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LAND USE COMMISSION
STATE OF HAWAI'I
HEARING and ACTION MEETING)
A94-706 KA'ONO'ULU RANCH)
_____)

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for a Public Hearing
at The Royal Lahaina Resort-Maui Ball Room 2780
Keka'a Drive Lahaina, Maui, Hawai'i 96761, Hawai'i,
commencing at 9:00 a.m. on August 24th, 2012, pursuant
to Notice.

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

A P P E A R A N C E S

COMMISSIONERS:

RONALD HELLER, VICE CHAIR (O'ahu)

CHAD McDONALD, VICE CHAIR (At large)

SHELDON R. BIGA

LANCE M. INOUE (At large)

ERNEST MATSUMURA (Hawai'i)

NICHOLAS W. TEVES, JR. (At large)

EXECUTIVE OFFICER: DAN ORODENKER

CHIEF CLERK: RILEY HAKODA

STAFF PLANNER: BERT SARUWATARI

DEPUTY ATTORNEY GENERAL: SARAH HIRAKAMI, ESQ.

AUDIO TECHNICIAN: WALTER MENCHING

Docket No. A94-706 KA'ONO'ULU RANCH (Maui)

For the Movants: Maui Tomorrow Foundation, Inc.,
South Maui Citizens for Responsible Growth
Daniel Kanahale: TOM PIERCE, JR., ESQ.

For the County:

JANE LOVELL, ESQ.

Deputy Corporation Counsel

WILL SPENCE, Planning Drtr.

MICHAEL HOPPER, Esq. Dep.Corp.Counsel

ANN CUA, Planner

For the State:

BRYAN YEE, ESQ.

Deputy Attorney General

JESSE SOUKI

Director Office of Planning

Respondents:

JOEL KAM, ESQ.

Honua'ula Partners, LLC

JONATHAN STEINER, ESQ.

Pi'ilani Promenade South, LLC

Pi'ilani Promenade North, LLC

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1 VICE CHAIR HELLER: (Gavel) Let's get
2 started. This is a hearing and action meeting
3 regarding Docket No. A94-706 Movant Maui Tomorrow
4 Foundation, Inc., South Maui Citizens for Responsible
5 Growth and Daniel Kanahele's Motion for Hearing,
6 issuance of Order to Show Cause and other relief
7 hereafter referred to as the Motion filed on May 23rd,
8 2012.

9 Will the parties please identify themselves
10 for the record.

11 MR. KAM: Good morning. Joel Kam. I'm
12 here for Honua'ula Partners.

13 MR. STEINER: Good morning. Jonathan
14 Steiner on behalf of Pi'ilani Promenade South, LLC and
15 Pi'ilani Promenade North, LLC.

16 MS. LOVELL: Good morning. Aloha, Chair,
17 Members of the Commission and Commission Staff. My
18 name is Jane Lovell. I'm a deputy corporation counsel
19 with the county of Maui. And with me today is our
20 Planning Director Will Spence, my colleague Deputy
21 Corporation Counsel Michael Hopper, and Planner Ann
22 Kua.

23 MR. YEE: Good morning. Deputy Attorney
24 General Bryan Yee on behalf of the Office of Planning.
25 With me a Jesse Souki, Director of the Office of

1 Planning.

2 MR. PIERCE: Good morning. Tom Pierce on
3 behalf of the Movant's. I have with me -- the Movants
4 are Maui Tomorrow Foundation, South Maui Citizens for
5 Responsible Growth and Daniel Kanahele. Mr. Kanahele
6 and Mark Hyde who's the representative for South Maui
7 Citizens are in the audience today. And with me to my
8 right is Irene Bowie, the executive director from Maui
9 Tomorrow Foundation.

10 VICE CHAIR HELLER: Thank you. Let me
11 update the record. On May 23rd, 201 the Commission
12 received Movant's Motion, Memorandum in Support, and
13 Exhibits 1 through 4. On May 24, 2012 the Commission
14 received Movant's Supplemental Certificate of Service.

15 On May 30, 2012 the Commission received
16 written correspondence from Jonathan Steiner
17 requesting an extension of time for Petitioner to
18 respond to Movant's motion.

19 On June 1, 2012 the Commission received
20 written correspondence from OP requesting an extension
21 of time to respond to Movant's motion.

22 On June 4, the Commission mailed copies of
23 letters granting the requested time extensions.

24 On June 13, 2012 the Commission received
25 the following: Affidavit of Mark Hyde in support

1 Movant's Motion and a second supplemental Certificate
2 of Service re: Movant's motion, Memorandum in Support
3 and Exhibits 1 through 4 and Exhibit 1.

4 On June 26, 2012 the Commission received
5 written correspondence from Senator Baker regarding
6 the Petition Area. And the Commission sent a response
7 letter on June 27, 2012.

8 On June 29, 2012 the Commission received
9 Movant's Supplement of New Facts to its Motions;
10 Declaration of Mark Hyde, Exhibit 5, Declaration of
11 Tom Pierce; Exhibits 6 through 9 and written
12 correspondence from House of Representatives George
13 Fontaine and Maui County Councilman Couch regarding
14 the Petition Area. A response letter was sent to
15 Representative Fontaine on the same day.

16 Additional correspondence from the
17 Commission was sent to Senator Baker and
18 Representative Fontaine on July 3, 2012 to advise them
19 of the planned August 23rd-24th hearing date.

20 On July 5, 2012 the Commission received
21 Petitioner's request for an extension of time to file
22 pleadings.

23 On July 9, 2012 the Commission mailed a
24 letter granting the extension of time.

25 On July 13, 2012 the Commission received

1 Maui County's Response to Movant's Motion and Exhibits
2 A through F and OP's response to Movant's Motion and
3 Exhibits 1 through 3.

4 On July 17, 2012 the Commission received
5 Honua'ula Partners, LLC's Memorandum in Opposition to
6 Movant's Motion, Declaration of Jonathan H. Steiner,
7 Exhibits 1 through 5; Pi'ilani Promenade South, LLC
8 and Pi'ilani Promenade North, LLC's Memorandum in
9 Opposition to Movant's Motion; Declaration of John H.
10 Steiner; Exhibits A through N and Certificate of
11 Service.

12 On July 25, 2012 the Commission mailed an
13 agenda notice for the August 2, 2012 LUC meeting to
14 the parties and statewide and Maui mailing lists to
15 advise of a site visit on that date.

16 On July 27, 2012 the Commission received
17 Movant's Reply to Landowners' and County's response;
18 and Exhibits 10-15.

19 On July 28, 2012 the Commission received
20 OP's Supplemental Response to Movant's Motion,
21 Exhibits 4 and 5.

22 On July 30, 2012 the Commission received
23 Honua'ula Partners, LLC's Memorandum in Response to
24 OP's Response to Movant's Motion, Declaration of
25 Jonathan H. Steiner, Exhibits 6 and 7, Pi'ilani

1 Promenade South, LLC and Pi'ilani Promenade North,
2 LLC's Memorandum in Opposition to OP Response to
3 Movant's Motion.

4 On August 7, 2012 the Commission received
5 written correspondence from State Representative
6 George Fontaine and a response letter was sent to him
7 on August 8th by the Commission.

8 On August 15, 2012 the Commission mailed
9 the agenda notice for this meeting to the Parties and
10 to the State and Maui mailing lists.

11 From August 20, 2012 the Commission
12 received written correspondence via email from: Warren
13 Haynes, Patrick Linnen, Victoria Huffman, Patricia
14 Stillwell containing Kihei Community Association
15 testimony, Mike Foley and Paula Baldwin.

16 On the same day the Commission also
17 received errata from Honua'ula Partners to their
18 memorandums: In option to Motion for Hearing,
19 Issuance of Order to Show Cause and Other Relief filed
20 on May 23rd, 2012 filed July 16, 2012. And in
21 response to OP Response to Movant's Motion for a
22 Hearing, Issuance of Order to Show Cause and other
23 relief filed on May 23rd, 2012 filed July 30, 2012.

24 And errata from Pi'ilani Promenade South,
25 LLC and Pi'ilani North, LLC to their Memorandum in

1 Opposition to motion for Hearing, Issuance of Order to
2 Show Cause and other relief filed on May 23, 2012
3 filed July 16, 2012.

4 And in Response to OP Response to Movant's
5 Motion for a Hearing, Issuance of Order to Show Cause
6 and Other Relief filed on May 23rd, 2012 filed July
7 30, 2012.

8 On August 21, 2012 the Commission received
9 written correspondence from Megan Hinman.

10 Let me briefly describe our procedure for
11 today on this docket. First, we will call individuals
12 desiring to provide public testimony to identify
13 themselves.

14 All such individuals will be called in turn
15 to our witness box where they will provide their
16 testimony.

17 After public testimony the Commission will
18 hear evidence and argument on the Motion for Hearing,
19 Issuance of Order to Show Cause and Other Relief.

20 At the conclusion of oral argument and
21 after questions from the Commissioners and the answers
22 thereto, the Commission will conduct its
23 deliberations. Are there any questions on our
24 procedure for today?

25 MS. LOVELL: Yes. The County has one

1 procedural question. And that is will there be
2 testimony from witnesses allowed other than during
3 the public testimony phase?

4 VICE CHAIR HELLER: At this point we were
5 anticipating oral arguments, but if there's evidence
6 to be presented we'll take that up when it's offered.

7 MS. LOVELL: Okay. Because the County does
8 have two witnesses here we would like to present. We
9 are willing to present them either during the public
10 testimony phase or during the argument phase, but we
11 just want to be sure that we are not foreclosed from
12 presenting their testimony.

13 VICE CHAIR HELLER: Understood. Let me ask
14 at this point: Is there any objection to allowing
15 witnesses to be called by any party?

16 MR. PIERCE: Movants would object. This is
17 at this stage a motion that can be heard on the
18 pleadings. The County will have an opportunity to
19 present testimony at the contested case hearing which
20 is one of the things the Movants have requested. So
21 we believe at this stage it would be premature to be
22 taking evidence.

23 VICE CHAIR HELLER: Understanding that what
24 we are addressing today is the Order to Show Cause and
25 not the substantive arguments themselves, if the

1 evidence offered is addressed to the matter that we're
2 hearing today, the witnesses will be allowed. So you
3 don't need to call them during public testimony. But
4 understand we're not going into the substance of the
5 underlying merits today.

6 MR. PIERCE: To the extent that the County
7 is permitted to present testimony, Movants would
8 request an opportunity to present rebuttal testimony.

9 VICE CHAIR HELLER: If you have somebody
10 you're prepared to call that's fine. Again,
11 restricted to the motion that we're hearing today.

12 MR. PIERCE: Correct.

13 VICE CHAIR HELLER: Any further questions
14 on our procedure for today? Let me remind everybody
15 that the Commission is addressing the specific matter
16 of whether or not to grant the present Motion for
17 Hearing on an Order to Show Cause.

18 The Commission may grant the motion when
19 the Commission has reason to believe that there has
20 been a failure to perform the conditions imposed or
21 representations or commitments made by the Petitioner.

22 This is *not* a hearing on an Order to Show
23 Cause today. The Commission is only making the
24 threshold determination on whether or not there is
25 reason to believe that there may have been a failure

1 to perform and thus to issue an Order to Show Cause.

2 *If* this motion is granted a full
3 evidentiary hearing will be scheduled. And there will
4 be an opportunity at that time, including a public
5 opportunity, to present testimony regarding the Order
6 to Show Cause.

7 For those who are testifying the Commission
8 would appreciate it if you would confine your
9 testimony to the issues relating to the present
10 motion, that is the decision whether or not to go
11 forward with a hearing on an Order to Show Cause.

12 How many witnesses do we have signed up?

13 MR. ORODENKER: We have eight witnesses,
14 Mr. Chairman.

15 VICE CHAIR HELLER: Okay. We would
16 appreciate it if witnesses could try to confine their
17 public testimony to 3 minutes each. If there's
18 anybody else who wishes to sign up, please check with
19 our clerk. Let's call the first public witness.

20 MR. ORODENKER: Mr. Chair, the first
21 witness is Danny Collier followed by Perry Artates,
22 After those two, Mike Foley and Renee Richardson.

23 THE WITNESS: Good morning, Commissioners.
24 My name is Danny Collier.

25 DANNY COLLIER

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

3 THE WITNESS: The whole truth and nothing
4 but the truth.

5 VICE CHAIR HELLER: Please state your name
6 and if you would give us either a residence or
7 business address.

8 THE WITNESS: My name is Danny Collier. I
9 live in Wailuku. I used to live in Kihei but I'm a
10 Wailuku resident right now. I've been -- I've been on
11 this island for 45 years just about. And I work --
12 and I work for Goodfellows. I kinda represent the
13 working force of Maui. I've been here working on
14 construction projects for the last 31 years with
15 Goodfellow. And I wanna make a testimony. Is that
16 all right?

17 VICE CHAIR HELLER: Please go ahead.

18 THE WITNESS: As you guys can see -- good
19 morning ladies and gentlemen of Maui -- as you can see
20 I have fellow people here with me from Goodfellows
21 too. My testimony this morning is for this Project.
22 This Project seems and deems to me and to most of my
23 constituents that works and lives on Maui, to be one
24 of the projects that will lead up to our advancement
25 towards better living on Maui.

1 This Project contains almost \$200 million
2 of productivity as far as money into the economy. The
3 construction-related jobs with us guys as far as union
4 people, reputable people that's with the union and
5 with a good upstanding contractor is about 200 people.

6 Public benefits for this Project includes
7 construction of the first increment of the
8 Upcountry -- Kihei Upcountry Highway. That to me
9 we've been talking about that for 20 years. That to
10 me is opening, yeah, for us guys to improve our
11 traffic, traffic problems that we do have. And let me
12 tell you I travel around this island a lot.

13 The water system improvements will total
14 about \$20 million. School fees -- the school fees
15 will contribute \$750,000. The county of Maui, the
16 traffic impact fees paid to the county of Maui be
17 about a million and a quarter dollars.

18 The Project includes all elements needed in
19 Kihei, and I think this is Maui, jobs, rental housing.
20 I know some people that live, that come to Maui, want
21 to make a stake here. And they're living in 1-bedroom
22 in a house, in a 1-bedroom they're paying something
23 like 1200 bucks to \$850 a month.

24 This rental, affordable rental units that
25 will be, will be available to 'em it's just more, just

1 more living spaces for them. And let me tell you
2 there's a lot of people that are moving to Maui. We
3 gotta make sure that we provide for that. I don't
4 know how we're gonna do -- I don't know how we're
5 gonna provide for 'em if we stop everything and not
6 improve our infrastructure, the places that we live,
7 our roadways, our highways.

8 If we stop something, and this is pretty
9 much to me pretty Smart Growth, we wanna leave the
10 ocean shorelines alone. To me that's 20 something
11 years ago when everybody was building. I been there
12 too, building on the shorelines. Now we move up about
13 a mile up from the shoreline. They wanna stop this
14 Smart Growth.

15 VICE CHAIR HELLER: Can you please bring
16 your testimony to a conclusion.

17 THE WITNESS: Oh, that's it. I mean, you
18 know, if you guys pass this, you guys will be doing a
19 smart move on the part of the living on Maui. That's
20 all I got.

21 VICE CHAIR HELLER: Parties, any questions?
22 Commissioners, any questions? Thank you very much.

23 MR. ORODENKER: The next witness is Perry
24 Artates followed by Mike Foley.

25 PERRY ARTATES,

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

3 THE WITNESS: Yes.

4 VICE CHAIR HELLER: Please state your name
5 and give us a residence or business address, then go
6 ahead.

7 THE WITNESS: My name is Perry Artates,
8 address 95 Lono Avenue in Kahului. 'm here on behalf
9 of the Hawai'i Operating Engineers to testify before
10 you in opposition, opposition to action item to
11 consider the Motion for Hearing, concerns about Order
12 to Show Case (sic) and other relief filed by your Maui
13 Tomorrow and, Maui Tomorrow Foundation, South Maui
14 Citizens for Responsible Growth and Daniel Kanahele.

15 I will give a snapshot of why I am in
16 opposition. Our members, as you have heard, have been
17 on the out-of-work list for two and-a-half years, some
18 of 'em even three. And to sympathize them for that
19 duration without any employment.

20 Since this Project moved forward our
21 members of our organization has the ability to fulfill
22 their dreams which is a roof over their head, or
23 having the ability to supply their families with the
24 economical needs that they need.

25 I really am amazed that these families are

1 finally beginning to get off their feet when the
2 Project started. And to witness, to witness them with
3 their hearts that finally they are able to financially
4 sustain themselves.

5 It hit them by the element of surprise when
6 this came forward. It kinda gave a hard feeling
7 toward every, to me every trade organization because
8 it sets back what we waited for a long time.

9 So that's why I'm here before you in
10 testifying in opposition in moving the case forward,
11 simply because our working families are finally back
12 working. And that's -- I know you need to find the
13 findings of fact and the conclusion of law to make a
14 decision.

15 But yet, then, our findings of fact in our
16 organization is that the members are back to work and
17 they're not suffering anymore. So I conclude my
18 testimony, Mr. Vice-Chair, and I am open to any
19 questions.

20 VICE CHAIR HELLER: Parties, any questions?
21 Commissioners, any questions?

22 COMMISSIONER BIGA: I have a question.
23 Good morning. One of the questions I had, what
24 assurances, if this Project moves forward, will the
25 jobs they give it to the local people and the union

1 members?

2 THE WITNESS: Commissioner Biga, I assure
3 you right now, as Mr. Collier has testified before
4 you, Goodfellow Brothers are the general contractor at
5 this time which is part of our industry which is
6 Operating Engineers. And, yes, I will testify that
7 Goodfellow Brothers are a signatory contractor to the
8 Operating Engineers also. I'm aware that they have
9 verbally conditioned themselves to use our local labor
10 here as well as our local signatory contractors of
11 Maui.

12 COMMISSIONER BIGA: Thank you. My second
13 question would be what estimate of the, I guess, union
14 members or workers would be used to do this Project?

15 THE WITNESS: As this Project broke ground,
16 Commissioner Biga, at this point in time our 350
17 members -- it has, the employer has taken about
18 approximate 18 to 19 members from our hall already.
19 As a status of our membership percentage here on Maui
20 we are close to zeroing out our hall.

21 And that's specifically because of this
22 Project that has started which is the Promenade
23 DeBartolo and Eclipse. And of course, as you know our
24 economic sustainability is moving forward with other
25 projects such as Hawai'i Wind Farm, the A&B commercial

1 properties.

2 This, I think, is a, is a, is a way to
3 sustain future work. And you know as Land Use
4 Commissioners you guys are aware that it doesn't
5 happen over night. It happens within the due process
6 which is between, my estimation, five to seven years
7 even to get the ground break. So in that process we
8 wait a longer time to something to be put forth as far
9 as work for our industry.

10 COMMISSIONER BIGA: Mahalo. That's all.

11 VICE CHAIR HELLER: Commissioners, anything
12 else?

13 THE WITNESS: Thank you.

14 VICE CHAIR HELLER: Next.

15 MR. ORODENKER: Mike Foley followed by
16 Renee Richardson.

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

20 THE WITNESS: I do.

21 VICE CHAIR HELLER: Please state your name
22 and address and a residence or business address then
23 proceed.

24 THE WITNESS: My name is Mike Foley. My
25 address is 3625 Pi'ikea Place in Makawao. And my

1 testimony has been submitted to the Commission. And
2 with your permission I'd like to read it. It's
3 testimony in support of the Motion for Issuance of an
4 Order to Show Cause.

