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LAND USE COMMISSION

STATE OF HAWAI'I

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TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for a Public Hearing at Honolulu Airport Conference Center, 400 Rodgers Blvd., Suite 700, Room #3, Honolulu, Hawai'i, commencing at 8:45 a.m. on April 19, 2013, 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:

KYLE J.K. CHOCK, CHAIRPERSON

CHAD McDONALD, VICE CHAIR

SHELDON R. BIGA

LANCE M. INOUE

JAYE NAPUA MAKUA

ERNEST MATSUMURA

NICHOLAS W. TEVES, JR.

EXECUTIVE OFFICER: DAN ORODENKER

CHIEF CLERK: RILEY HAKODA

STAFF PLANNER: SCOTT DERRICKSON

DEPUTY ATTORNEY GENERAL: SARAH HIRAKAMI, ESQ.

Docket No. DR08-36 Ko Olina Development LLC

For the Petitioner:

WYETH MATSUBARA, ESQ.

CURTIS TABATA, ESQ.

KEN WILLIAMS, Ko Olina

For the State:

BRYAN YEE, ESQ.

Deputy Attorney General

SCOTT FORSYTHE, OP

1 CHAIRMAN CHOCK: I apologize for the delay  
2 this morning. This is a meeting on Docket No. DR08-36  
3 Ko Olina Development Company to receive a continued  
4 status report from the Petitioner and take appropriate  
5 action if any. Will the parties please identify  
6 themselves for the record.

7 MR. MATSUBARA: Morning, Chair Chock,  
8 Commissioners. Wyeth Matsubara and Curtis Tabata on  
9 behalf of Ko Olina. With me to my right is Ko Olina's  
10 representative Ken Williams.

11 MR. YEE: Good morning. Deputy Attorney  
12 General Bryan Yee on behalf of the Office of Planning.  
13 With me is Scott Forsythe from the Office of Planning.

14 CHAIRMAN CHOCK: Good morning, everyone.  
15 Let me briefly update the record. On January 24th,  
16 2013 the Commission met and received Petitioner's  
17 written and oral status report, received written  
18 correspondence from Warren Von Arnswaldt and Creighton  
19 Chang.

20 On January 29th, the Commission mailed its  
21 order requiring a supplementary written status report  
22 and follow up oral status report.

23 From March 15 to April 8th the Commission  
24 received Petitioner's 14th quarterly status report and  
25 its supplement with its Exhibits A and B from

1     Petitioner.

2             On April 10 the Commission mailed the  
3     April 18-19th, 2013 LUC agenda to the parties and the  
4     Maui, O'ahu and statewide mailing lists.

5             Let me briefly describe our procedure today  
6     on this docket. First, I will call all those  
7     individuals desiring to provide public testimony to  
8     identify themselves. All such individuals will be  
9     called in turn to our witness box where they will  
10    provide their testimony.

11            After completion of the public testimony the  
12    Commission will ask the Petitioner to provide any  
13    comments relevant to the past quarterly status reports  
14    and supplemental status report filed on March 15th.

15            After Petitioner's presentation we will  
16    receive any comments from the State Office of Planning  
17    and the County, who is not present. Thank you. Good  
18    morning. Is there anyone in the audience who wishes  
19    to provide public testimony? There is no one signed  
20    up, but is there anybody interested in coming forward  
21    to provide testimony? Okay. Having seen no one, Ko  
22    Oolina, Petitioner proceed.

23            MR. MATSUBARA: Thank you, Chair. Before we  
24    go into our assessment on our status I'd like to see  
25    if our representative Ken Williams could say a few

1 comments before I proceed.

2 CHAIRMAN CHOCK: Absolutely.

3 MR. WILLIAMS: Thank you, Chair Chock and  
4 Commissioners. Aloha. I'm Ken Williams. Just a  
5 quick -- I understand the frustrations that everybody  
6 has experienced in the delays that we've incurred in  
7 getting this Project done. My apologies to the  
8 fishermen and any inconveniences, all your time that  
9 you've taken to come down here to make sure you voice  
10 your concerns.

11 Real quick. I've been at the resort since  
12 1989. I was the development manager. I helped, you,  
13 know -- I didn't do it all myself, but I did help in  
14 building the resort, the lagoons, the marina, the golf  
15 course, the roads, the reservoirs, all that stuff.

16 I only say that because I have a keen  
17 interest in development. My role has changed in the  
18 resort over the years. But I can speak to the central  
19 focus of any development.

20 There's one thing in development and it's  
21 true with many businesses. Everything needs to get  
22 done by yesterday. The main reason for that is "time  
23 is money", the old cliché. You need to get things  
24 done quickly. The state Land Use Commission had  
25 required us to build a new boat ramp in the back of

1 the marina. From that day on it's go. There's no  
2 reason for the resort to drag its feet or delay this  
3 Project by any means. I like Wyeth. I like all of my  
4 consultants, Arnold Kubo, but I do not want this to be  
5 a career for them. It behooves me, behooves the  
6 resort to get this done as quickly as possible.

7 With that said I also, on behalf of the  
8 department of -- excuse me -- the Army Corps of  
9 Engineers, the department of planning and permitting,  
10 the all the permitting agencies that you have to go  
11 through to get a development completed. We nudge as  
12 best we can. I use the word "nudge". We try to  
13 encourage them to hasten the Project. We can do that  
14 to only a certain extent.

15 They, as you know as the Land Use  
16 Commission, have a bag of requirements and mandates  
17 and other guidelines that they have to follow in order  
18 for them to do their for job. So there's some  
19 patience required. I know that comes along with some  
20 frustrations when you don't get things done as quickly  
21 as you wanted.

22 I just wanted to make the point that we are  
23 trying our very best to get this done as quickly as  
24 possible. Thank you.

25 MR. MATSUBARA: Commissioners, according to

1 our last status report we have finally issued our  
2 Department of Army permit, DOAP. That was issued to  
3 us February 26, 2013. As represented to you on prior  
4 occasions the DOAP still contain multiple special  
5 conditions of which the two special conditions which  
6 required us to provide further follow up with NOAA and  
7 SHPD like we said last time, we did.

