAUNU

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

9 THE WITNESS: Yes.

10 CHAIRMAN LEZY: Please state your name,  
11 your address and proceed.

12 THE WITNESS: My name is Kaniloa Kamaunu. I  
13 come from 222 Waihe'e Valley Road in the Wailuku area.  
14 I am a kuleana of the area. My kupuna is Pi'imaiwa'a  
15 is where we receive our Land Commission Award through.  
16 As we've gone through this case, I'm just gonna  
17 reiterate what I said before. Being that this is a,  
18 you know, you're placing it as a legal process where  
19 we're being sworn in, we have attorneys present to  
20 bring up their cases and their sides.

21 I have to again reiterate as before: What  
22 is the basic claims of those that are proposing this  
23 development, meaning as far as land is concerned? We  
24 know that in Hawai'i it's very complicated as far as  
25 what types of land people had at certain times being

1 from leaseholds to grants to allodial titles. We talk  
2 about government lands, we talk about ceded lands. So  
3 much confusion. And we also talk about warranty  
4 deeds.

5 Well, if you look at a warranty deed it's  
6 just a color of title, meaning that they pay for a  
7 piece of paper to say supposedly that they legally own  
8 this land. And that is a western concept.

9 But in actuality at when you have LCA's  
10 involved, Land Commission Awards, by law they cannot  
11 be sold. That is already stated in law. HRS 172-11  
12 it states that clearly. The owner of the property  
13 remains whoever received the Land Commission Award  
14 through the Kingdom of Hawai'i will always be the  
15 original owner.

16 What the county has done is placed a tax  
17 map key so that these transactions can seem to be  
18 legal. And it is just a color of title. They really  
19 have no title. Go through all the court cases, they  
20 never wanna talk about title because they don't have  
21 it.

22 If there's an LCA and royal patent that's  
23 attached to the property that they're on, by law the  
24 state recognizes it, it belongs to the original owner  
25 and his heirs forever. It cannot be sold. It cannot

1 be transferred.

2           And we know this because the only person  
3 that can do this action is no longer present which is  
4 the original owner. For me Pi'imaiwa'a. I as an heir  
5 can be able to do whatever rights was given to him  
6 through his contract I'm afforded. Whatever vested  
7 rights he has I have. I cannot change, I cannot  
8 alter, I can, you know, do whatever I want to to the  
9 contract. It remains the same.

10           So here we have to look at what is the  
11 legal standing. We have to understand what type of  
12 lands that they have. Is it a warranty deed? If it's  
13 a warranty deed it is limited. It is a color of title  
14 only to say that I put money down for this property.

15           We also understand that through the kingdom  
16 that those who became Republic of Hawai'i because they  
17 went against the monarchy, they lost their rights to  
18 land. That is also in law.

19           So when we look at Kuleana, the Kuleana  
20 Act, it gave us vested rights to resources. If the  
21 resources have been encumbered by these people,  
22 where's the compensation? And how to you deal with  
23 the compensation so that the compensation is adequate?  
24 What is the determination?

25           Because these are the factors. And that's

1 what you have to look at if you're going to run this  
2 as a legal process. Then all aspects of the law  
3 should be seen through. Otherwise it is not a legal  
4 action.

5 My being sworn in and asking to tell the  
6 truth and to say the truth becomes nothing, because if  
7 you're not going to uphold the truth and they disguise  
8 the truth, then it is a lie. And if it is a lie my  
9 testimony means nothing.

10 So the thing is: What is the truth? If  
11 I'm being sworn to tell the truth so that you  
12 understand what I'm saying and what I'm saying is  
13 legal, you can look -- you can look at whatever I'm  
14 saying and it is there.

15 So the thing is I want to understand, is  
16 this a legal process? Then what is the ramifications  
17 of the decision that you make? And what ramifications  
18 does it have on me legally, on my resources, on my  
19 rights to be kuleana? And are they afforded more  
20 rights than I am because they're willing to pay? That  
21 should not come into play.

22 It is what is factual, what it actually is  
23 and what is lawful because this is what the process we  
24 have here today. So my concern is is this process  
25 lawful? Is what the claims being made lawful? Are

1 the stance on such claims legal? Because when we went  
2 to one court case the party was thrown out because  
3 they said he had no legal standing.

4           So I questioned what is the legal standing  
5 of these people. Exactly what do they believe that  
6 they own and what do they believe rights supersede the  
7 rights that I've gained through my kupuna who has  
8 vested rights? HRS 7-1, HRS 172-11. We look at the  
9 state Constitution section 12, article VIII or  
10 reversed.

11           And of course we look at OHA, the creation  
12 of OHA. So I must have rights because OHA wouldn't  
13 exist if I didn't exist. They exist because they're  
14 the trustees. They're supposed to defend me as a  
15 Hawaiian. Being that so, the state and county  
16 realizes that as trustees they have a legal  
17 obligation to protect my right as a kanaka. And that  
18 is by law.

19           The state is not the trustees of all the  
20 people in Hawai'i. They are the trustees of the  
21 Native Hawaiians because the Native Hawaiians, as it  
22 is said by 103-150, still retain sovereignty.

23           So if such things are true then that means  
24 you have to look at what is happening from the  
25 decision you're going to make what is the ramification

1 in the end to the legal vested rights of the people.

2 Thank you.

3 CHAIRMAN LEZY: Parties, questions?

4 Commissioners, questions? Thank you for your

5 testimony, sir.

6 MR. SARUWATARI: Ke'eaumoku Kapu.

7 THE WITNESS: Aloha mai kakou. My name is

8 Ke'eaumoku Kapu. And I live in Lahaina.

9 CHAIRMAN LEZY: Can I swear you in, sir?

10 KE'EAUMOKU KAPU

11 being first duly sworn to tell the truth, was examined

12 and testified as follows:

13 THE WITNESS: Yes.

14 CHAIRMAN LEZY: Please state your address.

15 THE WITNESS: Sorry for jumping ahead.

16 CHAIRMAN LEZY: That's all right.

17 THE WITNESS: Ke'eaumoku Kapu. I live in

18 Lahaina, Maui. Through the years I've been involved

19 in a lot that has to do with this specific item. I

20 served on the Maui County Cultural Resources

21 Commission for five years 'til 2008. I'm currently

22 the Maui-Lanai Island Burial Council Chair.

23 And I also serve on the Native Hawaiian

24 Historic Preservation Council and advisory to the

25 Office of Hawaiian Affairs Board of Trustees.

1           And I think it's horrendous waking up in  
2 the morning and all of a sudden you gotta go to a  
3 county building meeting and give testimony basically  
4 on the same item you're talking about, then rush away,  
5 hopefully we can give some kinda positive perspective  
6 to this body.

7           I been in front of this body many times  
8 from, I would say, 2001 to probably around 2006. We  
9 filed a declaratory ruling on some lands in Lahaina.  
10 And I see a lotta new faces. The old guys I guess  
11 they all retired already.

12           But it's the same argument over and over  
13 again: What are we trying to protect? What are we  
14 trying to build homes for? Who are we trying to build  
15 homes for? I think all of us gotta take into heavy  
16 consideration of these kinds of things that is  
17 affording our community for future generations  
18 tomorrow. And we need to look at the community  
19 itself, what type of community we tryin' to provide  
20 these homes for.

21           My job being involved in all those  
22 commissions is to look at the heart of the community  
23 and to look at its historic properties and how we can  
24 protect those historic properties for the future  
25 generations. Because without the customs, religions

1 and identities of our islands, then this wouldn't  
2 become Hawai'i.

3           Hawai'i wouldn't be identified or  
4 recognized because we have entities such as the State  
5 Historic Preservation Division to give us a guideline,  
6 to look at these guidelines on what is prudent, what  
7 is fair, what is just to protect the makamae, the  
8 treasures of our past.

9           My job is to make sure that I cross the t's  
10 and dot the i's when we look at these kinds of  
11 projects and how we can better the preservation sites  
12 of large magnitude undiscovered burial remains,  
13 historic properties.

14           As well-known today right now that is  
15 pending the state has got cut back on the state  
16 historic preservations. There isn't money. We trying  
17 to give the most best recommendations we can. But  
18 then me as the burial chair as a body to give our  
19 recommendations that would be pure and just for the  
20 protection of iwi kupuna, we only recommendations.  
21 (sic)

22           The state gives its final recommendations.  
23 When we see these kinds of things we feel like: Okay,  
24 what is our job inside here to make recommendations to  
25 protect these burial sites, to protect all these

1 things? I'd like to come to this body and say, "Let's  
2 make some positive recommendations on the VMX area to  
3 cut it up, no development area."

4 I mean that area's been so impacted  
5 throughout, I would say, within the past 10 years, so  
6 heavily impacted that the numbers have risen so huge  
7 on the findings within that area to box it off, to  
8 leave it a cultural area that is untouched, to keep  
9 people away for those areas, to make sure that area is  
10 protected because our iwi kupuna, even though they're  
11 not here today to speak for themselves, the  
12 descendants are still here to speak on behalf of them.  
13 And I'm one of them.

14 I'm hoping that whatever your decisions  
15 are, to look at this Project in its multi-faceted  
16 kinda way on where we're going to provide just and  
17 fairness not just for the living but for our past.

18 My other kuleana here is I am the Ahu Moku  
19 representative for Maui. My job is to formulate these  
20 so-called bodies that come from the different mokus.  
21 Maui has 12 mokus. So out of the 12 mokus we've been  
22 able to, from February 7th we formed the Ahu Moku o  
23 Maui Advisory Committees.

24 We consist of six committees: Land, ocean,  
25 shoreline, water, air, and burials. These committees

1 is comprised of different representatives from all 12  
2 mokus. Some committees comprising of 10  
3 representatives, other committees like land and water  
4 comprising of 15 to 18 representatives.

5           We take on recommendation that come from  
6 the state and the county, review these recommendations  
7 and send our recommendations back. The  
8 recommendations come from people that understand, that  
9 live within the moku that is been affected by these  
10 mokus to give information that is of traditional and  
11 generational knowledge.

12           It's the grassroots from the bottom up  
13 process to get recommendations or mana'o from these  
14 people to help the state agencies, to help the county  
15 to make just decisions.

