

1 LAND USE COMMISSION MEETING  
2 STATE OF HAWAII  
3  
4  
5  
6 Held on September 10, 2015  
7 Commencing at 9:33 a.m.  
8 West Hawaii Civic Center  
9 Council Chambers  
10 74-5044 Ane Keohokalole Highway  
11 Kailua-Kona, Hawaii 96740  
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21 REPORTED BY: Jean Marie McManus, CSR #156  
22  
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1 APPEARANCES:

2 EDMUND ACZON, CHAIRPERSON

3 COMMISSIONERS:

4 NANCY CABRAL  
KENT HIRANAGA  
5 CHAD McDONALD  
ARNOLD WONG  
6

7 PATRICIA OHARA, ESQ.  
Deputy District Attorney  
8

9 STAFF:

10 DANIEL ORODENKER, Executive Officer  
SCOTT A.K. DERRICKSON, AICP Planner  
11 RILEY K. HAKODA, Planner/Chief Clerk  
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AGENDA

- |      |                                                           |        |
|------|-----------------------------------------------------------|--------|
| I.   | Adoption of Minutes                                       | Page 4 |
| II.  | Tentative Meeting Schedule                                | Page 4 |
| III. | Executive Session                                         | Page 5 |
| IV.  | A89-693 McClean Honokohau<br>Properties Motion to Release | Page 8 |

1                   CHAIRPERSON ACZON: Good morning. This is  
2                   the September 10th, 2015 Land Use Commission meeting.

3                   The first order of business is adoption of  
4                   the August 26, 2015 minutes. Are there any  
5                   corrections or comments on that? If not, is there a  
6                   motion to adopt minutes.

7                   COMMISSIONER WONG: Moved.

8                   COMMISSIONER McDONALD: Second.

9                   CHAIRPERSON ACZON: Moved and seconded.  
10                  Those in favor, say "aye". Opposed? Motion carried.

11                  (All Commissioners responded  
12                  affirmatively.)

13                  Commissioner Wong made the motion and  
14                  seconded by Commissioner McDonald.

15                  The next agenda item is tentative meeting  
16                  schedule.

17                  EXECUTIVE DIRECTOR: Our next meeting is  
18                  scheduled for September 30th, the video conference,  
19                  Honolulu and various neighbor islands at speaking  
20                  locations to address Makila (Maui) - request that LUC  
21                  be the accepting authority for EIS.

22                  Also should let the Commissioners know that  
23                  if this matter runs over, we will also reschedule  
24                  this matter for Kona at that conference.

25                  October 14th to 16 is the HCPO conference

1 at Waikiki Convention Center. There will be a LUC  
2 meeting held Friday October 16th to address Ko Olina  
3 Boat Ramp close-out and Kalaupapa Memorial.

4 October 22nd-23rd meeting at Honolulu  
5 Airport Conference Room 3 to address Special Permit  
6 Application Status Report on Waimanalo Gulch Landfill  
7 and the Dudley Order to Show Cause Motion.

8 November 4th and 5th open.

9 And November 18th and 19th on Maui, Maui  
10 Arts and Cultural Center - LUC to Consider Acceptance  
11 of the FEIS, Olowalu, Maui.

12 December 9 and 10, again on Maui, DOT  
13 meeting room for Commissioner Training - Site visit  
14 Ma'alaea Plantation.

15 January 11th, Ma'alaea on Maui, again to  
16 handle Ma'alaea Plantation.

17 And February is continuation of that  
18 hearing. That takes us up to February.

19 CHAIRPERSON ACZON: Thank you, Mr.  
20 Orodanker.

21 The Chair wants to address the agenda. Due  
22 to some flight delays, we need to move around the  
23 agenda. Can I have a motion to change the order of  
24 the agenda?

25 COMMISSIONER WONG: Move.

1 EXECUTIVE DIRECTOR: Mr. Chair, specify the  
2 change.

3 CHAIRPERSON ACZON: We're moving the  
4 executive session first. Moved by Mr. Wong and  
5 second?

6 COMMISSIONER McDONALD: Second.

7 UNIDENTIFIED SPEAKER: Can I ask what  
8 purpose the executive session is for?

9 CHAIRPERSON ACZON: Personnel matters.  
10 Moved by Commissioner Wong and seconded by  
11 Commissioner McDonald. Those in favor say "aye".  
12 Opposed? Motion carried.

13 (All Commissioners responded  
14 affirmatively.)