5 "I, Michael Foley support the motion filed
6 by Maui Tomorrow Foundation, South Maui Citizens for
7 Responsible Growth and Daniel Kanahale for issuance of
8 on Order to Show Cause why the above described
9 property should not revert to its former
10 classification due to the current owner's violation of
11 the 1995 Order arising from their failure to develop
12 the property for the purposes represented to the Land
13 Use Commission.

14 "I'm a resident of the county of Maui
15 Hawai'i and was the planning director for the county
16 of Maui, state of Hawai'i from January 2003 through
17 January 2007. I've also served as the planning
18 director for the California cities of Sausalito,
19 Davis, Woodside and Napa.

20 "I worked in the land use planning field
21 for 42 years. A resume of my work experience in the
22 field of planning was attached to my testimony as
23 Exhibit A. I'm currently on the board of directors of
24 Maui Tomorrow Foundation, one of the moving partners
25 in this action. I'm familiar with the range of

1 community planning concepts, land uses and their
2 impacts.

3 "In the field of planning and, in fact,
4 Light Industrial uses and impacts are entirely
5 different from housing and retail shopping center uses
6 and it affects specifically and without limitation
7 traffic and the economic impacts posed by Light
8 Industrial uses are substantially different from those
9 posed by housing and retail shopping centers.

10 "I have reviewed the 1994 Petition filed by
11 Kaonoulou Ranch in 1994 for a district boundary
12 amendment and for its proposed Kaonoulou Industrial
13 Park consisting of 123 fee simple lots reserved for
14 commercial and Light Industrial use.

15 And I have read the findings of fact,
16 conclusions of law, decisions and order issued in this
17 matter in 1995.

18 "I have reviewed the Eclipse Development
19 website describing the proposed Pi'ilani Shopping
20 Center and Outlet Mall together with the attachments
21 thereto and have examined the site plan for these
22 projects contained in Exhibit A to a report entitled
23 Traffic Impact Analysis Report for Pi'ilani Promenade
24 dated January 30th, 2012 revised May 7, 2012, a copy
25 of which is attached to my testimony as Exhibit B.

1 "I have read the rezoning criteria for
2 Waialea 670 also known as Honua'ula which calls for
3 development of 250 workforce housing units to be built
4 within the land reclassified by the Land Use
5 Commission in this matter.

6 "Based on my background and experience in
7 the field of community planning and development, it is
8 my professional opinion that the Project's proposed by
9 Pi'ilani Promenade North, LLC; Pi'ilani Promenade
10 South, LLC and Honua'ula Partners for the parcels of
11 land subject to the jurisdiction of the Land Use
12 Commission in this matter are substantially different
13 from that represented to the Hawai'i Land Use
14 Commission in Kaonoulu Ranch in 1994 and described in
15 the Findings of Fact, Conclusions of Law and Decision
16 and Order issued in this matter.

17 VICE CHAIR HELLER: Can you please bring
18 you testimony to a conclusion.

19 THE WITNESS: "Furthermore, it is my
20 opinion that the consequences and impacts to these two
21 developments, the Kaonoulu Industrial Park on one hand
22 represented to the Land Use Commission in 1994,
23 compared to the retail shopping center, the mega malls
24 and workforce housing developments on the other hand
25 proposed by the current owners are substantially

1 different." Thank you.

2 VICE CHAIR HELLER: Parties, any questions?
3 Commissioners, any questions?

4 COMMISSIONER BIGA: I have one. Morning,
5 Mike.

6 THE WITNESS: Morning.

7 COMMISSIONER BIGA: Just a hypothetical
8 question. If by some way this Project moves forward
9 is there any way opposition could look at probable
10 agreements to some of the concerns that you represent?

11 THE WITNESS: In order for this Project to
12 move forward a Community Plan Amendment is needed by
13 the county. And an approval is needed by this Land
14 Use Commission for an entirely different Project.

15 We really don't know what the traffic and
16 economic impacts would be of these proposed shopping
17 centers. So it's premature for me to say whether or
18 not the projects could be modified to be
19 satisfactory. We anticipate that there would be
20 significant traffic and economic impacts that would be
21 very difficult to mitigate.

22 COMMISSIONER BIGA: My question might be
23 premature. Thank you.

24 VICE CHAIR HELLER: Commissioners, anything
25 else? Thank you.

1 MR. ORODENKER: Next witness is Renee
2 Richardson followed by Patricia Stillwell.

3 RENEE RICHARDSON

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

6 THE WITNESS: I do.

7 VICE CHAIR HELLER: Please state your name
8 and a residence or business address then go ahead.

9 THE WITNESS: Good morning. My name is a
10 Renee Richardson. I live at 2191 South Kihei Road in
11 Kihei. And I have a very brief statement that I would
12 like to submit to the Land Use Commission. I'll just
13 read it if that's okay.

14 "We the undersigned respectfully request
15 the LUC to reopen the file regarding Kaonoulu Ranch
16 Docket No. A94-706. We believe there is sufficient
17 evidence to justify a review of the Project. The
18 currently proposed development differs greatly from
19 the original submission for a light industrial park.

20 No new traffic or marketing studies have
21 been prepared or presented, nor has the public been
22 given an opportunity to be heard. We ask that the LUC
23 provide us this opportunity." I've had the statement
24 signed by several people from Kihei, would like to
25 present if I may.

1 VICE CHAIR HELLER: If you have copies
2 please provide them to the clerk. Parties, any
3 questions? Commissioners, any questions? Thank you.

4 THE WITNESS: Thank you.

5 MR. ORODENKER: Next witness is Patricia
6 Stillwell followed by Mike Moran.

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

10 THE WITNESS: Yes, I do.

11 VICE CHAIR HELLER: Please state your name
12 if you would and give us a business or residence
13 address, then go ahead.

14 THE WITNESS: My name is Patricia
15 Stillwell. I live at 222 Kamakoi Loop in Kihei. And
16 I am on the Board of Directors of the Kihei Community
17 Association. And I'm here to represent their
18 testimony that you have received in writing. I will
19 be making reference to some attachments that, again,
20 you have received in the written testimony.

21 The Kihei Community Association is a
22 Hawai'i non-profit corporation founded over 50 years
23 ago to encourage, promote and aid in developing,
24 improving and maintaining the area of Kihei as a
25 desirable residential community.

1 The Kihei Community Association, which I
2 will refer to as KCA from here on out, supports the
3 motion filed by Maui Tomorrow Foundation, South Maui
4 Citizens for Responsible Growth, and Daniel Kanahele
5 for issuance of an Order to Show Cause why the subject
6 property should not revert to its former
7 classification due the current owner's violation of
8 the 1995 Order arising from their failure to develop
9 the property for the purposes represented to the Land
10 Use Commission.

11 After the property was reclassified by the
12 Land Use Commission in 1995 for Light Industrial uses,
13 KCA worked collaboratively with the landowner Kaonoulu
14 Ranch and its agents to ensure that the proposed
15 Kaonoulu Industrial Park would be developed in
16 accordance with the best interests of the community
17 and consistent with KCA's mission.

18 Given this, KCA wrote a letter to the Maui
19 County Planning Commission dated August 22, 1998, a
20 copy of which was included with the written testimony,
21 in support of the Ranch's effort to rezone the
22 property to permit development of the Kaonoulu
23 Industrial Park.

24 KCA supported the amendment of the
25 Kihei-Makena Community Plan to accommodate the light

1 industrial uses for the property. The Kihei-Makena
2 Community Plan was adopted into law by the county of
3 Maui in 1998. It remains in effect and has never been
4 amended.

5 The Community Plan, 1. Designates the
6 property "Light Industrial" on the land use map.

7 2. Defines Light Industrial narrowly as
8 warehousing, light assembly, service and craft type
9 industrial operations.

10 And 3. Specifically dedicates the property
11 to light industrial services and contains the
12 following limitation:

13 These areas should limit retail business or
14 commercial activities to the extent that they are
15 accessory or provide service to the predominant Light
16 Industrial use. These actions will place industrial
17 use near existing and proposed transportation arteries
18 with the efficient movement of goods.

19 And 4. Calls for development of commercial
20 services in three distinct areas all makai of Pi'ilani
21 Highway in order to create a sense of place and
22 address urban sprawl.

23 The currently proposed residential housing
24 development and two shopping malls bears no
25 resemblance whatsoever to what was presented to the

1 LUC, the County, and KCA in the 1990s.

2 VICE CHAIR HELLER: Would you please bring
3 your testimony to a conclusion.

4 THE WITNESS: There's been no study of
5 impact issues of concern to the state, the county and
6 the community with regard to this newly proposed
7 development, no opportunity for public testimony.

8 It's a significantly different Project than
9 what was approved and the community now has over 20
10 years of new conditions to factor into any new
11 development for this property including traffic
12 issues, a new high school to be built adjacent to the
13 property, flooding, drainage and grading issues.

14 For all the foregoing reasons KCA supports
15 issuance of an Order to Show Cause and reverse the
16 land classification or other such relief as the Land
17 Use Commission deems appropriate.

18 VICE CHAIR HELLER: Parties, any questions?
19 Commissioners, any questions? Thank you.

20 MR. ORODENKER: Next witness is Mike Moran
21 followed by Mark Hyde.

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

25 THE WITNESS: Yes, I do.

1 VICE CHAIR HELLER: Please state your name
2 and if you would a business or residence address, then
3 go ahead.

4 THE WITNESS: Certainly. My name is Mike
5 Moran. I'm a resident of Kihei, Hawai'i. I also serve
6 as the vice president of the Kihei Community
7 Association. However, I am not testifying for the KCA
8 we just heard that. What I would like to do this
9 morning is read into testimony from a resident and
10 former member of the Kihei Community Association,
11 Carla Flood, who was ill this morning and was not able
12 to attend. But her testimony was submitted in
13 writing.

14 So this is from Carla Flood, Kihei,
15 Hawai'i. "I Carla M. Flood support the motion filed by
16 Maui Tomorrow Foundation's South Maui Citizens for
17 Responsible Growth, and Daniel Kanahele for issuance
18 of an Order to Show Cause why the above described
19 property should not revert to its former
20 classification due to the current owner's violation of
21 the 1995 Order arising from their failure to develop
22 the property" --

23 VICE CHAIR HELLER: Excuse me. Could you
24 please slow down a little bit for the benefit of our
25 reporter.

1 THE WITNESS: Certainly. Thank you. I
2 didn't want to get cut off. I'll go a little slower.
3 "The property should not revert to its former
4 classification due to the current owner's violation of
5 the 1995 Order arising from their failure to develop
6 the property for the purposes represented to the Land
7 Use Commission.

8 "I, Carla Flood, am a resident of Kihei,
9 Hawai'i and served as the Planning and Development
10 Committee Chair of the Kihei Community Association in
11 the mid 1990s.

12 In that role I and fellow members of the
13 Planning and Development Committee as well as the
14 Kihei Community Association as a whole, worked
15 diligently and collaboratively with the owner and
16 agents of Kaonoulu Ranch to reach consensus on
17 architecturally diverse, attractive, and well-planned
18 Light Industrial park known as Kaonoulu Industrial
19 Park located on 88 acres of land mauka of the Pi'ilani
20 Highway, the same land as that which is the subject of
21 this proceeding.

22 The Kaonoulu Industrial Park then conceived
23 was to provide fee simple lots for the individual
24 Light Industrial use that made economic sense for the
25 Kihei area of Maui. The Kaonoulu Industrial Park was

1 to be a strategic asset for the community and a
2 prototype for the future development along Pi'ilani
3 Highway.

4 "The Kaonoulu Industrial Park was to
5 contain what was called a linear park for greenways,
6 bikeways system for the development mauka of the
7 Pi'ilani Highway.

8 "As a result of this collaborative process
9 an agreement on development of a Light Industrial park
10 on the subject property, the Kihei Community
11 Association acting through its planning development
12 committee sent a letter of support to the Maui County
13 Planning Commission dated August 22, 1998 in support
14 of the M-1 Light Industrial rezoning of the property.
15 A true copy of that letter is attached hereto as
16 Exhibit A and incorporated herein.

17 'the Kihei Community Plan enacted in 1998
18 called for and still calls for all major retail
19 development to be located makai of the Pi'ilani
20 Highway. At no time in the 1990s or beyond did
21 Kaonoulu Ranch suggest that the property would be
22 substantially utilized for retail purposes or for
23 workforce housing.

24 The proposed Pi'ilani Promenade Shopping
25 Center and Outlet Mall bear no resemblance to the

1 Light Industrial park discussed with Kaonoulu Ranch
2 that was the subject to our letter to the Maui County
3 Planning Commission."

4 VICE CHAIR HELLER: Would you please bring
5 your testimony to a conclusion.

6 THE WITNESS: Yes, sir. "The impacts
7 proposed by the Pi'ilani Promenade Shopping Center
8 Outlet Mall, and workforce housing are entirely
9 different from these contemplated and discussed with
10 the Kaonoulu Ranch in the 1980s: Specifically the
11 traffic and economic impacts on local, small
12 businesses, and existing shopping centers would be
13 entirely different, decidedly more negative and in
14 need of study. In addition they lack the connecting
15 roads, recalled linear park and greenways park.

16 "And in conclusion, in my opinion as the
17 former chair of the Kihei Community Association
18 planning development committee, the Pi'ilani Promenade
19 Shopping Center Outlet Mall and workforce housing land
20 use components and conditions do not do comply with
21 what Land Use conditions 5 and 15 as formerly
22 submitted, approved and mandated for this 88 acres
23 usage. Mahalo."

24 VICE CHAIR HELLER: Parties, any questions?
25 Commissioners, any questions?

1 THE WITNESS: Thank you.

2 MR. ORODENKER: The next witness is Mark
3 Hyde followed by Mary Star Little.

4 MARK HYDE

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

7 THE WITNESS: I do.

8 VICE CHAIR HELLER: Please state your name
9 and address. And if you would, give us either a
10 residence or business address, then proceed.

11 THE WITNESS: Thank you. My name is Mark
12 Hyde. I'm the president of South Maui Citizens for
13 Responsible Growth. And I've been asked by Victoria
14 Huffman, who could not be present today, to highlight
15 certain portions of her written testimony that's
16 previously been provided to the Commission.

17 Ms. Huffman supports the motion that's been
18 filed by the Petitioners herein. I would like to read
19 beginning at paragraph 4 of her testimony. She's a
20 licensed traffic engineer in the state of California.

21 "According to the Traffic Impact Analysis
22 Report for Pi'ilani Promenade, the proposed new
23 Project would be comprised of a 410,000 leasable
24 square foot retail shopping center including a 38,000
25 square foot outdoor garden area, and a 290,000

1 leasable square foot outlet center.

2 "Using formulas from the Institute of
3 Transportation Engineers' Trip Generation 8th Edition
4 2008, and assuming the two shopping centers are two
5 separate retail facilities as assumed in the Traffic
6 Impact Analysis Report for Pi'ilani Promenade, the
7 proposed retail Project is estimated to generate
8 approximately 30,900 driveway average traffic trips,
9 ADT.

10 "However, the property was estimated to
11 generate only approximately 4,820 ADT in the 1994
12 Traffic Impact Analysis Report for Kaonoulou Industrial
13 Park. This is less than one sixth the amount of
14 traffic that the property is now estimated to generate
15 with the proposed retail development in place.

16 "The property will generate even more
17 traffic, approximately 42,500 Driveway Average Daily
18 Trips when the traffic from the 250 workforce housing
19 units, which is a rezoning condition of the Honua'ula
20 Development Project is added.

21 "It is reasonable to assume the new
22 proposed retail development would have more traffic
23 impacts than the originally entitled industrial park
24 due to this dramatic increase in traffic. A review of
25 the Traffic Impact Analysis Report for Pi'ilani

1 Promenade confirms this assumption.

2 "It indicates traffic from the proposed
3 retail development alone, not including the traffic
4 from the workforce housing, would have significant
5 traffic impacts to the intersections of Pi'ilani
6 Highway, Honoulu Street and South Kihei Road at
7 Honoulu Street.

8 "More importantly, however, the large
9 increase in traffic from the proposed shopping centers
10 could compromise public health and safety by
11 increasing the potential for crashes and increasing
12 emergency vehicle response times.

13 "The lack of provision of a frontage road,
14 as was required by Condition 5 of the Findings of
15 Fact, Conclusions of Law and Decision and Order for
16 Land Use Commission Docket A94-706, may also
17 compromise public safety since students from the
18 planned future Kihei High School would be provided no
19 safe pedestrian route to the new retail centers.

20 "High school students would have no
21 alternative but to walk along Pi'ilani Highway, a
22 substandard, high-speed principal arterial which has
23 no sidewalk and little paved shoulder to reach the new
24 shopping center by foot."

25 VICE CHAIR HELLER: Would you please bring

1 your testimony to a conclusion.

2 THE WITNESS: Thank you. I will. "Such
3 impacts to traffic and public safety were not
4 disclosed to the Land Use Commission nor the public at
5 the time of the public hearing for the
6 reclassification of the property." Thank you very
7 much.

8 VICE CHAIR HELLER: Parties, any questions?
9 Commissioners, any questions? Commissioner Biga.

10 COMMISSIONER BIGA: The testifier, is she
11 still a highway expert in California?

12 THE WITNESS: Yes, sir.

13 COMMISSIONER BIGA: Okay. Thank you.

14 VICE CHAIR HELLER: Anything further?

15 COMMISSIONER BIGA: No.

16 VICE CHAIR HELLER: Thank you.

17 MR. ORODENKER: The next witness is Mary
18 Star Little followed by Tom Blackburn-Rodrigues.

19 MARY STAR LITTLE

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

22 THE WITNESS: I do.

23 VICE CHAIR HELLER: Please state your name
24 and if you would give us a residence or business
25 address then go ahead.

1 THE WITNESS: My name is Mary Star Little.
2 I live at 3275 Kehalo Drive in Maui Meadows, Kihei.
3 I've lived here for 27 years. I owned a small
4 business for 17 years.

5 I am only here to support the Show Cause
6 Motion. Unlike the two gentlemen, the first two
7 gentlemen that testified, we are *not* here to talk
8 about jobs and housing. We're here only to show cause
9 to open the docket. So I'm going to pass on what
10 women like to say and just offer my support for the
11 docket.

12 VICE CHAIR HELLER: Parties, any questions?
13 Commissioners, any questions? Thank you.

14 MR. ORODENKER: Next witness is Tom
15 Blackburn-Rodrigues followed by Ann Cua.

16 TOM BLACKBURN-RODRIGUES
17 being first duly sworn to tell the truth, was examined
18 and testified as follows:

19 THE WITNESS: Yes, I do. Thank you very
20 much. My name is Tom Blackburn-Rodrigues. I reside in
21 Kihei at 2085 Pi'ilani Apartment Gardens, No. 202.
22 And I'm here testifying today representing Pi'ilani
23 Promenade and Honua'ula as well.