8 Our current status is that in regards to the  
9 special fish habitats that NOAA required us to provide  
10 follow up for, with the help of AECOS we have already  
11 submitted a response of our proposed measures that we  
12 will do in regards to the special fish habitat. We  
13 submitted that to the Army Corps to forward to NOAA on  
14 February 21st, 2013.

15 At this time we have not received any  
16 further response from NOAA or Army Corps. NOAA has  
17 not requested a consultation which, hopefully for us,  
18 they do sign that they're okay with it. We're  
19 planning on trying to get a more definitive, concrete  
20 response from the Army Corps as to NOAA's concerns for  
21 the special fish habitat.

22 Basically from our point, from our  
23 standpoint we've complied with that special condition.  
24 We submitted it in response to NOAA's request back in  
25 February.

1           The other special condition that needed  
2 further workup was the response to the SHPD special  
3 condition. Basically SHPD sent us a general  
4 requirement requiring us to provide for archaeological  
5 monitoring and Archaeological Inventory Survey. So as  
6 noted the last time Hal Hammett of Cultural Surveys  
7 Hawaii was tasked to provide this Archaeological  
8 Assessment. Hal has basically completed his  
9 fieldwork, his background work. He's doing the final  
10 touches on his report.

11           As stated prior, because of the historical  
12 development of the Ko Olina area and how much earth  
13 has already been moved, Hal is proposing to SHPD to  
14 say that no further action is required, which would be  
15 helpful for us in helping move it forward.

16           And I spoke with Hal yesterday. He believes  
17 he could submit his Archaeological Assessment to SHPD  
18 within the next two weeks and then they're up for  
19 review. But based on Hal's report, which is fairly  
20 extensive, his Archaeological Assessment report is a  
21 fairly extensive one.

22           He'd rather do the workup now to ensure to  
23 SHPD as best as possible that there are no concerns  
24 in -- it varies in small areas -- there are no  
25 concerns in that area and that we can proceed forward.



1 That's basically the status of our situation now. So  
2 we do have the DOAP but there were those two  
3 conditions that we need to comply with prior to  
4 actually proceeding forward. Thank you.

5 CHAIRMAN CHOCK: Thank you, Mr. Matsubara.  
6 State?

7 MR. YEE: The Office of Planning did contact  
8 the State Historic Preservation Division, which, as  
9 you've been told, has not yet received the  
10 archaeological assessment. I did talk with them,  
11 though, generally about this Project.

12 And although they could not issue any  
13 certain determination without the document, they did  
14 tell me that the basis for their recommendation was a  
15 prior archaeological inventory survey which covered, I  
16 think, 124 acres in which there were human burials.  
17 Based upon that they had recommended further inventory  
18 survey and archaeological monitoring.

19 I did note for them that the boat ramp is  
20 actually a significantly smaller footprint than 124  
21 acres. And I also noted for them, though, that the  
22 archaeological assessment to be provided would not be  
23 including any subsurface investigation.

24 So there was apparently no trenching  
25 proposed or proposed to be required for this. It is

1 possible that the State Historic Preservation Division  
2 might look at the archaeological assessment and either  
3 accept -- they could reject -- or they could also  
4 accept for purposes of the boat ramp only that it's  
5 because the Project Area is conceivably much larger  
6 than the boat ramp footprint. And because there is no  
7 subsurface assessment, they may accept the  
8 archaeological assessment for the boat ramp, allow the  
9 boat ramp to continue so long as everyone is aware of  
10 that archaeological assessment is not necessarily  
11 sufficient for any further construction that may or  
12 may not occur within this larger area.

13           So they are aware of, as I said, the very  
14 limited work to be done for this Project. And they'll  
15 be looking at the archaeological assessment when it  
16 comes in.

17           I also had an occasion to speak with the  
18 Army Corps of Engineers to follow up on what's going  
19 on. As I think Mr. Matsubara was indicating, what's  
20 currently lacking, I think, is that final  
21 determination from NOAA that the permit conditions  
22 satisfy the Best Management Practices that NOAA would  
23 be asking for.

24           The Army Corps seems to think that it will,  
25 but I can understand that the developers are going to

1 ask for some final determination sort of officially in  
2 writing. All they have is an email at this time.

3 So there has been some movement. And we do  
4 have a pathway set for what has to occur. So I just  
5 wanted to keep you informed with that information.  
6 Thank you.

7 CHAIRMAN CHOCK: Thank you, Bryan.  
8 Mr. Matsubara, any other closing comments?

9 MR. MATSUBARA: Bryan and I spoke prior to  
10 this meeting and it's consistent. I also asked him to  
11 assist us, if possible, with SHPD because if we could  
12 minimize going further. Obviously we want to comply  
13 with everything we need to, but based on what out  
14 consultant is saying is that we are in a small area.  
15 This area has not historically had an issue before and  
16 that may help expedite going forward. So we  
17 appreciate that from the state OP.

18 CHAIRMAN CHOCK: Thank you very much.  
19 Commissioners, any questions for any of the parties?  
20 Commissioner Inouye.

21 COMMISSIONER INOUE: Thank you, Chair  
22 Chock. I'll try to speak louder. Just a couple  
23 questions. Forgive me 'cause as contractors we like  
24 to get into the details. In your latest report, I  
25 think it's a supplement, you said the report to SHPD

1 is going in a couple weeks, which is Monday. I think  
2 I heard you say a couple more weeks or something. Is  
3 that pretty good? I mean the next couple weeks more  
4 is what your consultant said?

5 MR. MATSUBARA: That's correct, from today.  
6 So I spoke to Hal yesterday in light of me coming to  
7 the Commission today. I wanted to try to get the best  
8 up-to-date information as possible. Hal told me based  
9 on -- they're still fine tuning some of the report,  
10 but that he should be able to turn it in within two  
11 weeks. Now, that's what Hal let me know. So I again,  
12 I mean I can't force the guy to turn it in within two  
13 weeks, but that's his best estimate and I gotta rely  
14 on him. I don't expect -- I know Hal -- I don't  
15 expect him to go far on that but if he does I will  
16 definitely let the Commission know.