16           And I would like to just ask that this  
17 board really considers finding out who these  
18 representatives are from these different types of  
19 mokus, get some information from them because they  
20 know of these places. They know of Kakanelua. They  
21 know of Wai'ale.

22           We've been working on this for a long time.  
23 Once when this development went through its  
24 application for another 10 year sand mining project,  
25 we're totally against it, because we knew what was

1 going to be found. Now it escalated to this point and  
2 the State Historic Preservation has signed off, it's  
3 still not done.

4           Now you have the decision to make here of  
5 what really needs to be protected versus what really  
6 needs to be an economic stimulus for our residents.  
7 For our residents. I'm not saying that, you know, I  
8 don't like this development entirely. But we need to  
9 protect what is there and not just sideswipe these  
10 things under the carpet.

11           As I mentioned I do represent these  
12 entities but I'm here as a representative of the 'Aha  
13 Moku Council system. Mahalo. Thank you for your  
14 time.

15           CHAIRMAN LEZY: Parties, questions?  
16 Commissioners, questions? Commissioner Makua.

17           COMMISSIONER MAKUA: Can you tell us who is  
18 the geographic Burial Council rep for this area?

19           THE WITNESS: The geographic -- I believe  
20 there's about total so far there's 15. We have two in  
21 the audience, Johanna Kamaunu and Kaniloa Kamaunu, the  
22 one that just gave testimony.

23           We have a kupuna. His name Clyde  
24 Kahalehao. He is a representative -- there's, I  
25 think, a total of 15 for this side. And the 'Aha Moku

1 Council system is always open for more people. We're  
2 looking for people with that generational knowledge to  
3 sit on these committees so they can give  
4 recommendations that would help you make decisions and  
5 would help the county make decisions, fair decisions.

6 That's the reason what you, it's from  
7 legislation the governor still has to sign it. But I  
8 think he has 'til June 27, 28 to sign HB 2806 which is  
9 the Ahu Moku bill. And there's James Ballao. He's a  
10 teacher at Baldwin School. The name of the Burial  
11 Council rep is James Ballao. He's that district  
12 representative for the Burial Council.

13 COMMISSIONER McDONALD: Chair, just a quick  
14 question.

15 CHAIRMAN LEZY: Commissioner McDonald.

16 COMMISSIONER McDONALD: Did the Maui Burial  
17 Council approve the preservation plan for Wai'ale?

18 THE WITNESS: Uhm, that, you know the  
19 Wai'ale development has been way before I been the  
20 chair, way before I even been a member of the burial  
21 council. So when we look at burial councils it's kind  
22 of agendized like they can find so much burials at one  
23 time, that's a separate agenda. We don't -- we don't  
24 give recommendations on burial treatment plans for the  
25 whole scope of the development. It depends on how the

1 application comes in.

2 So if I would say they staggered the agenda  
3 so it's not a magnitude kind of thing that we're at,  
4 that we're only looking at, say, maybe 25 in this  
5 area, another 20 in this area.

6 But if you look at the larger picture we're  
7 not addressing 300 burials. We're only addressing a  
8 minimum of burials giving recommendations to the  
9 state. And if you ask me that's wrong. We should  
10 lump it up because we trying to protect those burials.

11 When they stagment (sic) the agenda to make  
12 it a little bit more complicated for us to make  
13 decisions, once the burial treatment plan is set in  
14 place it's only specifically for that item, not  
15 specifically for the whole scope of the development.  
16 I hope you understand where I'm coming from.

17 COMMISSIONER McDONALD: Thank you.

18 CHAIRMAN LEZY: Any other questions? Thank  
19 you for your testimony, sir.

20 THE WITNESS: Thank you.

21 MR. SARUWATARI: Johanna Kamaunu.

22 JOHANNA KAMAUNU

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

25 THE WITNESS: Yes.

1                   CHAIRMAN LEZY: Please state your name,  
2 your address and proceed.

3                   THE WITNESS: My name is Johanna Kamaunu.  
4 I come from the Waihe'e ahupua'a. Address there is  
5 222 Waihe'e Valley Road. I'd like to make one comment  
6 on Ke'eaumoku's comments to you regarding the iwi and  
7 that the definition in the law regarding inadvertent  
8 finds. It says "Inadvertent burials or findings are  
9 unanticipated." Now, this Project has been ongoing  
10 for, like, 20 years or more? And we have accumulated  
11 to date through the burial council, 300+ iwi that's  
12 being discovered all the time.

13                   So to say that further discovery or AIS,  
14 what we call archaeological surveys, are saying is  
15 insignificant or they're not anticipating any more,  
16 it's wrong. It's deficient. We know that there's  
17 going to be more burials even on other projects  
18 currently going on right now, the Safeway project.  
19 Almost every week they're finding more iwi. So you  
20 cannot consider inadvertent finds as "unanticipated".

21                   I wanted to talk to you about Waihe'e. It  
22 may seem like it's out of the scope of this Wai'ale  
23 Project. But it's very significant to the success of  
24 the Wai'ale Project because that's where the water's  
25 coming from, one of water sources.

1           Recently Waihe'e had to reconsider its  
2 position with what we call the Waihe'e Community  
3 Association. The community is now split. So we have  
4 a new association called Old Waihe'e Mau Community  
5 Association and Cultural Center. And it's based on  
6 the belief that this is where, Waihe'e is where the  
7 community meets culture. And our focus is at the  
8 preservation and protection of our natural resources  
9 for the people.

10           When we started to put together our  
11 community plan, one of the things we realized is that  
12 a lot of the terminology in the current county plans  
13 asked for directed growth, transportation, affordable  
14 housing, all of those things that we felt didn't  
15 adequately address our situation.

16           So when we looked at the directed growth we  
17 realized that what we needed to look at was what we  
18 envision Waihe'e as being in a hundred years. And  
19 with that type of ahupua'a management guideline we  
20 were able to develop ideas or have a good discussion  
21 on what we saw that as being for directed growth.

22           And we realized that the way the people  
23 view Waihe'e, that community is more as a pu'uhonua.  
24 In past a pu'uhonua has been like a he'iau, a place of  
25 refuge. Well, today Waihe'e is our home. It's our

1 place of refuge. And that's how a multi-ethnic  
2 community like ours can come together when it comes to  
3 issues like development.

4           And we looked at the hundred year plan and  
5 the protection of that pu'uhonua, and found that,  
6 unfortunately, developments that require a water  
7 source that comes from Waihe'e is injuring the  
8 community. That's the best way to put it.

9           It's injuring our plans for our future.  
10 It's injuring our cultural practice. But we're a  
11 multi-ethnic community. And our knowledge is built on  
12 the multi-ethnic generational knowledge.

13           And all of that is coming together to meet  
14 in a vibrant way that could be a model for how  
15 development, government, community and our culture can  
16 come together. But we cannot get to even the first  
17 stage if our feet get knocked out from under us by  
18 losing our water resources.

19           We need to have water. We look at Waihe'e  
20 now as being the goose that lays the golden egg. It  
21 continually produces water and supports this county.  
22 But development and the changes proposed by County  
23 Planning Department is slowly killing that goose. And  
24 we won't have it one day.

25           We envision a thriving ahupua'a. And I'm

1 sure development envisions a cemented landscape. That  
2 won't survive without water source. And it won't  
3 survive without communities like ours that provide a  
4 refuge for those who have to, unfortunately, work in  
5 those areas.

6           There are certainly laws in place that  
7 allows people a legal right to do the things that  
8 they're doing now for development. But I think we  
9 have to look at how the law was created and what it  
10 was intended to provide for.

11           And I believe those laws especially our  
12 early laws, intended for the proliferation of  
13 communities like ours, not the modern day communities  
14 that we see today. Thank you.

15           CHAIRMAN LEZY: Thank you. Parties,  
16 questions? Commissioners, questions? Thank you for  
17 your testimony, ma'am. That concludes public  
18 testimony. We'll take a 10-minute break for our court  
19 reporter and pick things back up.

20           (Recess was held 10:30-10:40)

21           CHAIRMAN LEZY: (gavel) We're back on the  
22 record. Before we move into argument, just for the  
23 sake of the parties and the public, we won't be  
24 talking a lunch break today. We're going to push  
25 through.

1 MR. MATSUBARA: Thank you.

2 CHAIRMAN LEZY: With that, Mr. Matsubara,  
3 are you prepared to proceed?

4 MR. MATSUBARA: Yes, I am.

5 CHAIRMAN LEZY: Please do.

6 MR. MATSUBARA: Chairman, Members of the  
7 Commission, we are requesting the reclassification of  
8 the 545.229 acres for purposes of developing the  
9 Wai'ale planned residential community as we presented  
10 on the board. (Mr. Yasui displaying map)

11 As earlier testified to by public  
12 witnesses, the Master Planned community will include  
13 2,550 multi, single-family units of which 300 will be  
14 affordable units developed by Maui County.

15 There will be regional and neighborhood  
16 parks, cultural preserve, community center, greenways  
17 and open space, a middle school, a village mixed-use  
18 concept and commercial-like business uses.

19 So of the 545.2 acres we are asking to  
20 reclassify, approximately 206 of those acres are going  
21 to be set aside for parks and cultural preserves, open  
22 space and lands contributed for public facilities.

23 For example, the cultural preserve consists  
24 of 33 acres. The parks and open space comprise  
25 another 108 acres. The lands contributed for public

1 facilities and affordable housing, the state -- the  
2 affordable housing total 40 acres, the state middle  
3 school site 18 acres, and the community center  
4 7 acres. So a total of 65 acres for public facilities  
5 and affordable housing.

6 So approximately 38 percent of the property  
7 we're reclassifying, almost 40 percent will be used  
8 for those purposes. Thank you, Dan.

9 Now, we recognize, based on our own  
10 research relating to this property and through our  
11 experts, that the Project resides in a culturally  
12 significant and unique land area. The Petitioner has  
13 taken steps to protect known cultural resources on the  
14 property.

15 For example, as pointed out, we have, a  
16 33-acre cultural preserve has been created to minimize  
17 the need for relocation of burials. I believe,  
18 according to state records, this is one of the largest  
19 burial preserves in the state of Hawai'i.

20 Now, the total area you see up there, the  
21 545 acres, were all included in the Archaeological  
22 Inventory Survey. There were a hundred burials found  
23 on site of which 93 were preserved in place, seven  
24 were relocated.

