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LAND USE COMMISSION

STATE OF HAWAI'I

CONTINUED HEARING AND ACTION	)	PAGE
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A11-794 STATE OF HAWAI'I	)	1
DEPARTMENT OF EDUCATION-KIHEI HIGH SCHOOL	)	
(Maui)	)	
	)	
ACTION	)	
A94-706 KA'ONO'ULU RANCH (Maui)	)	29
	)	

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TRANSCRIPT OF PROCEEDINGS

The above-entitled matters came on for a Public Hearing at Maui Arts & Cultural Center, Alexa Higashi Meeting Room, One Cannon Way, Kahului, Maui, Hawai'i commencing at 9:40 a.m. on June 27, 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

RONALD HELLER, VICE CHAIR

CHAD McDONALD, VICE CHAIR

SHELDON R. BIGA

THOMAS CONTRADES

LANCE M. INOUE

ERNEST MATSUMURA

EXECUTIVE OFFICER: DAN ORODENKER

CHIEF CLERK: RILEY HAKODA

STAFF PLANNER: SCOTT DERRICKSON

DEPUTY ATTORNEY GENERAL: SARAH HIRAKAMI, ESQ.

AUDIO TECHNICIAN: WALTER MENCHING

Docket No. All-794 State of Hawaii-DOE, Kihei HS-

Decision Making

For the Petitioner:

WILLIAM YUEN, ESQ.

ROBERT PURDIE - DOE

For the County:

JAMES GIROUX, ESQ.

Deputy Corporation Counsel

WILLIAM SPENCE, Director

For the State:

JESSE SOUKI

Director Office of Planning

RODNEY FUNAKOSHI, OP

## 1 A P P E A R A N C E S (cont'd)

2 Docket No. A94-706 Ka'ono'ulu Ranch

3 Motion to Stay

4 For the Petitioner: JONATHAN STEINER, ESQ.

5 For the County MICHAEL HOPPER  
6 Dept. of Planning Deputy Corporation Counsel  
7 WILLIAM SPENCE, Director8 For the State: JESSE SOUKI, Director  
9 Office of Planning  
RODNEY FUNAKOSHI, OP10 For the Intervenor TOM PIERCE, ES1.  
11 Maui Tomorrow: IRENE BOWIE  
DANIEL KANAHELE12 For the Intervenor MARK HYDE  
13 South Maui Citizens  
For Responsible Growth:

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## I N D E X

Docket No. A11-794 State of Hawai'i-DOE

PUBLIC TESTIMONY

PAGE

Lucienne De'Naie

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Docket No A94-706 Ka'ono'ulu Ranch

PUBLIC TESTIMONY

Clayton Nishikawa

34

Joan Martin

35

1           CHAIRMAN CHOCK: (gavel) I'd like to call  
2 the meeting to order. This is a meeting of the State  
3 Land Use Commission. Our first item of business is  
4 the adoption of the minutes. Is there a motion to  
5 adopt?

6           COMMISSIONER CONTRADES: So moved.

7           COMMISSIONER McDONALD: Second.

8           CHAIRMAN CHOCK: Moved and seconded. Any  
9 discussion? Any objections to the minutes? If not  
10 the minutes have been approved. I'd like to ask our  
11 executive officer to briefly cover our tentative  
12 meeting schedule.

13           MR. ORODENKER: Thank you, Mr. Chair.  
14 July 11th and 12th our next scheduled meeting remains  
15 open. We have nothing on the agenda for those 2 days.

16           July 25th and 26th we are back here on Maui  
17 for Maui R&T at the Makena Beach and Golf Resort for a  
18 site visit and commencement of hearing.

19           On August 8th and 9th continued hearing for  
20 Maui R&T. On August 22nd and 23rd Halekua Development  
21 Corporation on O'ahu mostly to bifurcate and amend.

22           September 5th and 6th CMBY Investment, LLC  
23 on Maui until 2:00 p.m. Then at 2:00 p.m. we will be  
24 having our first public hearing on the Governor's  
25 recently-approved Administrative Rules. We also have

1 Maui R&T continued hearing oral argument on the  
2 following day.

3 September 19th and 20th is actually the  
4 HCPO conference on the Big Island. Sheraton Bay Kona.  
5 We will also be having a meeting in regard to our  
6 public rules at that time.

7 CHAIRMAN CHOCK: Thank you very much, Dan.  
8 This is a continued hearing and action on A11-794 oral  
9 argument and deliberation State Department of  
10 Education, Kihei High School, to amend the  
11 Agricultural Land Use District Boundary into the Urban  
12 Land Use District for approximately 77.2 acres of  
13 land. Will the parties please identify themselves for  
14 the record.

15 MR. YUEN: Good morning, Mr. Chair.  
16 William Yuen on behalf of the State of Hawai'i  
17 Department of Education. With me is Robert Purdie of  
18 the Department of Education.

19 CHAIRMAN CHOCK: Good morning.

20 MR. GIROUX: Good morning. James Giroux,  
21 deputy corporation counsel with the Department of  
22 Planning. And with me is William Spence, Director.

23 CHAIRMAN CHOCK: Good morning.

24 MR. SOUKI: Good morning, Chair and  
25 Commissioners. Jesse Souki for the Office of

1 Planning, state of Hawai'i. And with me is Rodney  
2 Funakoshi.

3 CHAIRMAN CHOCK: Good morning, Jesse.  
4 Congratulations on recently becoming a dad. Why do  
5 you look so well-rested? (laughter)

6 MR. SOUKI: Ask my wife.

7 CHAIRMAN CHOCK: *I'm* not. I'm not well  
8 rested. Anyway, let me briefly update the record in  
9 this docket. On June 13, 2013 the Commission began  
10 the hearings. June 14 the Commission concluded the  
11 evidentiary portion of the proceedings.

12 On June 19 the Commission received  
13 Petitioner's Proposed Findings of Fact, Conclusions of  
14 Law and Decision and Order after it had met with OP  
15 and County and mailed the agenda for the June 27-28  
16 meeting to the parties and the statewide and Maui  
17 mailing lists.

18 On June 25th and 26th the Commission  
19 received Petitioner's Stipulated Findings of Fact,  
20 Conclusions of Law and Decision and Order and OP and  
21 County Statements of No Objection to the Stipulated  
22 Findings of Fact, Conclusions of Law and Decision and  
23 Order.

24 Let me briefly describe our procedure for  
25 today. First I will call for those individuals

1 desiring to provide public testimony on this matter to  
2 identify themselves. All such individuals will be  
3 called in turn to our witness box where they will be  
4 sworn in. A 3-minute time limit on testimony will be  
5 enforced.

6 After completion of the public testimony,  
7 oral argument presentations will begin starting with  
8 the Petitioner. Chair will allow each party no more  
9 than 15 minutes to present oral argument in support of  
10 its Proposed Decision and Order and/or its exceptions  
11 to those proposed by other parties. Petitioner may  
12 reserve a portion of this time for rebuttal.

13 At the conclusion of oral argument and  
14 after questions from the Commissioners and the answers  
15 that follow, the Commission will conduct formal  
16 deliberation on this matter. Chair will also note for  
17 the parties and the public that from time to time I'll  
18 be calling for short breaks. Are there any  
19 individuals wishing to provide public testimony at  
20 this time? Please come forward.

21 Good morning, Ma'am. Would you please  
22 state your name and address for the record, please?

23 THE WITNESS: Yes. My name is Lucienne de  
24 Naie. I reside at 320 Door of Faith Road in Haiku,  
25 Maui.



1 LUCIENNE De NAIE

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

4 THE WITNESS: I do.

5 CHAIRMAN CHOCK: Proceed. Three minutes.

6 THE WITNESS: Thank you. I come today as  
7 an individual. We all support the Kihei High School  
8 being built. Just like to bring to your attention 2  
9 matters that may or may not have been brought up  
10 before.

11 One is that since this is a high school  
12 it's very important that it have connectivity to other  
13 areas where the high school students potentially would  
14 be coming from. One of those areas you will be  
15 hearing in July, that is the reconfigured RD, research  
16 a development parcel immediately to the south of the  
17 high school.