15 Can I get a motion to move into Executive  
16 Session?

17 COMMISSIONER WONG: Move.

18 COMMISSIONER CABRAL: Second.

19 CHAIRPERSON ACZON: Moved on by  
20 Commissioner Wong, second by Commissioner Cabral.  
21 Those in favor say "aye". Opposed? Motion carried.

22 (All Commissioners responded  
23 affirmatively.)

24 Can we clear the room for Executive  
25 Session.

1 (Executive Session held and not reported.)

2 CHAIRPERSON ACZON: We're back on the  
3 record. Unfortunately we are still short one  
4 Commissioner.

5 COMMISSIONER WONG: Can I move for recess  
6 until the Commissioner shows up?

7 CHAIRPERSON ACZON: There's a motion to go  
8 in recess. Any second?

9 COMMISSIONER CABRAL: Second. I think  
10 everyone understands I'm new. So we have to have six  
11 Commissioners present to operate, so that's why we  
12 have to wait for the sixth Commissioner to come.  
13 It's not just because we want to delay things.

14 EXECUTIVE DIRECTOR: Sorry to correct the  
15 situation, but in actuality we can operate with five,  
16 but if we're going to deliberate toward a motion,  
17 that Commissioner needs to have heard all the  
18 evidence and she's not here to vote. So we need six  
19 votes. That's the reason.

20 CHAIRPERSON ACZON: Moved and seconded.  
21 All in favor say "aye". Opposed?

22 (All Commissioners responded  
23 affirmatively.)

24 (Recess was taken.)

25 -o0o-

1                   CHAIRPERSON ACZON:   September 10, 2015 LUC  
2   meeting.   In Executive Session the Commission  
3   addressed certain personnel issues, including the  
4   Executive Officer's contract and decided to extend  
5   the contract for three years above the current term.  
6                   The next agenda item, action hearing on  
7   Docket A89-643 McClean Honokohau Properties' Motion  
8   to Release, Discharge and Delete All Conditions in  
9   the Land Use Commission's Findings of Fact,  
10   Conclusions of Law, Decision and Order entered  
11   April 16, 1991.

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1                   BEFORE THE LAND USE COMMISSION  
 2                   OF THE STATE OF HAWAII

3     In the Matter of the Petition    )DOCKET NO. A89-643  
                                           )  
 4     McCLEAN HONOKOHAU PROPERTIES, a)  
    Hawaii Limited Partnership,       )  
 5                                            )  
    To Amend the Land Use District    )  
 6     Boundary to Reclassify            )  
    Approximately 89.527 acres of     )  
 7     Land in the Conservation and     )  
    the Agricultural Districts to     )  
 8     the Urban District at Honokohau)  
    North Kona, Hawaii, Tax Map Key)  
 9     Nos.: 7-4-24: 1,2,4,6,7,8,9,11 )  
    and 12                                )  
 10     \_\_\_\_\_)

11                   LAND USE COMMISSION HEARING

12                   MOTION TO RELEASE

13     Held on September 10, 2015, commencing at 10:50 a.m.,  
 14     at West Hawaii Civic Center, Council Chambers,  
 15     74-5044 Ane Keohokalole Highway, Kailua-Kona, Hawaii  
 16     96740.

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22     BEFORE:   Jean Marie McManus, CSR #156

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1 APPEARANCES:  
2 EDMUND ACZON, CHAIRPERSON  
3 COMMISSIONERS:  
4 NANCY CABRAL  
KENT HIRANAGA  
5 CHAD McDONALD  
ARNOLD WONG  
6 LINDA ESTES  
7 PATRICIA OHARA, ESQ.  
Deputy Attorney General  
8  
9 STAFF:  
10 DANIEL ORODENKER, Executive Officer  
SCOTT A.K. DERRICKSON, AICP Planner  
11 RILEY K. HAKODA, Planner/Chief Clerk  
12 ROBERT J. SMOLENSKI, ESQ.  
DAVID ELBOGEN  
13 JAMES McCLEAN  
1628 Davies Pacific Center  
14 841 Bishop Street  
Honolulu, Hawaii 96813  
15  
Attorney for Petitioner  
16  
AMY G. SELF, ESQ.  
17 Deputy Corporation Counsel  
County of Hawaii  
18 DUANE KANUHA, Planning Director  
County Planning Department  
19  
For County of Hawaii  
20  
BRYAN YEE, ESQ.  
21 Dept. of Attorney General, Office of Planning  
LORENE MAKI, Office of Planning  
22 RODNEY FUNAKOSHI, Office of Planning  
23 For State of Hawaii, Office of Planning  
24  
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1 Will the parties identify themselves for  
2 the record?