25 The burial and preservation plan was

1 presented to the Maui and Lana'i Island Burial Council  
2 for their comment, and then to SHPD for their  
3 approval. The process is that the plan is submitted  
4 to the Maui-Lana'i Island Burial Council for their  
5 comment. SHPD staff provides them assistance, and the  
6 meeting's conducted by SHPD.

7           Final approval of the burial and  
8 preservation plan is by SHPD, which was received on  
9 September 13, 2010. And that's the burial  
10 preservation plan we've submitted.

11           As part of that process, our archaeologist  
12 and the Maui Island representative for SHPD, Hinano  
13 Rodrigues, met with the area representative James  
14 Belau. James Ballao was also interviewed in our  
15 Cultural Impact Analysis as a knowledgeable resident  
16 of the area. And his interview is attached to our  
17 Cultural Impact Analysis which is Exhibit 9-I.

18           One of the steps taken to ensure that the  
19 preservation plan proceeds accordingly with respect to  
20 for the cultural history of this property, is that  
21 property has been surveyed by metes and bounds and  
22 registered in Bureau of Conveyances as required by  
23 SHPD within 90 days after SHPD approved our plan.  
24 That's been done.

25           The plan is to have surface demarcation of

1 the burial sites with cobbles or small boulders or  
2 other appropriate material. The preservation and  
3 buffer area will have a -- the buffer area will be 50  
4 to a hundred feet from the furthest burial from the  
5 center of the site. And that will be marked off and  
6 landscaped as appropriate with native vegetation.

7           It is -- part of the preservation plan --  
8 this is the plan that was presented to the Maui-Lanai  
9 Island Burial Council and subsequently approved by  
10 SHPD. These are all the steps that are included in  
11 it.

12           Only traditional and customary activities  
13 associated with Native Hawaiian burial sites will be  
14 allowed within the preservation area. No access will  
15 be provided inside the preservation area except for  
16 maintenance purpose. Later I'll get to access by  
17 cultural and lineal descendants.

18           The landscape within this area will be  
19 natural vegetation or Native Hawaiian plants. There  
20 will be a walking path around the perimeter of the  
21 preserve area for purposes of allowing access to view  
22 the site.

23           Access *within* the buffer area will only be  
24 permitted to cultural and lineal descendants as  
25 determined by SHPD and the Maui/Lana'i Island Burial

1 Council. They'll be the ones that have access to the  
2 site.

3           There've been testimony to the fact that a  
4 major battle may have occurred on this site. As you  
5 see in our Cultural Impact Analysis, our expert's of  
6 the opinion that the exact location of the Battle of  
7 Kakanelua or the Alapa Battle, is still not known.  
8 And there is no archaeological evidence to support  
9 that many warriors perished on this site.

10           This is supplemented by the Archaeological  
11 Survey which reflects, based on the composition of  
12 burials of men, women, children and infants, the  
13 absence of traumatic injury to the skeletal remains,  
14 and the absence of war remnants do not exist.

15           So at least at this time it is the  
16 conclusion of our experts that the Battle of Kakanelua  
17 did not occur on this site.

18           Pursuant to Condition 11 on the proposed  
19 D&O we have committed to continuous archaeological  
20 monitoring during all excavation activities. Hana Pono  
21 has agreed to continue to assist us in regard to the  
22 work to be done following site clearing.

23           And these activities would include the  
24 development and implementation of a cultural  
25 orientation program for construction personnel, advice

1 concerning inadvertent finds and related protocol,  
2 advice and assistance relating to planned burial  
3 preserves.

4 Other conditions included in our proposed  
5 D&O also reflect standard conditions relating to the  
6 fact that the immediate cessation of work if any  
7 skeletal remains are found during the course of the  
8 Project.

9 In regard to agricultural issues the  
10 quality of land for this property from the Land Study  
11 Bureau is E. Under ALISH it's designated as "other".  
12 A&B continues to work with the current farmer tenants  
13 to find them suitable replacement property. And this  
14 continues A&B commitment to ag as reflected by their  
15 designation of 27,102 acres to the Land Use Commission  
16 in '09 as Important Ag Lands.

17 Let me talk about housing. The important  
18 feature of the housing units being built in this  
19 Project that it is largely targeted to the workforce  
20 market segment. The Project should be attractive to  
21 Maui residents interested in becoming homeowners.  
22 These are not second homes. This is geared for Maui  
23 residents.

24 As testified by our experts in this  
25 proceeding and included in his report, the fact that

1 this is a desirable location for Maui residents is  
2 confirmed by the fact that between '04 and '05  
3 90 percent of the residential sales in the  
4 Wailuku-Kahului area was attributed to Maui residents.

5           The additional benefit is that in addition  
6 to addressing housing needs, the Project will provide  
7 employment prior to, during and after completion.  
8 Direct and indirect revenue will also result and  
9 benefit both the county and the state.

10           In regards to water source: We testified,  
11 which was confirmed by a letter from the mayor of Maui  
12 County, that partnership between Atherton, A&B and  
13 Maui County will proceed in an effort to develop a  
14 five-well potable water system for purposes of  
15 providing water for the Project.

16           All the wells would be located in the  
17 Waikapu Aquifer which has, according to the Commission  
18 on Water Resource Management, 3 mgd sustainable yield.

19           Our expert also testified that at full  
20 buildout and including other entitled projects in the  
21 area, the demand for that aquifer would be 2.0 mgd per  
22 day. Water from the Wai'ale water treatment facility  
23 could also provide another water source.

24           I believe the Wai'ale master planned  
25 community is a good Project. It addresses many

1 aspects that would be of benefit to the community and  
2 the residents. And I would ask for your consideration  
3 in its approval.

4 I'd just like, in closing, to address the  
5 proposed Decision and Order, objections and replies  
6 that were filed subsequent to the close of the hearing  
7 in regard to the differences that exist.

8 Maui County graciously has no objections to  
9 our proposed D&O. We have certain language  
10 differences with the Office of Planning and  
11 disagreement on one condition.

12 The findings of fact that we have  
13 differences with number nine in number, and they're  
14 largely wording differences we have. I believe the  
15 proposed D&O we have, their objections and our reply  
16 clearly get into the issues relating to those  
17 differences. But if you would like me to get into  
18 them I would be glad to get into them.

19 The condition that we are arguing about  
20 relates to Condition 5. And Condition 5 has to do  
21 with the condition relating to highway and road  
22 improvements. The difference we have on that  
23 condition revolves around two areas. The first is the  
24 timing of the Traffic Impact Analysis approval that  
25 they're requesting. And secondly is the noise policy

1 they're attempting to impose on this particular  
2 Project.

3           The wording the Office of Planning desires  
4 is that, "No final zoning approval can be received  
5 until there is an approved TIAR by DOT."

6           I believe this process usurps the county  
7 zoning process to place before the County Council acts  
8 on any zoning request something that does not  
9 currently exist in the county zoning process and  
10 procedure, that DOT has to approve a TIAR.

11           One of the problems of that is that there's  
12 no time limit within which a TIAR must be approved.  
13 So final approval on zoning could come to a stop  
14 unless DOT acts.

15           What we are asking, instead, is that final  
16 approved TIAR received prior to final approval of the  
17 first increment subdivision. By that time, if they  
18 ask us to provide an approved TIAR before getting  
19 zoning, it's ignoring completely the requirements  
20 county zoning may place on this particular Project in  
21 regard to certain densities, in regard to certain  
22 access points, et cetera, and so on.

23           I mean we should allow the county to review  
24 our Project and place whatever changes and shape it as  
25 they deem appropriate as the county zoning. And once

1 that's done we can do our detailed planning, we can  
2 map out the routes, we can do the traffic counts and  
3 everything else.

4           And you'll have a definitive study at that  
5 time based on at least a Project that's almost ready  
6 to break ground. That's when your planning is going  
7 to be at its final stages and you can make the  
8 computation, the projections of traffic and everything  
9 else that matter.

10           We're not saying that DOT doesn't have the  
11 authority to approve a TIAR. We're just talking about  
12 when they can do it. And we believe the time we're  
13 suggesting provides the most logical sense to the  
14 natural process that exists. We can't begin work  
15 until we get approved TIAR.

16           And all we're saying is move it to the  
17 point that it makes the most sense so that all the  
18 planning is in place and we can run the computations.

19           It's almost like saying the LUC shouldn't  
20 grant a decision until you get an approved TIAR from  
21 the Department of Transportation. That shouldn't be  
22 imposed on Maui County in that regard.

23           The other aspect that they're asking in  
24 their Condition 5 is the imposition of a noise policy  
25 that has as its basis a federal regulation. That

1 would be Highway Traffic Noise and Construction, 23  
2 Code of Federal Regulations. That's included in the  
3 pleadings that have been filed.

4           If you examine that policy it's a policy by  
5 the federal government on the state. Whenever they're  
6 building a federal, or a federal aid highway they need  
7 to comply with these requirements. They're trying to  
8 impose it on us, policies really inapplicable to our  
9 probable Project as it stands under the definition of  
10 that requirement.

11           So that would be the one condition that we  
12 have a difference on that we're proposing that what  
13 we've submitted as our proposed Condition 5 be the  
14 accepted condition. That concludes our closing  
15 argument, unless there's any questions.

16           CHAIRMAN LEZY: I think we'll take  
17 questions at the end. Mr. Hopper.

18           MR. HOPPER: Thank you, Mr. Chair, Members  
19 of the Land Use Commission. The county of Maui  
20 Department of Planning recommends approval of this  
21 proposed district boundary amendment subject to the  
22 conditions recommended in its written testimony.

23           As you may recall the county of Maui  
24 Department of Planning in its written testimony  
25 recommended seven conditions to be placed on this

1 Project. And in the Petitioner's proposed findings,  
2 conclusions and decision and order it has incorporated  
3 all seven of those conditions.

4 The conditions involve parks, housing,  
5 water and traffic requirements as well as a  
6 requirement of the construction of a private  
7 wastewater system. Those have been included in the  
8 Petitioner's proposal.

9 As such the Department recommends approval  
10 of the proposed findings, conclusions and decision and  
11 order as altered by the Petitioner in response to the  
12 State Office of Planning's objections.