24 Just by way of background I have been
25 living here in Kihei since 1998. My family arrived

1 originally in 1870. And I am a former president for
2 the Maui Coastal Land Trust, now the Hawaiian Land
3 Trust. I'm not testifying on behalf of that
4 organization.

5 I'm also the founding president of Na Hale
6 o Maui affordable housing land trust. But, again, I'm
7 not testifying on behalf of that organization. I'm
8 not sure which of the gentlemen that I'm looking at is
9 the clerk. I have some material. Thank you very
10 much, sir. If I may, at the conclusion of my
11 testimony I will distribute to the clerk for each
12 member of the Commission. We have copies for each of
13 you. These are individual signed support for Pi'ilani
14 Promenade, support for the jobs. There are
15 approximately 500 of these that will be given to each
16 one of you that you can examine. They are all signed
17 with the name, the print name, also the address where
18 they reside.

19 And all of these individuals, all 500 of
20 these individuals are supportive of the Pi'ilani
21 Promenade and Honua'ula.

22 If I just might add one of the most
23 important things that I see along in this discussion
24 is also the tremendous need for affordable housing in
25 Maui County. This will provide 250 affordable housing

1 units. I do not have to remind the Commissioners what
2 housing prices have been and how many people have left
3 the island.

4 So with the distribution of this, in order
5 to distribute them to the clerk I will take the box
6 over and he will distribute as is the proper
7 procedure. It will be 500 individuals who have all
8 signed to support Pi'ilani Promenade and the Honua'ula
9 Project for affordable housing.

10 VICE CHAIR HELLER: Parties, any questions?
11 Commissioners, any questions? Thank you.

12 THE WITNESS: Thank you very much. And,
13 Mr. Clerk, I apologize for the weight of the box.

14 MR. ORODENKER: The next witness is Ann Cua
15 followed by William Spence.

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

19 THE WITNESS: Yes, I do.

20 VICE CHAIR HELLER: Please state your name,
21 and if you would a residence or business address then
22 begin.

23 THE WITNESS: My name is Ann Cua, and I
24 reside in Makawao at 44 Keleawi Street. I have worked
25 as a land use planner with the county of Maui for

1 almost 30 years. I was the planner assigned to the
2 Petition by Kaonoulu Ranch to amend the Agricultural
3 Land Use District Boundary into the Urban District in
4 1994.

5 The Petition proposed a Light Industrial
6 subdivision which could include uses permitted in the
7 County's M-1 Light Industrial zoning district. The
8 county of Maui's Light Industrial zoning district is a
9 tiered zoning district which includes business and
10 apartment uses.

11 The transcripts of the Land Use Commission
12 proceedings in this matter indicate that the Petition
13 Area could accommodate business and apartment uses in
14 accordance with county zoning and depending on market
15 conditions.

16 The Land Use Commission was aware of the
17 broad uses permitted by the county's M-1 Light
18 Industrial direct by its line of questioning of the
19 market feasibility expert in this case.

20 The market feasibility expert indicated
21 that the market would ultimately dictate what was
22 built within the standards of the county zoning
23 district.

24 The Land Use Commission approved the
25 redistricting to the Urban District in February of

1 1995. The Decision and Order did not include any
2 conditions restricting the uses within the Urban
3 District.

4 The planning director during his testimony
5 indicated that during the change in zoning process
6 with the county of Maui he would request that the
7 county council limit the amount of commercial uses
8 allowable under the County's light industrial zoning
9 ordinance.

10 I would like to note that in 2004 this
11 body, the Land Use Commission, did impose a condition
12 on a separate project, the Maui Business Park Phase 2
13 project, where you limited 50 percent of the Project
14 acreage to be used and developed for non-retail light
15 industrial uses.

16 I also distributed to the Commission the
17 prior Decision and Order for this particular, the Maui
18 Business Park Project, which shows you Condition No.
19 19 on Page 63 where you did impose that condition
20 restricting the uses for that Maui Business Park
21 Project.

22 The County Council in March of 1998 adopted
23 the Kihei-Makena Community Plan by Ordinance No. 2641.
24 The Community Plan designates the Petition Area for
25 Light Industrial use.

1 Based on the County's tiered zoning
2 approach for the M-1 Light Industrial Zoning District,
3 the Planning Department has historically interpreted
4 the Light Industrial designation in the community plan
5 to allow those uses expressly permitted in the
6 county's M-1 Light Industrial zoning district, unless
7 restricted by conditions of zoning.

8 In April of 1998 Kaonoulu Ranch applied for
9 a change in zoning from the county Agricultural
10 District to the M-1 Light Industrial zoning district.
11 I was the planner assigned to the change in zoning
12 application for the department and was present at the
13 Planning Commission and County Council meetings.

14 At that time the Planning Department in its
15 recommendation to the Maui Planning Commission did
16 propose conditions to limit the amount of commercial
17 use for the Project as it did in other similar
18 requests for change in zoning.

19 In this case the department recommended
20 that not less than 70 percent of the net property
21 developed shall be leased or sold as restricted to
22 uses permitted in the M-1 Light Industrial District
23 excluding uses permitted in the B1, B2 and B3 business
24 districts.

25 Both the Planning Commission and the County

1 Council did not support the Department's recommended
2 conditions. And as a result no conditions were
3 imposed to limit the uses within the M-1 Light
4 Industrial District for this Project.

5 VICE CHAIR HELLER: Would you please bring
6 your testimony to a conclusion.

7 THE WITNESS: Sure. In as much as the
8 zoning of the proposed property is M-1 Light
9 Industrial and there were no conditions imposed by
10 the State Land Use Commission for the district
11 boundary amendment and the County Council for the
12 change in zoning, the property allows for a variety of
13 uses including apartment, industrial and commercial
14 uses.

15 As a planner that has processed a large
16 number of land use permits I'm concerned about the
17 implication that this Order to Show Cause can have.

18 The specific zoning and permitted uses of a
19 parcel of land is normally determined at the county
20 level. The land Use Commission has the authority to
21 determine whether or not a Petition Area should be
22 urbanized. If the Land Use Commission determines that
23 a conceptual site plan is binding as representations
24 made to the Commission, then projects would need to
25 come back to the Land Use Commission for each change

1 to any plan. I don't believe this is the intent of
2 the Land Use Commission in its role in the land use
3 process. Thank you.

4 VICE CHAIR HELLER: Parties, any questions?

5 DIRECT EXAMINATION

6 BY MR. YEE:

7 Q Thank you, Ms. Cua, for your testimony. At
8 the time of the original Petition was it your
9 understanding that the focus of use, of the proposed
10 use, was on light industrial?

11 A That is correct. That was the focus. That
12 was what was represented based on that site plan. It
13 was also indicated when questioning the market expert,
14 that because of the county zoning district it could
15 also include other business type uses and apartment
16 uses as well.

17 Q Well, let me be more clear then. The
18 reference in the record to "apartment uses" was that a
19 proposed use? Did the petitioner any time say that
20 they are proposing to have residential use in the
21 area?

22 A The proposal from the developer at the time
23 was for a Light Industrial subdivision. The line of
24 questioning that came forward with the Land Use
25 Commission was based on the county of Maui's light

1 industrial zoning district and that it allowed broader
2 uses than strictly warehousing type of uses.

3 Q So I'm trying to slice this piece into
4 several parts. So I'm going to take a part what I
5 think you've said into several pieces. It's correct,
6 then, that the Land Use Commission noted that the
7 zoning for light industrial included a number of
8 different uses, correct?

9 A That's correct.

10 Q But the proposed use by the Petitioner did
11 not -- the Petitioner never said they were going to
12 include every single use that would be allowed under
13 the zoning for Light Industrial.

14 A No. No Petitioner ever does that in my 30
15 years of experience.

16 Q In this case the Petitioner proposed light
17 industrial with some additional commercial.

18 A Yes.

19 Q And the amount of commercial the Petitioner
20 made clear wasn't determined and would have to be
21 looked at later based upon the market.

22 A Right. They indicated the market would
23 pretty much dictate how the project would be built
24 out.

25 Q So the primary focus was on a light

1 industrial use for the Petition Area.

2 A That is correct.

3 Q And the impacts that were analyzed were
4 based upon a Light Industrial use, correct?

5 A Highest and best use of the zoning M-1
6 that the future zoning which would be M-1 Light
7 Industrial.

8 Q And there were no reviews for impacts based
9 on residential, correct?

10 A I don't know now how a traffic -- a traffic
11 impact study analyzes highest and best use. And an
12 industrial/commercial use is more intense than an
13 apartment type use.

14 Q Well, let me drill down a little bit on
15 that. The travel times for a residential project
16 differ than that of a commercial, correct?

17 A I would believe so, although I'm not a
18 traffic expert.

19 Q Well, when a person leaves a house is
20 different than when the person goes to the
21 supermarket, correct? Normally.

22 A Normally I would guess.

23 Q So when you say highest and best use, when
24 you look at traffic, the impacts for residential, and
25 the impacts from a commercial are just different.

1 A They are different.

2 Q So it's more intense at some times and more
3 intense at other times based upon the use, correct?

4 A Again I'm not a traffic expert. My
5 understanding is that traffic is more intense for a
6 commercial/industrial type development than it is for
7 a residential development.

8 Q Referring to the Community Plan Amendment,
9 I believe, Ms. Stillwell testified that the Community
10 Plan Amendment contained a definition of Light
11 Industrial which was narrower or more narrow than the
12 county zoning definition.

13 Do you know whether that's -- I know you've
14 talked about interpretation. Is there a definition
15 within the CPA of Light Industrial that is more
16 narrow?

17 A The Community Plan was adopted as an entire
18 document. And there are definitions for all uses:
19 Light Industrial, business, commercial, residential.
20 So, yes, there is a definition in the Community Plan
21 for Light Industrial. I don't have it right in front
22 of me.

23 Q Do you know whether that definition
24 includes residential?

25 A It does not include residential.

1 Q Typically when planners discuss uses,
2 wouldn't a planner normally distinguish between Light
3 Industrial and residential? That is normally when you
4 talk about land uses, and you say "Light Industrial"
5 the assumption is you're not including residential,
6 correct?

7 A Well, it depends on in what context you're
8 speaking. If you're speaking of Light Industrial in
9 the context of the M-1 Light Industrial zoning
10 district -- and I have to look at my zoning code which
11 lists 30 permitted uses under M-1 Light Industrial --
12 but the first permitted use refers me to the B-1
13 Business District which has about 14 permitted
14 business uses. And then the B-2 Business District
15 which has 66 business-type permitted uses.

16 So if you're talking to me as a planner
17 with my knowledge of the Light Industrial, I'm going
18 to say: Okay, it permits warehousing but it permits
19 apartments, and it permits restaurants, and it permits
20 libraries because of the context I'm looking at in the
21 M-1 light industrial zoning district ordinance.

22 Q I think it's a fair comment. I guess I was
23 speaking more in terms of a more generic use of the
24 term and whether there is, if you have two people at
25 the university talking about land uses, one's talking

1 about the impacts from Light Industrial. Generally
2 isn't the assumption is they're not talking about
3 residential?

4 MS. LOVELL: I object to the form of the
5 question.

6 VICE CHAIR HELLER: It may be leading but
7 I'll allow the question.

8 MS. LOVELL: It wasn't leading. My
9 objection was that it was speculative or called for
10 speculation. It was an improper hypothetical.

11 VICE CHAIR HELLER: I'll still allow the
12 question. If you have an answer go ahead.

13 THE WITNESS: I'm sorry. Can you ask that
14 again, please.

15 Q (By Mr. Yee) You've done planning for a
16 long time, right?

17 A Yeah.

18 Q So you've talked about a variety of
19 planning issues both specific to your job as well as
20 more generically on general, broader land use
21 questions, correct?

22 A Right.

23 Q When you're talking not specifically about
24 your zoning but just more generally about planning --
25 so that's the reason why I referred to an academic

1 scenario -- when two planners just get together to
2 talk about land uses, and when you refer to a land use
3 of light industrial, you generally understand that
4 that would not include residential, correct?

5 A Generally, yes, if I'm talking ac -- if I'm
6 speaking academically with someone, yes.

7 Q In fact, land use planners also make a
8 distinction between commercial and Light Industrial.

9 A Academically, yes.

10 Q Because there are important differences
11 when you do land use planning to know whether
12 something is what is typically regarded as commercial
13 and typically regarded as light industrial, and what
14 is typically regarded as residential, correct?

15 A Correct.

16 Q When you get to -- do you know whether
17 there are any other discretionary county approvals
18 that are needed for this Project?

19 A The only approvals that would still be
20 needed for this Project is building permits,
21 landscaping approvals I guess any grading permits.
22 The Project is not located within the Special
23 Management Area so they obviously don't need that
24 permit.

25 Q Those permits you referenced are all

1 generally regarded as ministerial permits?

2 A Yes, that's correct.

3 Q So there are no other discretionary permits
4 from the county, at least, that are required.

5 A No.

6 Q So when Commissioner Biga had asked: Well,
7 is there another process by which concerns by the
8 community could be addressed?

9 At least on the county level there is no
10 other process by which the Petitioner would need to
11 get county approval and further community input before
12 this Project is allowed to continue.

13 A That is correct.

14 MR. YEE: Nothing further, thank you.

15 VICE CHAIR HELLER: Parties, anything
16 further? Yes.

17 CROSS-EXAMINATION

18 BY MR. PIERCE:

19 Q Ms. Cua, are you familiar with the Land
20 Planning Use Statute Hawai'i Revised Statutes 205?

21 A Yes.

22 Q In fact, you have to understand that as
23 part of your practice as a planner?

24 A Hmm-mm, yes.

25 Q Would you agree that it is possible for

1 there to be a land use condition that's more
2 restrictive than the county zoning?

3 A Yes. Yes.

4 MR. PIERCE: Thank you.

5 CROSS-EXAMINATION

6 BY MR. KAM:

7 Q Good morning, Ms. Cua. My name is Joel Kam
8 appearing for Honua'ula Partners. I just have a few
9 questions for you. I think you testified that you
10 were the planner involved in the Project when the
11 original Petitioner came for the district boundary
12 amendment, is that correct?

13 A That's correct.

14 Q Were you present at the hearings that the
15 Land Use Commission held on that original Petition?

16 A Yes, I was.

17 Q And based on your recollection was it your
18 understanding that the Commission at the time was
19 aware that apartment use was a permitted use under the
20 intended zoning?

21 A Yes, because they basically asked the
22 question of the market expert and was told that the
23 M-1 Light Industrial District could include apartment
24 uses.

25 Q And did the Land Use Commission at the time

1 impose a specific condition that restricted the
2 property to any specific use, whether it was
3 industrial use or a certain quantum of industrial use,
4 or perhaps restricting apartment use or restricting
5 commercial uses? Were there any conditions, any
6 specific conditions that the Commission imposed in
7 regards to those types of things?

8 A No, it didn't.

9 MR. YEE: I know this is late but I'm going
10 to object on the basis it is outside any scope that
11 she has as a planner. The issue really that's being
12 asked is a legal question because there's a dispute
13 between the parties as to whether the condition
14 requiring compliance with their representations,
15 constitutes -- has or has not been violated.

16 So for Ms. Cua to answer that question
17 would require her to know whether that condition binds
18 this Petitioner and how. So I respectfully suggest
19 that's beyond her capacity to answer.

20 MR. KAM: Mr. Chairman, I'll rephrase the
21 question.

22 VICE CHAIR HELLER: Okay. Go ahead and
23 rephrase.

24 Q (By Mr. Kam): Ms. Cua, other than the
25 condition the general condition in the Decision and

1 Order that says that: The petitioner will develop the
2 Project in accordance with the representations made to
3 the Commission, are there any other specific
4 conditions that you're aware of in the Decision and
5 Order that restrict the use of the property?

6 A No.

7 Q Did you testify that there was another
8 industrial project that came before the Land Use
9 Commission where the Commission *did* impose a specific
10 use restriction?

11 A Yes, I did.

12 Q Okay. And are you familiar with the
13 language of that condition?

14 A I distributed it to the Land Use
15 Commission. It was Condition No. 19 of the Maui
16 Business Park phase 2 project. Basically -- I mean
17 it's a long condition, but it basically limited the
18 project to 50 percent of true Light Industrial uses.

19 Q But there's no similar condition, no
20 similar specific condition in the Decision and Order
21 that's being considered here today.

22 A No, there is not.

23 MR. KAM: Thank you.

24 VICE CHAIR HELLER: Mr. Steiner, did you
25 have anything else?

1 MR. STEINER: Nothing further.

2 VICE CHAIR HELLER: Anything further from
3 the parties? Commissioners, any questions?

4 COMMISSIONER BIGA: Ms. Cua, thank you for
5 being here. Are you still employed by the county as a
6 planner?

7 THE WITNESS: Yes. I'm still employed as a
8 planner.

9 COMMISSIONER BIGA: Thank you. When you
10 guys was -- when you were doing this planning in 1994,
11 how far out did you guys look at way back? Is it,
12 like, 10 years or 20 years when you were looking at
13 planning for Light Industrial area?

14 THE WITNESS: Well, are you speaking of the
15 Community Plan process? Or are you speaking of when
16 this Project came before the Land Use Commission?

17 COMMISSIONER BIGA: I guess when the
18 Community Plan.

19 THE WITNESS: The Community Plan process.
20 Well, the Community Plan process looks 20 years out
21 into, you know, development for the area. And at some
22 point in time, depending on what is designated in the
23 Community Plan, that land use is specified within the
24 plan itself. And for this particular Project it was
25 designated as Light Industrial.

1 COMMISSIONER BIGA: And in 2004 the Land
2 Use Commission had another look at it to make some
3 amendments at that time?

4 THE WITNESS: The Land Use Commission does
5 not, is not involved in the Community Plan process.
6 That's a county process. The Land Use Commission
7 looked at the district boundary amendment from Ag to
8 Urban for this property.

9 COMMISSIONER BIGA: Okay. Thank you very
10 much.

11 VICE CHAIR HELLER: Commissioner McDonald.

12 VICE CHAIR McDONALD: Good morning,
13 Ms. Cua.

14 THE WITNESS: Good morning.

15 COMMISSIONER McDONALD: I'm just curious.
16 In 1998 when the Petitioner went to county zoning,
17 what plan was presented at that time?

18 THE WITNESS: At that time they presented
19 the same Light Industrial type of subdivision, but
20 asked for M-1 Light Industrial District zoning.

21 VICE CHAIR McDONALD: So the same plan that
22 was presented to the Land Use Commission.

23 THE WITNESS: Right. And at the time we
24 tried to restrict the percentage of right industrial
25 versus commercial uses. However, when we, the

1 department, went before the Planning Commission and
2 the County Council, our recommendation was not
3 supported. And therefore there were no conditions
4 restricting uses for the zoning of this property.

5 VICE CHAIR McDONALD: So basically at this
6 point what I'm hearing is seeing that the Petitioner
7 has the county zoning in place, the only other permits
8 that's required by the county are building permit,
9 grading permit.

10 THE WITNESS: Yes. Landscaping --

11 VICE CHAIR McDONALD: To develop this
12 160 acres.

13 THE WITNESS: Landscaping approval. Yes,
14 yes that is correct.

15 VICE CHAIR McDONALD: Okay. Thank you.

16 VICE CHAIR HELLER: Commissioners, anything
17 further?

18 COMMISSIONER INOUE: Mr. Chair, I have a
19 question. Thank you. Thank you, Ms. Cua. Is it your
20 opinion that the Land Use Commission in approving a
21 boundary amendment is approving a particular county
22 zoning like M-1, your M-1?