18 Right now there's no means to connect  
19 students with that except to go on Pi'ilani Highway.  
20 This just really doesn't seem smart planning, good  
21 planing, safe planning in any way.

22 So just, you know, as this body makes its  
23 final deliberations that fact should be known.

24 The matter is that the Archaeological  
25 Inventory Survey for this property, once again, was

1 done in a manner where it was not very careful.  
2 Walking the land recently with several members of the  
3 Kihei Community Association and even some public  
4 officials, a site was identified that has not been  
5 recorded at all that is very, very likely to be a  
6 cultural site. I'll turn in a picture of it just for  
7 the record. It has an alignment of rocks. There were  
8 fragments of coral found there.

9           This is a half mile from the ocean. Coral  
10 had to be transported there for cultural purpose. It  
11 has an outstanding view. It's a low-rise. It's a  
12 typical type of place that would have been modified  
13 for cultural use. It's not recorded at all. It's  
14 likely that it could be avoided. There's plenty of  
15 room to build this high school here.

16           It's just because it was poor work done on  
17 the Archaeological Inventory Survey that an opportunity  
18 here could be lost for future generations to  
19 understand who came before on this land.

20           So I would just ask that the Commission  
21 recommend that, you know, in the next phase that there  
22 be a supplementary Archaeological Survey done. Several  
23 lineal descendants participated in this site visit.  
24 Members of the Naole family that held the royal patent  
25 back at the time of the Mahele, they'd be happy to be

1 consultants. It's just we should do the process a  
2 little more properly. Thank you.

3 CHAIRMAN CHOCK: Thank you, very much.  
4 Parties, any questions?

5 MR. YUEN: No questions.

6 CHAIRMAN CHOCK: County?

7 MR. GIROUX: No questions.

8 CHAIRMAN CHOCK: State?

9 MR. SOUKI: No questions.

10 CHAIRMAN CHOCK: Commissioners, any  
11 questions? Thank you for your testimony?

12 THE WITNESS: May I leave this (photo) with  
13 the staff?

14 CHAIRMAN CHOCK: Yes. Anyone else in the  
15 public wishing to provide public testimony on this  
16 matter, please come forward. Okay. Seeing none,  
17 parties, I understand there's been some discussion  
18 regarding Proposed Findings of Fact, Conclusions of  
19 Law and Decision and Order? Can you give the  
20 Commission an update in terms of what's been agreed  
21 to and what have been stipulated to, Petitioner?

22 MR. YUEN: Yes, Mr. Chairman. On June 25th  
23 we submitted a Stipulated Findings of Fact,  
24 Conclusions of Law and Decision and Order containing  
25 the findings as well as 25 conditions.

1           The County yesterday submitted to you the  
2 signature of the deputy corporation counsel indicating  
3 its approval. On June 25th the Office of Planning  
4 submitted a Statement of No Objection which  
5 procedurally indicates its approval of the  
6 stipulation.

7           CHAIRMAN CHOCK: Thank you. County.

8           MR. GIROUX: Yes, that is our position.  
9 And I believe we also filed a Statement of  
10 Non-opposition to what was filed on July 25th also, to  
11 have some redundancy so it was clear that we had no  
12 objections to everything that we had talked about and  
13 put into that document.

14          CHAIRMAN CHOCK: Okay. State, any  
15 comments?

16          MR. SOUKI: Just a few comments. We did  
17 file a Statement of No Opposition. But if there's any  
18 one overarching issue before the Commission in these  
19 proceedings for the district boundary amendment to  
20 allow the Kihei High School was the welfare of  
21 Hawai'i's current and future keiki.

22           And I think that through discussions among  
23 the parties and relying on input by the DOE and its  
24 technical expertise, we're able to address the issue  
25 of student safety and the mission of DOE to provide

1 education facilities for them.

2 In summary, a couple of facts that helped  
3 us arrive at this decision and amicable agreement was  
4 Finding of Fact 66 which recognizes that Pi'ilani  
5 Highway is a 4-lane, 2-way limited access roadway that  
6 separates the residential and proposed residential on  
7 the makai side from the proposed high school.

8 Finding of fact 70 recommends that  
9 Petitioner submit a revised TIAR for DOT acceptance  
10 including revised traffic signal warrant studies and  
11 pedestrian route study.

12 Finding of fact 70 which recognizes that  
13 Wilson Okamoto, the consultant for the Petitioner,  
14 used the 1 percent growth rate, but the DOT would  
15 require a 2 percent growth rate.

16 This is important because the finding of  
17 fact 114 it recognizes that in 2000 the population in  
18 the Kihei Community Plan area was 22,870. And the  
19 forecast in 2030 is 46,896. It's 105 percent increase  
20 in growth, about 3 percent per annum. So 2 percent  
21 analysis of the TIRA seems fair.

22 Also finding of fact 76, what DOT is  
23 concerned about the conflicts between vehicles and  
24 pedestrians and the overall safety of pedestrians  
25 crossing the highway. And most importantly DOE has

1 agreed to evaluate pedestrian issues using Federal  
2 Highway Administration guidance on grade-separated  
3 crossings.

4 In conclusion, the condition that ties this  
5 all together is Condition 1. And in particular  
6 subsection B which, among other things, has DOE  
7 evaluating compliance with the FHWA guidance relating  
8 to grade-separated crossings. And also that  
9 Petitioner will submit 3 updated pedestrian route  
10 studies and analyses for the Project.

11 So given these facts and conditions and our  
12 review and agreement on all the other conditions and  
13 findings and conclusions, we are in agreement with the  
14 parties and have no opposition to the proposed D&O.

15 CHAIRMAN CHOCK: Thank you very much,  
16 Jesse. Petitioner, are you ready to proceed with  
17 closing argument?

18 MR. YUEN: Yes, Mr. Chairman.

19 CHAIRMAN CHOCK: 15 minutes.

20 MR. YUEN: Thank you. I will try to keep  
21 my remarks brief. Basically in reviewing the  
22 Commission's decision-making criteria contained in  
23 Hawaii Revised Statutes Section 205-17 and the Land  
24 Use Commission's Rules 15-15-77, first the  
25 reclassification of the Petition Area conforms to

1 goals and objectives and policies of the Hawai'i State  
2 Plan and priority guidelines, particularly with  
3 respect to the Educational Functional Plan and the  
4 Population, Economy and Employment Functional Plan.

5           The reclassification will allow the  
6 Department of Education to build a new high school to  
7 serve the Kihei-to-Makena region. It will provide the  
8 up to 1,650 residents of the Kihei area easier access  
9 to quality education, remove the necessity to commute  
10 to Central Maui, and enhance employment and higher  
11 education opportunities for these students.

12           The Kihei High School will be designed also  
13 to provide appropriate educational opportunities and  
14 facilities to special needs students.

15           With respect to the Population and  
16 Employment Functional Plan, construction of Kihei High  
17 School will both further the State's goals to develop  
18 land resources to meet the level of growth predicted  
19 for the Kihei region.

20           It will facilitate creation of  
21 construction-related jobs during the building of the  
22 school as well as open long-term educational  
23 employment opportunities in the Kihei region.

24           The reclassification conforms to the Urban  
25 District standards that I'll review later. There are

1 no endangered or threatened species of flora or fauna  
2 or any critical habitat on the Petition Area. The  
3 Petition Area does not contain important cultural,  
4 natural or agricultural resources. And development of  
5 the Petition Area will not adversely affect any such  
6 resources.

7           The Petition Area is basically low quality  
8 cattle ranchland. It does not qualify for Important  
9 Agricultural Land development classification. And  
10 development of the Petition Area will not impair  
11 either agricultural production or cattle ranching.

12           The 2013 Legislature appropriated  
13 \$113 million for construction of Kihei High School  
14 which evidences the State's commitment of significant  
15 resources and funding to build this new school.

16           The reclassification is consistent with the  
17 County of Maui General Plan and its various components  
18 including the Countywide Policy Plan, the Maui Island  
19 Plan and the Kihei-Makena Community Plan.

20           And the Kihei High School is a designated  
21 public facility in the Maui Island Plan's Public  
22 Facilities Infrastructure map.

23           Turning to the Urban District standards,  
24 this land is characterized by a city-like  
25 concentration of people, structures, streets and urban



1 level of services immediately adjacent to Pi'ilani  
2 Highway on the makai side.