13 If this Project receives a district  
14 boundary amendment it will still need a change in  
15 zoning and community plan amendment going forward.  
16 This will involve the determination of the precise  
17 location of the permitted uses, what those permitted  
18 uses are, and the specific location of the green space  
19 throughout the Project.

20 It will also be subject to public hearings  
21 before the Maui County Council and the County Planning  
22 Commission. If approved it is anticipated that this  
23 Project will provide housing and commercial space for  
24 Maui's workforce as opposed to the off-island market,  
25 and will provide affordable housing and green space

1 to that same population.

2           The county presented several witnesses in  
3 this proceeding. In first was Planning Director  
4 William Spence. He testified that the draft Maui  
5 Island Plan includes this Project in the draft urban  
6 growth boundary submitted by the planning director.

7           In addition, he testifies that the Project  
8 in some form was recommended for approval by the  
9 General Plan General Advisory Committee, Planning  
10 Commission and the planning director in their proposed  
11 urban growth boundaries in the draft Maui Island Plan.

12           The precise location of the green space in  
13 the plan, the director testified, may be determined  
14 through the zoning process. In the draft Maui Island  
15 Plan the director is recommending for approval before  
16 the council as well.

17           In addition, the county presented JoAnn  
18 Ridao, director of the Department of Housing and Human  
19 Concerns. In her testimony she discussed that the  
20 Project will provide over 50 acres of affordable  
21 housing, park and community center space required by  
22 another zoning condition for separate project by the  
23 developer.

24           But in addition to this housing, will also  
25 be required, based on her estimate, over 500 units of

1 affordable housing throughout the Project in addition  
2 to the 40 acres of affordable housing to be used by  
3 the county to provide affordable housing.

4           Again, the precise unit counts have to be  
5 determined in an affordable housing agreement at a  
6 later date. But that was the estimate based on the  
7 unit count and the design of the Project currently.

8           In addition, the precise location of the  
9 housing in the other land that will be dedicated to  
10 the county must be determined through the entitlement  
11 process. In fact, the Maui County Council must accept  
12 the specific land to be dedicated. So the acceptance  
13 and location of any lands to be used for affordable  
14 housing or other county purposes must be accepted by  
15 the Maui County Council after public hearings.

16           Finally, the Commission heard from Water  
17 Director David Taylor. Water, as it often does in  
18 Maui County, at this stage, the district boundary  
19 amendment stage, remains an unresolved issue.  
20 However, the Petitioner's expert, Mr. Nance, presented  
21 an option of utilizing the water wells in the Waikapu  
22 Aquifer area to service the Project.

23           This plan would still require, however, an  
24 agreement with the current owner of those wells, and  
25 potentially dedication to Maui County.

1           Mr. Taylor, in his testimony, testified  
2 that in his opinion this proposed option is a feasible  
3 way of providing water for this Project and was, in  
4 fact, the most feasible of the methods that were  
5 discussed by the Petitioner in its documentation and  
6 at the hearing.

7           As with any other project in Maui County  
8 the developer must show access to a long-term reliable  
9 source of water prior to subdivision approval

10 Mr. Taylor testified to this as well.

11           So in conclusion, the Department does  
12 recommend approval of this Project as stated in the  
13 Petitioner's proposed findings, conclusions and  
14 decision and order as modified by the Petitioner in  
15 its most recent pleading in response to the Office of  
16 Planning's objections. Thank you.

17           CHAIRMAN LEZY: Thank you. Mr. Yee.

18           MR. YEE: The Office of Planning supports  
19 the proposed reclassification subject to conditions.  
20 The five major issues in this case relate to: First,  
21 transportation; second, potable water; third,  
22 consistency with Maui County Plans, fourth, culture  
23 and archaeology and fifth, what I'm simply going to  
24 call miscellaneous items raised by Petitioner's  
25 objections to the Office of Planning's comments.

1           With respect to the Department of  
2 Transportation there are two significant issues.  
3 First, the timing of the TIAR acceptance and second,  
4 the inclusion of a noise mitigation requirement.

5           The Office of Planning and the Department  
6 of Transportation recommend the TIAR be accepted by  
7 DOT before zoning approval by the County Council. And  
8 that subsequently an MOA can be accepted by  
9 subdivision approval.

10           Petitioner suggests that the TIAR should be  
11 differed until subdivision approval. OP's position is  
12 not new. In Docket No. A03-739 involving A&B's  
13 proposed development of approximately 138 acres in  
14 Kahului for the Maui Business Park expansion, the LUC  
15 approved the reclassification with Condition 6 that  
16 the "TIAR be revised to the satisfaction of DOT prior  
17 to zoning."

18           Although Petitioner's traffic consultant  
19 did respond to a question from Petitioner's attorney  
20 that final engineering designs would be done after the  
21 zoning change, he also said that the conceptual plans  
22 that we have today would be firmed up at the time of  
23 zoning approval. And that a TIAR acceptance would be  
24 better for TIAR's acceptance at that point.

25           He said in particular on page 52 line 16:

1           "Q. And I'm getting to the question of not  
2 so much the revision of a TIAR but the acceptance of  
3 the TIAR by DOT. So typically a TIAR is not accepted  
4 at the LUC stage, correct?

5           "A. That's correct.

6           "Q. Okay. But it would be appropriate, if  
7 I hear you correctly, to have the TIAR accepted by the  
8 project district zoning approval.

9           "A. That is -- I mean that probably is a  
10 better point, yes."

11           Now, he does go on to say that the  
12 engineering designs would be done after zoning or  
13 project district zoning approval. But our point is  
14 that you don't need the engineering design for a TIAR  
15 acceptance.

16           What happens at a zone change application  
17 is that the Petitioner must provide a map showing the  
18 major proceed access points and the densities and  
19 location of land uses. Based on these facts a TIAR  
20 can be submitted and finalized before the zone change  
21 application and then be accepted concurrently during  
22 the average, let's say six to nine months in which the  
23 Petitioner gets zoning approval.

24           Grading and other engineering designs are  
25 often made before subdivision approval. So if we

1 wait for subdivision approval before getting the TIAR  
2 acceptance, actual construction may be occurring  
3 before that TIAR is finally approved or accepted.

4 In short, you have all the information you  
5 need at the time you submit your zoning application to  
6 submit a TIAR. And you can then concurrently get  
7 acceptance from both DOT on the TIAR and the zone  
8 change application from the City Council.

9 This does not in any way usurp county  
10 powers or county ability. The condition is not  
11 applicable to the county. And the county may proceed  
12 as it sees fit with the application before it.

13 You may recall that we have another case in  
14 which the Petitioner has agreed to have an accepted  
15 TIAR even before the zone change application.  
16 Intervenors in that case have argued that the TIAR  
17 should be accepted before this reclassification. The  
18 Office of Planning recognizes that there is a balance  
19 to be made and that a project is often conceptual at  
20 the time of the LUC reclassification but it is not  
21 conceptual at the time of zone change application.

22 Based on past precedent the recommendation  
23 of the Department of Transportation and the judgment  
24 of the Office of Planning, we believe the balance in  
25 this matter, as in most matters, is best drawn by

1 requiring an accepted TIAR at the time of zoning  
2 approval.

3           The second issue with respect to Department  
4 of Transportation is a noise mitigation requirement.  
5 OP has argued that noise mitigation is done for areas  
6 which will exceed the 66 dBA hourly LEQ. Petitioner  
7 has objected saying that DOT's noise abatement  
8 policies simply don't apply because the Petition Area  
9 is not a part of the Federal-Aid Highway Projects.

10           First, a noise study was done for the  
11 Kuihelani Highway widening project which includes  
12 approximately 1.3 along the Petition Area. At the  
13 time the Petition Area was agricultural so no further  
14 noise abatement was required.

15           In the EIS for this Project a noise study  
16 was done which showed that the noise levels from  
17 Kuihelani Highway would exceed federal highway and  
18 noise abatement criteria. That study itself noted the  
19 discrepancy or incompatibility between the noise and  
20 the proposed residential use. Now, DOT itself has no  
21 authority to require developers to abate noise.  
22 That's just not part of their jurisdiction.

23           So the Department of Transportation's noise  
24 policy instead says that, "DOT shall inform local  
25 planning and zoning authorities of the noise impacts

1 from the highway."

2           That is the application of -- that is what  
3 their noise policy says. So they have done so with  
4 the expectation that planning authorities will work to  
5 ensure compatibility between existing highways and new  
6 residential development.

7           OP and DOT recommend the option of  
8 Condition 5 requiring Petitioner to address traffic  
9 noise levels which exceed DOT's limits of 66 dBA  
10 hourly LEQ along Kuihelani Highway.

11           OP would recommend that the term "66 dBA"  
12 be modified to read "66 dBA hourly LEQ" to be more  
13 technically accurate.

14           If the LUC's inclined to not accept OP's  
15 proposed Condition 5 relating to noise, then we would  
16 ask at the least that Petitioner be required to  
17 provide a clear disclosure and release requirement  
18 relating to highway noise problems. At the very least  
19 the new owners, of traffic along this highway, should  
20 not then be allowed to complain that they're bothered  
21 by the noise from the existing highway. The  
22 disclosure and the release should read something along  
23 these lines. We can provide a copy if requested.

24           "A&B shall include a provision in each of  
25 A&B's sales, lease and conveyance documents whereby

1 each person who may have from time to time owned the  
2 property, any portion thereof or hold any interest  
3 therein or occupy any improvements thereon, make the  
4 same acknowledgment in the following agreements in  
5 favor of the state of Hawai'i:

6           "(A) Said person assumes complete risk of  
7 and forever releases the state of Hawai'i for all  
8 claims for damages and nuisance occurring on the  
9 property and arising out of or related to highway  
10 traffic noise on Kuihelani Highway.

11           And "(B) Such person waives any rights to  
12 require the state of Hawai'i to take any action to  
13 eliminate or abate any highway traffic noise from  
14 Kuihelani Highway; file any suit or claim against the  
15 state of Hawai'i for injunction or abatement of any  
16 highway traffic noise from Kuihelani Highway and for  
17 any damage or other claims relating or arising  
18 therefrom."

19           This is going to be a problem. It will be  
20 an issue. And it will be an issue resulting from  
21 development situated next to an existing highway. If  
22 you don't want to require the Petitioner to resolve  
23 the problem, then at least you should prohibit any new  
24 residents from then complaining to the state of  
25 Hawai'i about this resulting issue.