17 COMMISSIONER INOUE: Okay. Then on the  
18 other matter with NOAA it's been a couple months since  
19 you turned it in. And I understand your statements  
20 about it's difficult to force a government agency to  
21 act. But I presume with Bryan's comments you are in  
22 contact. Are there any estimates of when it might  
23 come in?

24 MR. MATSUBARA: Well, sure. So there has  
25 been nudging, as Mr. Williams alluded to. And one of

1 the responses back was that we can assume that we're  
2 okay. And 'assuming' for me is I'm not good enough to  
3 tell to go ahead and starting doing your multi  
4 (inaudible).

5 So in response to that I recommended and the  
6 clients agreed that we're going to submit a formal  
7 letter addressed to NOAA through the Army Corps  
8 stating that we believe that we've complied with all  
9 Best Management Practices procedures. We believe that  
10 we have responded to your concerns including your  
11 essential fish habitat and how we proceed with  
12 construction, and that we understand that we can go  
13 forward. If you disagree with this please let us know  
14 immediately. But we expect that letter to be sent out  
15 next week sometime to Army Corps to go to NOAA.

16 COMMISSIONER INOUE: Thank you. One last  
17 question is, and you might have answered it at the  
18 last meeting we had, but are you -- is the developer  
19 informing the public, the boaters, about the plans  
20 itself if it's okay, but the boat ramp itself, design  
21 and everything like that --

22 MR. MATSUBARA: Yes.

23 COMMISSIONER INOUE: -- it satisfies their  
24 needs?

25 MR. MATSUBARA: Sorry. So on prior

1 meetings, prior occasions if you look at our quarterly  
2 reports we've provided the building plans, the design,  
3 the ramp plans, they've all been submitted. These  
4 were submitted to the city DPP last year sometime. So  
5 they've been through the process.

6 And as I mentioned last time this is a --  
7 for the client this is a world class marina and  
8 resort. And the last thing they want to do is just  
9 stick some ramp in there. They've gone through hiring  
10 all the best consultants they can. They've spent a  
11 lot of time on this design.

12 The original plans were just for a single  
13 ramp. Based on a strong push from the boaters and a  
14 generous offer from the client they decided to put a  
15 double wide ramp in there. So there's been a  
16 substantial amount of effort from the client to  
17 accommodate the boaters the best they can in the area  
18 that they have.

19 From what we have with DPP right now there's  
20 no indication that our plans or design are, there's  
21 anything wrong with them.

22 COMMISSIONER INOUE: So you are vetting the  
23 design with the boating community and the public.  
24 That's my question. Or is it just through a regular  
25 process?

1           MR. MATSUBARA: I would believe the design  
2 -- the original design, this was done, like, two or  
3 three years ago. Once those designs were kinda set  
4 then we went ahead and started submitted that. So  
5 based on what our designers had done two or three  
6 years ago.

7           So in terms if there's current discussions  
8 on design not necessarily. I've fortunately been in  
9 contact with a few of the boaters. And I try to keep  
10 in contact the best possible and give them up-to-date  
11 information about what we're doing. But at this stage  
12 the designs are already submitted into what we have.

13           They're compliant with all the department of  
14 planning and permitting regulations to how many  
15 parking stalls' required and whatnot. We're actually  
16 requiring more stalls than what's required, based on  
17 our prior commitments. But that's where we are on  
18 that aspect.

19           COMMISSIONER INOUE: I understand. Just to  
20 make sure the record is straight. In order to change  
21 now you're going to have to go through this whole  
22 process again type of thing if you change the design  
23 of this.

24           MR. MATSUBARA: Depending on the design, if  
25 we have to redesign that's correct. We'd probably

1 have to resubmit not only the building permit but also  
2 our conditional use permit.

3 COMMISSIONER INOUE: That's all I have.  
4 Thank you.

5 CHAIRMAN CHOCK: Questions, Commissioner  
6 McDonald? Anybody else questions?

7 COMMISSIONER McDONALD: Just more a  
8 clarification for myself, Mr. Matsubara. SHPD had  
9 requested an archaeological inventory survey. Your  
10 consultant went through and conducted an archaeological  
11 assessment report. Why not just go through with the  
12 inventory survey?

13 MR. MATSUBARA: Great question. So to give  
14 some background. The client, thankfully, hired a  
15 well-known, well-respected experienced consultant Hal  
16 Hammett of Cultural Surveys Hawai'i. When they  
17 initially reviewed the request from SHPD to do the  
18 full blown AIS, their initial thought was to do some  
19 due diligence first to get some kind of indication  
20 whether there probably was a need to do one or  
21 probably not a need to do one based on the historical  
22 development in that area.

23 After Hal did his initial kind of  
24 walk-through, he contacted SHPD to see if he can  
25 provide an Archaeological Assessment based on his



1 position at that time that there probably would not be  
2 a need to do a full blown AIS. That the AIS would  
3 obviously entail a lot more time, cost and most  
4 definitely push back our delay to start building on  
5 the site.

6 And the client obviously appreciated Hal  
7 coming up with this. So that's why we went with an  
8 archaeological assessment. That's why Hal's taking his  
9 time to provide a well-supported assessment indicating  
10 that -- you know basically the SHPD letter was kind of  
11 a general response: You're developing here, based on  
12 this TMK, 124 acres, as Bryan mentioned, boom, do all  
13 this.

14 Hal was able to fine tune it a little bit in  
15 discussion with them. My understanding is they agreed  
16 that they would *review* his archaeological assessment to  
17 make a determination. It doesn't guaranty that we  
18 will *not* have to do an AIS but the client -- Hal felt  
19 comfortable enough that we were just doing an  
20 archaeological assessment and help speed things up.  
21 That was the reason why we chose to do just an  
22 assessment based on what we saw there historically and  
23 also in hopes of speeding up the process.

24 COMMISSIONER McDONALD: All right. Thank  
25 you.

1 CHAIRMAN CHOCK: Thank you, Commissioner  
2 McDonald. Any other questions, Commissioners?

3 MR. YEE: Chair Chock, could I just make one  
4 quick comment?

5 CHAIRMAN CHOCK: Go ahead.

6 MR. YEE: Commissioner Inouye, the original  
7 designs in 2008, 2009, at that time they did go out to  
8 receive comments from the public and the boaters.  
9 Based upon that they made some additional design  
10 changes.