3           The Petition Area is in proximity to  
4 centers of trading and employment. In addition to  
5 being adjacent to Pi'ilani Highway it's contiguous to  
6 land in the Urban District and in close proximity to  
7 commercial and resort areas in Kihei and Wailea.

8           Basic services such as commercial  
9 facilities, parks, wastewater systems, drainage,  
10 potable water, transportation systems, public  
11 utilities and police and fire protection are available  
12 to the Petition Area.

13           Reclassification of the Petition Area will  
14 lead to creation of a significant reserved area for  
15 foreseeable urban growth. The Kihei High School is  
16 planned for development in phases. The initial phase  
17 will accommodate approximately 800 students with plans  
18 to develop additional classrooms as well as support  
19 facilities as the population continues to grow and  
20 subsequent state funds are available.

21           The Petition Area has satisfactory  
22 topography, drainage and site conditions. It's  
23 reasonably free from the danger of flood, tsunami,  
24 unstable soil or other adverse environmental effects.

25           With respect to the State and County Plans,

1 I've already discussed conformance with the State  
2 Plan. In terms of the County of Maui Plans it  
3 conforms to both the County-wide Policy Plan. The  
4 recently adopted Maui Island Plan designates the  
5 Petition Area within the Kihei-Makena Urban Growth  
6 Boundary. And it's also designated on the Maui Island  
7 Plan's public facility infrastructure map as the site  
8 for a public school.

9 Approximately 2/3 of the Petition Area is  
10 designated for public facilities in the Kihei-Makena  
11 Community Plan. The remaining acreage is the subject  
12 of a proposed amendment to the Kihei-Makena Plan that  
13 the County Planning Commission will be entertaining in  
14 July, and will subsequently be considered by the  
15 county council later this summer or in early fall.

16 As Jesse Souki has described to the  
17 Commission, the Department of Education, the County  
18 and the Office of Planning have reached agreement on  
19 25 conditions of reclassification.

20 The Department of Education has agreed to  
21 revise the Traffic Impact Analysis Report including  
22 the Traffic Signal Warrant Study and to prepare a  
23 Pedestrian Route Study for both Phase I of the Project  
24 as well as for the entire Project incorporating Phases  
25 1 and 2.

1           The Department of Education has agreed to  
2 update the Traffic Impact Analysis Report as indicated  
3 by Mr. Souki, and more important, to make the traffic  
4 improvements recommended by the studies. If necessary  
5 the Department of Education will go back to the  
6 Legislature to seek additional funds for these  
7 improvements. I'll reserve the rest of my time for  
8 rebuttal. Thank you.

9           CHAIRMAN CHOCK: Thank you, Petitioner.  
10 County?

11           MR. GIROUX: Thank you, Chair. But just  
12 for the record, I did my closing at the last meeting.  
13 I knew Mr. Yuen would steal my thunder so I took an  
14 early shot. We just want to reiterate that Maui  
15 County is in full support of the District Boundary  
16 Amendment. And we appreciate the time and effort that  
17 everybody has put into it, the amount of cooperation.  
18 And we just want to see this move forward.

19           We will be seeing this at the Planning  
20 Commission very soon. And it will be forwarded to the  
21 county council for the ordinance for the change in  
22 zoning. So we appreciate everybody's help on this.

23           CHAIRMAN CHOCK: Thank you, Mr. Giroux.  
24 State, any closing statement?

25           MR. SOUKI: I think I'll let what I stated

1 earlier stand as my closing. But I think it's  
2 important to note, given the public testimony, that  
3 the hearings are closed so the Commission is not  
4 taking additional facts.

5 And regarding archaeological studies it  
6 does say on the finding of fact 54: The consultant  
7 conducted an archaeological survey of the Petition  
8 Area, a hundred percent pedestrian survey. And a  
9 subsurface testing of 77 acres that SHPD concurred  
10 with its findings.

11 And then Conditions 3 and 4 regarding  
12 Archaeological Inventory Survey mitigation plans and  
13 monitoring, and Condition 4 regarding unidentified  
14 finds adequately and sufficiently address the issues  
15 of archaeological resources.

16 CHAIRMAN CHOCK: Okay. Thank you,  
17 Mr. Souki. Petitioner, do you still want the time?

18 MR. YUEN: I don't need to say anything  
19 further, thank you.

20 CHAIRMAN CHOCK: Thank you very much,  
21 parties. The Commission will now conduct formal  
22 deliberations concerning whether to grant the Petition  
23 whether in whole or in part or to deny.

24 If the Commission decides to grant the  
25 Petition, it needs to determine what conditions of

1 approval to impose. I'd like to note for the parties  
2 and the public that during the Commission's  
3 deliberations we'll not entertain additional input  
4 from the parties or the public unless those  
5 individuals or entities are specifically requested to  
6 do so by the Chair. If called upon I would like to  
7 ask that comments be limited to the question at hand.

8           The Commission held hearings on the merits  
9 of this Petition on June 13-14 and oral argument  
10 concluded today. Commissioners, let me confirm that  
11 each of you have reviewed the record, read the  
12 transcripts for any meeting that you may have missed  
13 and are prepared to deliberate on this docket.

14           After I call your name please signify with  
15 either a yes or no that you are prepared to deliberate  
16 on this matter. Commissioner Biga?

17           COMMISSIONER BIGA: Yes.

18           CHAIRMAN CHOCK: Contrades?

19           COMMISSIONER CONTRADES: Yes.

20           CHAIRMAN CHOCK: Heller?

21           COMMISSIONER HELLER: Yes. Mr. Chair, I  
22 have a disclosure that I've put on the record in other  
23 dockets but not yet in this docket. So I'd just like  
24 to note for the record that I represent taxpayers in  
25 real property tax cases including some cases on the

1 Island of Maui which means that my clients would be  
2 adverse to Maui County in those cases. I don't think  
3 that will affect my ability to be impartial in this  
4 case but I wanted to note that for the record.

5 CHAIRMAN CHOCK: Thank you for the  
6 disclosure, Commissioner Heller. Parties, any  
7 concerns or objections?

8 MR. YUEN: No objection.

9 MR. GIROUX: County has no objection.

10 MR. SOUKI: No objections from the State.

11 CHAIRMAN CHOCK: Okay. Thank you,  
12 Commissioner Heller. Commissioner Inouye?

13 COMMISSIONER INOUE: Yes.

14 CHAIRMAN CHOCK: Commissioner Matsumura?

15 COMMISSIONER MATSUMURA: Yes.

16 CHAIRMAN CHOCK: Commissioner McDonald?

17 COMMISSIONER McDONALD: Yes.

18 CHAIRMAN CHOCK: Commissioner Teves is  
19 excused. Chair is also prepared to deliberate on this  
20 matter. The goal today is to determine by way of  
21 motion the Commission's decision on whether to grant  
22 in whole or in part Petitioner's request to reclassify  
23 the subject property or to deny the Petition.

24 If a decision is reached today, and based  
25 on the Commission's guidance, the staff will be

1 directed to draft appropriate Findings of Fact,  
2 Conclusions of Law and Decision and Order reflecting  
3 the Commission's decision. Commissioners, what is  
4 your pleasure on this matter? Commissioner Biga.

5 COMMISSIONER BIGA: Mr. Chair, I move to  
6 grant A11-794 State of Hawai'i, DOE-Kihei High School  
7 Maui the Petition with the conditions and in the  
8 general format of the agreed-to Decision and Order  
9 submitted by Petitioner with the added condition that  
10 an above- or below-ground pedestrian crossing be  
11 constructed prior to opening of Phase I.

12 And that Petitioner's proposed Decision and  
13 Order be further modified by staff to be consistent  
14 with the motion and with the procedural findings  
15 reflecting all filings in this docket.

16 CHAIRMAN CHOCK: Maybe before we get into  
17 the conditions, just to keep matters clean I'd like to  
18 just maybe suggest a friendly amendment that I believe  
19 you're making a motion to approve, Commissioner Biga?

20 COMMISSIONER BIGA: Yes.

21 CHAIRMAN CHOCK: Okay. Chair will second  
22 that motion. Then maybe now for the discussion if you  
23 want to restate that condition.