3 MR. SMOLENSKI: Robert Smolenski  
4 representing McClean, and with me is David Elbogen  
5 and James McClean who are general partners.

6 MS. SELF: Deputy Corporation Counsel, Amy  
7 Self representing Planning Department, and to my  
8 right is the Planning Director, Duane Kanuha.

9 MR. YEE: Bryan Yee on behalf of the Office  
10 of Planning. With me is Lorene Maki from Office of  
11 Planning as well as Randy Funakoshi behind me.

12 CHAIRPERSON ACZON: Thank you and welcome.

13 Let me update the recent record in this  
14 docket.

15 On December 23rd, 2014, the Commission  
16 received Petitioner's Motion and Exhibits 1 through  
17 5.

18 On February 5th, 2015, Commission received  
19 Petitioner's filing fee.

20 On February 18, 2015, Commission received  
21 Petitioner's email requesting time extension for  
22 hearing this Petition.

23 On February 24th, 2015, Commission advised  
24 Petitioner that the hearing was scheduled for May 28,  
25 2015. This planned hearing in May was subsequently

1 cancelled due to loss of Commission quorum.

2 July 27th, 2015, Commission advised  
3 Petitioner that it would hold a hearing on this  
4 matter on September 10, 2015.

5 On August 24th, 2015, Commission received  
6 Petitioner's First Supplemental Memorandum and  
7 Exhibits in Support of its Motion to Release  
8 Conditions in the Land Use Commission Findings of  
9 Fact, Conclusions of Law, and Decision and Order  
10 entered April 16, 1991; and Exhibits 6 through 20.

11 On August 27, 2015, Commission received  
12 Response in Partial Support of Petitioner's Motion to  
13 Release Conditions.

14 On August 31st, 2015, Commission received  
15 County of Hawaii Department of Planning's Response to  
16 Petitioner's Motion to Release, Discharge and Delete  
17 All Conditions in the Land Use Commission's Findings  
18 of Fact, Conclusions of Law, and Decision and Order  
19 entered April 16, 1991.

20 On September 1, 2015, the Commission mailed  
21 the September 10, 2015 LUC meeting agenda notice to  
22 the Parties and the Statewide, and Hawai'i mailing  
23 lists.

24 On September 3, 2015, the Commission  
25 received Petitioner's Second Supplemental Memorandum

1 in Support of its Motion to Release Conditions in the  
2 Land Use Commission's Findings of Fact, Conclusions  
3 of Law, and Decision and Order entered April 16,  
4 1991.

5 On September 9, 2015, the Commission  
6 received Petitioner's Third Supplemental Memorandum  
7 with Exhibits 21 and 22, and Lists of Witnesses and  
8 Exhibits.

9 Also on September 9th, 2015, Commission  
10 received email for Public Testimony from the National  
11 Park Service given by Dr. Jeff Zimpfer.

12 Mr. Smolenski, has our staff informed you  
13 of the Commission's policy regarding the  
14 reimbursement of hearing expenses? If so, could you  
15 state your client's position with respect to this  
16 policy?

17 MR. SMOLENSKI: We are in agreement with  
18 the policy.

19 CHAIRPERSON ACZON: Thank you.

20 Let me describe our procedure for today.  
21 First I will call for those individuals desiring to  
22 provide public testimony on this matter to identify  
23 themselves. All will be called in turn to our  
24 witness box where they will be sworn in. A  
25 three-minute time limit on testimony will be

1       enforced.

2                   After the public testimony I will give  
3       opportunity for the parties to admit their exhibits  
4       for the record.

5                   After admission of exhibits to the record,  
6       the parties will then present their arguments on the  
7       Motion, starting with the Petitioner, followed by  
8       Hawaii County Planning Department and State Office of  
9       Planning.

10                  Once the parties have completed with their  
11       arguments, Commission will deliberate on this matter.

12                  The Chair would also note for the parties  
13       and the public that from time to time I will be  
14       calling for short breaks. It is the intention of the  
15       Chair to conclude proceedings by 12:35 to allow the  
16       Commission time to make their return flights home.