23 THE WITNESS: No. In my opinion the Land
24 Use Commission is approving a redistricting -- well,
25 in this particular case, to the Urban District, but in

1 other case it may be to the Rural District.

2 The zoning, the decision of zoning is
3 actually the county's under the county's authority.

4 COMMISSIONER INOUE: I'm not familiar with
5 the county zoning, so forgive me. What is B-1. B2,
6 B-3.

7 THE WITNESS: Okay. I'm sorry. B-1, B-2,
8 B-3 are three different business types of zoning
9 district: Neighborhood, business -- I'm sorry, I deal
10 with this every day and I'm drawing a blank. B-1 is
11 neighborhood businesses district, B-2 community
12 business district, and B-3 is central business
13 district. So basically just your typical business,
14 commercial type of district.

15 COMMISSIONER INOUE: So can the county
16 powers in granting an M-1 industrial zoning restrict
17 it to one of those three? B-1 only, B-2, B-3?

18 THE WITNESS: Well, I mean I guess they
19 could. That seems a little odd. What we normally do
20 in a lot of cases for a lot of change in zoning
21 applications is the county imposes conditions maybe to
22 restrict the uses.

23 So let's say in the M-1 Light Industrial
24 district that can allow anything from warehousing to a
25 restaurant, you know. We may recommend that maybe

1 because of traffic impacts we wouldn't want like a,
2 maybe a gas station to be allowed. So we can restrict
3 that. The county can restrict that. And it has. It
4 has.

5 COMMISSIONER INOUE: One last question.
6 In your opinion did the decision in the 1998 planning
7 hearing to just allow a blanket M-1 industrial zoning,
8 comply with the intent of the LUC ruling in 1994?

9 THE WITNESS: Well, in my opinion, yes.
10 The Land Use Commission, based on its analysis,
11 Findings of Fact, Conclusions of Law, decided that the
12 lands in the Petition Area were appropriate to be
13 designated in the Urban District. The M-1 light
14 Industrial District is an urban type use. Whether it
15 includes business uses or not it's an urban type of
16 use.

17 So, yes, the county zoning it to M-1 light
18 industrial is consistent with the Urban designation
19 that the Land Use Commission granted for this
20 property, in my opinion.

21 COMMISSIONER INOUE: Thank you.

22 VICE CHAIR HELLER: Commissioners, anything
23 further? Thank you. We have one more public witness?

24 MR. ORODENKER: Yes. The final witness is
25 William Spence.

1 WILLIAM SPENCE

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

4 THE WITNESS: I do.

5 VICE CHAIR HELLER: Please state your name
6 and if you would give us a business or residence
7 address and then begin.

8 THE WITNESS: My name is William Spence.
9 I'm the planning director for Maui County. My
10 business address is 250 South High Street, in Wailuku
11 on Maui.

12 I thought I would provide a little bit of
13 background regarding there's already been some
14 questions about the background of our zoning. I
15 thought I might clarify some of those things so
16 there's some context for the Commission in their
17 decision-making.

18 Our zoning regime on Maui was established
19 in approximately 1960. So it's an Euclidean, what
20 they refer to as a Euclidean zoning regime. And it's
21 a very old regime named after a Supreme Court Case
22 Euclid vs. Amboy.

23 One of the common traits of this zoning
24 regime is that it allows what are considered
25 compatible or less intense uses in sort of a tiered

1 manner. So Light Industrial or heavy industrial is
2 considered a very intense use. So it therefore would
3 allow compatible or less intensive uses such as
4 business, commercial, apartments, those kinds of
5 things.

6 It takes place in a number of our different
7 zoning districts like hotel where it also allows
8 apartments and single-family residences.

9 In the case of our light industrial zoning
10 district, when it was originally established Maui
11 County had about 37,000 people total. We're now up to
12 about 140, 150. At that time in 1960 when zoning was
13 established the predominant industries were
14 agriculture and related uses. So there was a lot of
15 Light Industrial land. Just in Kahului alone there
16 was, like, 385 acres and the business zoning only
17 57 acres.

18 As time progressed, as the population
19 changed, as the national and world economies and thus
20 the island economies changed those properties zoned
21 Light Industrial had opportunity to change with the
22 times.

23 So that stacking ability provision under
24 the law allowed, say, the Maui Mall to change from
25 basically a baseyard near the harbor to one of our

1 primary commercial malls.

2 Queen Ka'ahumanu Center, which is currently
3 the largest mall on the island, I think it's zoned
4 heavy industrial.

5 Any number of other places: Maui
6 Marketplace, Wailuku Town Center. On your way home or
7 on your way to the airport today you'll pass by the
8 Lahaina Cannery, Lahaina Gateway, those are both very
9 large commercial projects.

10 Those are all on Light Industrial.
11 Everything on Dairy Road is also Light Industrial, but
12 you'll see the commercial nature of it.

13 VICE CHAIR HELLER: Would you please bring
14 your testimony to a conclusion.

15 THE WITNESS: Certainly. I'll just cover
16 two other things. It's very common to put apartments
17 on Light Industrial. One of our largest affordable
18 projects, 'Iao Parkside is 480 units. So that's not
19 unusual either. I'll just close with what's going to
20 come up with the Maui Island Plan. And my testimony
21 has a map attached to it.

22 The Maui Island Plan also designates this
23 property for urban kinds of uses. In fact it's going
24 to be surrounded by urban uses. To put it back to
25 Agriculture would be inconsistent with that plan that

1 is going to be adopted by the Council and would not
2 make a whole lot of sense in the whole world scope of
3 Maui's comprehensive plans.

4 VICE CHAIR HELLER: Parties, any questions?
5 Yes Mr. Pierce.

6 EXAMINATION

7 BY MR. PIERCE:

8 Q Hi, Mr. Spence. Did you hear Ms. Cua when
9 she testified and said that, that if the Land Use
10 Commission issues an Order with respect to a piece of
11 property that has restrictions on it, and those
12 restrictions are more restrictive than the underlying
13 county zoning, in that situation the restrictive, the
14 more restrictive would apply. Would you agree with
15 that?

16 A I would agree with that.

17 Q And you mentioned some other businesses and
18 identified the county zoning associated with them.
19 You mentioned the Queen Ka'ahumanu Shopping Center,
20 for example. Do you know what the underlying Decision
21 and Order was with respect to that property?

22 A That was probably established in the Urban
23 District when the Commission established the four
24 different state districts.

25 Q In other words, it was not a site-specific

1 request made by a landowner/applicant.

2 A No, it wasn't.

3 Q Okay. So if, in fact, if it had been --
4 and if there had been an Order issued restricting the
5 uses, those would have to be taken into account,
6 correct?

7 A Any time the State Land Use Commission
8 issues a condition, when it comes to the county to
9 implement what are our community plans through zoning
10 but also takes -- we always consider what the Land Use
11 Commission says. We have to follow your conditions.

12 In this particular case lacking a specific
13 condition to restrict the uses, we deferred to the
14 County Council when we went to zoning. The County
15 Council also did not put any specific conditions
16 limiting the commercial aspect of this Project.

17 Q It wasn't what I asked, but continuing on.

18 A Okay.

19 Q You understand how the chapter 205 works in
20 terms of the statewide zoning process, right?

21 A Pretty well, yes.

22 Q Okay. You're in charge -- as the planning
23 director you're in charge of dealing with the county
24 issues and in some cases having to review decisions
25 made by the Land Use Commission, correct?

1 A That's correct.

2 Q But you're not the final say with respect
3 to anything that was issued by the Land Use
4 Commission. That would be the domain and jurisdiction
5 of the Land Use Commission, would you agree?

6 A That's correct. I would agree with that.

7 MR. PIERCE: Thank you.

8 VICE CHAIR HELLER: Parties, anything else?
9 Commissioners, any questions? Thank you. Do we have
10 anyone else present who wishes to provide public
11 testimony on this docket? Please step forward.

12 CYNTHIA FLINT BASTONI-GROVES
13 being first duly sworn to tell the truth, was examined
14 and testified as follows:

15 THE WITNESS: I do.

16 VICE CHAIR HELLER: Please state your name
17 and if you would give us a residence or business
18 address and then go ahead.

19 THE WITNESS: Yes, sir. I'm Cynthia Flint
20 Bastoni-Groves. People call me Onawai. (phonetic) My
21 address is 105 Kulipu'u Street, Kihei on Maui. And
22 I've been a resident of Maui primarily since 2003 but
23 I originally came in 1987. So I've seen Maui go
24 through lots of different changes.

25 VICE CHAIR HELLER: Thank you. After

1 you're concluded if you would just come and sign the
2 witness list so we have your name down correctly.

3 THE WITNESS: Okay.

4 VICE CHAIR HELLER: Go ahead.

5 THE WITNESS: I actually have written
6 testimony, but I want to address a couple things
7 because I pulled off the adopted chapter 1924 M-1
8 light industrial district currently for this piece.
9 And 19.24.01 says 'M-1 Light Industrial District is
10 designed to contain mostly" -- I'm using that word
11 *mostly* "warehousing and distribution types of activity
12 and permits most compounding, assembly or treatment of
13 articles or materials with the exception of heavy
14 manufacturing and processing of raw materials.
15 Residential uses are excluded from this district."

16 Now I know that right now this is -- there
17 is proposed legislation to change M-1. So I just want
18 to bring this up because the times they are a
19 changing. And what fit maybe back then may not fit
20 right now.

21 And then when you go into the actual, you
22 know, the different uses and then you look at the
23 representation of what Eclipse is saying on their
24 website, it's completely "mall", an outlet. It isn't
25 a variation. It's a retail mall.

1 And the concern that I have is that the --
2 I saw a website where they talked about what happens
3 when, particularly when big box stores come in. And I
4 just want to read a little bit because the impact
5 really needs to be considered here.

6 I was recently warned that one of the
7 unintended consequences of big box shopping centers,
8 they haven't been held that long and particularly of
9 late. And the shopping center build and flip
10 mentality has taken down numerous small businesses in
11 communities across the United States since the 1990s.

12 We now have an epidemic of retail vacancies
13 in much of the Mainland U.S. And Hawai'i will follow
14 unless elected officials recognize what's really going
15 on and take steps to limit retail development to
16 what's truly needed and supportable. And this is
17 particularly of concern in Maui.

18 I don't know if you've seen Kihei, but, you
19 know, in our Community Plan we were getting a
20 wonderful mall in the center of Kihei that the Kihei
21 community's totally behind.

22 Then I understand that the Weinstein
23 property has been bought and that we're getting
24 something like the Polynesian Cultural Center, which
25 is the other side. Each of these projects is the

1 other side of these 88 acres.

2 It's in our Community Plan. And it's what
3 we want. I think that needs to be taken into
4 consideration particularly traffic-wise, but also the
5 feeling and the attraction that we want to create in
6 Maui. It's an outer island. It's not O'ahu. And we
7 want to bring that sense of it's kind of magic that's
8 here. And people are not really oriented toward
9 malls. They're really oriented toward the Maui No Ka
10 Oi experience.

11 We want to continue to allow that kind of
12 tourism to happen. One of the problems, I think, that
13 when commercial developers buy up cheap Light
14 Industrial land and drive up land prices during their
15 flips in which the M-1 was designed for sustainable
16 Light Industrial, it, instead, hurts those who do want
17 to offer and take pride in their sustainable Light
18 Industrial services at a reasonable cost.

19 Small businesses on a small island like
20 this would find it more difficult to compete with the
21 big box megaplex which is disheartening in such a
22 small community as Kihei of 45,000 people on an island
23 with 145,000. So I hope you'll take this into
24 consideration.

25 There's been a really reaction to the sheer

1 size of the scale of the Eclipse Mall. And I don't
2 know if you've driven by it. I hope you get a chance
3 to while you're here.

4 VICE CHAIR HELLER: Would you please bring
5 your testimony to a close.

6 THE WITNESS: Yeah. It's pretty huge. And
7 I know they presented 500 signatures. I'm sorry I
8 didn't bring the polls that were on the newspapers. I
9 think that would have been significant.

10 VICE CHAIR HELLER: Parties, any questions?
11 Ms. Lovell.

12 MS. LOVELL: Yes, I have question.

13 DIRECT EXAMINATION

14 BY MS. LOVELL:

15 Q Is it Ms. Groves?

16 A Groves, yes.

17 Q You referenced chapter 19.24.010 of the
18 County's zoning ordinance. The caption on that
19 particular section reads "generally."

20 A Yes.

21 Q Now, have you looked at the very next
22 ordinance that's right below that 19.24.020 "use
23 regulations"?

24 A Right. And there are 32.

25 Q Right. And under A-1 that says that "Any

1 use permitted in the B-1, B-2 or B-3 district is
2 allowed," correct?

3 A That's correct.

4 Q And then No. 32 on that list specifically
5 allows apartment houses, doesn't it?

6 A It does. But I think you also should take
7 into consideration the M-1 is also being looked at and
8 it's been shifted. And I hope you get a copy of it.
9 I don't know if anybody here has it. If I do I'll
10 give it to you.

11 But I think that it's worthy of looking at
12 because the stacking thing, there's been an attempt to
13 try to eliminate the stacking of B-1-2 and 3-B because
14 one of the major reasons -- I think Will Spence can
15 address it -- but there was concern with that the
16 number of non-conforming type of situations that would
17 happen if they eliminated the B-1, 2 and 3. Is that
18 correct?

19 Q Well, I think what we need to focus on is
20 the zoning regulations that are actually in place now
21 and not some proposal that hasn't been adopted yet.
22 When you were --

23 A This is what's happening right now.

24 Q -- when you were doing your research before
25 testifying today, did you have an opportunity to look

1 back at the original plan or the original market
2 feasibility study and economic report that was
3 prepared in this docket and presented to the Land Use
4 Commission?

5 A I haven't seen that. All I can see is
6 what's on their website right now.

7 Q All right.

8 A It's what's been represented out in the
9 community, you know, far and wide.

10 Q Okay.

11 A So I don't think that was of the original
12 intent. I mean you can ask Mr. Spence but I don't
13 think that was the original intent was for M-1 to be
14 converted to an entire mall. You know and with no
15 warehousing distribution type of activities.

16 Q But you haven't actually read the market
17 feasibility study and economic report that was a part
18 of the Land Use Commission's deliberations, have you?

19 A In 1995 you mean?

20 Q Yes.

21 A No, I have not. But I'm sure it's not the
22 same as it is now.

23 MS. LOVELL: No further questions then.

24 THE WITNESS: Thank you.

25 VICE CHAIR HELLER: Parties, anything else?

1 Commissioners, any questions? Is there anyone else
2 present who wishes to give public testimony on this
3 docket?

4 UNIDENTIFIED PUBLIC WITNESS: Do you want
5 the hard copy?

6 VICE CHAIR HELLER: If you're submitting it
7 hand it to our clerk. Okay. This is it. Last call
8 for public testimony. Come forward, please. I will
9 ask you to come up and sign our witness list as soon
10 as you're done.

11 IVAN LAY
12 being first duly sworn to tell the truth, was examined
13 and testified as follows:

14 THE WITNESS: Yes, I do.

15 VICE CHAIR HELLER: Please state your name,
16 your --

17 THE WITNESS: My name is Ivan lay. I'm
18 affiliated with the Hawai'i Regional Council of
19 Carpenters. I'm a field representative for them. Our
20 business location is 330 Ho'oka'i Street in Wailuku.

21 VICE CHAIR HELLER: Go ahead, please.

22 THE WITNESS: I'm against this motion.
23 We're talking about economics here on the island.
24 This mall will bring jobs and opportunities to our
25 local families, to our construction trades over 200

1 jobs, for the people working at these retail centers
2 we have stock boys, we have business managers, we have
3 people that will bring their product in. We have a
4 great availability for our consumers out there who
5 want to get a better product at a better price.

6 So this does effect economics of us. This
7 motion before you it's already stated that there's no
8 restrictions on this zoning. And it falls within the
9 perimeters of it. So I ask you not to take this into
10 consideration. And that's my feelings on this.

11 VICE CHAIR HELLER: Thank you. Parties,
12 any questions? Commissioners, any questions? Thank
13 you.

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

17 THE WITNESS: The whole truth and nothing
18 but the truth.

19 VICE CHAIR HELLER: Please state your name
20 and if you would a business or residence address and
21 then go ahead.

22 THE WITNESS: My name is Bill Kamai. I am
23 a service representative for the Hawai'i Regional
24 Council of Carpenters. My business addresses is 330
25 Ho'okahi Street in Wailuku -- Wailuku industrial that

1 is.

2 I'm here to ask that you not support the
3 motion for consideration as filed. This Project has
4 been through three significant public reviews, a
5 District Boundary Amendment, an updated Kihei-Makena
6 Community Plan and a change in zoning request. Now is
7 the time to stop delaying this Project any further and
8 start putting people back to work.

9 This Project is the single largest
10 construction Project in Maui County, total value well
11 over \$200 million. The construction-related jobs is
12 well over 200 as well as creating retail jobs in the
13 neighborhood of 500 jobs.

14 The public benefit for this Project is the
15 construction of the first increment of the Kihei
16 Upcountry Highway, something that we've been waiting
17 for for years here on Maui.

18 It will have improvements to Pi'ilani
19 Highway from 4 to 8 lanes as well as a water system
20 improvements totaling well over \$20 million. School
21 fees and traffic impact fees will be paid by the
22 developer to Maui County.

23 This Project includes all elements in Kihei
24 that's needed: Jobs, housing, 250 affordable housing
25 units, as well as retail for both residents and

1 tourism industry. So no more delays. I ask that you
2 not support the Motion for Consideration. Thank you.

3 VICE CHAIR HELLER: Parties, any questions?
4 Commissioners, any questions? Thank you. That
5 concludes public testimony on this docket. At this
6 point I think it might be helpful to have a brief
7 consultation with our legal advisor. Commissioners,
8 I'd like to invite a motion for an executive session.

9 COMMISSIONER BIGA: So moved.

10 COMMISSIONER TEVES: Second.

11 VICE CHAIR HELLER: All in favor?

12 COMMISSIONERS: "Aye".

13 VICE CHAIR HELLER: Any opposed? (no
14 response) We will take about a 20 minute recess during
15 which we will have an executive session.

16 (Recess was held 10:35-11:15)

17 VICE CHAIR HELLER: (Gavel) We are back on
18 the record. Mr. Pierce, are you ready to proceed for
19 Movants?

20 MR. PIERCE: I am.

21 VICE CHAIR HELLER: Do you have any
22 witnesses to call?

23 MR. PIERCE: No.

24 VICE CHAIR HELLER: Let's see if any of the
25 other parties have witnesses to call and then we'll

1 allow everybody to make arguments. OP, any witnesses?