11 And then based upon *those* design changes  
12 that was the subject of various permits that were  
13 submitted. So they did go out to public comment or  
14 some public outreach before finalizing their designs.

15 COMMISSIONER INOUE: Thanks, Bryan.

16 CHAIRMAN CHOCK: Thank you, Mr. Yee.  
17 Commissioners, what is your pleasure on this matter?  
18 Commissioner McDonald.

19 COMMISSIONER McDONALD: I guess right now  
20 the Petitioner's required to submit annual reports.

21 CHAIRMAN CHOCK: Is that what we require?

22 COMMISSIONER McDONALD: Quarterly. Next  
23 quarterly report will be due when?

24 MR. MATSUBARA: Probably around June.

25 CHAIRMAN CHOCK: Since this item actually

1 requires no action on the part of the Commission, if  
2 there's no motions from anyone we're just going to  
3 note the acceptance of your quarterly report and look  
4 forward to seeing Mr. Williams back in three months  
5 maybe with another apology speech. (laughter)  
6 Hopefully with an update. But if not, if nobody has  
7 any formal motions we're going to note your report and  
8 we'll see you back here in a couple months? Any  
9 comments?

10 MR. MATSUBARA: No comments other than we  
11 will be happy to show up if that's the Commission's  
12 desire. I mean there's no problem with that. Since  
13 it seems that we are, I mean there is no question as  
14 to whether or not we're trying to be diligent in this  
15 and are moving forward, we would be happy to just  
16 provide supplement reports. And if at that time if  
17 you feel that there's further need for us to be  
18 present we can be present.

19 CHAIRMAN CHOCK: Why don't you work with  
20 staff on that. Then, Dan, you can maybe bring it to  
21 the executive committee. Then we can see what, if  
22 any, kind of presentation in person is required.

23 MR. MATSUBARA: I would gladly help Ken make  
24 a profession out of this but if written reports will  
25 suffice we'll be fine with that as well.

1           CHAIRMAN CHOCK: It think we'd much rather  
2 have you guys spending your time actually working for  
3 building the ramp versus coming before us. That would  
4 be good. Bryan, any other comments? Sorry for the  
5 late start. Thank you. Thank you, everybody. We're  
6 going to take a short recess in place and reset for  
7 the next item on our agenda.

8           MR. MATSUBARA: Thank you.

9           (Recess in place was held 9:10 to 9:15)

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1           CHAIRMAN CHOCK: (Gavel) Okay. We're back  
2 on the record. Next item on our agenda is the Revised  
3 Draft of Administrative Rules for Publication. I'll  
4 turn over this portion of the meeting to our Executive  
5 Officer, Dan. Go ahead.

6           MR. ORODENKER: Thank you, Mr. Chair.  
7 Actually to clarify, this meeting is to approve the  
8 Revised Draft of Administrative Rules, Chapter 15-15,  
9 for the purpose of obtaining the necessary approvals  
10 from the administration and from other entities and  
11 moving forward toward publication and holding public  
12 hearings on the proposed rules.

13           Just for everybody's edification, on  
14 April 10 an agenda notice was mailed to the statewide,  
15 O'ahu and Maui mailing lists. The rules are also  
16 published on our website for public review. Since we  
17 last discussed this matter with the Commission we have  
18 had discussions and input on our rules from a number  
19 of agencies and individuals. Of course, we've had  
20 input from the individual Commissioners, in particular  
21 Commissioners Heller and Inouye.

22           Had an extensive review with the Office of  
23 Planning, the Office of Hawaiian Affairs, the  
24 Department of Agriculture and the Department of Land  
25 and Natural Resources.

1           We have incorporated most of OP's  
2 suggestions into our draft rules. And a lot of that  
3 concerned time constraints and procedural aspects. I  
4 do have to note that OP was, in a number of areas,  
5 trying to extricate itself from our proceedings but we  
6 denied them that capability. OHA only had a few  
7 substantive comments mainly with regard to review of  
8 district boundary amendments. DOA and DLNR did not  
9 have any comments of substance. DOA actually was  
10 quite happy with our rules with regard to Important  
11 Agricultural Lands.

12           This is sort of a quick review. The key  
13 changes to the rules, our existing rules, are mostly  
14 administrative and clarifications. We do modernize  
15 the filing requirements to reduce paper and we  
16 modernize a lot of language in our existing rules.

17           We conformed public hearing notice  
18 requirements to changes in the law that have been made  
19 in other areas. We also clarified a lot of our  
20 practice and procedures with regard to filing of  
21 information in conduction with petitions, how many  
22 votes are needed for various actions and what happens  
23 if votes don't carry.

24           There's also clarification for  
25 responsibility of fees. Up until now our rules had

1 only discussed fees when it came to DBA proceedings.

2 It also conforms the rules to recent changes  
3 in chapter 205 such as whether it would allow uses in  
4 the Ag District.

5 The change in the rules also allows the  
6 Commission through the executive officer to dismiss  
7 cases that have not been pursued or do not meet LUC  
8 requirements. In particular section 15-15-51  
9 clarifies the conditions under which a petition may be  
10 withdrawn.

11 Chapter 17 is the most important change in  
12 the rules. And that is it's a completely new chapter.  
13 This attempts to codify and develop rules governing  
14 the Important Agricultural Lands sections.

15 Much of this work was interpretive since the  
16 Important Agricultural Lands statute are silent on a  
17 number of issues and procedural on substantive  
18 matters.

19 The rules that we have drafted include  
20 adherence to chapter 343 and develop procedures for  
21 and requires a contested case hearing for petitions  
22 requesting 15 percent reclassification of land to  
23 urban or rural or a reservation of the credits.

24 Recent changes to this section include  
25 Commissioner Inouye's request that parties reflect in

1 their petitions what percent of the landowner's total  
2 holdings are the subject of the petition.

3 We are asking the Commission at this time to  
4 approve the current draft of the rules so they can be  
5 submitted for final review and approval by the  
6 administration to publish them for public comment.