17                  Are there any questions regarding  
18       procedures for today? Thank you.

19                  Are there any individuals desiring to  
20       provide public testimony on this docket?

21                  EXECUTIVE DIRECTOR: Mr. Chair, we have two  
22       signed up to testify. The first one is Jeff Zimpfer  
23       from the National Park Service, followed by Janice  
24       Palama-Glennie.

25

1 JEFF ZEMPFER

2 Was called as a Public Witness, was sworn to tell the  
3 truth, and testified as follows:

4 DIRECT EXAMINATION

5 THE WITNESS: Good morning, Members of the  
6 Commission.

7 My name is Jeff Zimpfer. I am the  
8 Environmental Protection Specialist at  
9 Kaloko-Honokohau National Historical Park.

10 The National Park Service is here today in  
11 response to McClean's Honokohau Properties' Motion to  
12 Release, Discharge and Delete all conditions related  
13 to the April 16th, 1991 Decision and Order.

14 More specifically, the National Park  
15 Service is here to ask that Conditions 1, 3, 6 and 12  
16 remain in place.

17 The McClean property is very close to the  
18 National Park Service's boundary. It's about a  
19 quarter mile away from the park and uphill from the  
20 park.

21 Condition No. 1 relates to screening the  
22 McClean property. And then Conditions 3, 6 and 12  
23 relate to preventing water pollution from entering  
24 the park's waters and other water down-gradient from  
25 the national park.



1           The National Park Service is particularly  
2   concerned about nonpoint source pollution. In 2008  
3   the State of Hawaii declared Honokohau Bay impaired,  
4   according to the Clean Water Act, because of  
5   increased nutrients. So we're quite concerned about  
6   nonpoint source pollution in which to prevent, where  
7   we can, nonpoint source pollution.

8           For those who of you who aren't familiar  
9   with the National Park, it was declared a Historic  
10   Landmark in 1962. Then in 1972 the area was slated  
11   for Urban and Resort purposes. Local Kona citizens,  
12   including many Native Hawaiians, came together. They  
13   went to congress and asked to have a national park  
14   established.

15           The congress established an Advisory  
16   Commission. They produced what we call the Spirit  
17   Report, which was a document that came out in 1974.  
18   And in approximately 1978 congress established  
19   Honokohau National Historic Park for the purposes to  
20   provide a center for the preservation, interpretation  
21   and perpetuation of traditional Native Hawaiian  
22   activities and culture, and to demonstrate historic  
23   land use patterns, as well as to provide a needed  
24   resource for the education, enjoyment and  
25   appreciation of such traditional Native Hawaiian

1 activities and culture by local residents and  
2 visitors.

3 The park contains many archaeological,  
4 cultural and biological resources. We have heiau,  
5 fishponds, anchialine pools, trails. We have many  
6 rare and endangered aquatic species, including  
7 Hawaiian coots and Hawaiian stilts which inhabit the  
8 high Aimakapa Fishpond.

9 The park also contains 596 acres of marine  
10 waters and coral reef habitat. All of these aquatic  
11 resources are dependent upon the continued flow of  
12 abundant supplies of fresh, clean water.

13 Approximately 150,000 visitors a year. And  
14 so we're here today not to, you know, say that the  
15 Petitioner wants to do something bad. We're saying  
16 that these Conditions 1, 3, 6 and 12, they're in  
17 place, they're ongoing. These need oversight, and  
18 they should remain in place, continue to protect the  
19 parks resources.

20 For the last 15 years the Park Service has  
21 intervened in land use proceedings before the state  
22 and the county. And where we haven't intervened, we  
23 have come to agreements with property owners adjacent  
24 to the park to protect the park's resources.

25 So this Commission has a long history of

1 protecting resources within the park, including the  
2 1991 Decision and Order for the McClean property.

3 So --

4 CHAIRPERSON ACZON: Please summarize.

5 THE WITNESS: So the Commission has a long  
6 history. I've got some quotes from things that are  
7 quite relevant to the park from 2002 TSA.

8 So in closing, we would just like to ask  
9 that these conditions remain in place.

10 CHAIRPERSON ACZON: Any questions from the  
11 parties? Mr. Smolenski?

12 MR. SMOLENSKI: No questions.

13 CHAIRPERSON ACZON: County?

14 MS. SELF: No questions.

15 CHAIRPERSON ACZON: OP?

16 MR. YEE: No questions.

17 CHAIRPERSON ACZON: Commissioners, any  
18 questions?

19 COMMISSIONER HIRANAGA: So as part of the  
20 exhibits provided to me, there is the letter from  
21 Cheryl Palesh, Vice President Belt Collins. And she  
22 makes the statement in her letter of testimony that  
23 Petitioner's property is discharging no direct runoff  
24 to the ocean, any water quality impact considered as  
25 being through underground injection.