2 MR. YEE: No witnesses.

3 VICE CHAIR HELLER: County?

4 MS. LOVELL: No witnesses, thank you.

5 VICE CHAIR HELLER: Mr. Kam?

6 MR. KAM: No witnesses.

7 VICE CHAIR HELLER: Mr. Steiner?

8 MR. STEINER: No witnesses.

9 VICE CHAIR HELLER: In that case,
10 Mr. Pierce, please go ahead and make your arguments.

11 MR. PIERCE: Commissioners, the Movants are
12 not against jobs. We're not against affordable
13 housing. We're against abuse of process. That's what
14 is happening here. We also don't have a problem with
15 Kaonoulu Ranch. They appear to have had, you know, no
16 intent to change their plan. But what you have before
17 you today is a Project that has just come to light
18 recently.

19 It bears no significance to the one that
20 was presented in 1994 before another group of
21 Commissioners like yourselves. That one that was
22 that presented at that point in time was 123-lot Light
23 Industrial park.

24 The proposal, in essence, and you have our
25 pleadings on this, and you have the responses, it's

1 all there in the record. We're not here to tell you
2 anything that's not in the record before you or that
3 the current landowners said. There's no new
4 information that's necessary to really make our point
5 on this one.

6 But the point that I do want to make sure
7 is understood is that that proposal was very clearly
8 123-lot industrial subdivision. Those were going to
9 be made available to local entrepreneurs. Those folks
10 would have an opportunity to create real meaningful,
11 sustainable jobs in the community.

12 What was even more important was one of the
13 selling points that Kaonoulu Ranch made then, the
14 Petitioner, was that in fact they could help assist
15 Kihei reduce its traffic by providing services for
16 hotels in local proximity. It would eliminate travels
17 to Central Maui.

18 That was a persuasive argument. They
19 provided economic studies. They provided traffic
20 studies focused and devoted to that 123-lot industrial
21 subdivision. No problem.

22 The Land Use Commission issued, based upon
23 that testimony, the document, the one and only
24 document that really needs to be the focus of
25 attention today. And that is that 1995 Findings of

1 Fact, Conclusions of Law and Decision and Order, what
2 I'll be calling the Order.

3 This encompassed the Land Use Commission's
4 deliberations, the evidence that they received and
5 their final Order. And the two parts that we're
6 focused on, although there may be other parts, but the
7 two parts that we think are sufficient to meet the
8 very minimal threshold that's here before you today,
9 is that the Land Use Commission said: We're going to
10 give you the green light to go ahead. We're going to
11 give you the approval subject to you developing this,
12 you or your successors developing this, in a way
13 that's consistent with your representations that you
14 made here today. Very simple.

15 And Kaonoulu Ranch proceeded exactly in
16 that fashion. They went to the county of Maui and
17 they sought a rezoning of the property. What did they
18 present? They didn't present affordable housing.
19 They didn't present retail shopping centers. They
20 presented the 123-lot subdivision for industrial uses.

21 The same thing happened at the subdivision
22 level. Things changed when the ranch sold the
23 property. That's when things changed. And as came
24 out in the testimony this morning it happened
25 coincidentally after the land had obtained all

1 discretionary permits that were necessary.

2 To the extent that any of your concerns
3 about vested rights, and by that I mean is there a
4 concern here that we have an unfortunate landowner
5 that thought, based upon discussions with the county,
6 that they could proceed, we would ask you to put that
7 aside.

8 We have already briefed that issue in our
9 pleadings. If you've read it you've seen it already.
10 It's not the issue before us today. That threat of
11 vested rights is something that will ultimately be
12 shown as being a hollow argument. And the reason is
13 simply this.

14 As the planning director for the county,
15 Mr. Spence, said and as one of the planners also said,
16 they all agreed that your Decision and Order was the
17 final say in this. So you were the experts on this
18 part not the county of Maui. It's for you and your
19 staff to decide what this document means.

20 Now, it was the job of Pi'ilani Promenade
21 South and North and Honua'ula, the current landowners,
22 collectively to do their due diligence before they
23 bought this property. They're smart people. They
24 have the ability obviously to hire smart attorneys.
25 They can make a decision as to what this document

1 says. They can also make a decision as to -- or what
2 they believe it says. Let's put it that way.

3 They can also make a decision as to what
4 they might be able to persuade you and the county 15
5 or 16 years after the fact after 1995, to believe is
6 the truth.

7 So to the extent that they're here today
8 taking a chance that they can get this Project through
9 without having ever gone through any public process,
10 that's something that is their own risk that they're
11 taking. It's a business decision they made. This is
12 not about vested rights, an innocent landowner who
13 somehow misunderstood something.

14 This was recorded against twice under the
15 Land Use Commission rules. This was recorded twice
16 against the property. It's been there all along the
17 way.

18 One of the testifiers earlier mentioned
19 something that is perhaps a good real estate attempt
20 to do, which is to take lands that have a market value
21 based upon something like an industrial use and see if
22 you can turn them into a higher value thing.

23 So you buy cheap, and you see what it takes
24 for you to get through the entitlement process.

25 So the landowners have been trying to get

1 through the entitlement process by essentially seeing
2 if they can just say, "Look, we've got all the
3 permits." That's their argument. Currently the
4 County is saying, "We think they have all the
5 permits."

6 But if you notice something the County is
7 focused on county issues, county zoning, county land
8 use community plans. And we would submit, Movants
9 would submit, that that is a distraction. It's a
10 purposeful distraction. They're attempting to ask --
11 they're attempting without saying it, to make you
12 defer to the county on this issue.

13 But we have chapter 205 which back in the
14 '60s set up this Land Use Commission to make the big
15 decisions on State Land Use. Once again, they vested
16 this Commission with the power and authority to enter
17 an Order and to put restrictions on title which are
18 the law. And to the extent that this Order is more
19 restrictive than county zoning, it's the Order that
20 applies.

21 So with that said, the Vice Chair already
22 read at the very beginning of the meeting what the
23 threshold issue here which is: Is there sufficient
24 reason for this matter to move on to the next stage?
25 And that standard was "reason to believe". There's a

1 reason to believe. The Office of Planning has already
2 submitted their pleadings saying there is reason to
3 believe.

4 And that reason to believe standard is, as
5 we mentioned in our pleadings, the Supreme Court says
6 that's basically like probable cause. As long as
7 there's an objective, particularized finding, then
8 there's sufficient reason for you to dig deeper to
9 issue the Order to Show Cause.

10 In this case we would argue that based upon
11 the undisputed facts that were presented back in 1995,
12 and those are the ones that we provided, and the
13 undisputed facts with respect to what the landowners
14 are now saying they're going to do, those don't look
15 the same.

16 So those two conditions that we think are
17 of paramount importance in this Decision and Order,
18 among others, are Condition 5 and Condition 15.
19 Condition 5 says: Are you building this -- are you
20 constructing this in a way that's consistent,
21 substantially and materially consistent with
22 representations you made to the Commission in 1995?

23 The other part relates to a very important
24 traffic issue which is a connector road which was set
25 forth in Condition 15. Once again we don't have to

1 make up the numbers.

2 The original Petitioner said that the
3 traffic was going to be close to 5,000, a little bit
4 less than 5,000 traffic trips per day.

5 And now we're looking at around 35,000
6 based upon the landowner's own submissions. That's a
7 huge significant difference. It bears no relationship
8 back.

9 So I'll conclude by just pointing the
10 Commission to our reply. On Page 3 of our reply we
11 basically laid out the differences that we see here,
12 the big ones. You have the original industrial park
13 and the new proposal for affordable housing, 250
14 units, plus the retail and outlet shopping centers.
15 So on the one hand you had 123 lots. What we have
16 today are four lots.

17 What was presented was fee simple lots.
18 What we have today are leased lots.

19 What was presented was a Light Industrial
20 park. What we have now is a retail complex with 250
21 housing units.

22 What was presented was mostly Light
23 Industrial uses including warehousing distribution
24 with possibly some limited, *limited* ancillary retail.
25 Of course the Commissioners left an opportunity for

1 there to be some small commercial uses such as, you
2 know, a bank for the folks to use that are within the
3 Light Industrial area and restaurants and things were
4 going to be used.

5 But before that to be a whole fabric new
6 thing which is now we're talking about national
7 retailers, fast food restaurants, and once again these
8 250 housing units.

9 What was asked for was something that would
10 serve local business needs. What we have now
11 presented is something that serves consumer needs and
12 provides employee housing. Not necessarily that we're
13 saying those are bad uses, but those are different
14 uses, substantially different in terms of traffic
15 impacts and a host of other things, economic issues
16 and other things that were not addressed or evaluated
17 by the Land Use Commission in 1995 and '94.

18 Before what was requested was provide
19 locally owned small businesses. What we have now is
20 something that would be leased to national retailers.

21 Before, small impact on traffic. Now,
22 significantly larger impact on traffic.

23 Before, connecting roads linking mauka
24 neighborhoods. Now no frontage or connector roads.

25 Before, reduced traffic. Now, increased

1 traffic.

2 Before, something that would have complied
3 with the community plan. Now, something that violates
4 the Community Plan.

5 But once anyone these issues with respect
6 to county zoning really don't need to be addressed by
7 you. That is a distraction that you need not address.
8 We're asking you to focus on the one document here
9 that's important here today which is the Decision and
10 Order. Thank you.

11 If I may, let me just add one additional
12 thing with respect to our request. We had identified
13 our request for relief back in the beginning. And the
14 next step in this would be for this to move to the
15 contested case. That's the opportunity where you
16 would have issued the Order to Show Cause.

17 And what we think is extremely important
18 with this, another request that we made was all the
19 annual reports up until now have been telling the
20 Commission that everything is proceeding as if they
21 were going to do the light industrial project.

22 We submitted copies of samples of those
23 annual reports. We are asking you as part of your
24 initial decision today, because this is something that
25 we believe you need, something the public needs, and

1 it's time for the landowners to come clean with
2 exactly what they want to state is the proposed
3 development.

4 We, of course -- they have a lot of
5 information from their website. We have what they
6 have submitted so far. And I would also point out
7 that it appears to us we believe that they actually
8 have not filed annual reports which are due right now
9 or already due.

10 So we'd be asking as part of your relief
11 today is to issue the Order to Show Cause and also
12 require the landowners before the next meeting, before
13 the next hearing, to provide a timely revised,
14 amended -- or actually what they really need to do is
15 retract the other ones which we believe are absolutely
16 wrong and are not a statement of what was, what
17 actually has been happening for a few years now -- and
18 to state the actuality.

19 Resubmit new annual reports. Put you on
20 notice properly. You have not been on notice of this
21 before we brought this motion, and put the public on
22 notice so we can evaluate it as part of the process.
23 Thank you very much.

24 VICE CHAIR HELLER: Mr. Kam, Mr. Steiner
25 your office submitted separate pleadings on behalf of

1 Honua'ula and the Pi'ilani entities. Are you planning
2 to present separate arguments?

3 MR. STEINER: Yes, Your Honor, and with the
4 Commission's permissions I'd prefer to go first
5 followed by Mr. Kam.

6 VICE CHAIR HELLER: If that's all right
7 with Mr. Kam that's fine.

8 MR. KAM: That's fine.

9 VICE CHAIR HELLER: Proceed.

10 MR. STEINER: Thank you, Commissioners.
11 One thing that Mr. Pierce said that I agree with is
12 that --

13 VICE CHAIR HELLER: Excuse me. Just for
14 the record which entity are you speaking on behalf of
15 first?

16 MR. STEINER: I apologize. I am Jonathan
17 Steiner. I represent Pi'ilani Promenade North and
18 Pi'ilani Promenade South which are the owners of the
19 seven of the eight parcels at issue. Mr. Kam
20 represents Honua'ula who is the owner of the parcel
21 which is proposed for the affordable housing use.

22 VICE CHAIR HELLER: Thank you. Go ahead.

23 MR. STEINER: One thing that Mr. Pierce
24 said that I agree with is that the issues regarding
25 county zoning issues, whether this proposed use

1 complies with zoning and whether it complies with the
2 community plan are not before you today.

3 What's before you today is your own Order,
4 the Decision and Order issued back in 1995. What's at
5 issue here: Pi'ilani right now, Pi'ilani Promenade is
6 prepared to invest significant funds towards the
7 installation of infrastructure which is critical not
8 only to the Project they want to build but to the
9 whole Kihei-Makena community.

10 That infrastructure includes bikeways,
11 sidewalks, a 1 million gallon capacity water tank,
12 drainage improvements, wastewater connections, the
13 Kihei Upcountry Highway Development which you've heard
14 testimony that Maui's been waiting for years for that.
15 Signalization in connection with Pi'ilani Highway, an
16 electrical subdivision for Maui Electric Company, and
17 a dedication of electrical easements amongst a lot of
18 other infrastructure improvements.

19 Majority of these aren't directly tied to
20 the Project but benefit the community as a whole. And
21 they're based on the requirements that have been
22 established either under the Order at issue today or
23 coordinated with the Department of Transportation and
24 with the county of Maui.

25 Over 20 million is going to be spent

1 addressing these water, infrastructure and highway
2 improvement and other infrastructure just on that
3 alone before we even get to building the Project that
4 will benefit my client.

5 The construction plans for the installation
6 of this infrastructure have been reviewed and approved
7 on multiple occasions. And some further approvals are
8 still pending. But they've been reviewed by the Maui
9 Department of Public Works, the Maui Department of
10 Water Supply, the State Department of Health
11 Environmental Management Division and the Highways
12 Division of the DOT, Department of Transportation.

13 Pi'ilani Promenade's ready to invest this
14 money into the infrastructure. Movants now are
15 requesting that the Commission enter an Order to Show
16 Cause and ultimately requesting they reclassify this
17 land to Agriculture, a classification which is
18 completely inconsistent with the installation of this
19 much needed infrastructure.

20 Now, on a Motion for Order to Show Cause
21 the burden is on the Movant. It's not on Pi'ilani
22 Promenade. It's easy to think this is a preliminary
23 step and that you should just push it on to the next
24 level. But right now the burden is on the Movant to
25 show certain requirements.

1 And in order to prevail under the rules it
2 says, "The Movant must identify, "No. 1. The condition
3 or conditions ordered by the Commission, which has not
4 been performed or satisfied and 2. Particular facts
5 showing that that condition has not been satisfied."

6 This case we respectfully submit they have
7 not done that. They haven't met that burden. In
8 order to issue the Order to Show Cause the Land Use
9 Commission has to have reason to believe there's been
10 a failure to perform a condition.

11 Now, Movants said something about some
12 Supreme Court saying this is low threshold. There's
13 no Hawai'i Supreme Court decision interpreting that.
14 They have analogized to this being like a suspicion
15 that will allow you to do a search and seizure.
16 That's not the law.

17 The law is they've got to show facts that
18 demonstrate that a specific condition has been
19 violated. And they haven't done that in this case.
20 They haven't identified a single condition that's been
21 violated or any representation that hasn't been lived
22 up to.

23 They cite the two conditions: 15 and
24 Condition 5. I'm going to focus first on Condition
25 15. That condition has not been violated. Condition

1 15 requires the landowners to develop the property in
2 substantial compliance with the representations made
3 to the LUC.

4 So really the question for you today is:
5 What representations were made to the LUC back in
6 1995? We don't have to guess on that. There's a
7 record of that.

8 And in our Petition we have set forth the
9 fact that what was represented is precisely in line
10 with what's being done today. The Petition itself
11 indicated that subdivision would be both commercial
12 and Light Industrial. That's first of all, and got
13 into more detail in some of the exhibits that were
14 submitted with the Petition.

15 There was a market feasibility study,
16 Exhibit 5 top the Petition, that was submitted. It
17 was a study done by Lloyd Sodemani. And it made clear
18 that other permitted uses were, all of those were
19 within the M-1 zoning. You heard a lot of testimony
20 from Mr. Spence and Ms. Cua regarding what that means.

21 M-1 zoning is tiered zoning that includes
22 all these different uses. Includes, for instance, M-1
23 zoning: Candy stores, book stores, drug stores
24 florists, grocery stores, auditoriums and theaters,
25 business offices and agencies, restaurants, jewelry

1 stores, a whole variety of other businesses the type
2 of have which you would expect to see in a retail
3 shopping complex like Pi'ilani Promenade is proposing
4 to build.

5 Now, Mr. Sodemani described possible
6 tenants in his market study. He had three different
7 classification of possible tenants. And you heard
8 Mr. Pierce say that this was all supposed to be for
9 local entrepreneurs. Instead we've got these national
10 retailers and fast food coming in.

11 But if you look at what Mr. Sodemani said,
12 and I'm going to quote here, this is in the market
13 report that was submitted to the Commission. This is
14 a representation made by the Petitioner.

15 Quote, "The third category of occupants are
16 generally long-term lessees. These occupants require
17 the best possible visibility advantage from highways
18 and streets. The expectation is that other investors
19 will purchase the land, develop improvements for
20 multi-tenant use and have a long-term lease with
21 occupants. Examples of these occupants are: Discount
22 retailers, auto part sellers, furniture and appliances
23 sales, sportswear and equipment, wholesale food
24 distributors, fast food outlets, et cetera."

25 That's a direct quote from what was

1 represented to the Commission back then.

2 The second part goes on to note, quote.

3 "The success of marketing these parcels will depend on
4 the success of obtaining popular and internationally
5 recognized outlets to occupy the larger parcels."

6 That was what was represented to the Council.

7 Finally, and perhaps most importantly, he
8 made clear in his report that the proposed
9 development, the 163-lot subdivision that they're
10 saying, 123-lot subdivision that Mr. Pierce claims we
11 are wedded to says, "The estimates of lot sizes,
12 quantity and values are provided for planning purposes
13 only. It's only one conceptual alternative which
14 meets current market conditions with considerations
15 for economic, social, physical variables. These
16 estimates require reassessment from time to time and
17 may need to be adjusted accordingly." In other words,
18 the market was going to drive this.

19 There's also attached to the Petition
20 Exhibit 6 which was a project assessment report. And
21 in that the map, which had the 123-lot subdivision,
22 they described the 123-lot subdivision as part of a
23 conceptual plan. It exactly was. It was one
24 conceptual plan.

25 They also note that the proposed, and I

1 quote, "The proposed Project is anticipated to contain
2 commercial and Light Industrial uses. These could
3 include commercial, retail and service
4 establishments." It goes on to say on the next page,
5 quote, "The success of marketing these parcels will be
6 dependent on the success of obtaining popular and
7 internationally recognized outlets to occupy the
8 larger parcels."

9 That's what Pi'ilani's doing. It's doing
10 exactly what was represented to this council --
11 Commission. There's further testimony at the hearing
12 before this council (sic). More representations were
13 made. Mr. Sodehani testified at that hearing. And he
14 was questioned specifically by Commissioner Kajioka
15 who noted that there were all these permitted uses
16 within the Light Industrial zoning classification.

17 He said, "This zoning classification,
18 quote, "appears to be pretty broad: B-1, B-2, B-3
19 districts permitted uses. Even apartment houses are
20 permitted in light industrials. In other words, we
21 could have an preponderance of retail service-type
22 establishments in this."

23 In response Mr. Sodehani on behalf of the
24 developer who did the market study said, "Yeah, this
25 is a possibility but in today's market it's more

1 likely it will be light industrial." Then
2 Commissioner Kajioka pointed out, "But there's no way
3 you can stop them." Meaning there's no way you can
4 stop it from being a hundred percent retail or from
5 retail coming in. And Mr. Sodetani agreed. And he
6 indicated the market would dictate whether this
7 occurred.