7 Once the rules have been published we will hold public  
8 hearings as a prelude to final approval and adoption.

9 The process is a little bit burdensome after this. We  
10 do have to hold public hearings.

11 The Commission -- not all Commissioners need  
12 to be present for those public hearings, but we do  
13 have to go to all the islands to hold hearings and  
14 obtain public input into the rules. So this isn't  
15 the be all, end all. This is jut the first step  
16 towards actual adoption and publication. If there are  
17 any questions I can answer them at this time.

18 CHAIRMAN CHOCK: Thank you very much, Dan.  
19 I was remiss in not asking if there were any  
20 individuals in our audience who wanted to provide  
21 public testimony on this matter. And being that we  
22 have several practitioners in front of our Commission  
23 on a regular basis, anybody have any comments,  
24 testimony or questions? We'd love to hear from you  
25 folks.



1 MR. BEN MATSUBARA: The purpose was  
2 basically to monitor what happened today and to inform  
3 our clients as to the status of this process and  
4 especially relating to the proposed changes that may  
5 affect them in what concerns or comments they may  
6 have.

7 So during the public hearing process I think  
8 if there's interest in responding to specific  
9 provisions that are approved by the Commission, we  
10 will probably raise them and address them at that  
11 time. We're hear to listen and learn from you guys.

12 CHAIRMAN CHOCK: That would actually be  
13 great because you folks definitely know the ins and  
14 outs of our rules and our policies and procedures. So  
15 that would be very helpful. Appreciate you guys  
16 sticking around and actually giving us the courtesy of  
17 your presence.

18 Dan, I did have one question. And that was  
19 a question I raised several years back when we started  
20 this process prior to you coming on board. But one of  
21 the questions and comments that I had was on the  
22 adoption of the Order. What is the standard in terms  
23 of number of votes required for adoption?

24 I believe our rules were silent on that  
25 particular standard. And we had an issue that was

1 raised in a previous docket that we were actually  
2 challenged on. So I asked when your predecessor was  
3 going through the process of making changes and  
4 revisions to the rules, if that change actually got  
5 made. Do you know if that actually got written into  
6 the update?

7 MR. ORODENKER: I believe it did. I'm  
8 looking for the section right now. Sarah, do you  
9 recall?

10 MS. HIRAKAMI: It did go in there. It  
11 specifies 5 votes for the adoption of the findings and  
12 order.

13 MR. BEN MATSUBARA: (from audience) It's  
14 under "Quorum". It's under the section of "Quorum".  
15 In our office we refer to that as the Castle & Cooke  
16 Koa Ridge condition.

17 MS. HIRAKAMI: It's not a specific section  
18 but it is in there.

19 CHAIRMAN CHOCK: 15-15-13. Okay. Thanks,  
20 Dan. That was my question. I think it's important we  
21 have clarity for the public and the parties on exactly  
22 what our rules require.

23 MR. ORODENKER: 15-15-13(a) provides that  
24 the changes in a petition will receive 6 affirmative  
25 votes. A subsequent vote reflecting the Commission's

1 approval of the Form of the Order shall require 5  
2 affirmative votes.

3 CHAIRMAN CHOCK: Okay. Very good. Thank  
4 you, Dan. Commissioners, any questions on the rules,  
5 the proposed rule changes or the process that Dan's  
6 going to remark on?

7 COMMISSIONER INOUE: Just one  
8 clarification. I thought we were talking about how  
9 many votes needed to adopt the rules. That's not your  
10 question?

11 CHAIRMAN CHOCK: No. Adopt the Form of the  
12 Order.

13 COMMISSIONER INOUE: Form of the Order.  
14 Okay. I do have just a couple questions on that. We  
15 will have a chance after we receive public comments  
16 like from Mr. Matsubara, like that to make further  
17 changes, you suggest, further changes to adopt.

18 MR. ORODENKER: Yes, we will.

19 COMMISSIONER INOUE: So this isn't the last  
20 chance for us to comment?

21 MR. ORODENKER: No. There will be a lot  
22 more time for people to comment. And there will be  
23 the ability for the Commission to make modifications.  
24 I do have to caution if the modifications are  
25 significant there are -- it changes the whole

1 landscape, then we will have to go back out and go  
2 through the process again to make sure everybody has a  
3 chance to comment on those larger changes.

4 COMMISSIONER INOUE: I think you mentioned  
5 that Commissioners do not necessarily have to go  
6 through two public hearings or did I hear that wrong?

7 MR. ORODENKER: That's correct. There are  
8 several different processes by which we can hold  
9 hearings. Although the Commissioners are always  
10 welcome to attend, a subcommittee can be appointed to  
11 handle the public hearings.

12 COMMISSIONER INOUE: But the public  
13 comments will be -- Holly will be there too.

14 MR. ORODENKER: Yes.

15 COMMISSIONER INOUE: -- to record comments  
16 so we can read about it.

17 MR. ORODENKER: Yes. We will have  
18 transcripts and a recording.

19 COMMISSIONER INOUE: Okay. Thank you.

20 MR. BEN MATSUBARA: Mr. Chair, just one  
21 comment. Way back when when I was serving as Special  
22 Deputy Attorney General for the Land Use Commission,  
23 one of the processes utilized was that you appoint a  
24 hearings officer to go to the neighbor islands with a  
25 court reporter and the executive officer to listen to

1 all the testimony. Because, you know, you do Hilo and  
2 Kona in one day; you fly to Maui, then you come back  
3 to O'ahu. So it takes quite a bit of time.

4 And then the hearing officer was then  
5 responsible for presenting a report to the Commission  
6 as to all the major comments raised during this public  
7 hearing process. And, you know, that was one process  
8 that was utilized that kind of expedited. The  
9 Commissioners, of course, on the various islands would  
10 come and attend if they were free and wanted to. But  
11 that was one process because, you know, it's done in  
12 two days, Hilo/Kona one day and Maui and then you come  
13 back to O'ahu. So it's all a relatively compact  
14 period of time to get it done.

15 MR. ORODENKER: (addressing Mr. Ben  
16 Matsubara) As I said there are no set, there are no  
17 definite priorities. Thank you for that.