1 I'm asking you, in your experience and  
2 knowledge, has the subject property ever had surface  
3 runoff that might have entered the ocean? I'm not  
4 that familiar with the --

5 THE WITNESS: Off the top of my head, I  
6 can't answer that. I'm not certain. But I guess I  
7 would like to add that we're not saying the property  
8 owner has done something bad. And we're here today  
9 because we believe these should be ongoing.

10 So I'm not certain that there has been  
11 surface runoff from that property that has entered  
12 the ocean, but I can't say with absolute certainty.

13 CHAIRPERSON ACZON: Commissioner Wong.

14 COMMISSIONER WONG: Sir, your anchialine  
15 pond, how is it fed? Through an aquifer or --

16 THE WITNESS: They are fed -- well, they're  
17 freshwater and saltwater, so the freshwater enters  
18 the anchialine ponds as groundwater. So when it  
19 rains, anything up-gradient from the park flows out  
20 to the coast and comes into the anchialine pools at  
21 the coast.

22 COMMISSIONER WONG: So in the Belt Collins  
23 exhibit that I read, the issue, there must be an  
24 aquifer underneath this property.

25 THE WITNESS: Absolutely.

1                   COMMISSIONER WONG: Does that aquifer feed  
2   into the anchialine ponds?

3                   THE WITNESS: Yes.

4                   COMMISSIONER WONG: In your best estimate,  
5   if there is any injection in the aquifer from the  
6   industrial, it will affect the ponds?

7                   THE WITNESS: Right. The best vision is to  
8   think of a river. We're sitting on top of a river  
9   here in West Hawaii with fresh water flowing out to  
10  the ocean.

11                  COMMISSIONER WONG: Thank you.

12                  CHAIRPERSON ACZON: Anybody else? Thank  
13  you, Mr. Zimpfer.

14                  EXECUTIVE DIRECTOR: Next witness is Janice  
15  Palma-Glennie.

16                  CHAIRPERSON ACZON: Good morning.

17                  THE WITNESS: Good morning.

18                  CHAIRPERSON ACZON: Let me swear you in.

19                                 JANICE PALMA-GLENNIE

20  Was called as a public witness, was sworn to tell the  
21  truth, and testified as follows:

22                                 DIRECT EXAMINATION

23                   THE WITNESS: Aloha, Commissioners.

24                   I am speaking today on behalf of the Kona  
25  Kai Ea Chapter of the Surfrider Foundation regarding

1 the Petition by McClean Honokohau Properties to  
2 Release, Discharge, and Delete All Conditions.

3 Our group opposes their request in  
4 accordance with our mission to protect and enjoy our  
5 oceans, waves and beaches.

6 When the watershed's quality is diminished,  
7 so is the quality of life of our members as well as  
8 the well-being of the general public and host culture  
9 who depend upon clean, safe waters for pleasure,  
10 sustenance, and subsistence.

11 We understand that business success is this  
12 company's priority, as it is for many residents who  
13 strive to survive and lead comfortable lives here.  
14 But ongoing protection of our region's environment,  
15 especially its waters, is necessary for the benefit  
16 of all, including the Petitioner, their ohana, and  
17 anyone else whose goal is to have long-term  
18 sustainable financial success and a bright, healthy  
19 future.

20 The No. 1 condition relates to visual  
21 screening of the Petitioner's property. Viewplane  
22 protection is sadly often far down the list of  
23 development priorities. Yet residents' lives are  
24 enhanced each day, in subtle, undeniable ways, by the  
25 direct experience of the island's exquisite beauty

1     and changing face, which are, in best case scenarios,  
2     can be seen as far as the eye can see.

3             As chicken skin as it is to be in the  
4     national park, one needs only look toward the  
5     shameless tragedy that is the Kaloko Industrial Park  
6     which was apparently developed without thought to the  
7     damage its sheer ugliness would do to the experience  
8     of the nearby shoreline.

9             The screening of industrial and urban  
10    development is seriously lacking in our region, it is  
11    quite do-able. And maintaining that screening over  
12    time is often a larger issue than creating it in the  
13    first place.