8 It was clear to the Commission that retail
9 in part or even as a predominance was a possibility.
10 That was what was represented to the Commission. The
11 Commission could have put conditions in there limiting
12 what the Petitioner could build on the property. They
13 did not.

14 Based on all the foregoing the Land Use
15 Commission was aware of the possibility of the
16 property could be developed, include a substantial
17 amount or even a hundred percent of retail and also
18 include apartment use. Despite knowing this they
19 chose not to put any sort of limiting condition in
20 there.

21 Now, there's been some indication that this
22 is completely different; that we represented it would
23 be a Light Industrial and commercial subdivision and
24 that the current plan for this shopping complex would
25 be fully retail. That's not necessarily true. That's

1 speculative.

2 Pi'ilani's still in the negotiation stage
3 as to its potential tenants. No leases have yet been
4 signed. In fact they can't sign any leases under the
5 current status of the Project.

6 But they're currently looking for a
7 potential tenant to provide a home improvement
8 warehouse type of business that would supply
9 contractors and tradesmen as well as the general
10 public.

11 We would submit that that type of use is
12 the light -- would qualify as Light Industrial under
13 any definition.

14 I'd like to touch briefly on Condition 5
15 regarding the traffic condition that was put into the
16 Order. That also has not been violated. Condition 5
17 is very lengthy.

18 It talks about roadway improvements to make
19 sure that -- the idea being to make sure that the
20 Petitioner, more so the Department of Transportation,
21 would put in appropriate roadway improvements. And
22 the language that they quote to specifically says,
23 "Petitioner shall provide for frontage road parallel
24 to Pi'ilani Highway and other connector roads within
25 the Petition Area in coordination with other

1 developments in the area with the review and approval
2 of the state Department of Transportation and the
3 county of Maui."

4 Now read as a whole this condition is clear
5 that the roadway improvements, including signalization
6 of the intersection and other necessary frontage,
7 would be left to the discretion of the Department of
8 Transportation and the county. That's exactly what's
9 happened in this case.

10 There's been multiple traffic assessments.
11 And there's one currently pending before the DOT. The
12 DOT has expertise regarding traffic in this area.
13 It's up to them to make sure that the Project is
14 constructed properly to address traffic concerns. And
15 that's exactly what they're doing.

16 The idea behind the frontage road
17 presumably was to allow or to preclude each of these
18 123 different lots from having -- or a number of them
19 from having an egress onto Pi'ilani Highway which
20 could cause major traffic problems.

21 The idea was to limit it to a single
22 entrance off Pi'ilani Highway to minimize the number
23 of cars that -- or number of places the cars would
24 turn there. And that has been achieved under the plan
25 that's being worked out with DOT. There's one ingress

1 and egress point on the property.

2 This Commission wisely left it up to the
3 Department of Transportation to meet -- to make sure
4 that the traffic needs were met. And, you know, this
5 is really illustrated by the fact that the
6 circumstances have really changed since when this
7 Order was issued in 1995.

8 Since then the state and county determined
9 that the property itself, the one that, the subject
10 Order is going to be bisected by the future Upcountry
11 Kihei Highway which is something that the first part
12 of which my client is prepared to put in.

13 Also Pi'ilani itself has changed
14 dramatically with further infrastructure. And there's
15 going to be further improvements when signalization's
16 put in by Pi'ilani Promenade.

17 The LUC -- it's important that the LUC
18 consider the traffic implications when they reclassify
19 the land from Agriculture to Urban, but it should
20 leave the details of that up to the Department of
21 Transportation and the county of Maui. That's what it
22 did. And, therefore, there's been no violation of
23 that condition.

24 Essentially, and in conclusion, Movants
25 have failed to identify a single representation or

1 condition that's been violated. They claim that it
2 was represented that the only thing that would be
3 built would be this 123-lot commercial subdivision.

4 But as I've read into the record today,
5 those are all direct quotes in the record, it was, in
6 fact, represented to this Commission that that was one
7 conceptual plan and that the market would drive what
8 was built, and that the national retailers and the
9 type of development that's being developed today was a
10 distinct possibility being driven by the market.

11 We respectfully request that the Commission
12 deny the motion because there has been no showing that
13 any condition has been violated. Thank you.

14 VICE CHAIR HELLER: Mr. Kam.

15 MR. KAM: Thank you. Again, my name is
16 Joel Kam. I'm on here on behalf of Honua'ula
17 Partners. While a lot has been said so far, and I'm
18 not going to go into quite as much detail as
19 Mr. Steiner, but from Honua'ula's perspective there
20 are two concepts that we think are important and that
21 we would ask the Commission to keep in mind as you
22 deliberate on this motion.

23 The first concept is that the Commission
24 should really focus on the conditions that are
25 specified in the D&O. There's been a lot of

1 discussion about findings, representations, what was
2 submitted to the Commission both during the hearing
3 and after at rezoning.

4 And in our view the most important thing,
5 the most significant thing is to focus on the
6 conditions that are set forth in the D&O. And the
7 reason why that's most significant is because the Land
8 Use Commission statute Chapter 205 expressly requires
9 the Commission to impose conditions that are necessary
10 to assure compliance with the representations that
11 were made.

12 I'd like to read just for purposes of the
13 record what the statute says. HRS 205-4(g) says, I'll
14 paraphrase just a little bit: The Commission shall
15 act to approve the Petition, deny the Petition or to
16 modify the Petition by imposing conditions necessary
17 to uphold the intent and spirit of this chapter or the
18 policies and criteria established pursuant to section
19 205-17, or to assure substantial compliance with
20 representations made by the Petitioner.

21 So what that means is if there isn't a
22 condition in the D&O, it probably wasn't that
23 important. The conditions represent the checklist of
24 all the things that the Petitioner needs to do in
25 order to assure compliance with what was represented

1 the Commission during the hearings. That's what the
2 statute says. That's the first concept, focus on the
3 conditions.

4 The second concept is the LUC, and any
5 administrative agency for that matter, has to be
6 specific about the conditions that are imposed. That
7 concept derives from a Hawai'i Supreme Court case
8 called Lanai Company vs. LUC.

9 In that case there was a condition in the
10 D&O that prohibited the Petitioner from using potable
11 water from an aquifer to irrigate a golf course.

12 The LUC tried to say that: What we really
13 meant by that condition was that no water, whether
14 potable or not, could be used to irrigate the golf
15 course. The basis for the Commission's belief that
16 that was what the condition required were
17 representations made by the Petitioner in the original
18 hearing, but the Hawai'i Supreme Court disagreed.

19 The Hawai'i Supreme Court said: You cannot
20 enforce an interpretation of a condition that has not
21 been expressly adopted. The Court said, and I'll
22 quote, "The LUC cannot now enforce a construction of
23 Condition 10," that was the potable water condition,
24 "that was not expressly adopted. An administrative
25 agency such as the LUC has the responsibility of

1 stating with ascertainable certainty what is meant by
2 the conditions it has imposed."

3 In other words, the Court is saying that
4 enforceable conditions must be specifically expressed
5 in the D&O so that it's clear to anyone reading the
6 condition what was meant.

7 So the two concepts we would respectfully
8 ask the Commission to focus on are 1. Focus on the
9 conditions. And 2. Focus on the specific.

10 Now, in this case there's already been
11 testimony, and we've argued it in our submissions,
12 that there are no specific conditions in the D&O that
13 restrict the land to any particular use whether it's
14 industrial or any quantum of industrial or commercial
15 use.

16 The Commission could have done that. And
17 actually the statute requires that the Commission do
18 that if it's necessary to assure compliance with the
19 representations that were made. But that wasn't done.

20 The Commission did not impose any specific
21 condition requiring exclusively or any particular
22 amount of any particular type of use.

23 And following the Lana'i Case it would be
24 inappropriate for the Commission to now interpret the
25 D&O whether it's Condition 15 or any other condition,

1 in a way that requires or prohibits particular types
2 or amounts of uses. Thank you very much.

3 VICE CHAIR HELLER: Ms. Lovell, are you
4 going to present the County's argument?

5 MS. LOVELL: Yes. Thank you very much.
6 Coming in this order of lineup many of the points that
7 I was going to present have already been presented.

8 But just following up on Mr. Kam's last
9 argument, I think it's very important and that's where
10 I would like to start off.

11 In 2004 in the Lanai Company, Inc. vs. Land
12 Use Commission case, which is 105 HI 296, the Hawai'i
13 Supreme Court gave guidance to the Land Use Commission
14 and said very specifically, quote, "Parties subject to
15 an administrative decision must have fair warning of
16 the conduct the government prohibits or requires to
17 ensure that the parties are entitled to fair notice in
18 dealing with the government and its agencies."

19 Then it goes on to say, as Mr. Kam
20 indicated, "An administrative agency such as the LUC
21 has the responsibility of stating with ascertainable
22 certainty what is meant by the conditions it has
23 imposed."

24 So this is the guidance that our Supreme
25 Court has given to you that will both help you and

1 which actually must be followed as you consider
2 whether the moving parties have met their burden of
3 proof that there is just cause for an Order to Show
4 Cause to be issued.

5 There is no express condition in the
6 original Decision and Order of the Land Use Commission
7 that would provide any such guidance along the lines
8 that the moving parties are now suggesting be
9 interpreted into that Decision and Order.

10 There are no express conditions limiting
11 the particular uses for this property. And while it
12 is true that this Commission has the opportunity to
13 make restrictive conditions on uses that would be
14 binding on the county in its zoning process, here the
15 Land Use Commission determined not to make any such
16 restrictive conditions, certainly none that are
17 express and easily, and stating with ascertainable
18 certainty what was meant.

19 Now, the Land Use Commission has in other
20 dockets on other projects imposed express conditions
21 on uses. Ann Cua this morning during her testimony
22 pointed out and included the text of one such
23 condition that was adopted in a docket that came
24 before this body in 2004 with respect to a different
25 Project, the Maui Business Park II Project in

1 Kahului.

2 That restriction was very specific. It was
3 Condition 19. And it's entitled "Project
4 composition." That condition says, "For a period of
5 eight years from the date of the County's approval of
6 zoning for the Project, a total of at least 50 percent
7 of the Project acreage shall be used and developed by
8 Petitioner for non-retail Light Industrial use and/or
9 sold or leased to and developed and used by third
10 party buyers for non-retail Light Industrial use."

11 And it goes on even further to give further
12 details to what was allowed in that Project and what
13 was not allowed in that Project.

14 So this Commission knows how to do that
15 kind of thing if that's what the Commission wants to
16 do. And when you have that specific a condition, then
17 the landowner knows how to follow it, and the County,
18 which is ultimately the enforcement arm of this body,
19 knows how to enforce the Land Use Commission's
20 Decision and Order.

21 But here we have no such specificity. We
22 have only a very general statement that the property
23 is to be developed in conformance with the
24 representations.

25 Mr. Steiner went over what the

1 representations actually were at the time that the
2 Land Use Commission originally considered this
3 Project. And the County in its papers referenced a
4 number of those. We've attached them to our papers so
5 that you can see exactly what they were. But all
6 along the way the Project was described as both
7 commercial and Light Industrial.

8 There were representations made that
9 apartment houses could be allowed. There were
10 representations regarding retail projects and what
11 kind of retail would be allowed.

12 So when you look at this particular record
13 and this particular Decision and Order of the Land Use
14 Commission, and if you follow the advice and guidance
15 and indeed the law as set forth in Lanai Company vs.
16 Land Use Commission, the only conclusion that you can
17 come to is that there is not a sufficient basis for
18 going forward with an Order to Show Cause.

19 There is no violation. No violation has
20 been established. Therefore we ask you to deny the
21 Motion. Thank you.

22 VICE CHAIR HELLER: Mr. Yee.

23 MR. YEE: In many ways this case presents
24 to the Office of Planning a primarily legal question,
25 in fact almost a procedural question. Because for the

1 Office of Planning these types of cases are really
2 best heard not as a Motion for Order to Show Cause but
3 preferably as a Motion to Amend.

4 That when a developer comes to you and has
5 a proposed use and later down the line changes that
6 use, the appropriate method, frankly, is to come back
7 to you and say, "We've changed our use. We'd like to
8 amend the Decision and Order."

9 You've done this in other cases. In
10 Princeville, A83-557 they changed the use from golf
11 course to residential, came back you, got an order
12 that allowed to amend.

13 In A99-728 subdocket A. West O'ahu Campus
14 came to you and said, "Well, we were originally going
15 to be put the university campus here. We've changed
16 the location. We need to change the conditions as
17 well. We'd like to amend the Decision and Order."

18 Same thing happened in subdocket B with the
19 Salvation Army's request to build the Kroc Center.
20 They said, "We were originally going to build these
21 commercial. We're not going to do that now. We're
22 going to build the Kroc Center. It's going to be a
23 Community Plan. We need to change the D&O." And you
24 did that as well.

25 You have currently a case before you in

1 subdocket C of that same number 99-728, which the
2 Department of Hawaiian Home Lands is coming to you and
3 saying, "Well, originally this land was to be used for
4 a sports complex but now it's going to be used for a
5 commercial mall." So they've come to you and filed a
6 Motion to Amend. That will, frankly, be heard in
7 September.

8 You probably or very well may be hearing
9 other cases in future developers that made
10 representation, said that the land is going to be used
11 for a particular purpose but things happen. So the
12 developer now will come back to you and say, "I'd like
13 to file a Motion to Amend."

14 That might happen, for example, in Maui R&T
15 which they originally came to you and said -- it's a
16 research and technology park. That's what we will
17 have.

18 We've recently seen an environmental impact
19 statement from them on additional land which they
20 indicate that perhaps they may need to put in more
21 commercial and even residential in both the additional
22 areas as well as the existing Petition Area that has
23 already been urbanized.

24 So, in other words, there is a process
25 which we have done in the past where developers have

1 come to the conclusion that the prior use originally
2 proposed just doesn't work for them anymore. They've
3 come back to you. They filed a Motion to Amend.

4 That's the process the Office of Planning
5 would have preferred rather than an Order to Show
6 Cause. Reversion is not the preferred route. It's
7 not the way in which -- it's not the hammer that we
8 think is the best way to resolve these issues.

9 Petitioner knows about our position. We've
10 told them about that position. Unfortunately the
11 Petitioner has decided not to come to you with a
12 Motion to Amend.

13 So we have no choice except to confront
14 this question through the only process you have
15 available to you today, which is the Motion for Order
16 to Show Cause filed by the Movants.

17 I also want to note before I get into some
18 of the substance is that the Office of Planning is not
19 challenging the County's decision for subdivision and
20 zoning. The County's made its decisions. We're not
21 challenging that decision, but we do note that the
22 issue before you is it not a county decision. It's a
23 state decision.

24 What's required by the LUC may or may not
25 be the same as what's required by the county. That's

1 ultimately your call, not the County's whether or not
2 the county did or didn't grant or properly did or
3 didn't grant any other permit from their perspective
4 really should have no impact on you in determining
5 whether there's been compliance with an LUC decision.

6 So getting to the particular motion before
7 you. I'm going to start with the standard which has
8 been read to you I know before. But I'm going to come
9 back to it again.

10 That is under Section 15-15-49 Hawaii
11 Administrative Rules: You are to determine whether
12 there's reason to believe that there has been a
13 failure to perform according to the conditions imposed
14 or the representations or commitments made by the
15 Petitioner.

16 There's "reason to believe" is the term
17 that you're going to be hearing a few times. That's
18 because there's a clear two-step process in this. The
19 first step is a threshold question.

20 Is there a reason to believe? It's not a
21 determination that there is guilt or that there has
22 been a violation. It's not a determination that this
23 property *should* be reverted.

24 It's only a question of: Is there a reason
25 to believe there's been a failure to perform according

1 to the conditions or the representations or
2 commitments made by the Petitioner.

3 Based on that threshold the Office of
4 Planning believes there's sufficient information to
5 proceed to the next step. The Office of Planning is
6 *not* saying, is *not* saying that reversion is an
7 appropriate remedy in this case.

8 I want to touch on an argument made by the
9 Petitioners that the Land Use Commission might lack
10 the authority to issue this Order to Show Cause. In
11 which they argue in their papers that you don't have
12 that authority because the condition that you imposed
13 was not, I guess, identical to the statutory provision
14 of 205-4(g).

15 In fact some of you may remember years ago
16 under a different administration which I came and
17 asked for an automatic Order to Show Cause condition.
18 I said, well, here's the statute. Here's what the
19 wording of the statute is.

20 All we're asking is to put in the exact
21 same language from that statute in case the Petitioner
22 does not comply with the infrastructure deadline. And
23 I argued that to you.

24 And the Land Use Commission rejected that
25 argument, did not impose that condition because they

1 said -- and developers at the time were saying, "No,
2 don't do that. Because if you have this automatic
3 Order to Show Cause it's going to be so difficult for
4 me to find financing if everybody knows that at any
5 moment the Land Use Commission might change my
6 reclassification."

7 So now we have a developer who comes in and
8 says: Well, you have a statute. The statute says you
9 have to impose this condition. That's not the
10 condition you imposed.

11 The Office of Planning thinks you need to
12 be consistent. You decided that you were not going to
13 impose that condition in those other cases. Clearly,
14 I think you have to be consistent with that and uphold
15 the condition in which you say basically the Order to
16 Show Cause may be issued, not shall as required by --
17 as stated in the statute, but may impose one *if*
18 there's been a failure to comply with the
19 representations.

20 Furthermore, in the Lana'i Company, Inc.
21 case which has been cited by the other parties, the
22 Supreme Court said, "Absent substantial commencement
23 of use of the land in accordance with such
24 representations made in seeking the boundary change,
25 the LUC is expressly authorized to order a reversion

1 of land to the prior classification."

2 So the Hawai'i Supreme Court has found that
3 you have the authority to issue an Order to Show
4 Cause.

5 The Petitioners also raise a ripeness
6 question. They suggest that, well, you know, they
7 haven't even done the mass grading yet. They haven't
8 actually built something. Therefore this issue is
9 not ripe. You can't find we violated a condition
10 because we have not yet built the structure.

11 The problem with that is that zoning and
12 subdivision has already been granted. As Ms. Cua
13 testified, there are no other county discretionary
14 permits were needed in this case.

15 So if you waited until after the structures
16 were built to figure out whether or not they are in
17 compliance with the representations, the developer is
18 gonna come back and say: "Well, having spent a
19 hundred million dollars to put in these structures you
20 can't take away my land use classification. I'm
21 claiming estoppel."

22 So in terms of ripeness I think that now is
23 an appropriate time to review the question. And that
24 if you wait too long until after hundreds of millions
25 of dollars are spent on the vertical construction that

1 then becomes too late. So we don't think the ripeness
2 question is valid.

3 Now, I want to be clear that the Office of
4 Planning's view on the failure to comply with
5 representations. And there's been an argument well
6 that the condition is not clear and you're focusing
7 too much on the Findings of Fact or the
8 representations rather than the condition itself.

9 But the Office of Planning's view is the
10 condition itself is clear. The condition says: You
11 must substantially comply with your representations.
12 And if not you may, *may* have an Order to Show Cause
13 and your property may be reverted.

14 So because the condition which says
15 "substantially comply with the representations," we
16 then look to the Findings of Fact, for example, to
17 determine what are those representations.