1           The second issue involves potable water.  
2 The Office of Planning's not recommending a particular  
3 condition. We simply wanted to note for the  
4 Commission that there are three relevant aquifers at  
5 issue.

6           The first is the 'Iao Aquifer.

7           The second is the Kahului Aquifer.

8           And the third is the Waikapu Aquifer. The  
9 Petitioner has no set plan, no one set plan by which  
10 they say they will be obtaining water for this site.

11           OP simply notes for the Commission that the  
12 'Iao Aquifer appears to be an unlikely source of  
13 water. Certainly from the groundwater perspective as  
14 a practical matter there's unlikely to be any water --  
15 groundwater to be used for this Project.

16           With respect to surface water, although  
17 they have proposed the possibility of a surface water  
18 treatment plant, we note that after the Nawaieha  
19 Decision, the total surface water permit applications  
20 for preexisting uses already exceed the supply  
21 available.

22           So the likelihood that a surface water  
23 treatment facility will be allowed for the several mgd  
24 that they're proposing to be built to service this  
25 Project also seems unlikely.

1           The Kahului Aquifer has water but there's  
2 not enough potable water in the 1.0 mgd sustainable  
3 yield for this aquifer. Consequently, Petitioner  
4 would be required to treat the non-potable water such  
5 as through a reverse osmosis process to achieve the  
6 necessary salinity levels for public use.

7           The Petitioner has not submitted any cost  
8 analysis for desalination or other treatment method.

9           The Waikapu Aquifer from a resource  
10 standpoint is certainly a realistic possibility. But  
11 the Petitioner has not acquired any rights to develop  
12 the Waikapu Aquifer. And we don't know what the costs  
13 will be.

14           So all that we ask is that Petitioner shall  
15 be clearly on notice that the 10-year infrastructure  
16 requirement means that Petitioner will need to resolve  
17 this potable water issue under some reasonable  
18 timeframe.

19           The Office of Planning has not recommended  
20 a specific deadline for the water resolution. And the  
21 water problem is certainly not insurmountable. But  
22 the Petitioner has an obligation to solve this within  
23 the required infrastructure deadline and should be  
24 aware of this obligation.

25           The third issue deals with consistency with

1 county plans. The county of Maui has decided to adopt  
2 an Urban Growth Boundary for the first time.

3 Consequently, the draft Maui Island Plan needs to be  
4 adopted and then other changes will be needed to bring  
5 the community plans into conformity.

6 Because these are unusual circumstances in  
7 the county planning process, because the Petition Area  
8 has, in major part, been included in the Urban Growth  
9 Area through the various drafts of the Maui Island  
10 Plan, and because the County's in favor of this  
11 Project, the Office of Planning has no objection to  
12 the reclassification even though we are relying on a  
13 draft Maui Island Plan.

14 The fourth issue involves archaeology and  
15 culture. The public has raised a number of issues  
16 relating to culture and archaeology. The Office of  
17 Planning notes that the Petitioner has complied with  
18 the requirements of the law by having a Cultural  
19 Impact Assessment and in having an Archaeological  
20 Inventory Survey *and* Preservation Plan completed and  
21 accepted by the State Historic Preservation Division.

22 The concerns of the public have been noted  
23 and considered. But the Office of Planning cannot  
24 oppose a reclassification where Petitioner has  
25 complied with the law. We do note, however, that the

1 requirement for continuous archaeological monitoring  
2 during excavation is understood by the Office of  
3 Planning to mean that there will be an archaeologist  
4 on site during excavation.

5           Finally, there are a number of  
6 miscellaneous issues that were raised by their  
7 objections, primarily to findings of fact. I just  
8 wanting to go over some of them.

9           Finding of fact 59 relates to Bird Wildlife  
10 Attractant. OP included language that the green space  
11 in the development was likely to attract Nene goose.

12           Petitioner argues that the language should  
13 be deleted because Hobdy found no native bird species  
14 in the Petition Area. But these conclusions are not  
15 mutually exclusive. As Hobdy testified he simply did  
16 not look at whether new development would create any  
17 bird attractant impacts, and did say that Nene goose  
18 are attracted to open spaces.

19           Finding of Fact 62A relates to the  
20 Blackburn's Sphinx Moth. OP included a finding that  
21 was more reasonable than not that even with reasonable  
22 precautions, a Blackburn's Sphinx Moth was likely to  
23 be taken if the Tree Tobacco plants were cut down. OP  
24 objected saying that there are seven lines in the  
25 transcript which don't support this conclusion.

1           But all they needed to do was look a little  
2 further in the transcript in which we said:

3           "Q. Now, if you cut down the tree tobacco  
4 plants and you take reasonable precautions to try to  
5 avoid the take of a Blackburn's Sphinx Moth, would you  
6 say it's more likely than not that you're going to  
7 miss at least one of the Blackburn's Sphinx Moth?

8           "A. Yeah.

9           "Q. For the same reason why it would be  
10 unreasonable to expect you to identify in the survey,  
11 it would be unreasonable to expect anyone else to  
12 identify every single tree tobacco plant which would  
13 have a Blackburn's Sphinx Moth associated with it.

14          "A. Yes."

15          The point of this is not that we wanted a  
16 particular condition requiring a particular mitigation  
17 for the Blackburn's Sphinx Moth. But it is  
18 important -- but we do have an Endangered Species Law.  
19 And the Petitioner's left free to make its own  
20 decisions about how it will comply. But the findings  
21 of fact should be clear about the risk that the  
22 Petitioner is going to take if it chooses to avoid  
23 pursuing an incidental take permit and habitat  
24 conservation plan. For this reason the Office of  
25 Planning requests that this finding of fact be

1 included.

2 Findings of Fact 88, 89, 90 relate to the  
3 inclusion by the Office of Planning of the term that  
4 Tom Nance testified to certain matters. And the  
5 Petitioner prefers and the finding of fact indicate  
6 that the LUC is making certain findings.

7 The Office of Planning inserted this note  
8 in these conclusions that these were findings by Tom  
9 Nance rather than being findings by the LUC. In  
10 particular because Finding of Fact 89 is a  
11 determination that the sustainable yield of 3.0 mgd is  
12 incorrect.

13 The Office of Planning views that this  
14 determination of a sustainable yield is really the  
15 province of the Commission on Water Resource  
16 Management. They determined that the stainable yield  
17 for the Waikapu Aquifer was 3.0. Other people may  
18 disagree. You can take into consideration the fact  
19 that other people have disagreed. But we don't think  
20 that the LUC should determine that this 3.0 mgd  
21 determination is incorrect.

22 There's an entire process by which a  
23 sustainable yield is determined or reconsidered. And  
24 the LUC simply should not inject itself into that  
25 process by entering a finding that the 3.0 mgd

1 determination is incorrect.

2           These types of paragraphs in which  
3 consultant opinions are noted as opinions of the  
4 consultant rather than the LUC are not uncommon  
5 especially where the conclusions are not necessary for  
6 the classification, and encompass judgments which are  
7 subjected to reasonable debate or which involve  
8 complex issues which have not been fully vetted within  
9 the LUC hearing. Potable water issues in our view  
10 clearly would fall within this category.

11           Finally, with respect to wastewater reuse  
12 Petitioner objected to the language in which we said  
13 the Petitioner had "committed" to wastewater reuse.  
14 And OP's proposed finding was based on the testimony  
15 from the consultants on wastewater, engineering and  
16 water who both drew conclusions based upon wastewater  
17 reuse.

18           Now, we do think the record should be  
19 accurate. And if Petitioner has not committed to  
20 doing wastewater reuse then they haven't. And we  
21 don't want an inaccurate record. But we will note  
22 that Petitioner has fairly conceptual plans that they  
23 have presented to you. There are very few commitments  
24 in here to sustainability. And wastewater reuse was  
25 one of the few concrete commitments we identify which

1 were made by the consultants.

2 In conclusion, our comments today do  
3 highlight many of the differences we have with the  
4 Petitioner. But it does bear repeating that OP  
5 supports the reclassification with conditions.

6 We have a statutory obligation to provide  
7 you with our viewpoints and we have done so. But we  
8 should not lose sight of the fact that OP supports the  
9 reclassification of this Project and hopes you do the  
10 same. Thank you.

11 CHAIRMAN LEZY: Thank you. Mr. Matsubara,  
12 brief rebuttal?

13 MR. MATSUBARA: Brief rebuttal. For  
14 example, Condition 5 Mr. Yee read from portions of the  
15 February 17, 2012 transcripts from Pages 50, 51, 52,  
16 53. I would just draw the Commission's attention to  
17 after that examination by Mr. Yee occurred, under  
18 redirect of Mr. Niiya, the expert, on Page 54 and 55  
19 basically provides, "At the zoning part, you know, lot  
20 of times the county or the developer won't go through  
21 and do all the engineering work related to the  
22 project. It would be better after they get their  
23 zoning that most of the projects and developers do the  
24 engineering work. And that would be more appropriate.

25 "After they do all the engineering work, do

1 all the final designs, at that point it would probably  
2 be better, more prob-- appropriate to do the update to  
3 the TIAR."

4           So I'm just reflecting that later in the  
5 transcript that was the conclusion that the Petitioner  
6 came to.

7           I'd also reflect that as to finding of fact  
8 62 as it relates to the Blackburn's Sphinx Moth that  
9 if you read on beyond the pages cited by Mr. Yee,  
10 February 16, 2012, if you go three pages further to  
11 Page 196, in questions of Mr. Hobdy, this relates to  
12 the Sphinx Moth which lays its eggs and infants on the  
13 tobacco plant, which is not native to Hawai'i. But  
14 the other plant it used to lay its eggs on no longer  
15 exists so it's adjusted and it's doing that.

16           And the question was, Mr. Yee asked, "Even  
17 with reasonable precautions for cutting off the  
18 tobacco tree plants within the Petition Area will more  
19 likely than not result in the taking of the  
20 Petitioner's Blackburn's Sphinx Moth."