18 CHAIRMAN CHOCK: Thank you, Commissioner  
19 Inouye. Any other questions or comments on rules or  
20 the process, Commissioners? Okay, Dan. Well, great  
21 job. I know a lot of time and effort on your part  
22 went into getting us to this point. And a lot more  
23 time depending on whether you get a hearings officer  
24 to do this or not.

25 MR. ORODENKER: Appreciate that.

1           CHAIRMAN CHOCK: Appreciate your work on  
2 this. It's been kind of a long time in the making.  
3 Bryan, I know you were out of the room. Any comments  
4 or questions on the proposed rules?

5           MR. YEE: We look forward to seeing them at  
6 the next public hearing. (Audience laughter)

7           CHAIRMAN CHOCK: I'll be like PLDC.  
8 (laughter)

9           MR. ORODENKER: I want to take the  
10 opportunity to thank the Commissioners as well.  
11 Really appreciate the input and in particular  
12 Commissioner Inouye provided some significant  
13 insights. So appreciate that.

14           CHAIRMAN CHOCK: Okay. Thanks, Dan. Let me  
15 just note that for the record that should the  
16 Commission approve the draft rules, Chair would like  
17 to include as part of the Commission's approval that  
18 staff may continue to correct typographical formatting  
19 and other mistakes that may be found during further  
20 review. So apologize for not moving that. Okay.

21           Commissioners, what is your pleasure on this  
22 matter? Is there a motion to approve?

23           COMMISSIONER BIGA: So moved.

24           COMMISSIONER TEVES: Second.

25           CHAIRMAN CHOCK: Moved by Commissioner Biga,

1 seconded by Commissioner Teves. Any discussion? Dan,  
2 will you please poll the Commission.

3 MR. ORODENKER: Thank you, Mr. Chair. The  
4 motion is to approve the Revised Draft Administrative  
5 Rules chapter 15-5 HAR for purposes of obtaining  
6 necessary approval from other entities and moving  
7 forward toward publishing and holding public hearings  
8 on these proposed rules. Commissioner Biga?

9 COMMISSIONER BIGA: Yes.

10 MR. ORODENKER: Commissioner Teves?

11 COMMISSIONER TEVES: Yes.

12 MR. ORODENKER: Commissioner Matsumura?

13 COMMISSIONER MATSUMURA: Yes.

14 MR. ORODENKER: Commissioner McDonald?

15 COMMISSIONER McDONALD: Yes.

16 MR. ORODENKER: Commissioner Makua?

17 COMMISSIONER MAKUA: Aye.

18 MR. ORODENKER: Commissioner Inouye?

19 COMMISSIONER INOUE: Yes.

20 MR. ORODENKER: Chair Chock?

21 CHAIRMAN CHOCK: Yes.

22 MR. ORODENKER: Mr. Chair, the motion  
23 carries unanimously.

24 xx

25 xx

1           CHAIRMAN CHOCK: Okay. Thanks, Dan. Great  
2 job. Next item on our agenda is the discussion to  
3 consider developing and/or adopting a policy on  
4 videotaping LUC witnesses and proceedings. And this  
5 was an issue that I believe was raised by Sarah, our  
6 attorney general. And I thought we could have her  
7 give a little bit of background and then have some  
8 discussion to see what, if any, direction the  
9 Commission might want to take on this item.

10           MS. HIRAKAMI: By statute the administrative  
11 boards and commissions are only required to permit  
12 audio recordings. They're not required to permit  
13 photography or video recordings.

14           And the OIP, although they encourage boards  
15 and commissions to allow video and photography  
16 recordings, they had at least one informal opinion to  
17 a neighborhood board that said that the board was not  
18 required to allow it, even if they were encouraged to  
19 allow it as long as the prohibition was stated to the  
20 public in a reasonable manner.

21           And I think in that case the example of an  
22 "unreasonable" manner is threatening to destroy their  
23 camera. So as long as you have a reasonable  
24 prohibition I think it would be allowed.

25           And I just brought it up because I noticed



1 some of the cases, particularly on Maui, when the  
2 public witnesses are testifying people will videotape  
3 them in their entirety including as the witness sits  
4 there and announces their name and their home address  
5 and everything. And I think its unnerving.

6 And I think it might do a disservice in  
7 discouraging people, members of the public to come  
8 forward and provide testimony if they don't know  
9 what's going to happen with these videos of  
10 themselves. So that's just why I brought it up with  
11 the Commission.

12 CHAIRMAN CHOCK: Thanks, Sarah. Any  
13 questions or discussions, Commissioners? I'll start  
14 with one question in terms of just the practically of  
15 enforcing prohibition of videotaping of witnesses or  
16 Commissioners. How would that apply to news media who  
17 might come to cover a story here? Would that ban also  
18 apply to news media? Or here to cover some of these  
19 cases that are at times very controversial and high  
20 profile?

21 MS. HIRAKAMI: It would, but just because  
22 you have a rule saying: In general you do not permit  
23 photography or videotaping, they can still ask for  
24 special permission.

25 And I know there are other boards that will

1 permit the media to videotape certain parts of their  
2 proceeding if it's of high public interest. I think  
3 even the courts would do that.

4 Generally you can't bring a camera and video  
5 tape a proceeding in court, but you can get permission  
6 to do it if it's a particularly important case. So  
7 all they would have to do is ask and it would be up to  
8 the Commission's discretion.

9 CHAIRMAN CHOCK: Commissioners, any  
10 questions, commentary?

11 MR. ORODENKER: I'm sorry.

12 CHAIRMAN CHOCK: Dan.

13 MR. ORODENKER: May I ask a question.  
14 Sarah, would this require amendments to our  
15 Administrative Rules or would it just be a change on  
16 our Notices of Hearing where we would have a paragraph  
17 that says: Videotaping is not allowed without  
18 permission of Commission?

19 MS. HIRAKAMI: I don't think it requires a  
20 change to the rule. I think we can put it as part of  
21 our agenda, just as notice on the agenda.

22 MR. ORODENKER: Okay. Thank you.

23 CHAIRMAN CHOCK: Commissioner Biga.

24 COMMISSIONER BIGA: Sarah, would this be in  
25 any way a conflict with what's happening in the

1 Legislature with that media thing that's going through  
2 the legislation right now?

3 CHAIRMAN CHOCK: You're referring to the  
4 shield law?

5 COMMISSIONER BIGA: Yes.

6 MS. HIRAKAMI: I'm not -- actually I'm not  
7 familiar with the shield law. I'm not sure how that  
8 impacts our hearings.