18 And it's clear that, for example, in
19 Finding of Fact 32 they talked about the industrial
20 use that was proposed for this property. And from the
21 Office of Planning's viewpoint the problem with the
22 Project, at least as we initially see it, is not that
23 there *is* commercial but that we cannot find a light
24 industrial use anywhere in the documentation or the
25 current proposed use.

1 Now, Petitioner did come back and say:
2 Well, we're looking at an additional tenant who might
3 put in a home construction warehousing set of
4 businesses. But, 1. That's not in the record. And
5 2. Based upon the information we have in the mass
6 grading and subdivision requests, the requests that
7 they submitted to the county have no indication of
8 that, making it clear that what they're proposing to
9 build is a mall or two malls or two related malls.
10 And those are not Light Industrial.

11 So perhaps if we proceed to the next step
12 and there's been a further change in use and the
13 Petitioners want to bring further evidence about the
14 home construction portion of this, we're certainly
15 open to reviewing that.

16 But based on the record that we've seen
17 that is before you today, the representation -- I'm
18 sorry. The representation was that this will be used
19 for Light Industrial and commercial. And the proposed
20 use as set out in the county permits, county permit
21 applications, is that it would only be used for
22 commercial and there is no Light Industrial aspect to
23 this.

24 Furthermore, it is clear that there was no
25 discussion in the prior statements in 1995 through

1 1998 that there would be any residential housing.
2 There was discussion that Light Industrial zoning
3 allows apartments. That's true. But the Petitioner
4 never said that they would build apartments.

5 The LUC just noted, well, Light Industrial
6 doesn't allow apartment construction. But at no time
7 did the Petitioner ever represent they were going to
8 build apartments. What they represented was they're
9 going to put in Light Industrial and commercial.

10 So the inclusion of residential -- I'm
11 sorry. Let me backtrack a step because the use is
12 very, very important. It's probably one of *the* most
13 important representations that any developer will make
14 in their petition.

15 In your rules section 15-15-50(c)(6) you
16 require each Petitioner to state what is the proposed
17 use, whether it's residential, whether it's
18 commercial, whether it's industrial. You recognize
19 that these are different uses in the rules because
20 it's important to know what that use is. It's
21 important because the use determines the impact.

22 And as most of you probably know ever since
23 the Towne vs. the Land Use Commission Decision the
24 Land Use Commission must do an individualized
25 case-by-case analysis. So you don't just look

1 generically at land and say: Okay. This area should
2 go urban. This area should stay ag.

3 You look at a proposed use by an individual
4 petitioner for a particular parcel of property and
5 then analyze what the impacts are under the criteria
6 set forth in the statute. And based upon that you
7 make the decision as to whether or not the property
8 should be reclassified.

9 You cannot do that if you don't know what
10 the use is. The use determines the impact. And
11 because the use of residential was not included there
12 was no analysis of what the impacts were down below.

13 Now, Petitioners have come back and made
14 several other arguments. One is what I call the
15 double negative argument. And that is the developers
16 argued: We did not say that we would not build
17 apartments. Therefore you can't hold us or you can't
18 prohibit us from putting in apartments now.

19 But we never require developers to tell us
20 what they're not going to build. You don't ask them:
21 Are you going to put in a nuclear power plant? Are
22 you going to put in a landfill? Are you going to put
23 in a hazardous -- or a waste incinerator?

24 We ask them to require as required by the
25 rules: "What are you going to build?" And then hold

1 them to those representations.

2 Developers also argue that while they only
3 submitted a conceptual plan, because it's a conceptual
4 plan there's going to be changes so they cannot be
5 held responsible for those changes.

6 And it is true that developers as they come
7 to you do provide to you a conceptual plan. They
8 certainly do not -- we do not require them to come up
9 with technical drawings. We acknowledge that there
10 are changes that occur in the land use process in
11 zoning and subdivision. So we certainly understand
12 there's some need for flexibility as developers come
13 to you.

14 On the other hand there's also a need for
15 reliability. You need to know what they're going to
16 do at least in some general terms to allow you to do
17 the case-by-case analysis required by Towne vs. Land
18 Use Commission. And if you don't know what the use
19 is, if you cannot rely upon those representations of
20 use, then you also cannot do your job in analyzing the
21 impacts and reviewing the criteria set forth under
22 the statute: What are the impacts to natural
23 resources, et cetera.

24 And so somehow the Land Use Commission must
25 be able to accommodate both concerns of flexibility as

1 well as reliability in order to do your job. From our
2 perspective substantial compliance with the
3 representations draws that balance.

4 So we don't list everything the developer
5 can do. We allow them to come in with a conceptual
6 but we do not allow that "conceptual plan" label to
7 avoid responsibility for the their representations.

8 They also argue that there was no specific
9 condition prohibiting residential or requiring a
10 certain percentage of commercial. And while it's a
11 factually correct statement that is not necessarily
12 determinative of this analysis. There is a condition
13 that says "substantially comply with their
14 representations."

15 There are Findings of Fact that sets out
16 what some of those representations are, more
17 specifically, that they were going to be put in Light
18 Industrial. By the way I should add that Finding of
19 Fact, I think it's 32, set out what Light Industrial
20 meant: Warehousing, et cetera. Commercial is not in
21 there.

22 The Finding of Fact also had -- by the way
23 Finding of Fact 21 also had the lots of 123
24 individually owned lots. That is a substantially
25 different configuration than what we have here. I

1 should note that that configuration of lots is an
2 emphasis that there's been a substantial change in the
3 plan.

4 That what they -- the Project that they
5 submitted to you back then and the Project they
6 submitted to you now are different because when you
7 compare 123 lots to 4 lots, at least 4 major lots,
8 that's just very, very different.

9 If this was a case in which they were
10 changing from 123 lots to 89 lots we would have a
11 different question. But this is a substantive
12 difference. It puts an exclamation point to the
13 argument that the change in use has occurred.

14 Going back to the argument that they have
15 made that there is no specific condition. There is a
16 specific condition. It requires compliance with the
17 representations. So we think the fair notice of the
18 condition has been made. And that the Petitioners are
19 deemed to have fair notice of the representations they
20 made especially where those representations are
21 contained in the Findings of Fact in your Decision and
22 Order.

23 Next I just wanted to note that there is an
24 argument that they're making that the impacts have
25 been accounted for under existing conditions. So they

1 said, for example, "Well, the Department of
2 Transportation's reviewing the traffic impacts. Leave
3 it to them."

4 And while -- and I will note that the
5 Office of Planning listed a variety of potential
6 impacts that could be different. We don't know for
7 sure. We haven't set the record. That's an issue
8 that would be looked at if you move forward to the
9 next step.

10 But we see a variety of facts that could
11 occur simply because there's a change in use. And
12 these impacts could be more, could be less or could be
13 just different. So perhaps there's no need for a
14 frontage road now as required under the existing
15 condition. And that requirement should be deleted.

16 Perhaps there is a need for a contribution
17 for educational -- for an educational contribution
18 that should be added. Perhaps the wastewater is
19 completely resolved and no change needs to be made.

20 The point is not that we know what those
21 impacts are definitely going to be or what they have
22 definitely changed. It's only that you have not
23 analyzed those impacts back in your original Petition.
24 And therefore there's a reason to believe that there's
25 been substantial failure to comply.

1 So all of these are issues that they've
2 argued regarding the impact that may be legitimate
3 questions to consider in the next hearing. But for
4 purposes of today there's a sufficient basis to
5 conclude or really to get back to the wording:

6 There's reason to believe there's been a
7 failure to perform according to the conditions imposed
8 or the representations or commitments made by the
9 Petitioner. Thank you.

10 VICE CHAIR HELLER: Going to give each of
11 the parties a brief, and I want to emphasize a *brief*
12 opportunity to present any rebuttal argument and we'll
13 go to questions by the Commissioners. Mr. Pierce.

14 MR. PIERCE: Thanks for the additional
15 time. Mr. Steiner began by identifying all the good
16 infrastructure that could come from this Project
17 they're proposing.

18 If this is a good idea, why are the
19 landowners afraid to go to through the public process
20 and the public agency review process that every other
21 landowner and every other developer is required to do?

22 So we're not here to say today whether
23 those are good ideas or bad ideas or great
24 infrastructure that might really benefit parts of the
25 county. But that is something that needs to be

1 vetted. It needs to be reviewed by the Land Use
2 Commission and it hasn't.

3 Mr. Steiner spoke of Mr. Sodetani's
4 testimony. And I will jump here to something where I
5 agree with his co-counsel, Mr. Kam. He emphasized
6 that the focus -- his words, quote, "The focus is on
7 the conditions in the Order."

8 You won't find Mr. Sodetani's testimony in
9 that Decision and Order. What you do find is the
10 summary of a lot of testimony and summary that was
11 given an opportunity of all the parties that were
12 there, that included the county of Maui and the
13 Petitioner to have their say. And at that point the
14 Commission then concluded and did what it has the
15 authority to do and said, "These are the Findings of
16 Fact." No one appealed that Order.

17 So we agree with Mr. Kam you've got to look
18 at the four corners of this document what essentially,
19 and we've seen this already in the briefing. And it's
20 probably a way, a preface what is to come in the
21 hearing which we hope to have, is that the County and
22 the landowners would like for you to essentially go
23 back, look at all that testimony and reinterpret it.

24 That's not your job here today. That's
25 water under the bridge. We are here to interpret

1 what's in the four corners of this document.

2 With respect to Condition 5: Condition 5
3 is the one that related to the connector road. And
4 Mr. Steiner urged you to let that be something that
5 goes to the authority of the Department of
6 Transportation. But that's absolutely counter to the
7 express language in Condition 5.

8 It says, "Petitioner shall provide for a
9 frontage road parallel to Pi'ilani Highway and other
10 connector roads within the Petition Area."

11 And we've cited the case when an
12 organization, an agency like this uses the word
13 "shall" it means "shall". There's not room there.
14 Now, once again, as Mr. Yee has pointed out, the
15 Petitioners chose not to at an early stage, whatever
16 that was a year ago or more, to file a Motion to
17 Amend. That issue is not before us. But certainly
18 they could say: Look, there's been changes. There's
19 something else that should be happening, but in the
20 meantime this is what we have here.

21 In fact the county and the other
22 respondents have focused on the fact that if there's
23 some express language in here it certainly is express.
24 We would say that was an express requirement.

25 It did -- the Condition 5 did require the

1 landowners to go obtain review and approval of the
2 frontage and connector roads from the Department of
3 Transportation. But the Department of Transportation
4 must do so consistent with this Order. The Lanai
5 Company Case, I would agree with what the Office of
6 Planning has said about it.

7 Essentially we don't have a new condition
8 here. We are not asking you to place new conditions.
9 We are focused once again entirely on this document.

10 Now, it's very clear that we interpret some
11 of the conditions in here differently from the
12 Respondents. But the conditions certainly are here.
13 And as long as that's here the Lanai Company Case is
14 not even an issue.

15 And on that point what the Respondents are
16 asking you to do is to really avoid any focus on large
17 parts of the Order. And Mr. Yee's already pointed
18 this out so I won't spend much time on it. But the
19 Findings of Fact, you know, when you look at the
20 requirement that they do this with respect to the
21 representations, the representations that we have that
22 are before you today are the ones that are in that
23 Order.

24 We have identified those in our reply, some
25 of them on Page 8. We identified 2, 4, 6, 8, 9

1 different ones that all used the word "Light
2 Industrial" in it.

3 The first one Finding of Fact 21
4 "Petitioner proposes to develop the property as the
5 Kaonoulu Industrial Park, 123-lot commercial and Light
6 Industrial subdivision. Improved lots are proposed to
7 be sold in fee simple or leased on a long-term basis.
8 The size of the lots will range from approximately
9 14,000 feet to 54,000 square feet."

10 The rest of the Conclusions of Law and the
11 Decision and Order has to be based upon those kinds of
12 Findings of Fact that you see here. And what we would
13 submit is that if, in fact, the Petitioner initially
14 had said: You know, we really want to have our
15 options.

16 One of the things that's on the floor is
17 we're thinking about doing some substantial retail or
18 we actually think that we would like to have the
19 option open to doing affordable housing.

20 If that had been presented in that way to
21 the Commission, the Commission's conditions very
22 likely might have been different. So, so what they're
23 attempting to do at this stage with the new landowners
24 is to say: We're gonna take -- and I think this
25 actually goes to a precedent setting thing here for

1 the Commission to consider -- you know what the
2 Respondents are encouraging you to do is to let this
3 slide by, which will tell every landowner that the
4 best thing they can do when they come before an agency
5 is to give you the most benign proposal they can
6 because anything goes after that, according to them.

7 And on that point I would just point out
8 that although the County has pointed on several
9 occasions to the Maui Marketplace as one example where
10 there was an express condition to limit the amount of
11 retail, one of the things that wasn't presented is
12 what the proposal was. What did the Petitioner
13 actually present at that meeting?

14 That could very well be very different and
15 in such a light where actually the Commissioners were
16 on notice of the possibility of some more difficult,
17 some more intensive kinds of uses and they would
18 therefore have been aware that they should put
19 different conditions on.

20 Then going just real briefly to one of the
21 things that the Office of Planning had to say with
22 respect to their preference if this had been a Motion
23 to Amend. Obviously the landowners did not file a
24 Motion to Amend, which forced us to do this.

25 And currently the only option given to the

1 Land Use Commission is the power of reverter. I would
2 just point out the Hawai'i Supreme Court has, as does
3 the statute and in your Administrative Rules, makes it
4 clear that it's the planning director that is required
5 to enforce the conditions.

6 But we've heard from the planning director
7 before and we heard him again today that they believe
8 that there are no conditions here.

9 So we can't get -- the public can't get
10 relief through the County. So at least at this stage
11 the issue of a Motion to Amend is it not before the
12 Planning Commission. We would just point out that
13 even the issue of reverter is not before that. So we
14 need not go to that step yet. We're just asking to
15 take it to the first step of having that Order to Show
16 Cause issued.

17 VICE CHAIR HELLER: Mr. Pierce, I did say
18 "brief" rebuttal.

19 MR. PIERCE: That's good right there.
20 Thank you.

21 VICE CHAIR HELLER: Okay. For the benefit
22 of our reporter let's take a 10-minute break, and then
23 we'll finish up.

24 (Recess held)

25 VICE CHAIR HELLER: (2:10) Back on the

1 record. I think we just had rebuttal by Mr. Pierce.
2 Mr. Steiner, brief rebuttal.

3 MR. STEINER: Thank you. I'll keep this
4 very brief. I just had two points of rebuttal that
5 I'd like to make. The first has to do with Mr. Yee
6 from the Office of Planning indicated that there's a
7 procedure where you could come in with a Motion to
8 Amend the Petition.

9 And our position is that we're not in
10 violation of the Petition so there's no need to come
11 in to move to amend. And moving to amend would be
12 essentially concluding that what we're doing is
13 inconsistent and in violation of the Petition. And
14 Pi'ilani Promenade is not, I think as we've
15 demonstrated.

16 He cited to a whole bunch of different
17 instances and gave docket numbers of different matters
18 where other landowners have come in where they changed
19 the use and they petitioned to or they moved to amend
20 the Decision and Order.

21 And because none of those were cited in
22 their papers I haven't had a chance to pull up and
23 look at any of those. But, you know, I suspect that
24 chances are if you look at those there's probably a
25 specific condition that they were concerned with and

1 that their changed use couldn't fill. That's likely
2 why they would have moved to amend.

3 But in this case there's no condition that
4 has been violated or that is inconsistent with what
5 the Pi'ilani Promenade is planning to develop.

6 And, therefore, there is no reason to come
7 in and delay this Project additionally with the Move
8 to Amend when we're ready to create these jobs and put
9 in this important infrastructure.

10 And also Mr. Pierce indicated that in the
11 instance where a -- that Ms. Cua testified regarding
12 an instance where a specific condition regarding
13 restricting uses put in, and I think Ms. Lovell quoted
14 that condition, Mr. Pierce said, "Well, in that case
15 they probably had notice that there was any possible
16 other use."

17 Well, as I've indicated by what was read
18 into the record, the Land Use Commission was on notice
19 that there were all these other possible uses. It
20 said in the market report that the market would drive
21 what would be developed and that this is one
22 conceptual plan. And it isn't an instance of where we
23 have to prove there's a double negative.

24 It was clearly set forth that this is a
25 conceptual plan, that the market would drive what was

1 being put in here, this is going to be a Commercial
2 and Industrial, and Light Industrial subdivision. So
3 the possibility of commercial use is in there.

4 I think that at the end of the day if you
5 look at what was actually represented to the
6 Commission in this case it's consistent with what's
7 being built today. They presented a conceptual plan.
8 They made it clear that the market would drive what
9 went in here.

10 They made it clear that they were going to
11 be looking for these internationally and nationally
12 known brand name tenants in order for this Project to
13 be successful. And that's exactly what they're doing.

14 Therefore there is not, in this case, any
15 reason for this court to reasonably believe that the
16 conditions have been violated. For that reason the
17 motion should be denied and the Project should be allowed
18 to proceed forward.

19 VICE CHAIR HELLER: Mr. Kam.

20 MR. KAM: Thank you, Mr. Chairman.

21 Honua'ula Partners also believes that it is not in
22 violation of the Decision and Order. And therefore no
23 Motion to Amend is necessary or called for. So that
24 is why a Motion to Amend has not been filed to date.

25 I want to respond briefly to the Office of

1 Planning's position that the current owners and
2 developers of the property need to comply with every
3 single representation that was made or may have been
4 made by the original Petitioner.

5 I think Mr. Yee said in his argument that
6 we don't need to worry that there isn't a specific
7 condition that restricts the use because we have
8 Condition 15 which says that the Petitioner has to
9 comply with all the representations. And
10 representations were made about the use.

11 You know, if Mr. Yee's position is correct
12 what that would mean is that every petitioner,
13 whenever there's the slightest change in a proposed
14 use or proposed development compared to what was
15 originally presented to the Commission, every single
16 time there's the slightest change you would need to
17 come back and move to amend the D&O or get the
18 Commission's specific authorization for that
19 particular use.

20 We would submit that that's just an
21 impractical understanding of how the land use
22 decisions are supposed to work. And that is not what
23 the statute or the Land Use Commission's rules
24 require.

25 I think the thing that is the most

1 significant is that the Hawai'i Supreme Court itself
2 disagrees with Mr. Yee's position about the
3 significance of that one condition.

4 The Lana'i Case stands for the clear
5 proposition that the Commission must be specific about
6 the conditions that it expects to enforce and hold the
7 Petitioner to. It is the specific conditions that
8 control. And the Commission cannot rely upon a
9 general condition to impose a requirement that's not
10 expressly stated in the Decision and Order.

11 Finally, I want to respond to something
12 that Mr. Pierce said in his argument. I think he said
13 at one point that once the Commission issues its
14 decision, after that all bets are off and that
15 anything can be done. That certainly is not the case.

16 Zoning must still be complied with. And
17 under the specific conditions that are set forth and
18 that are normally included in all of your D&O's, the
19 development of the property must be done in
20 coordination with county and state agencies. And it's
21 not a situation where the developer can just do
22 whatever it wants.