24 COMMISSIONER BIGA: Restating the  
25 condition. In the general format of the agreed-to

1 Decision and Order submitted by the Petitioner with  
2 the added condition an above- or below-ground  
3 pedestrian crossing be constructed prior to opening of  
4 the Phase I and that the Petitioner's proposed  
5 Decision and Order, further modified by staff, to be  
6 consistent with this motion and with these procedural  
7 findings reflecting all filings in this docket.

8 CHAIRMAN CHOCK: Thank you. Discussion?  
9 Commissioner Heller.

10 COMMISSIONER HELLER: I generally agree  
11 with Commissioner Biga in that I'm very concerned  
12 about the issue of pedestrian access. And I  
13 personally think a pedestrian overpass probably is a  
14 good answer. However, I'm not a traffic engineer or  
15 an expert on pedestrian safety.

16 As I understand the parties' proposal they  
17 are proposing to work out the final decision on an  
18 overpass or underpass between the Department of  
19 Education and the Department of Transportation. And  
20 the parties will ultimately reach some agreement as to  
21 what is necessary.

22 Given that I'm not a traffic engineer and  
23 given that the TIAR has not been finished at this  
24 point, I don't think it's appropriate for us to make  
25 that decision today. I think it's more appropriate to



1 say that the experts will work it out and that the  
2 experts have to ultimately agree on what the proper  
3 answer is.

4 So therefore would, while I share  
5 Commissioner Biga's concern, I would oppose the  
6 amendment regarding this specific requirement.

7 CHAIRMAN CHOCK: Thank you, Commissioner  
8 Heller. Any other discussion, Commissioners,  
9 comments, concerns, questions for any of the parties?  
10 Commissioner Inouye.

11 COMMISSIONER INOUE: Thank you, Chair. I  
12 think the No. 1 issue -- not issue, but the No. 1  
13 concern that we as Commissioners have is public safety  
14 and safety of the children as well as the residents of  
15 Maui and whoever does frequent the place.

16 So I want to echo what Commissioner Heller  
17 says. I am concerned as Commissioners imposing  
18 something that the parties have not yet come to  
19 fruition because there's a TIAR yet to be done and  
20 some engineering to ensure that the right thing is  
21 being done.

22 However, I'm prepared -- I have that  
23 discomfort but I'm prepared to approve the amendment  
24 with reservations, if that's allowed. Thank you.

25 CHAIRMAN CHOCK: Thank you, Commissioner

1 Inouye. (pause in proceedings) Commissioners, any  
2 other comments? (pause) Commissioners, any other  
3 questions on the proposed condition to require the  
4 overpass/underpass? Just so we're clear I believe  
5 Commissioner Biga's Motion's to Approve this condition  
6 based on the overpass/underpass?

7 Is that the correct understanding that  
8 there was some concerns raised by Commissioners Heller  
9 and Inouye?

10 COMMISSIONER BIGA: And thank you, Chair.  
11 I just want to reiterate on my motion. Living on  
12 Maui, traveling on that highway on numerous occasions,  
13 I've seen the speed that goes through that highway.  
14 Again, my concern is for the safety of the pedestrians  
15 and the children that will be going to that school.

16 Throughout this hearing I brought up my  
17 concerns of that nature. That's why I believe this  
18 motion, I brought this motion up. So that's my  
19 concern, the safety of the public, the safety of the  
20 children that're going to that school.

21 CHAIRMAN CHOCK: Any other comments,  
22 Commissioners? If not I'm going to have the executive  
23 officer poll the Commission. Dan.

24 COMMISSIONER HELLER: Mr. Chair, just for  
25 clarification, we're voting now on -- yes or no on

1 granting the Petition with the condition of an  
2 overpass or an underpass, is that right?

3 CHAIRMAN CHOCK: That's my understanding,  
4 correct.

5 MR. ORODENKER: Thank you, Mr. Chair. The  
6 motion is to grant the Petition with the added  
7 condition of requiring the construction of a  
8 pedestrian overpass or underpass prior to the opening  
9 of Phase I. Commissioner Biga?

10 COMMISSIONER BIGA: Yes.

11 MR. ORODENKER: Chair Chock?

12 CHAIRMAN CHOCK: Yes.

13 MR. ORODENKER: Commissioner Matsumura?

14 COMMISSIONER MATSUMURA: Yes.

15 MR. ORODENKER: Commissioner McDonald?

16 COMMISSIONER McDONALD: Yes.

17 MR. ORODENKER: Commissioner Contrades?

18 COMMISSIONER CONTRADES: Yes.

19 MR. ORODENKER: Commissioner Heller?

20 COMMISSIONER HELLER: No.

21 MR. ORODENKER: Commissioner Inouye?

22 COMMISSIONER INOUE: Yes, with  
23 reservations.

24 MR. ORODENKER: Thank you, Commissioners.  
25 The motion passes 6 votes in support and 1 vote in

1 opposition.

2 CHAIRMAN CHOCK: Thank you very much.

3 Parties, any questions? Petitioner?

4 MR. YUEN: No questions.

5 MR. GIROUX: No questions from the County.

6 CHAIRMAN CHOCK: State?

7 MR. SOUKI: No questions from the State.

8 CHAIRMAN CHOCK: Thank you very much. Why  
9 don't we take a brief recess in place to set up for  
10 the next item on our agenda. (Pau 10:11.)

11 --00--

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1 CHAIRMAN CHOCK: We are back on the record,  
2 everyone. This is a hearing and action meeting to  
3 consider the following motions regarding Docket No.  
4 A94-706: Petitioner Pi'ilani Promenade South, LLC and  
5 Pi'ilani Promenade North, LLC Motion to Stay Phase II  
6 of the Order to Show Cause proceedings hereafter  
7 referred to as Petitioner's Motion to Stay, filed  
8 April 8, 2013.

9 Intervenor Maui Tomorrow Foundation, Inc.,  
10 South Maui Citizens for Responsible Growth and Daniel  
11 Kanahele's Motion to Conclude Contested Case at the  
12 Earliest Practicable Time, hereafter referred to as  
13 Intervenor's Motion to Conclude filed on April 16,  
14 2013.

15 Petitioner Pi'ilani Promenade South and  
16 Pi'ilani North, LLC's Motion to Strike and Objection  
17 to Intervenor's Supplemental Memorandum in Support of  
18 Intervenor's Motion to Conclude Contested Case at the  
19 Earliest Practicable Time, filed April 16th and  
20 Intervenor's Memorandum in Opposition to Pi'ilani  
21 Promenade's Motion to Stay Phase II of the Order to  
22 Show Cause Proceeding, hereafter referred to as  
23 Petitioner's Motion to Strike.

24 Will the parties please identify themselves  
25 for the record.

1 MR. STEINER: Good morning, Chair and  
2 Commission. Jonathan Steiner appearing on behalf of  
3 Pi'ilani Promenade North and Pi'ilani Promenade South.  
4 I'm also appearing on behalf of Honuaula Partners,  
5 LLC. With me is Mr. Charlie Jencks.

6 CHAIRMAN CHOCK: Thank you, very much.

7 MR. HOPPER: Good morning, Mr. Chair,  
8 members fo the Commission. Deputy Corporation Counsel  
9 Michael Hopper representing the Maui County Department  
10 of Planning. With us is William Spence, planning  
11 director.

12 CHAIRMAN CHOCK: Good morning.

13 MR. SOUKI: Jesse Souki, state of Hawai'i  
14 Office of Planning. With me -- or returning shortly  
15 is Rodney Funakoshi.

16 MR. PIERCE: Good morning, Mr. Chair. Tom  
17 Pierce on behalf of the Intervenors. And with me  
18 today is Irene Bowie for Maui Tomorrow. And behind me  
19 is Mark Hyde here on behalf of South Maui Citizens for  
20 Responsible Growth. And Daniel Kanahele is here as  
21 well.

22 CHAIRMAN CHOCK: Thank you very much,  
23 parties. Let me briefly update the record. On  
24 February 7, 2013 the Commission voted that violations  
25 of Conditions 5, 15, 17 of the 1994-95 Decision and

1 Order had occurred and began proceedings for Phase II  
2 Order to Show Cause.

3           On April 8 the Commission received  
4 Petitioner's Motion to Stay. The parties timely filed  
5 their respective Statements of Position on April 11  
6 and 12 and their respective comments, responses,  
7 joinders, objections and replies on April 16th  
8 regarding Petitioner's Motion to Stay.