21           We reflect that this misstates Mr. Hobdy's  
22 testimony. Because as it goes on it says, "So if you  
23 were to cut down, cut down the tree tobacco plants,  
24 even if you took reasonable precautions, isn't it more  
25 likely than not that you're going to take at least one

1 Blackburn's Sphinx Moth?

2 "A. I know that the U.S. Fish and Wildlife  
3 Service that oversees endangered species has a  
4 protocol for how to remove plants so that you do not  
5 harm them. It's a timing issue. And we've agreed to  
6 consult with Fish and Wildlife. Timing is because  
7 they lay eggs at a certain time of the year. So  
8 you're not gonna cut plants that time of the year.  
9 And that's the timing issue we've agreed to work out  
10 with Fish and Wildlife."

11 As Mr. Hobdy indicates that appears to be  
12 the situation.

13 As far as the water system I mean we  
14 present our experts to you, the decision-makers, the  
15 fact-finding. You either accept it or not. And if  
16 you accept the decision it's stated as a finding of  
17 fact that the Commissioners found.

18 So all we're saying is that we're not  
19 introducing the evidence for purpose of saying Tom  
20 Nance said that. We're introducing it to you for your  
21 consideration. And if you accept it then it should be  
22 one of the findings of fact.

23 In regard to the commitments we need to  
24 make there is that overriding commitment to Maui  
25 County that no permits will be issued unless, unless

1 you satisfy the Show Me the Water ordinance which  
2 means you need to have a groundwater water source for  
3 your project or you won't get any permits.

4 So within that time process we have that  
5 we've committed to, all of those things need to be  
6 done. And those requirements will be met. I'll end  
7 there. Thank you very much.

8 CHAIRMAN LEZY: Commissioners, questions?  
9 Commissioner Judge.

10 COMMISSIONER JUDGE: Mr. Matsubara, can you  
11 address the issue: Would the Petitioner be agreeable  
12 to a condition about doing a disclosure for buyers for  
13 the highway noise? Would that be acceptable?

14 MR. MATSUBARA: We'll work on the language  
15 that Mr. Yee suggested. But it sounds like it's  
16 something that's doable and would be acceptable to us  
17 to provide disclosure. All we need to do is work out  
18 the language. But the commitment to provide  
19 disclosure is agreeable.

20 COMMISSIONER JUDGE: Okay. Thank you.

21 CHAIRMAN LEZY: Commissioner McDonald.

22 COMMISSIONER McDONALD: I guess along the  
23 same line, this goes to OP's Condition 5 with regards  
24 to the noise. You mentioned DOT's limit of 66  
25 decibels. Could that potentially conflict with the

1 mitigation measures noted in the EIS for exterior  
2 noise sensitive receptors for the DOE which is lower,  
3 45 decibels? I believe interior residential noise  
4 measures shall not exceed 45; 65 decibels for the  
5 exterior along residential lots.

6 I was just wondering if that condition  
7 would conflict with the mitigation measures noted in  
8 the EIS. And I believe on Page 23 of the EIS the  
9 Petitioner did note, or actually the study did note  
10 that residents of units with exterior useable space  
11 facing Kuihelani Highway and East Waiko Road shall be  
12 given notice of possible incompatible exterior noise  
13 levels.

14 MR. YEE: First of all, it's not --

15 CHAIRMAN LEZY: Mr. Yee, I'm sorry --

16 MR. YEE: I'm sorry.

17 CHAIRMAN LEZY: Cogitate on your answer for  
18 a moment. Let's just take a quick break. One of the  
19 Commissioners needs to tend to something. Okay, two  
20 minutes. (Back on the record)

21 CHAIRMAN LEZY: Mr. Yee.

22 MR. YEE: You had asked us whether the  
23 proposed condition would be consistent with the  
24 recommendations in the noise study. And the answer is  
25 no. The DOT requirement only applies to exterior

1 noise. So the various interior noise mitigations are  
2 separate and apart from the exterior noise mitigation  
3 requirement.

4 The only thing that the noise study had  
5 said with regard to the exterior noise is that they  
6 would give notice of possible incompatible exterior  
7 noise levels. And so to that extent the proposed  
8 condition from the Office of Planning is much stricter  
9 than that.

10 It's not just -- even if you look at the  
11 alternative proposal, alternative condition, it's more  
12 than just notice. It's a release.

13 It's telling people: If you move here next  
14 to a highway you're not going to sue the state because  
15 you moved in next to a highway. So it's more than  
16 just simply a notice. It's stricter than that.

17 CHAIRMAN LEZY: Commissioners, any other  
18 questions?

19 COMMISSIONER TEVES: I have a question.

20 CHAIRMAN LEZY: Commissioner Teves.

21 COMMISSIONER TEVES: Mr. Matsubara,  
22 regarding the sand dunes -- I don't have the proposed  
23 D&O in front of me -- but you're protecting the  
24 existing sand dunes, is that right?

25 MR. MATSUBARA: In terms of the burial

1 preserve --

2 COMMISSIONER TEVES: Yes.

3 MR. MATSUBARA: -- the sand dunes are  
4 located within that preserve. There are other sand  
5 dunes that exist beyond the preserve but the bulk of  
6 it is within the preserve itself.

7 COMMISSIONER TEVES: So that those would be  
8 protected.

9 MR. MATSUBARA: Yes.

10 COMMISSIONER TEVES: Thank you.

11 CHAIRMAN LEZY: Commissioner Judge.

12 COMMISSIONER JUDGE: Mr. Yee, in the  
13 previous dockets I recall that we've pretty much done  
14 this acceptance of the TIAR prior to final  
15 subdivision. And I'm just wondering what's the  
16 reasoning for trying to move that up? Is it a -- what  
17 is your reasoning for moving that timeline up to the  
18 zone change?

19 MR. YEE: A couple things. Subdivision  
20 approval, certainly final subdivision approval comes  
21 very late. So the TIAR should be done before final  
22 subdivision approval. Construction goes on before  
23 final division approval. Decisions get made before  
24 final subdivision approval.

25 And, frankly, the engineering that they're

1 proposing can be done after zoning isn't necessary for  
2 the TIAR. I mean the TIAR will identify, for example,  
3 you may need a storage lane. But it won't tell you  
4 how long the storage lane is going to be. That will  
5 be done by the MOA. And the MOA is deferred until the  
6 subdivision approval.

7           So the thought by the Department of  
8 Transportation and the Office of Planning is that all  
9 the information you need for the TIAR should all be  
10 available actually at the time they submit the  
11 application for zoning. And, therefore, it's okay to  
12 do it concurrently with the county. And to the extent  
13 the county makes a change, certainly the TIAR  
14 acceptance can be revised.

15           But it's -- to wait all the way to  
16 subdivision approval is just too late. I mean just  
17 about every EA and EIS has a TIAR in it. There's  
18 basically just no need to wait further engineering  
19 design work to complete it.

20           COMMISSIONER JUDGE: Okay. So my next  
21 question would be why is it too late, then, if there's  
22 already an existing one? Why is it too late for it to  
23 come at this time?

24           MR. YEE: Because you'll be doing all your  
25 engineering before you know what the traffic

1 mitigation should be. You'll get all the subdivision  
2 done. You'll get all the, everything else completed  
3 and set, maybe not in stone, but set pretty clearly  
4 before the Department of Transportation says, "Yes, I  
5 agree. This is the traffic mitigation."

6 COMMISSIONER JUDGE: Okay. My concern is  
7 is there any requirement for the DOT to act in a  
8 timely manner like, for example, when a petitioner  
9 submits a TIAR there's, like we have when somebody  
10 sets a DB we have a 365-day deadline?

11 Is there a deadline for the DOT when they  
12 accept it they get a TIAR? Is there a timeline by  
13 which they have to accept something?

14 MR. YEE: There's not a specific statutory  
15 timeline. Although what I would say is that by making  
16 it done before subdivision approval the pressure is  
17 then on. It gives the DOT a deadline to get things  
18 done. Because the DOT will then know that they have  
19 to get something done before a land use process  
20 approval.

21 CHAIRMAN LEZY: He said that with a  
22 straight face. (general laughter)

23 MR. YEE: You know we could have asked  
24 for -- and there's another case in which we were  
25 saying get it done before you do your, before you

1 submit your zoning application. I guess you could do  
2 it that way. But that then makes it sequential rather  
3 than concurrent.

4 COMMISSIONER JUDGE: It's my understanding,  
5 like you said, even way back when they start the EIS  
6 process there's usually a TIAR done. So it's a  
7 constantly evolving document. And I certainly agree  
8 that they are very useful for decision-making and  
9 discussion.

10 So I would support having a current updated  
11 TIAR be submitted to the DOT at the same time as they  
12 submit a zone change. And I'm speaking for myself. I  
13 mean I have a hard time linking any kind of approval  
14 just because in the eight years I've been here the DOT  
15 doesn't have a, doesn't have a reputation for acting  
16 always in a timely manner.

17 I mean I just don't know. Without there  
18 being some kind of statutory requirement for them to  
19 act in a timely manner, it's hard to hang that over a  
20 Petitioner's head or the county's head in this fact  
21 that they can't get a zone change from the county  
22 until the DOT acts. That just doesn't seem  
23 appropriate in this situation.

24 So I guess what I'm throwing out to you is  
25 would you be -- would it -- would it help to put in

1 language that: The Petitioner would submit a current  
2 updated TIAR in concurrence with the application for a  
3 zone change, but still get their final acceptance  
4 prior to subdivision approval?

5 MR. YEE: I suppose it's better than  
6 getting at subdivision approval. But the problem is  
7 there is no assurance of how well the TIAR revision  
8 will be done. And it then puts additional pressure on  
9 DOT's review at the LUC level to get sort of all,  
10 everything in line.

11 As you know, the Department of  
12 Transportation's been coming to you and saying, "Well,  
13 you know, it's not perfect but you can go ahead with  
14 the reclassification."

15 If we know DOT has to wait for subdivision  
16 approval before we know we're going to get a TIAR  
17 that's acceptable, you know, the counter pressure then  
18 is for DOT to make sure at the time of the LUC  
19 reclassification they get, you know, that a very good  
20 TIAR, puts additional pressure on the TIAR that's  
21 submitted to you at this time. And I suppose we could  
22 look at that as a possible alternative. But it's  
23 difficult from DOT's viewpoint.

24 COMMISSIONER JUDGE: Mr. Matsubara, your  
25 comments?

1           MR. MATSUBARA: Just to comment on the  
2 process you're suggesting. As a normal process once  
3 we conclude the LUC process, and if we have a  
4 favorable decision, we will have an update of the  
5 TIAR, we normally do, to reflect the changes you may  
6 have done to our Project before we submit our zoning  
7 AP. So we'll submit an updated TIAR at that time.