23 There are still -- there's still
24 cooperation with the municipalities and other state
25 agencies that must occur. And there are still -- the

1 petitioner is still subject to the enforcement power
2 of the County to enforce the conditions that the
3 Commission has adopted. That's the way the system
4 works.

5 And we submit that Honua'ula Partners is in
6 compliance with all the specific conditions in the D&O
7 and even the general condition because there were
8 representations made about commercial and apartment
9 uses during the original hearing. Thank you very
10 much.

11 VICE CHAIR HELLER: Thank you. Ms. Lovell.

12 MS. LOVELL: Thank you. Mr. Pierce, I
13 heard him say that the county and the landowner here
14 want the Land Use Commission to go back and
15 reinterpret the Land Use Commission's Decision and
16 Order. In fact we want the exact opposite. We
17 believe that the original Decision and Order does not
18 require interpretation. It says what it says.

19 And in fact the Lanai Company vs. Land Use
20 Commission Supreme Court case from 2003 says very
21 expressly that the "Land Use Commission's orders
22 cannot be construed to mean what the LUC may have
23 intended but did not express."

24 Here the Land Use Commission's original
25 Decision and Order could have attached the conceptual

1 plan or somehow made it apart of the Decision and
2 Order, referred to it in a condition and required the
3 developer to develop only in accordance with the
4 conceptual plan. But that conceptual plan is not a
5 part of the Decision and Order. It's not attached and
6 it's not made part of any condition.

7 Mr. Pierce also suggested that what the
8 county was trying to do was to urge this Commission to
9 let some violation of law slide by. Absolutely not.
10 All we are saying is that -- all we are asking of this
11 Commission is that it be very clear in its orders and
12 decisions so that the people who are to comply with
13 them or to enforce them know precisely what is
14 intended and allowed. I know the time is late so I'll
15 hang it up here. Thank you.

16 VICE CHAIR HELLER: Mr. Yee.

17 MR. YEE: Just three quick points. My
18 argument was characterized as saying that each and
19 every representation would be a violation. That's not
20 correct. I believe what I said is there is an
21 acknowledgment of a need for flexibility as well as a
22 need for reliability. I said that balance was drawn
23 by a requirement for substantial compliance with the
24 representations. So I did not say each and every. I
25 suggested that "substantial compliance" was the term

1 to use as it's set forth in the condition.

2 Second, I believe they're characterizing
3 or it was characterized in the Lanai Water Case as
4 saying a general condition was not enough. That's not
5 the holding of the Lana'i Water Case.

6 The Lana'i Water Case involved a
7 disagreement about what the condition said and meant.
8 And so it's not a dispute between specific versus
9 general in the Lana'i Water Case.

10 Finally, while I do agree that the Decision
11 and Order speaks for itself, given the disagreement,
12 and I think the reasonable disagreements by the
13 parties, I think that speaks to the argument for
14 moving forward with another hearing and finding that
15 there's reason to believe and that threshold's been
16 met. Thank you.

17 VICE CHAIR HELLER: Commissioners, any
18 questions? Commissioner McDonald.

19 VICE CHAIR McDONALD: This question is for
20 Mr. Steiner or Mr. Kam. Was an EA conducted for your
21 development plan, an Environmental Assessment? Or was
22 it assumed that the entitlements were in place and no
23 such environmental documentation was required?

24 MR. KAM: My understanding is that Kaonoulu
25 did not prepare an Environmental Assessment for its

1 Project. Honua'ula Partners has prepared an
2 Environmental Impact Statement for the Waialea 670
3 Project. So that process is ongoing. That EIS has
4 been submitted to the Office of Environmental Quality
5 Control and has been made available to the public.

6 VICE CHAIR McDONALD: The Wailea Project,
7 though, does that encompass this Project as well?

8 MR. KAM: I would need to check that,
9 Commissioner, to be sure if the affordable housing was
10 included. I don't know the answer to that off the top
11 of my head.

12 MR. STEINER: In further response I don't
13 believe for the specific Project, the Pi'ilani
14 shopping complex, that an EA was completed. There
15 have been EAs and/or I think an EIS. I don't know
16 exactly regarding some of the Pi'ilani Highway
17 improvements that are going to be built. I don't have
18 all the details of that. I do know there have been
19 some Environmental Impact Studies regarding impacts
20 regarding the roadway.

21 VICE CHAIR McDONALD: Office of Planning,
22 would you know if an EIS was conducted for the initial
23 Kaonoulu Petition?

24 MR. YEE: There's no EIS in the record for
25 the initial Kaonoulu Petition.

1 MS. LOVELL: If I could speak to that. I
2 believe the reason there was no EIS was that there was
3 no trigger under Chapter 343.

4 For instance, there was no use of state or
5 county land or state or county money. The Project is
6 not in the SMA. The Community Plan Amendment preceded
7 this Project as part of the comprehensive change in
8 the Community Plan. And a county change in zoning
9 does not trigger Chapter 343.

10 So, therefore, there would have been no
11 legal triggers under the Hawai'i Environmental Policy
12 Act to require one.

13 VICE CHAIR McDONALD: No use of state
14 lands. Isn't Honoapi'ilani Highway a state highway?
15 I mean it's a state facility under the Department of
16 Transportation.

17 MS. LOVELL: Right. But the Project I
18 think as originally as it came before the Commission
19 for the redistricting and as it came before the county
20 for any further entitlements, was not deemed to be a
21 use of state land or state properties. And, you know,
22 whether a highway project triggers chapter 343 depends
23 very much on the facts and specific basis.

24 I'm sure there will be an EIS for the major
25 highway that the State DOT is going to build between

1 this area and Upcountry Maui. But not every Project
2 that has an ingress or egress to or from the state
3 highway requires an EIS.

4 VICE CHAIR McDONALD: Okay. Well, I guess
5 I'm eluding to the infrastructure which consists of
6 both state and county. Has the Chapter 343 rules
7 changed since 1995 in which current petitioners' now
8 required to undergo an EIS process?

9 MS. LOVELL: I'm sorry, Commissioner, I'm
10 not quite sure what you're talking about. I thought
11 we were talking about when this Project first came up
12 before the Land Use Commission.

13 VICE CHAIR McDONALD: Well, I guess my
14 question is has Chapter 343, has there been any
15 changes to the Chapter 343 requirements regarding
16 Environmental Assessments or EIS triggers? Have there
17 been revisions from 1995 to the present time?

18 MS. LOVELL: I think there have been. I'm
19 aware of one. I think it involves wastewater plants.
20 If you have an onsite wastewater treatment plant you
21 have to get an Environmental Impact Statement for
22 that. There are a couple of specific categories that
23 trigger the Chapter 343-5, but I'm really not aware of
24 any that would affect this particular Project.

25 MR. KAM: Commissioner, if I may I think I

1 know what you're getting at. I think you might be
2 referring to the Koa Ridge Case in which my
3 understanding is that the Hawai'i Supreme Court, in
4 that case, determined that the Land Use Commission
5 should have required an EIS for a project on O'ahu
6 because there was work that was supposed to be done
7 connecting some of the roadways to a state roadway. I
8 believe that occurred in the early 2000s. I'm not
9 sure of the exact dates.

10 So I think there would -- the
11 Commissioner's correct that there would have been a
12 change in the law that occurred at that time. Then my
13 understanding also is that subsequent to that
14 decision, perhaps two or three years ago there was an
15 amendment to chapter 343 that was enacted by the
16 Legislature, that provided for an exemption for those
17 projects that involve a secondary action being a
18 connection to a state highway, or improvements that
19 are done in a state highway in situations where there
20 is no further discretionary approval required.

21 So provided there's no further
22 discretionary approval, the connection and work that's
23 required on the state highway would not constitute a
24 trigger under 343 for an Environmental Assessment.

25 MR. YEE: Just for the Commission's

1 information, I believe the Koa Ridge, that particular
2 Environmental Impact Statement decision involving
3 Castle & Cooke was 2006.

4 VICE CHAIR McDONALD: Thank you.

5 VICE CHAIR HELLER: Commissioner Biga.

6 COMMISSIONER BIGA: Mr. Steiner, why wasn't
7 the annual reports up-dated? It stopped and then it
8 didn't continue up to present.

9 MR. STEINER: My understanding is that last
10 year there was an annual report filed and that there
11 is -- so, in other words, there was one done in 2011
12 and in every year prior thereto. And that we are or
13 the client, I believe, is currently working on the
14 2012 annual report. There was no specific date as far
15 as when that is due but it is something the client is
16 working on.

17 And in light of the proceeding it seemed
18 unwise to file something in the middle of this
19 proceeding while this is pending as opposed to when
20 this gets resolved one way or the other.

21 However, if the Commission wanted us to
22 file an annual report by a particular date we'd be
23 happy to do so.

24 COMMISSIONER BIGA: Okay. I think this is
25 maybe directed to Mr. Kam. There was a period of time

1 that it stopped before even 2011, right, I think?

2 MR. STEINER: The record actually is a
3 little unclear. Because we tried to get annual
4 reports from the LUC and weren't able to find all the
5 annual reports. But we do have records of ones being
6 submitted.

7 Other than, for example, one of the annual
8 reports we were able to get from the Land Use
9 Commission was an incomplete report. And we have the
10 transmittal of the entire report. So there seems to
11 be a glitch in the record.

12 But it goes through first through I think
13 the last one filed was the fifteenth annual report or
14 maybe the sixteenth for 2011 which leads me to believe
15 they were filed every year. I don't believe that
16 there was a gap, but I think that's a little bit of an
17 unanswered question at this point.

18 COMMISSIONER BIGA: Okay. Thank you.

19 COMMISSIONER INOUE: That's the line of
20 questioning I was going to ask. Do you have a record
21 of 2005 through 2009 submitting your annual reports?
22 Could be both of you. Because the Commission staff
23 has informed us that they have not seen it. Nobody
24 has seen it. I just want to know if you have a record
25 of that.

1 MR. STEINER: I don't. I can't give a
2 definitive answer to that as I sit here today.

3 COMMISSIONER INOUE: Did you folks own the
4 property at the time?

5 MR. STEINER: No.

6 COMMISSIONER INOUE: Somebody else.

7 MR. STEINER: Yeah. The Kaonoulu owned the
8 property during that time period.

9 COMMISSIONER INOUE: Refresh my memory.
10 When was that sold to you folks?

11 MR. STEINER: If you'll bear with me.

12 COMMISSIONER INOUE: Sure.

13 MR. PIERCE: Commissioner, if I may? We
14 have in our pleading -- of course the Respondents may
15 have some different information, but we saw a
16 conveyance -- after Kaonoulu Ranch there was another
17 party that owned it for a while. And that is the Maui
18 Industrial Partners. Maui Industrial Partners in our
19 pleading we've identified they conveyed it to the new
20 landowners in September of 2010.

21 COMMISSIONER INOUE: Now you indicated
22 that you'd be filing your 2012 report. Did you know
23 that it was due? I'm just reading from the rules.
24 But it says, "Annual report shall be due prior to the
25 anniversary date of the approval of the Petition."

1 And I think the anniversary date was sometime earlier
2 this year.

3 MR. STEINER: I was not aware of that.

4 COMMISSIONER INOUE: Okay. One more set
5 of questions. There is a motion of, I think it's
6 Movant's Appeal to Grant of the Grading Permit. Do
7 you know where that stands or what the procedure is
8 when it's going to be heard?

9 MR. STEINER: Yes. That matter, the county
10 filed a Motion to Dismiss that appeal for lack of
11 jurisdiction which motion was granted. I believe
12 there was a hearing yesterday where the Proposed Order
13 submitted by the county was accepted.

14 COMMISSIONER INOUE: Thank you, Chair.

15 VICE CHAIR HELLER: Commissioners, anything
16 else? I have a couple of questions. First, just
17 wondered if the owners -- let me refer to the two
18 Pi'ilani entities and Honua'ula Partners together just
19 as "owners" for convenience. If the owners could give
20 us an update as to right now exactly what's going on
21 in terms of activity on the property and what's
22 planned in the near future.

23 MR. KAM: My understanding is there's
24 nothing going on right now on the Honua'ula parcel.
25 There are no -- a timeframe for the development of the

1 affordable housing units has not been determined at
2 this point. So there's no specific timeframe. It's
3 still out in the future at some point. The timeframe
4 hasn't been established.

5 MR. STEINER: Regarding the Pi'ilani
6 parcels I don't know exactly, but my understanding is
7 that they've been issued grading permits and they have
8 installed basically BMPs, I'm sorry, Best Management
9 Practices. They have staged some equipment, I
10 believe, on the property. They have installed some
11 dust fences, but no groundbreaking has started. That
12 would have started already but for these various
13 challenges.

14 VICE CHAIR HELLER: Do you know anything
15 about the projected timetable at this point?

16 MR. STEINER: I believe, if given the go
17 ahead or if determined to go ahead, they'd be ready to
18 break down very quickly.

19 VICE CHAIR HELLER: Now, following up on
20 the question of Condition 5 and the frontage road.
21 There is a specific provision in Condition 5 of the
22 Decision and Order. It says, "Petitioner shall
23 provide for a frontage road parallel to Pi'ilani
24 Highway." Did I correctly understand that the owners
25 are not proposing to build that frontage road at this

1 time?

2 MR. STEINER: I guess to a certain extent
3 that's a question of interpretation. The way the
4 Project has been laid out -- I'll respond to is No. 1
5 the circumstances have changed because now the
6 property is bisected by the Upcountry, the planned
7 Upcountry Highway at the Request of the state. So
8 that changes it.

9 In addition, so then there's an egress
10 point off of Pi'ilani Highway at that point and then
11 off of that road into the Project. Then really
12 there's parking that sort of surrounds the property
13 which might be the equivalent of a frontage road or
14 could be interpreted as a frontage road.

15 But, no, right now there's not a dedicated
16 road that would be frontage along and parallel to the
17 Pi'ilani Highway. And the Department of
18 Transportation has not recommended or approved any
19 such road.

20 VICE CHAIR HELLER: Okay. I understand that
21 the Department of Transportation approval is a
22 separate question. I was just trying to clarify that
23 the owner's present intent is to do something other
24 than building the frontage road that was described in
25 Condition No. 5.

1 MR. STEINER: That is correct.

2 VICE CHAIR HELLER: Thank you.

3 Commissioners, anything further? Commissioners, what
4 is your pleasure? Does anybody have a motion they
5 want to make?

6 COMMISSIONER INOUE: I guess I'll make
7 the motion. Before I do I want to commend all of the
8 parties and their attorneys for a very thorough
9 briefing and for your arguments. I think you folks
10 presented all the points very well. We appreciate
11 that.

12 Also want to preface it by saying that we
13 Commissioners, and not trying to make excuses, but we
14 have a tough job. It's very difficult for us to make
15 decisions that will cover everything that might pop
16 up.

17 So I just want to point out the Condition
18 15 I believe, yeah, is not just a formality. It's for
19 real. So the issue is what does "substantial
20 compliance" mean? It's not a black or white type of
21 thing. And things change. And the market conditions
22 change. So we recognize that. But we need to be kept
23 apprised of these things because they affect what was
24 presented in the Decision and Order that was made.

25 I don't know if it's gonna affect traffic.

1 I don't know if it's going to change the
2 representations made. But we need to be kept apprised
3 of those things.

4 And so I'm saying this at the risk of
5 getting into the merits of it. But my motion is
6 really to grant the Order to Show Cause because, at
7 least I personally, think the threshold, I think the
8 word was "reasonable" something. Or somebody said
9 "probable cause" has been met. And I feel that we
10 should grant the Movant's a Motion for a Hearing.

11 At the same time I recognize the fact that
12 in the real world there's the other side of the story.
13 We gotta get projects moving. We need to make sure
14 that we're not just a cog in the wheel. So the motion
15 is with the hope that we do this expeditiously and not
16 delay the Project any more than it has to. 'Cause
17 we're not making a ruling on the merits at this point
18 as was pointed out. All we want to do is hear, and
19 hear whether those conditions really have been met.
20 So, anyway, my motion is to grant the Order to Show
21 Cause.

22 COMMISSIONER BIGA: I second the motion.

23 VICE CHAIR HELLER: Okay. Discussion?
24 Commissioners, anybody have any discussion they want
25 to present at this point? Okay.

1 COMMISSIONER BIGA: Thank you, Chair.

2 VICE CHAIR HELLER: Go ahead.

3 COMMISSIONER BIGA: Again going on with
4 what Commissioner Inouye said about delaying this
5 Project. This Project heavily is dependent on the
6 people of Maui. You heard testimony about jobs, the
7 economy. Again, there's a lot of questions and it
8 needs to be looked at.

9 But also in regards, there's the community
10 waiting for possibly jobs that could be dealt with
11 here on Maui and also the economy. So I think with
12 that my comments is that we need to move this Project
13 along once the questions are answered and we have a
14 clear understanding on how to move forward. Thank
15 you, Chair.

16 VICE CHAIR HELLER: Anyone else? Okay.
17 Let me add a comment which is that the decision that
18 we're making today, whichever way it goes, is not a
19 yes/no decision on the Project. It's not a decision
20 is this a good project or a bad project or even is
21 there a violation of the conditions or not.

22 The only decision that we're making today
23 is whether or not there's a need to take the next
24 procedural step in terms of figuring out what's going
25 on here. And my feeling is there is a sufficient

1 basis to take that next procedural step and go into a
2 hearing where we will consider all of the evidence,
3 and then make an actual decision as to whether or not
4 the conditions in the original Decision and Order have
5 been complied with. If no one else has anything to
6 say will you call the roll.

7 MR. ORODENKER: Thank you, Mr. Chair. The
8 motion is for to grant the Order for the motion, the
9 Motion for the Order to Show Cause. Commissioner
10 Inouye?

11 COMMISSIONER INOUE: Yes.

12 MR. DAVIDSON: Commissioner Biga?

13 COMMISSIONER BIGA: Yes.

14 MR. ORODENKER: Commissioner Matsumura?

15 COMMISSIONER MATSUMURA: Yes.

16 MR. ORODENKER: Commissioner Teves?

17 COMMISSIONER TEVES: Yes.

18 MR. ORODENKER: Commissioner McDonald?

19 COMMISSIONER McDONALD: Yes.

20 MR. ORODENKER: Commissioner Contrades,
21 Commissioner Makua and Commissioner Chock are excused.
22 Vice Chair Heller?

23 VICE CHAIR HELLER: Yes.

24 MR. ORODENKER: Chair Heller, the motion
25 passes with 6 votes.

1 VICE CHAIR HELLER: Thank you. Is there
2 anything else anybody wishes to bring before the
3 Commission at this time?

4 MR. STEINER: Yes. A number of the
5 Commissioners expressed a desire this thing move
6 expeditiously. My client, we very much would like to
7 have this moved expeditiously. If it doesn't it could
8 threaten the very existence of the Project. Therefore
9 I just would, I guess, inquire as to what we need to
10 do to get this set for hearing as soon as possible.

11 VICE CHAIR HELLER: Okay. I suggest you
12 coordinate with the Commission staff, but I assure you
13 it is our intent to move forward promptly with this.

14 MR. STEINER: Thank you very much.

15 VICE CHAIR HELLER: We are adjourned.

16 (The proceedings were adjourned at 1:45 p.m.)
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C E R T I F I C A T E

I, HOLLY HACKETT, CSR, RPR, 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 24th day of August 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

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

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