9           On April 16 the Commission also received  
10 Intervenor's Motion to Conclude. The parties filed  
11 their respective comments, responses, joinders,  
12 objections and replies on April 23rd and 24th  
13 regarding Intervenor's Motion to Conclude.

14           And on June 6 the Intervenor filed its  
15 supplemental Memorandum in Support of the Intervenor's  
16 Motion to Conclude Contested Case at the Earliest  
17 Practicable Time filed April 16, 2013, and the  
18 Intervenor's Memorandum in Opposition to Pi'ilani  
19 Promenade South, LLC's Motion to Stay Phase II of the  
20 Order to Show Cause proceeding.

21           On June 12th the Commission received  
22 Petitioner's Motion to Strike, Department of Planning,  
23 County of Maui's Reply and Joinder in Petitioner's  
24 Motion to Strike Exhibits A through B.

25           On June 19 the Commission mailed the agenda

1 for June 27-28 meeting to the parties and Statewide  
2 and Maui mailing lists.

3 Mr. Steiner, has our staff informed you of  
4 the Commission's policies regarding reimbursement of  
5 hearing expenses? If so could you state your client's  
6 position with respect to this policy.

7 MR. STEINER: I actually am not aware  
8 whether we have received that or not. I wasn't  
9 prepared to address that.

10 CHAIRMAN CHOCK: Dan? It's pretty  
11 standard.

12 MR. ORODENKER: It's standard for the  
13 Petitioner to be responsible for hearing expenses:  
14 court reporter and so forth.

15 MR. STEINER: We have no objections.

16 CHAIRMAN CHOCK: Thank you, Mr. Steiner.  
17 Let me briefly describe our procedures for today on  
18 this docket. First, I'll call those individuals  
19 desiring to provide public testimony to identify  
20 themselves. All such individuals will be called in  
21 turn to our witness box where they will be sworn in  
22 prior to testimony.

23 After public testimony the Commission will  
24 hear evidence and argument on the motions  
25 concurrently. At the conclusion of the arguments on



1 the motions and after questions from the  
2 Commissioners, the Chair will decide or the Commission  
3 will decide -- as to its deliberations. Are there any  
4 questions regarding our procedure for today? Parties?  
5 Petitioner?

6 MR. STEINER: None.

7 MR. HOPPER: No, Mr. Chair.

8 MR. SOUKI: None from the State.

9 CHAIRMAN CHOCK: Intervenor?

10 MR. PIERCE: No.

11 CHAIRMAN CHOCK: Thank you very much. So  
12 let me just remind everyone, including the parties,  
13 that we will be concurrently hearing the evidence and  
14 argument on all 3 motions. For those wishing to  
15 provide testimony the Commission would appreciate if  
16 you could confine your testimony to the issues  
17 consistent with these motions and avoid unnecessary  
18 repetition.

19 In addition a 2-minute time limit on  
20 testimony will be enforced. I believe we have a few  
21 members of the public signed up to testify.

22 MR. ORODENKER: Calling Clayton Nishikawa  
23 followed by Joan Martin.

24 CHAIRMAN CHOCK: Good morning, Clayton.

25 xx

1 CLAYTON NISHIKAWA

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

4 THE WITNESS: I do.

5 CHAIRMAN CHOCK: Please state your name and  
6 address, please.

7 THE WITNESS: My name is Clayton Nishikawa.  
8 Address 569 Kulaiwi Drive Wailuku.

9 CHAIRMAN CHOCK: Proceed.

10 THE WITNESS: Good morning, Commissioners,  
11 good morning, Chair.

12 CHAIRMAN CHOCK: Good morning.

13 THE WITNESS: The decision was made by the  
14 State Land Use Commission that there were violations  
15 to the D&O. The owner is proposing a Motion to Amend  
16 to correct the violations. Please approve the request  
17 for the state and allow the owner to process the  
18 Motion to Amend. This will allow the owner to address  
19 all issues and correct any violations to the Decision  
20 and Order.

21 Being in the position of raising equity  
22 capital for my own affordable housing project, I have  
23 become acutely aware that we in Hawai'i are perceived  
24 by equity capital sources to be a hostile environment  
25 for capital risk.

1           Allowing the opportunity for the owner to  
2 address issues and work collaboratively together, will  
3 help to bring investor confidence back to Hawai'i and  
4 to prove that Hawai'i is a place that equity capital  
5 can consider investing in. Thank you for allowing me  
6 the opportunity to provide testimony.

7           CHAIRMAN CHOCK: Thank you for your  
8 testimony. Parties, any questions for this  
9 individual?

10          MR. SOUKI: None from the State.

11          MR. GIROUX: None from the County.

12          CHAIRMAN CHOCK: Commissioners, any  
13 questions? Thank you for your testimony.

14          MR. ORODENKER: Joan Martin.

15          CHAIRMAN CHOCK: Good morning, Joan.

16                   JOAN MARTIN

17 being first duly sworn to tell the truth, was examined  
18 and testified as follows: someone.

19          THE WITNESS: I do.

20          CHAIRMAN CHOCK: Please state your name and  
21 our address and proceed.

22          THE WITNESS: Joan Martin, 85 Manino Circle  
23 No. 202, Kihei, Hawai'i.

24          CHAIRMAN CHOCK: Proceed.

25          THE WITNESS: Thank you. Good morning. My

1 name is Joan Martin. I'm a resident of Kihei. I'm  
2 testifying today to respectfully request the State  
3 Land Use Commission stay its Decision and Order and  
4 allow Seraphim Realty Advisors, the successor to  
5 Eclipse Development to submit a Motion to Amend and  
6 allow the company to submit new plans for the property  
7 in Kihei, a new Environmental Impact Statement, work  
8 with the community and move forward in full compliance  
9 with the rules of the Commission.

10 I want to be clear that I'm not testifying  
11 for or against the Project as that is not the issue  
12 before the Commission today. And even those who have  
13 brought this matter to the Commission have always said  
14 they weren't against the Project, but were against the  
15 process that was being followed. And I take them at  
16 their word.

17 In closing, I ask the Commission to grant a  
18 stay and a Motion to Amend by the owners. Thank you  
19 for the opportunity to testify and for all your work  
20 on behalf of the people of Hawai'i.

21 CHAIRMAN CHOCK: Thank you very much.  
22 Parties, any questions?

23 MR. SOUKI: No questions.

24 CHAIRMAN CHOCK: Commissioners? Thank you  
25 for your testimony. I believe those are the registered

1 members signed up to provide testimony. Is there  
2 anyone else in the audience who would like to come  
3 forward at this time to provide testimony? Anyone?

4           Okay. Seeing none let's proceed with the  
5 presentations by the parties. Again I'll ask the  
6 parties to limit your time to 15 minutes to cover all  
7 3 motions. You've all briefed them and we have them.  
8 So if you'd like to proceed, Petitioner, we'll go in  
9 order followed by County, State and Intervenor.  
10 Mr. Steiner.

11           MR. STEINER: Thank you, Chair. Thank you,  
12 Commission. As the Commission is aware a majority of  
13 the Commission voted to find that the *proposed*  
14 Pi'ilani Promenade Project, if constructed, would  
15 violate the conditions of the 1995 Decision and Order.

16           Pi'ilani has determined, therefore, to not  
17 proceed with any Project. And rather to move at this  
18 time to amend the Decision and Order in order to allow  
19 it to construct a development on the Project that's  
20 been fully vetted by the Commission and to address  
21 those issues in that way.

22           Pi'ilani has committed to filing a Motion  
23 to Amend the 1995 Decision and Order by no later than  
24 December 31st of this year. Significant progress has  
25 already been made. And we're hoping to be able to

1 file that Motion to Amend prior to that date, but  
2 that's the date that they're committed as an outside  
3 date upon which they would file the motion.

4           Until that motion is filed Pi'ilani is  
5 committed that it will not commence any development or  
6 work on the property in question and will maintain the  
7 status quo.