8           When we conclude the county process, the  
9 zoning process, there may be changes also which may  
10 require an update what we submitted. At that time  
11 with all the plans being definitive, we're saying then  
12 we submit one, and then you can put the approval  
13 requirement upon us. Because by that time all the  
14 entitlement agencies will have provided us with what  
15 they want.

16           And at that point in time we're willing to  
17 accept approval by them as a requirement. But it's  
18 just fitting in with the normal process so that you're  
19 not doing things unnecessarily or at inappropriate  
20 times. And we can't do anything until we get the  
21 approval anyway. So, you know, I mean they have the  
22 ultimate trump card. I mean we need to get it. So....

23           COMMISSIONER JUDGE: Okay. So if I  
24 understand you correctly you would be okay with  
25 submitting a current updated TIAR along with the

1 county zone change application.

2 MR. MATSUBARA: Yes, we would be.

3 COMMISSIONER JUDGE: Okay. That's all I  
4 have.

5 CHAIRMAN LEZY: Commissioners, other  
6 questions? The Commission will now conduct formal  
7 deliberations on whether to grant the Petition,  
8 whether in whole or in part, or to deny the Petition.  
9 During the Commission's deliberations no additional  
10 input from either the public or the parties will be  
11 allowed unless specifically requested by the  
12 Commission.

13 The Commission held hearings on this  
14 Petition on February 16-17, 2012 and April 4, 2012:  
15 Oral argument was presented and concluded today.  
16 Commissioners, allow me to confirm that each of you  
17 have reviewed the record, read the transcripts for any  
18 meeting that you may have missed and are prepared to  
19 deliberate on this docket.

20 When I call your name please signify  
21 whether you're prepared to deliberate on this matter.  
22 Commissioner Chock?

23 COMMISSIONER CHOCK: Yes.

24 CHAIRMAN LEZY: Commissioner Makua?

25 COMMISSIONER MAKUA: Aye.

1 CHAIRMAN LEZY: Commissioner Judge?

2 COMMISSIONER JUDGE: Yes.

3 CHAIRMAN LEZY: Commissioner McDonald?

4 COMMISSIONER McDONALD: Yes.

5 CHAIRMAN LEZY: Commissioner Heller?

6 COMMISSIONER HELLER: Yes.

7 CHAIRMAN LEZY: Commissioner Teves?

8 COMMISSIONER TEVES: Yes.

9 CHAIRMAN LEZY: The Chair is also prepared  
10 to deliberate on this matter. The goal today is to  
11 determine by way of motion the Commission's decision  
12 on whether to grant in whole or in part or to deny  
13 Petitioner's request to reclassify the subject  
14 Petition Area.

15 If a decision is reached today and based  
16 upon the Commission's guidance, staff will be directed  
17 to draft appropriate Findings of Fact, Conclusions of  
18 Law and Decision and Order reflecting the Commission's  
19 decision. With that in mind, Commissioners, what's  
20 your pleasure? Commissioner Judge?

21 COMMISSIONER JUDGE: Thank you, Chair. For  
22 discussion purposes I'm going to move to approve the  
23 reclassification of the approximately 545.229 acres in  
24 Docket A10-789 as stated in the Petitioner's Proposed  
25 Findings of Fact and Decision and Order as amended by

1 the Petitioner in response to the comments made by the  
2 Office of Planning but with the following changes to  
3 Condition No. 5.

4 After the first sentence we would simply  
5 insert a sentence which says, "Petitioner shall submit  
6 to the DOT prior to application for a zone change an  
7 updated TIAR."

8 And there would also be a new condition  
9 that would address the noise, the traffic noise. And  
10 that would state that, "The Petitioner will make a  
11 disclosure and obtain a waiver from prospective  
12 buyers." And that that condition will be worked out  
13 between the Office of Planning and the Petitioner as  
14 discussed prior.

15 CHAIRMAN LEZY: Does that set forth your  
16 motion in its entirety?

17 COMMISSIONER JUDGE: That is.

18 CHAIRMAN LEZY: Do I have a second?

19 COMMISSIONER HELLER: Second.

20 CHAIRMAN LEZY: Discussion? Commissioner  
21 Makua.

22 COMMISSIONER MAKUA: Aloha. Although the  
23 subject area does meet most of the criteria for Urban  
24 zoning, I'm deeply concerned about the adverse effects  
25 this development will have on our cultural future.

1 The iwi kupuna are part of our identity. They're who  
2 we are as Hawaiians.

3 In Hawaii Administrative Rules chapter 15,  
4 subchapter 8, section 15-15-77 which I know we all  
5 know, our decision making criteria for boundary  
6 amendments are clearly listed.

7 No. 3(a) reads: In its review of any  
8 petition for reclassification of district boundaries  
9 pursuant to this chapter, the Commission shall  
10 specifically consider the following: The impact of  
11 the proposed reclassification on the following areas  
12 of the state concern.

13 B. Being the maintenance of valued,  
14 cultural, historical or natural resources. As a  
15 Hawaiian practitioner, a term I hear being used very  
16 loosely here, I know that there is no more sacred  
17 practice than that of the final rites of our dead.

18 In the case of Ka Pa'akai O Ka 'Aina vs.  
19 Land Use Commission in the opinion of the court who  
20 vacated the LUC's grant of KP's petition for land use  
21 boundary reclassification it reads, "The exercise of  
22 Native Hawaiian traditional and customary rights is  
23 considered a public trust purpose. And the LUC has an  
24 independent and affirmative duty to protect the  
25 reasonable exercise of customarily and traditionally

1 exercised rights of Native Hawaiians to the extent  
2 feasible.

3 "To protect traditional and customary  
4 Native Hawaiian rights the LUC is required at a  
5 minimum to make specific findings and conclusions  
6 regarding the identity and scope of valued cultural,  
7 historical or natural resources in the area including  
8 the extent to which traditional and customary Native  
9 Hawaiian rights are exercised in the area.

10 "The extent to which those resources  
11 including traditional and customary Native Hawaiian  
12 rights will be affected or impaired by the proposed  
13 action.

14 And 3. "The feasible action to be taken by  
15 the state to reasonably protect Native Hawaiian rights  
16 if they are found to exist."

17 If we think the rights of Hawaiians to  
18 gather salt for ceremony deserve protection, what  
19 about the rights to have our own iwi kupuna protected?  
20 There's talk about a cultural preserve. Very honestly  
21 just the terminology I'm hearing regarding the  
22 cultural preserve proves to me the insensitivity of  
23 this Petition.

24 As a burial practice our iwi are buried.  
25 And those things are never to be looked at or visited

1 or not like how we think of Western burials today.  
2 And I want to remind everybody that because we don't  
3 do things like everybody else does them doesn't mean  
4 that they are not valid and they're not legitimate.

5 The thought of a sidewalk and a paved  
6 walkway so that people can view and visit this site  
7 makes my na'au turn.

8 There's 545.2 acres here and just 33 acres  
9 for the preserve. The straight answer to Commissioner  
10 Teves' question if all of those dunes would be  
11 preserved is, "no."

12 In her testimony Lisa Rotunno-Hazuka  
13 assumes that because there are iwi of men, women and  
14 children that the iwi of the alapa warriors of  
15 Kalaniopu'u were our warriors who fought for Kahekili  
16 are not there. I don't believe this assumption.

17 Firstly, I know that women, my kupuna  
18 specifically, often fought alongside their men and  
19 that certain weapons such as the pi'ikoi were  
20 especially used by women.

21 When asked by Chair Lezy if there's no  
22 other requirements to consult with anyone else before  
23 SHPD accepts a plan for an inadvertent find,  
24 Ms. Rotunno-Hazuka's response was, "For inadvertent?  
25 No. Just the two. SHPD and the geographic rep." But

1 when Commissioner Chock asked about the protocol in  
2 terms of what happens when inadvertent finds are  
3 discovered, she says they call SHPD and "if the  
4 geographic rep is available we'll call him as well."  
5 They did. James Ballao.

6           When, in fact, in the Hawaii Administrative  
7 Rules Title 13 subtitle 13 chapter 300, the laws that  
8 govern SHPD are clearly stated. In 13-340 the  
9 instance of inadvertent discovery of human remains  
10 they must gather sufficient information from lineal or  
11 cultural descendants.

12           And let's clarify what a "cultural  
13 descendant" is. A cultural descendant is a person  
14 whose family is from that area but they cannot prove  
15 the remains in question are their 'ohana.

16           Keli'i Tau'a is not a cultural descendant.

17           What process did we go through to find it?  
18 His testimony says he asked around and came up with  
19 three names: the Pelligrinos, the Cocketts and one  
20 more family that he could not remember. Also that  
21 there were elders that did not want to be on tape so  
22 we left it at that.

23           This does not sound like a satisfactory or  
24 thorough search to me.

25           We heard this morning Ke'eaumoku Kapu's

1 testimony that the Burial Council is against the sand  
2 mining. I don't think we fully understood the answer  
3 to Commissioner McDonald's question when he asked if  
4 the Burial Council approved that plan.

5 He said that they did it in phases and that  
6 they didn't look at it as a whole, and he wasn't on  
7 the Burial Council when this first came in.

8 What I want to be sure we understand is  
9 that they're only looking at what they find. We know  
10 from the neighboring project that what they find in  
11 this search isn't nearly what they will find at the  
12 end.

13 It is part of our kuleana on this  
14 Commission to, like the court stated, reasonably  
15 protect Native Hawaiian rights if they're found to  
16 exist. If not here then where? We see loopholes in  
17 communications between burial council, archaeologists  
18 and SHPD.

19 The county. We heard the director of  
20 Housing and Human Concerns testify that she saw no  
21 difference in her own family having the privilege to  
22 have a home near the graves of her kupuna and this  
23 instance will dig up or build upon our kupuna, our  
24 ali'i. I hear this conversation of: Was the war  
25 here? Wasn't the war here. Are the Alapa warriors

1 there? Are they not there? We know already and it's  
2 been confirmed by testimony that our ali'i are there.