14            Conditions 3, 6 and 12 have successfully  
15    helped minimize pollutants coming from the  
16    Petitioner's property, and into ground and nearshore  
17    waters, and if allowed to stand, will do so into the  
18    future.

19            The Petitioner's are savvy business people  
20    who understand the irreplaceable value of unblemished  
21    viewplanes and, even more important, clean water, not  
22    just for our island's people and environmental  
23    integrity, but for their future bottom line.

24            Open, clean, culturally significant coastal  
25    space is a valuable, irreplaceable, and disappearing

1 commodity - one which people pay dearly to live near  
2 and have access to. To be able, by eliminating these  
3 conditions, to potentially diminish those assets when  
4 such harm can be avoided would be shortsighted, bad  
5 for our island, and certainly bad, and in the long  
6 run, for the company as well as our region's future  
7 bottom line.

8           Though the Petitioner has apparently  
9 followed the conditions of their development to date,  
10 our members feel, in general and in this case, that  
11 the best way to guarantee our region's future is to  
12 maintain the strictest standards requiring landowners  
13 to do what's needed to protect Public Trust  
14 resources. We ask the LUC to uphold the conditions  
15 placed upon McClean Honokohau Properties as a way to  
16 address changing environmental needs and conditions  
17 as they arise in the future.

18           Mahalo. Thank you for your time.

19           CHAIRPERSON ACZON: Any questions from the  
20 parties?

21           MR. SMOLENSKI: No questions.

22           CHAIRPERSON ACZON: County?

23           MS. SELF: No questions.

24           CHAIRPERSON ACZON: OP?

25           MR. YEE: No questions.



1                   CHAIRPERSON ACZON: Commissioners?

2                   COMMISSIONER WONG: So are you saying that  
3   you don't want any of the conditions to be -- or is  
4   it just the certain ones that the park service  
5   stated?

6                   THE WITNESS: I'm going to be honest with  
7   you, I have not read through the entire document.  
8   And those were the parts of the conditions that most  
9   fit the needs and the interest of the members of my  
10  group.

11                  COMMISSIONER WONG: So that is mostly the  
12  water issue?

13                  THE WITNESS: Yeah, and the viewplane is  
14  important as well, but water is huge.

15                  CHAIRPERSON ACZON: Anybody else? Thank  
16  you, Ms. Palma-Glennie.

17                  Mr. Smolenski, please describe the exhibits  
18  you have.

19                  MR. SMOLENSKI: We would offer into  
20  evidence all of our -- we would like to offer  
21  Exhibits 1 through 22 into evidence.

22                  CHAIRPERSON ACZON: Any objections from the  
23  parties?

24                  MS. SELF: No objection.

25                  MR. YEE: No objection.

1                   CHAIRPERSON ACZON: Commissioners? Hearing  
2     none, Petitioner's Exhibits Number 1 through 22 are  
3     admitted inn to the record.

4                   (Petitioner's Exhibits Nos. 1 through 22  
5     were received into the record.)

6                   County, please describe the exhibits you  
7     wish to have admitted to the record.

8                   MS. SELF: The county has no exhibits.

9                   CHAIRPERSON ACZON: Thank you. OP.

10                  MR. YEE: The Office of Planning submits  
11     Exhibits 1 through 9 attached to its response in  
12     partial support of the motion.

13                  CHAIRPERSON ACZON: Any objections from  
14     parties?

15                  MR. SMOLENSKI: Petitioner has no  
16     objection.

17                  MS. SELF: County has no objection.

18                  CHAIRPERSON ACZON: Commissioners? Hearing  
19     none, State Office of Planning Exhibits Number 1  
20     through 9 are admitted to the record.

21                  (State Office of Planning Exhibit Nos. 1  
22     through 9 were received into evidence.)

23                  Mr. Smolenski, proceed with your arguments.

24                  PETITIONER'S ORAL ARGUMENT

25                  MR. SMOLENSKI: Before I start, I would

1 point out we have submitted stipulation by  
2 Petitioner, the County and OP. And I believe  
3 everyone has a copy of that.

4 The stipulation covers Conditions 4, 5, 7,  
5 9, 10 and 14. And we ask that that be entered into  
6 the record if it hasn't been already.