8           And, therefore, Pi'ilani respectfully  
9 requests in its motion that the Commission enter a  
10 stay of Phase II of the proceeding on the Order to  
11 Show Cause in order to allow Pi'ilani the opportunity  
12 to bring the Motion to Amend and to address that  
13 before the Commission and allow that process to move  
14 forward.

15           If a stay is granted as we've requested, no  
16 one will be prejudiced. There'll be no development on  
17 the property. The Intervenor and the public will not  
18 be prejudiced because they'll have the right to appear  
19 and be heard on any amendments before the proposed  
20 Project will be presented to the Commission.

21           In fact Pi'ilani's developers have already  
22 met with members of the Kihei Community Association to  
23 obtain their initial input on the proposed amendment,  
24 and they plan to continue that dialogue.

25           Intervenor in their opposition and in

1 their position to continue, they object to the stay  
2 insisting they have a right to proceed with Phase II  
3 and arguing the granting the stay is the equivalent to  
4 a dismissal.

5           That's not true. Granting a stay will hold  
6 the status quo. It's not the same as a dismissal.  
7 For instance, if Pi'ilani does not, as it promised, to  
8 Move to Amend the D&O, then the Commission could  
9 proceed to Phase II. Or if the Motion to Amend were  
10 denied, then it could proceed to Phase II.

11           Even if the Motion to Amend were granted,  
12 it's theoretically possible that we could proceed to  
13 Phase II, although arguably in that case Phase II  
14 could be rendered moot.

15           The Intervenor's other argument is that  
16 once a contested case procedure started that the Land  
17 Use Commission has the obligation that it is forced to  
18 move forward through to completion.

19           They're essentially arguing that the  
20 Commission lacks the power to manage its own docket.  
21 In an adversarial proceeding such as this, a  
22 quasi-adjudicative proceeding is similar to the  
23 courts.

24           And courts often and fairly routinely grant  
25 stays under the appropriate circumstances to allow

1 other procedures to move forward that have an impact  
2 upon the proceeding that's pending before them.

3 For instance, sometimes in the event that  
4 other proceedings that are moving forward might  
5 resolve the dispute.

6 If in fact the Motion to Stay is denied and  
7 Phase II moves forward, it's Pi'ilani's primary  
8 position will be that it does not intend to develop  
9 the property until a Motion to Amend has been heard.  
10 And therefore because there's going to be no  
11 development that will violate the Decision and Order,  
12 that the property should not be reverted back to  
13 Agriculture or changed to any other designation.

14 Thus in Pi'ilani's view proceeding with  
15 Phase II would simply be a waste of the Commission's  
16 time and the parties' time and resources.

17 Intervenors' other argument seems to be  
18 that having gone through Phase I that they have a  
19 right to the remedy of rescission. That's simply not  
20 the case. It's not the Land Use Commission's charge.

21 The Land Use Commission is not here to  
22 decide who's a winner or a loser between two parties  
23 in this case like in a civil court proceeding.

24 Rather, its charge is to protect, preserve  
25 and encourage development of land in a responsible



1 way. We respectfully submit that staying Phase II and  
2 allow instead the promised Motion to Amend to proceed  
3 forward is the best way to achieve that objective.

4 I'm also here wearing another hat as  
5 representing the Honua'ula owner of the 13-acre  
6 parcel. Honua'ula joins in the motion. As the  
7 Commission may be aware, Honua'ula is involved in at  
8 least one other legal dispute regarding its final  
9 Environmental Impact Statement as to the Waialea 670  
10 Project that directly has as one its issues the same  
11 13 acres that is before the Commission.

12 Honua'ula has not yet determined how it  
13 intends to proceed with regards to that parcel.  
14 However, it has determined that, and has, in fact,  
15 committed on the record that it will not proceed with  
16 any development of the parcel while the stay is  
17 pending unless it comes back to the Commission first.

18 Thus there's no imminent development plan  
19 for the Honua'ula parcel. And, therefore, maintaining  
20 the status quo will not prejudice anybody as to that  
21 parcel either.

22 And for that reason I respectfully request  
23 that the Commission grant Petitioner's Motion to Stay  
24 and for the same reasons deny Intervenor's Motion to  
25 Continue.

1           With regards to the Motion to Strike I  
2 would rest on my pleadings. I think that the purpose  
3 of filing the motion was to bring some credence to the  
4 rule that you can't continue filing paper after paper  
5 in this case without leave of the court. And that  
6 nothing new was presented therein, and therefore the  
7 pleadings should be stricken or the arguments there  
8 ignored. Thank you.

9           CHAIRMAN CHOCK: Thank you, Mr. Steiner.  
10 County?

11           MR. HOPPER: Thank you, Mr. Chair. The  
12 Department of Planning has filed a Statement of No  
13 Opposition to the request for a stay and has also  
14 joined Pi'ilani parties in the opposition to the  
15 Intervenor's Motion to Conclude.

16           The County's position is that a Motion to  
17 Amend is not required. However, based on the  
18 Commission's decision on Phase I in this docket, the  
19 Office of Planning's position as well as Pi'ilani's  
20 offer to come forward with a Motion to Amend in this  
21 case, the County sees that that could potentially  
22 resolve many of the issues in this case. So that  
23 appears to be the wisest course of action at this  
24 time.

25           Now, one other point that was raised in the

1 Intervenor's' opposition and their Motion to Conclude  
2 is that there may be Commissioners leaving. And  
3 that's a common practice obviously with boards and  
4 commissions that have limited tenures for their  
5 members. That's why you have in HRS 91-11, as well as  
6 the Commission's own procedures, that prior to voting  
7 the Commissioners are required to familiarize  
8 themselves with the record.

9           Even in the Order to Show Cause proceeding  
10 that were times where Commissioners weren't attending  
11 every single one of the hearings. So prior to voting  
12 they were required to review the record and state that  
13 they were prepared to deliberate.

14           So Commissioners leaving is not necessarily  
15 an uncommon practice. So it would not be prejudicial  
16 to grant a stay in this case based on that.

17           And other than that the County is going to  
18 rest on its pleadings and simply add that it did file  
19 a Reply to the Supplemental Memorandum and would rest  
20 on that reply unless the Commission has questions.

21           That was related to a zoning matter before  
22 the Maui County Council that has been concluded that  
23 the county does not believe is relevant to this  
24 proceeding. But because it was raised in the  
25 supplemental memorandum the County did respond and can

1 provide information if questions are asked, but other  
2 than that does not feel the need to add anything to  
3 its moving papers. Thank you.

4 CHAIRMAN CHOCK: Thank you very much,  
5 County. State?

6 MR. SOUKI: The Office of Planning supports  
7 the Movant's motion. Petitioner's decision to  
8 construct 2 commercial malls without amending the 1995  
9 D&O to address the new and different types of impacts  
10 caused by the change in development was the problem.

11 After the LUC's ruling that the proposal  
12 was inconsistent, we don't believe it's necessary to  
13 go into Phase II because Pi'ilani Promenade is  
14 addressing the procedural issues by agreeing to amend  
15 the 1995 D&O.

16 Moving forward with the OSC at this time is  
17 unnecessary. And continued expenditures of state  
18 resources on this matter serves no legitimate Land Use  
19 Commission purpose. In particular our support is  
20 based on the following facts:

21 1. That Pi'ilani Promenade will file a  
22 Motion to Amend before the end of this calendar year.

23 2. The Petition Area has not been and will  
24 not be further developed until the LUC has approved a  
25 Motion to Amend or has otherwise given express

1 approval for such development.

2 3. Honua'ula Partners, LLC will not  
3 commence any construction during the stay unless  
4 Honua'ula has given the Commission adequate notice of  
5 its intent to do so.

6 4. In addition to Honua'ula's  
7 representations the apartments cannot be constructed  
8 without the roadway and other infrastructure provided  
9 by Pi'ilani Promenade. So for those reasons we  
10 support the Movant's motion.

11 CHAIRMAN CHOCK: Thank you very much,  
12 Mr. Souki. Intervenor?

13 MR. PIERCE: Thank you, Mr. Chair. The  
14 first thing I'd just like to state is our great thanks  
15 to the Land Use Commission for the amount of time and  
16 care that they've taken throughout this entire  
17 proceeding.