9 CHAIRMAN CHOCK: I think it generally deals  
10 with news media being able to protect their sources  
11 confidentially. I don't think it's related to what  
12 Sarah's talking about, which is generally creating  
13 some kind of policy that would restrict anyone,  
14 basically, news media or anybody, from videotaping  
15 unless we created some kind of a system for how we  
16 manage that, maybe perhaps manage that situation.

17 COMMISSIONER BIGA: Okay. I figured I'd  
18 just throw it out to clear it up.

19 CHAIRMAN CHOCK: Anyone else, comments?  
20 Questions?

21 COMMISSIONER INOUE: I just tend to want to  
22 be transparent. So I hate to restrict too much. But  
23 if we have the ability to decide by permission, I just  
24 want to make a comment that it should be freely  
25 granted unless there's a reason why.

1 I don't necessarily have a problem with  
2 restriction, but I just want to have a transparency  
3 process in place so that we don't arbitrarily  
4 basically restrict videotaping and the like.

5 CHAIRMAN CHOCK: Thank you, Commissioner  
6 Inouye. I think just a couple of thoughts on this  
7 issue. I know that, I appreciate Sarah bringing it up  
8 for our consideration. I know that in the past when  
9 we've gotten into some of these very controversial  
10 hearings, some of the -- depending on whatever side of  
11 the issue you're on, I noticed that some of the  
12 individuals that have come forward with video cameras,  
13 they kinda used that to intimate people who are just  
14 there to express an opinion.

15 I think that's something that is part behind  
16 what Sarah's kind of talking to, creating an  
17 environment where people can feel like they're not  
18 going to be harassed or threatened or intimidated  
19 especially if they reveal their residential address or  
20 something along those lines.

21 Another issue that came up in another  
22 Commission, I think it was on reapportionment, where a  
23 member of the news media left a cellphone on the  
24 table. And it was videotaping an executive session --  
25 not videotaping but audio-taping a portion of our

1 executive session.

2 I think there's certain things where our  
3 staff needs to be kind of diligent in terms of  
4 monitoring what might get left behind, recording  
5 devices, things of that nature. But I would tend to  
6 kind of agree with Commissioner Inouye.

7 That is I think in this day and age that of  
8 transparency is something that is critical to our  
9 process and how we deliberate and go through these  
10 matters.

11 So anything that might impede that or take  
12 away from that I'm certainly not in favor of doing,  
13 but I think if we can have some kind of media bay, if  
14 you will, for news media or press box to keep cameras  
15 from coming behind us or just to kind of control the  
16 environment.

17 I know when we were in sort of the larger  
18 dockets on Koa Ridge and Ho'opili where we were in  
19 meeting spaces that were very crunched. People were  
20 all over the place. That wasn't necessarily an  
21 orderly way to handle the meeting either. So just  
22 appreciate the fact that you brought this in front of  
23 us because it's definitely worthy of a discussion.

24 In terms of my perspective I wouldn't be  
25 inclined at this point in time to kind of create a new

1 policy or rule or mandate, but just to have maybe  
2 staff coordinate and work with press a little more  
3 actively to manage that process.

4           It's going to be a challenge though. I  
5 think in the era where we have cell phone cameras and  
6 recordings in your hands it's going to be very  
7 difficult to control that. It's ubiquitous now. So  
8 it's the era that we're in. Anyway, that's just my  
9 comment. Anybody else have any questions or comments  
10 before we adjourn?

11           COMMISSIONER MAKUA: I agree. I think the  
12 more the public can -- the more transparent we are the  
13 better. Even if we have reporters or whatnot in the  
14 room reporting, they only report a little section of  
15 what they want to report as we read. So I think it's  
16 good for the general public, the people who cannot  
17 take off of work and be involved to see what's  
18 happening.

19           MR. ORODENKER: Just a comment, Mr. Chair.  
20 When staff and Sarah decided to bring this up before  
21 the Commission we really weren't talking about the  
22 press. We were talking about private individuals,  
23 someone who, in an organization who's recording or  
24 just an individual who's trying to make sure they have  
25 everybody's address, and things like that.

1           CHAIRMAN CHOCK: Any other comments,  
2 questions? Anybody want to take any action on this  
3 topic?

4           COMMISSIONER McDONALD: Well, I guess  
5 regarding the address thing, the requirement for  
6 public testifiers to state your name and address. Is  
7 that a rule of ours that's required?

8           MS. HIRAKAMI: They're not required to give  
9 their name or address, but when people submit public  
10 testimony to a board or commission. My understanding  
11 was it was the practice of the Commission to ask for  
12 that because if there's two people, for example, named  
13 Bob Smith, they know which Bob Smith it was who came  
14 to testify. That is just the way to distinguish. It  
15 was suggested to maybe they can just ask for a mailing  
16 address or business address. They wanted a way to  
17 distinguish public witnesses.

18           But generally when asked for an address the  
19 witness gives their home address. Another thing is  
20 when we go on appeal then the question too is we have  
21 to redact the address from the record on appeal that  
22 goes up.

23           I suppose they waived it in a way because  
24 they announce their address in the public open  
25 hearing. But it all ties. my main concern was if they

1 want the maximum number of members of the public to  
2 come and participate and speak freely it should be in  
3 a least intimidating environment. And I think more  
4 people would be encouraged to do it.

5 And I think the difference between private  
6 people and the press sitting here and videotaping them  
7 is the press is usually invited. So KITV is here. We  
8 know KITV is here as opposed to some person who takes  
9 a private video and then it's up on U-Tube or  
10 something of a witness. And it just seems to me some  
11 of the witnesses seemed a little intimidated by that.

12 COMMISSIONER McDONALD: Have we gotten  
13 comments from the public regarding this particular  
14 issue?

15 MS. HIRAKAMI: I have not solicited them.  
16 This is just my own observation. It wasn't coming  
17 from any particular person.