3           So I'm wondering what the point of all  
4 these questions were. So she doesn't see the  
5 difference in strangers that will dig up or build upon  
6 our kupuna, our ali'i, for the benefit of strangers.  
7 This is the same county department that accepted the  
8 cultural assessment for the last petition on this  
9 island done by the same company we see here, Hana  
10 Pono, that included the interviews of only two random  
11 people of the Waiakoa area.

12           So who, then, do we put our full faith and  
13 confidence in to look after the sacred right of my  
14 people? The county? SHPD? Lisa Rotunno-Hazuka? Or  
15 A&B Properties? For this reason I vote no today.  
16 (Applause)

17           CHAIRMAN LEZY: Commissioners, further  
18 discussion? Commissioner Judge.

19           COMMISSIONER JUDGE: I believe this  
20 proposed Petition for the Wai'ale development is a  
21 good plan. And as a Master Planned community it  
22 offers residential choices, commercial spaces, open  
23 space, parks, the cultural preserves, affordable  
24 housing, a school and a community center.

25           It's one of the few things we've seen that

1 has taken a lot of time, it has a lot of collaboration  
2 between the county, the general public. And I think  
3 it's an example of good planning. And it's brought  
4 forth a development that actually offers many  
5 community benefits.

6 I recognize that there are, you know, there  
7 are various concerns and a lot of archaeological  
8 concerns. But as we've done in the past through  
9 conditions and hopefully with diligence from the state  
10 and county agencies, these concerns can be addressed.  
11 And for that reason I'm going to be supporting this  
12 Project today. I ask for your support as well.

13 CHAIRMAN LEZY: Commissioners, further  
14 discussion? Commissioner Heller.

15 COMMISSIONER HELLER: Just a brief comment  
16 primarily in response to Commissioner Makua's  
17 comments. I certainly respect her knowledge and  
18 expertise in the area of Hawaiian cultural practices  
19 and wouldn't presume to disagree with her. But I do  
20 think that there is a balancing that has to be done  
21 here.

22 Obviously the maximum in terms of  
23 preservation of cultural significance would be to just  
24 leave the land as is and do nothing. Pretty much  
25 anywhere in the state if you wanted to absolutely

1 maximize preservation and protection of resources that  
2 would be the answer.

3           But obviously there's also a need in our  
4 state for housing. There's also a need in our state  
5 for economic development. I think it's part of our  
6 job to do some sort of balancing. I recognize that  
7 it's a difficult decision. And I certainly respect  
8 the opinions of others. But I think that on balance  
9 there's a reasonable effort here to build cultural  
10 preservation into the Project. Thank you.

11           CHAIRMAN LEZY: Further discussion? Before  
12 we turn to the vote I'd first like to thank the staff  
13 for their hard work on this Petition matter. I know  
14 there's a lot of time and effort put in by the folks  
15 that make sure that we get our job done correctly.

16           I'd also like to thank the parties for  
17 their very well presented cases. But I would like to  
18 thank, most of all, the public for their participation  
19 in this process. I said it before that I think that  
20 the Commission doesn't really have a full  
21 understanding of all the issues that are presented by  
22 any petition unless there's active and vigorous public  
23 participation in the process.

24           In particular I'd like single out a few  
25 folks. Ms. Apana, your contributions, I think, were

1 very important to this process. I'd also like to  
2 thank the Kamaunus for their participation as well  
3 very, very helpful.

4 I too echo some of the comments that  
5 Commissioner Heller just said. I don't think since  
6 I've been on the Commission that there has been a  
7 petition matter that I've participated in the decision  
8 in that didn't have some difficulty to it. And this  
9 petition matter is no different. And the points that  
10 Commissioner Makua makes I think go to why this is a  
11 difficult decision to be made.

12 However, in my experience on the Commission  
13 it's been my observation of any developer that I've  
14 had experience with, I think that Alexander & Baldwin  
15 has demonstrated a willingness to be very sensitive to  
16 the concerns that are raised by the public in how they  
17 do their business.

18 And it is my hope that in addition to the  
19 proposed conditions that they've agreed to have been  
20 proposed here, that they will continue to work with  
21 the public if this Petition is approved. With that  
22 I'd ask our executive officer to poll.

23 MR. SARUWATARI: On the motion to approve  
24 the reclassification of the Petition Area subject to  
25 conditions as proposed by Petitioner with the

1 amendments so noted today: Commissioner Judge?

2 COMMISSIONER JUDGE: Yes.

3 MR. SARUWATARI: Commissioner Heller?

4 COMMISSIONER HELLER: Yes.

5 MR. SARUWATARI: Commissioner Teves?

6 COMMISSIONER TEVES: Yes.

7 MR. SARUWATARI: Commissioner McDonald?

8 COMMISSIONER McDONALD: Yes.

9 MR. SARUWATARI: Commissioner Makua?

10 COMMISSIONER MAKUA: 'A'ole.

11 MR. SARUWATARI: Commissioner Chock?

12 COMMISSIONER CHOCK: Yes.

13 MR. SARUWATARI: And, Chair Lezy?

14 CHAIRMAN LEZY: Yes.

15 MR. SARUWATARI: Chair, we have six votes  
16 in support of the motion.

17 CHAIRMAN LEZY: Thank you very much. Thank  
18 you for your time.

19 MR. MATSUBARA: Thank you very much.

20 MR. YEE: Thank you.

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25 CHAIRMAN LEZY: We're still on the record.

1 The Chair would like to make a motion to amend the  
2 agenda to take up a motion that I will make concerning  
3 the pending docket matter that's about to be remanded  
4 to us on the Waimanalo Gulch Landfill.

5 I will tell you the substance of that  
6 motion so you can decide whether you're agreeable to  
7 amending the agenda. The substance of that motion is  
8 it's my understanding that the County Planning  
9 Commission will be voting this Friday on a pending  
10 special use permit also involving the landfill.

11 My thought is that since we have the SUP  
12 coming back to us on appeal on the remand, and we have  
13 this parallel SUP which my understanding is that it  
14 was brought by the county essentially as a back stop,  
15 depending on how the appealed SUP came out, that we  
16 now have two parallel proceedings.

17 What I would like to do is have the  
18 Commission send a letter to the Planning Commission  
19 encouraging them to delay vote, their vote on the  
20 pending SUP until there has been a remand of the  
21 appealed SUP. Then encourage them to consolidate the  
22 two into a single matter for purposes of economy so  
23 that they can be taken together.

24 So with that, the motion that's on the  
25 floor is to amend the agenda so that I can make that

1 motion.

2 COMMISSIONER JUDGE: I'll second your  
3 motion.

4 MR. SARUWATARI: On the motion to amend the  
5 agenda to include sending a letter to the Planning  
6 Commission regarding the landfill matter, Chair Lezy?

7 CHAIRMAN LEZY: Yes.

8 MR. SARUWATARI: Commissioner Judge?

9 COMMISSIONER JUDGE: Yes.

10 MR. SARUWATARI: Commissioner Teves?

11 COMMISSIONER TEVES: Yes.

12 MR. SARUWATARI: Commissioner McDonald?

13 COMMISSIONER McDONALD: Yes.

14 MR. SARUWATARI: Commissioner Makua?

15 COMMISSIONER MAKUA: Aye.

16 MR. SARUWATARI: Commissioner Heller?

17 COMMISSIONER HELLER: Yes.

18 MR. SARUWATARI: And, Commissioner Chock?

19 COMMISSIONER CHOCK: Yes.

20 MR. SARUWATARI: You have seven votes in  
21 support of the motion, Chair.

22 CHAIRMAN LEZY: Thank you. Okay. The  
23 agenda is amended. Commissioner Chock?

24 COMMISSIONER CHOCK: I don't know if this  
25 is appropriate to discuss now in this forum, but I'd

1 also like to ask --

2 CHAIRMAN LEZY: Oh, wait. I have to make  
3 the motion now for the okay to send the letter. We'll  
4 get to you.

5 With the agenda amended, then, I will make  
6 the motion that I just indicated I would make which  
7 is: I'm asking the permission of the Commission to  
8 send a letter to the city and county of Honolulu  
9 Planning Commission encouraging them to delay their  
10 upcoming vote on the currently pending Waimanalo Gulch  
11 special use permit until the appealed special use  
12 permit has been remanded.

13 And then informing them on remand that we  
14 will send that special use permit back down to them to  
15 consolidate with the pending SUP. If that's not  
16 confusing enough let me know.

17 COMMISSIONER JUDGE: Second.

18 MR. SARUWATARI: On the motion to send a  
19 letter to the Planning Commission, Chair Lezy?

20 CHAIRMAN LEZY: Yes.

21 MR. SARUWATARI: Commissioner Judge?

22 COMMISSIONER JUDGE: Yes.

23 MR. SARUWATARI: Commissioner Teves?

24 COMMISSIONER TEVES: Yes.

25 MR. SARUWATARI: Commissioner McDonald?

1 COMMISSIONER McDONALD: Yes.

2 MR. SARUWATARI: Commissioner Makua?

3 COMMISSIONER MAKUA: Aye.

4 MR. SARUWATARI: Commissioner Heller?

5 COMMISSIONER HELLER: Yes.

6 MR. SARUWATARI: Commissioner Chock?

7 COMMISSIONER CHOCK: Yes.

8 MR. SARUWATARI: Chair, we have seven votes  
9 for the motion.

10 CHAIRMAN LEZY: Thank you. Now,  
11 Commissioner Chock, is there something you wanted to  
12 say?

13 COMMISSIONER CHOCK: Yes, Chair, thank you.  
14 I thought it might be helpful, given the complexity  
15 and the long history of this particular docket with  
16 respect to Waimanalo Gulch, to have our attorney  
17 general prepare for us sort of a background executive  
18 summary of some of the key issues that have taken  
19 place, especially for the benefit of most of the new  
20 Commissioners who weren't on board at that time, kind  
21 of summarizing the key points. I think that would be  
22 very helpful.

23 COMMISSIONER TEVES: Is that a motion?

24 COMMISSIONER CHOCK: It's just a comment.

25 COMMISSIONER TEVES: I agree.



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C E R T I F I C A T E

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

That I was acting as court reporter in the foregoing LUC matter on the 21st day of May 2012;

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

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

DATED: This \_\_\_\_\_ day of \_\_\_\_\_ 2012

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HOLLY M. HACKETT, HI CSR #130, RPR  
Certified Shorthand Reporter