18 So thank you very much for the great care  
19 and time that you've taken with the proceeding to  
20 date. We really appreciate. My clients appreciate.  
21 The community appreciates it.

22 I just want to share the background that we  
23 think that the Commission needs to remind itself of as  
24 it's making its decision today. The first thing is  
25 one of the strongest points that's being made here by

1 the other parties is: Look, we don't want to cause  
2 the Land Use Commission to do work that's going to  
3 become unnecessary.

4 In fact, in the words of the Petitioners  
5 they said: Look, we may render this moot if we come  
6 up with a proposal that works for everyone, a new  
7 proposal.

8 And that certainly is the case. We're  
9 optimistic that we get a new proposal. That certainly  
10 is something that's going to happen one way or the  
11 other, whatever you all decide today. So that's  
12 certainly something that could happen.

13 I will address that mootness issue here in  
14 a moment that Mr. Steiner spoke about. But what we  
15 have to remember here is who has caused there to be --  
16 who has caused the Land Use Commission to have to take  
17 up this matter?

18 So let's just remember that back when  
19 Ka'ono'ulu back in 1995 came here, they in good faith  
20 requested -- they put a proposal on the table for a  
21 light industrial complex. That went forward. It was  
22 approved. It encumbered the land.

23 Then we saw several landowners take  
24 procession of the property in succession. The last of  
25 those was now before the current Petitioners was Maui

1 Industrial Partners. During the period of time Maui  
2 Industrial Partners owned the property, they started  
3 negotiating with new landowners. And they also  
4 started considering new proposals, new ideas.

5 They had an opportunity before -- first of  
6 all, they had an obligation as well as an opportunity  
7 to let the Land Use Commission know what was going on.  
8 So we're talking about going back to 2010 or earlier  
9 when that was -- when the Petitioners were the former  
10 landowners knew what was going on and what was before  
11 them.

12 They hid the ball from the Land Use  
13 Commission. They hid the ball from the community. So  
14 when those transactions occurred no one came here to  
15 ask for a bifurcation into the different landowners.  
16 None of us knew about that until sometime in 2012. In  
17 the spring of 2012 once the Intervenors and the  
18 members of the public, who then became the  
19 Intervenors, learned about this, what they did -- and  
20 this is the next part is -- they first asked, we wrote  
21 a letter to Eclipse Development who showed up on all  
22 the developer building applications down at the  
23 county.

24 We said: "Look, this violates the 1995  
25 Order. Will you stop?" We never got a response on

1 that letter. We then asked the County to take action  
2 because under Chapter 205 the County is the first  
3 enforcer of the land use law. And the County turned  
4 us down.

5           So we were then required to come to the  
6 Land Use Commission. And we can all still recall when  
7 we met over in Lahaina about a year ago or a little  
8 bit less than a year ago, that there were, I think  
9 Office of Planning for sure and perhaps even some  
10 Commissioners were asking at that point in time: Why  
11 aren't you seeking to amend?

12           And we never got an answer to that. They  
13 decided, the Petitioners decided to go forward. So  
14 it's important to remember that the Petitioners are  
15 ones who had the choice here. They had the choice to  
16 seek to amend but they chose not to.

17           So what happened as a result we filed our  
18 Motion for an Order to Show Cause. The Petitioners  
19 are smart people. They knew that that's what was  
20 going to happen. Once they did, it initiated a  
21 contested case with certain things that we knew were  
22 going to happen. And all of that is layed out in  
23 Chapter 205 in your rules. We won't need to go over  
24 those, but that is what is before the Commission.

25           I'm going to assume -- we think that it



1 lays it out pretty carefully, but to the extent that  
2 the Commission has discretion we're asking you how  
3 you should be considering this. Of course efficiency,  
4 which is one of the points that they made here, is one  
5 of the points. But there's a few other things that  
6 need to be considered.

7           What is not before you is a Motion to  
8 Amend. Although what is now being proposed is a  
9 Motion to Amend. So in a moment I'm going to come  
10 back and talk about some of the procedural issues.  
11 But the question is: Are the Petitioners asking for  
12 this Motion to Amend to be part of the current  
13 contested case?

14           It seemed that way the way Mr. Steiner was  
15 talking because he said in fact that Intervenor would  
16 be permitted an opportunity to participate in that as  
17 parties. And we're glad to hear that. And that  
18 certainly is helpful in terms of how we look at this  
19 issue.

20           But the other thing we would just ask the  
21 Commission to think about is the precedent that this  
22 sets. Once the contested case started there's an  
23 outcome. Either you're going to find in this case an  
24 Order to Show Cause. You're either going to find  
25 there's a violation or not. And at that point what

1 any landowner knows, if they've gone through that  
2 process, that there's a possibility that they're going  
3 to then have to argue to the Land Use Commission that  
4 their property shouldn't revert because that's one of  
5 the only options for remedies that the Land Use  
6 Commission has.

7           So in this case what happened is the  
8 Petitioners took their chances. They lost. And now  
9 they're basically trying to pull their way back from  
10 that second phase that they don't want you to go to.

11           So what does that set in the community in  
12 terms of the landowners? The community -- it  
13 prejudices the community. Because the public are the  
14 people here who have to take an enormous chance when  
15 they go out, they see a violation, they have to go  
16 raise funds. They have to go and work hard to put  
17 their case before the Land Use Commission. So what  
18 this does is it doesn't send a message to landowners  
19 or developers that they need to look carefully at the  
20 law before they make decisions or before they try to  
21 cooperate with the community.

22           It actually suggests that they can go ahead  
23 and take the chances as long as they're willing to  
24 pony up the money. That's what happened here. So we  
25 would just ask you to keep that in mind in terms of

1 what's possibly the precedent that comes out of this.

2           The other thing is there was the argument  
3 made there'd be no prejudice to any of the parties  
4 from the stay. The first thing that I would just ask  
5 for you to think about, Commissioners, is that the  
6 stay will do nothing in terms of what has happened.  
7 The issue that's before the Commission right now is  
8 the issue of whether or not there was -- was a  
9 violation.

10           So a stay -- and what these folks, the  
11 Petitioners, do to try to improve the situation has  
12 nothing to do with this contested case. The issue  
13 will still be: Was there a violation before and  
14 should the land revert?

15           So, in fact, what we can really take the  
16 Petitioners at their word is they're trying to moot  
17 out the next part of the case. They want to come back  
18 with something. Perhaps that works, perhaps it  
19 doesn't.

20           And that leads to the next part is what  
21 they are certainly doing is creating an incredible  
22 amount of procedural uncertainty by the way they're  
23 going about this because there's a question as to are  
24 we on the same docket?

25           We have another question which is one of

1 the footnotes the Petitioner had said: Honua'ula  
2 might come back and ask for a bifurcation of the  
3 landowners. We already know that there's Pi'ilani  
4 North, there's Pi'ilani South, there's Honua'ula,  
5 there's now Seraphim development.

6 How many different cases will the  
7 Intervenors have to be a participant in as the State  
8 continues on?

9 What happens if the state cannot be  
10 completed by year end, which certainly seems like a  
11 kind of an optimistic goal? So when will the State  
12 conclude? In the process what happens to the case and  
13 to the memory of this Land Use Commission? The County  
14 said it's a common thing for Commissioners to come and  
15 go off and they can go back and read the record.

16 What we're asking for a new Commissioner to  
17 do in this case is to basically read a gigantic record  
18 that we had on that hearing. So, by the way, on that  
19 I'd just ask, if nothing else, one of the things we  
20 think is very important is that we certainly -- we ask  
21 the Commission, this is part of our motion, that the  
22 Findings of Fact and Conclusions of Law be adopted so  
23 that we can at least complete that Phase I.

24 And I actually didn't hear any of the  
25 parties objecting to that part. They didn't talk

1 about it, but I didn't hear anyone objecting to that  
2 part. So we think the confusion is a big problem. We  
3 identified a couple other questions in our motion.

4 I think I covered enough of 'em where I  
5 won't talk about those any further. But to us there  
6 is an opportunity here for procedural certainty or  
7 procedural uncertainty. We're asking whatever the  
8 Commission does here today let's make sure we take  
9 care of some of that housekeeping that needs to happen  
10 with that. Thank you.