18 MR. ORODENKER: We have not had anybody  
19 complain. But staff has noticed that some of the  
20 participants seem to be intimidated when there's a  
21 camera and they know that it's on.

22 I think that the concern arises from our  
23 changing world. It used to be that if somebody came  
24 and testified, and gave their name and address, that  
25 to obtain that information required someone to come



1 and ask for it to go through our records, go through  
2 the paper.

3 Now people can take a video and put it up on  
4 U-Tube in five minutes and all of a sudden the whole  
5 world knows what your position is and you subject  
6 yourself to a lot of potential harassment. I think  
7 that's what we're trying to prevent and curtail.

8 We see this happening a lot with kids. I  
9 mean that's where it's most obvious. Kids videotape  
10 each other at school and it goes viral. That kid's  
11 subject to harassment. And while for the most part  
12 our participants are quite good about not doing that,  
13 there has been instances where it's been very  
14 contentious. And the community's been divided.  
15 There's been small communities. It could result in  
16 some harm to the individuals. That was the main  
17 reason why we brought it up.

18 COMMISSIONER MAKUA: I think at the meetings  
19 we see people being intimidated, it just there's  
20 intimidating meetings 'cause they're so, you know,  
21 like with Ho'opili. Those witnesses that come up are  
22 under pressure already.

23 And I don't know if I think that people are  
24 videotaping to get addresses. 'Cause I've seen, I've  
25 seen the person that videotapes a lot at our meetings,

1 videoing at every Hawaiian event, at every public  
2 speaking at UH Manoa. You know what I mean? He's  
3 there everywhere. So I don't think the Land Use is  
4 his only thing. I think he's just -- I've seen him at  
5 lectures at UH. I've seen him everywhere. Even  
6 though he comes here he has no idea who I am.

7 (Laughing)

8 He sees me on performances. He has no idea.  
9 He doesn't connect this and that. So I don't think  
10 he's seriously like ooooho, like concentrating on us,  
11 you know. He has no clue how he remembers me.

12 MS. HIRAKAMI: Just to follow up on  
13 Commissioner McDonald's question. Whether or not we  
14 ask for their home address is a different issue.  
15 We're not required to ask for their home address.  
16 Whether or not you want to or not is a different  
17 issue.

18 Because they can -- regardless of any policy  
19 on videotaping then can always audiotape. 'Cause  
20 that's in the statute. So they're going to get the  
21 address no matter what. As long as we are asking them  
22 to give an address anybody in the public can audiotape  
23 that from the Commission.

24 COMMISSIONER MAKUA: Maybe if they put their  
25 full name, then that differentiates the Bob William

1 Smith from the Bob whatever Smith. I don't know.

2 COMMISSIONER TEVES: Have we ever had a  
3 problem with two guys showed up with the same name?  
4 I've never had that since I've been here.

5 MR. ORODENKER: Not on *my* last name.  
6 (laughter)

7 COMMISSIONER TEVES: If we do then we can --  
8 (overlapping conversations)

9 COMMISSIONER MAKUA: We wouldn't have to ask  
10 their address.

11 COMMISSIONER TEVES: If we do then we can  
12 ask for the address or something like that. I don't  
13 ever remember guys with the same name over here.

14 COMMISSIONER McDONALD: What about if it's  
15 an address they give, I can understand the whole  
16 privacy thing, an intimidation. What about having the  
17 public witnesses state their name but sign in name and  
18 address for the Commission's records? And I do  
19 understand it's public record. But if somebody's  
20 after an address they gotta come to the office.

21 COMMISSIONER TEVES: That's a good idea.

22 MS. HIRAKAMI: I suppose we could do that.  
23 Again, it's a separate issue whether or not we want to  
24 ask the public witnesses for their address or not.  
25 That's up to the Commission to ask. That wasn't the

1 main concern about when I raised about the  
2 videotaping. Because if they announced their public  
3 address it's already announced. But if it's more,  
4 just stating their address and audio recording you  
5 like Holly's audio recording us right now.

6 It's a little different than having people  
7 you don't know who don't even identify themselves  
8 taking videos of you that you don't know what they're  
9 going to do with it. It was just my personal  
10 observation.

11 COMMISSIONER INOUE: And this is just part  
12 of the proceeding, but I do like to know where they're  
13 from, not necessarily an address. Somebody from  
14 California or somebody in the local area. So I  
15 wouldn't want to completely take it out. But I don't  
16 need to know their exact address.

17 COMMISSIONER McDONALD: That's a good point.

18 COMMISSIONER INOUE: On the matter at hand  
19 I guess a suggestion would be coming from Sarah, Dan  
20 or the staff, to maybe put down in writing what we  
21 would want, what we could do.

22 In other words, if we're going to put it out  
23 in an announcement I'd like to know what the wording  
24 be like that you're suggesting. Then we can, you  
25 know, look at that and see if we want to tweak it,

1 that type of thing, rather than trying to come up with  
2 a general statement at this time. That's just a  
3 suggestion.

4 CHAIRMAN CHOCK: Riley.

5 MR. HAKODA: Chair Chock, on the Witness  
6 List there's a request that they fill in their  
7 address. As you swear in the witness you could ask,  
8 "Please state your name and do you verify that the  
9 address you provided on the sign-in sheet is correct."  
10 I think this would solve the concern about where their  
11 private address is coming from.

12 CHAIRMAN CHOCK: It's a great suggestion,  
13 Riley. Thank you. How about the introduction of the  
14 press? Sometimes it's very difficult to distinguish  
15 who the press is and who the public is. If there's  
16 any intimidation, and pointing the cameras at us, if  
17 we could have some kind of introduction who the press  
18 is. That "press" I'm talking about is the media. Any  
19 other comments? Nick, okay with that?

20 COMMISSIONER TEVES: Okay.

21 CHAIRMAN CHOCK: Okay. Thanks, Sarah.  
22 Thanks, Dan on that. Anybody have any other questions  
23 before we adjourn for the day? Okay. Thank you,  
24 everybody. We stand adjourned. Have a good weekend.

25 (The proceedings were adjourned at 9:50 a.m.)

## 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 matters on the 19th day of April 2013;

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 matters.

DATED: This \_\_\_\_\_ day of \_\_\_\_\_ 2013

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