11 CHAIRMAN CHOCK: Thank you very much.  
12 Excuse me, Mr. Pierce.

13 MR. PIERCE: If I may I forgot to mention  
14 on the Motion to Strike if I may, Mr. Chair, just had  
15 a short one on that.

16 CHAIRMAN CHOCK: Go ahead.

17 MR. PIERCE: What I'd just like to add on  
18 that is the reason we filed that Supplemental Memo,  
19 and I guess the first thing we'd just point out is the  
20 fact that there's not a lot of clarity on the ability  
21 to do this Motion to Stay. We hear all the parties  
22 here, the County and the Petitioners, saying you've  
23 got lots of discretion here. But when it comes to the  
24 small supplemental memo we suddenly see all the rules  
25 being thrown at us.

1           What I would just point out is going back  
2 to the uncertainty issue is that the County attorney,  
3 who's here today, also testified to the county  
4 council, and told them that they couldn't have  
5 certainty on certain issues that were being asked of  
6 that date because the Land Use Commission had not  
7 adopted Findings of Fact and Conclusions of Law.

8           So it goes to show how this creates  
9 uncertainty to other decision-makers outside of the  
10 state realm. That was the reason for our supplemental  
11 memo. Thank you.

12           CHAIRMAN CHOCK: Thank you, Mr. Pierce.  
13 Commissioners, any questions for any of the parties?  
14 Okay, no questions for the parties. Commissioners,  
15 what is your pleasure on this matter or on these  
16 motions? Commissioner Heller.

17           COMMISSIONER HELLER: Yes. Mr. Chair, I'd  
18 like to move for a brief executive session to consult  
19 with our legal advisor regarding the powers and duties  
20 of the Commission.

21           COMMISSIONER McDONALD: Second.

22           CHAIRMAN CHOCK: Moved and seconded. Any  
23 opposed? We'll go into executive session. I'd like  
24 to ask everybody if you don't mind leaving the room  
25 and then we'll come back and get you in a few minutes.

1 Thank you very much.

2 (Executive session 10:50-11:00)

3 CHAIRMAN CHOCK: Thank you very much.

4 We're back on the record. Commissioners, what is your  
5 pleasure on this matter? Commissioner Heller.

6 COMMISSIONER HELLER: Yes. Mr. Chair, in  
7 order to keep the record clear I would suggest taking  
8 the motions one at a time for purposes of voting.

9 CHAIRMAN CHOCK: Sure.

10 COMMISSIONER HELLER: So I'd like to start  
11 with the Motion to Stay.

12 And I'll make a Motion to Grant the Motion  
13 to Stay, but to make it clear that we expect not only  
14 the Movants but Honua'ula as well to refrain from any  
15 development activity during the stay period.

16 I'd like to make it an express condition of  
17 the granting the stay that no action will be taken by  
18 any of the Petitioners including Honua'ula until the  
19 Motion to Amend has been filed that the stay would  
20 terminate if that condition is violated.

21 CHAIRMAN CHOCK: Okay.

22 COMMISSIONER BIGA: Second.

23 CHAIRMAN CHOCK: Moved by Commissioner  
24 Heller, seconded by Commissioner Biga. Any  
25 discussion, Commissioners? (no response) Dan, will

1 you please poll the Commission.

2 MR. ORODENKER: Thank you, Mr. Chair. This  
3 is a vote on the Motion to Stay. The motion is to  
4 grant but with the condition that Petitioner and  
5 Honua'ula will not take any action pending the filing  
6 of the Petition to Amend. Commissioner Heller?

7 COMMISSIONER HELLER: Yes.

8 MR. ORODENKER: Commissioner Biga?

9 COMMISSIONER BIGA: Yes.

10 MR. ORODENKER: Commissioner Matsumura?

11 COMMISSIONER MATSUMURA: Yes.

12 MR. ORODENKER: Commissioner McDonald?

13 COMMISSIONER McDONALD: Yes.

14 MR. ORODENKER: Commissioner Contrades?

15 COMMISSIONER CONTRADES: Yes.

16 MR. ORODENKER: Commissioner Inouye?

17 COMMISSIONER INOUE: Yes.

18 MR. ORODENKER: Chair Chock?

19 CHAIRMAN CHOCK: Yes.

20 MR. ORODENKER: Mr. Chair, the motion  
21 carries unanimously.

22 CHAIRMAN CHOCK: Thank you very much. The  
23 next motion is regarding Maui Tomorrow's Motion to  
24 Conclude. What is your pleasure on this matter,  
25 Commissioners? Commissioner Heller.



1 COMMISSIONER HELLER: I think in view of  
2 the decision that we've just made we have effectively  
3 denied this motion, but I think for purposes of the  
4 record we should formally deny it. So I move to deny  
5 the motion.

6 CHAIRMAN CHOCK: Any second?

7 COMMISSIONER BIGA: I second.

8 CHAIRMAN CHOCK: Moved and seconded by  
9 Heller and Biga, Commissioners, Heller and Biga.  
10 Commission, any discussion? Dan, will you please poll  
11 the Commission.

12 MR. ORODENKER: Thank you, Mr. Chair. The  
13 motion is to deny Intervenor's motion. Commissioner  
14 Heller?

15 COMMISSIONER HELLER: Yes.

16 MR. ORODENKER: Commissioner Biga?

17 COMMISSIONER BIGA: Yes.

18 MR. ORODENKER: Commissioner Matsumura?

19 COMMISSIONER MATSUMURA: Yes.

20 MR. ORODENKER: Commissioner McDonald?

21 COMMISSIONER McDONALD: Yes.

22 MR. ORODENKER: Commissioner Contrades?

23 COMMISSIONER CONTRADES: Yes.

24 MR. ORODENKER: Commissioner Inouye?

25 COMMISSIONER INOUE: Yes.

1 MR. ORODENKER: Chair Chock?

2 CHAIRMAN CHOCK: Yes.

3 MR. ORODENKER: Mr. Chair, the motion  
4 carries unanimously.

5 CHAIRMAN CHOCK: Thank you very much.  
6 Third and final Petition regarding Pi'ilani Promenade  
7 South and North Motion to Strike. Commissioners, what  
8 is your pleasure on this matter. Commissioner Heller.

9 COMMISSIONER HELLER: I would move to deny  
10 this motion as well. Although there is an argument  
11 that the filings were untimely, given the decision  
12 that we've just made I think it's largely moot at this  
13 point. And I think just for the sake of completeness  
14 of the record we should preserve those filings.

15 CHAIRMAN CHOCK: Thank you very much,  
16 Commissioner Heller. Is there a second?

17 COMMISSIONER BIGA: Second.

18 CHAIRMAN CHOCK: Commissioner Biga  
19 seconded. Any discussion, Commissioners? Dan, will  
20 you please poll the Commission.

21 MR. ORODENKER: Thank you, Mr. Chair. The  
22 motion is to Deny the Motion to Strike. Commissioner  
23 Heller?

24 COMMISSIONER HELLER: Yes.

25 MR. ORODENKER: Commissioner Biga?

1 COMMISSIONER BIGA: Yes.

2 MR. ORODENKER: Commissioner Matsumura?

3 COMMISSIONER MATSUMURA: Yes.

4 MR. ORODENKER: Commissioner Teves...sorry.  
5 absent. Commissioner McDonald?

6 COMMISSIONER McDONALD: Yes.

7 MR. ORODENKER: Commissioner Contrades?

8 COMMISSIONER CONTRADES: Yes.

9 MR. ORODENKER: Commissioner Inouye?

10 COMMISSIONER INOUE: Yes.

11 MR. ORODENKER: Chair Chock?

12 CHAIRMAN CHOCK: Yes.

13 MR. ORODENKER: Mr. Chair, the motion  
14 carries unanimously.

15 CHAIRMAN CHOCK: Thank you very much,  
16 parties. Any questions for our staff, anyone? Okay.  
17 That concludes our scheduled business for today.  
18 Reconvene tomorrow morning at 9:30 in Honolulu. Thank  
19 you very much. Safe travels everyone. We're  
20 adjourned.

21 (The proceedings were adjourned at 11:06 a.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 matters on the 27th day of June 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