7 CHAIRPERSON ACZON: Do the Commissioners  
8 have any questions?

9 COMMISSIONER HIRANAGA: Mr. Chair, just  
10 wondering regarding the stipulation. Particular due  
11 to the time constraints that we face today, if there  
12 is no objection from the Applicant, county or state  
13 or the Commission, could we possibly address  
14 Conditions 4, 5, 7, 9, 10 and 14 first versus  
15 numerical order that the decision was made?

16 CHAIRPERSON ACZON: Any objections?

17 MR. SMOLENSKI: I have no objections.

18 MS. SELF: County has no objection.

19 MR. YEE: OP has no objection.

20 CHAIRPERSON ACZON: 4, 5, 7, 9, 10 and 14.

21 MR. SMOLENSKI: Exhibit 22, if the  
22 Commissioners have that available, is a list of the  
23 conditions for convenience so you can see them in one  
24 place.

25 Petitioner's No. 4 was contribute its pro

1     rata share of the cost to develop and distribute  
2     water to Petitioner.

3             We have set forth that we have contributed  
4     our share and distribution of water by installing a  
5     12-inch waterline in the present access road of  
6     Kamanu Street on Kealakehe Parkway.

7             And also paid a \$40,500 facilities charge  
8     and 6,000 capital assessment fee to the County of  
9     Hawaii, Department of Water Supply.

10            And as agreed with the Department of Water  
11     Supply, allocation of water to each lot, and I would  
12     ask that Jim McClean and Dave Elbogen be sworn as  
13     witnesses, and then I can ask them to confirm  
14     statements for the record so we have written  
15     testimony, if the Chair would allow that.

16            CHAIRPERSON ACZON: Go ahead. Would you  
17     like them sworn, for the record?

18            MR. YEE: If we're going to have a witness  
19     testify, could I ask that the witnesses testify on  
20     all matters, not necessarily 4, 5, 7, 9, 10 and 14?

21            MR. SMOLENSKI: I was trying to go by the  
22     stipulated condition as suggested, which I'm happy to  
23     do, or go from Condition 1 all the way through and  
24     hit these six of them as we go.

25            MR. YEE: We will obviously follow up on

1     whatever the Chair thinks is best. I made a  
2     suggestion. I don't mean to make it difficult. I'll  
3     let you make a decision.

4                   CHAIRPERSON ACZON: You agree that the  
5     testimony you're about to give is truthful.

6                   MR. McCLEAN: I do.

7                   JAMES McCLEAN

8     Was called as a witness by and on behalf of the  
9     Petitioner, was sworn to tell the truth, was examined  
10    and testified as follows:

11                   DIRECT EXAMINATION

12    BY MR. SMOLENSKI:

13           Q     May I call you Jim?

14           A     Yes.

15           Q     Did you hear what I stated the Petitioner  
16    has done? And can you confirm that's in fact what  
17    you did far as the water facilities?

18           A     Yes. We built a 12-inch waterline down  
19    Honokohau Stream up to our property line through our  
20    property, and then the line on Kamanu Street over to  
21    the Parkway.

22           Q     Have you been requested to put any water  
23    facilities in that you have not put in?

24           A     No.

25           Q     Have you done everything that's been

1     required so far?

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1 A Yes.

2 Q Condition No. 5 --

3 A Let me get my list.

4 Q -- is: Petitioner shall fund and construct  
5 the necessary wastewater disposal improvements on the  
6 subject property for eventual hook-up to a municipal  
7 sewer system as determined by the State Department of  
8 Health.

9 Have you done that?

10 A Yes.

11 Q What is the present status briefly of what  
12 you constructed?

13 A Well, we currently have dry lines in our  
14 roadways. We have stub-outs to each lot. Until that  
15 is hooked up to the system, we can't put anything in  
16 it. But it's there ready to go.

17 Q So you have to wait for the system to come  
18 in and then just hookup to it?

19 A Yes. I think the state has to build a  
20 pumping station.

21 Q Condition No. 7: Fund pro rata share for  
22 electrical facilities as determined by Hawaiian  
23 Electric Company, HELCO.

24 Have you done that?

25 A Yes. We brought the electric all the way

1 from the Parkway at the roadway to the harbor up to  
2 Queen Kaahumanu Highway and then up to Honokohau  
3 Street and to our project.

4 Q And you've seen the correspondence we have  
5 submitted as the exhibit reflecting the payment; is  
6 that correct?

7 A Correct.

8 Q Condition No. 9: Provide pro rata share  
9 for police, fire, park and solid waste disposal as  
10 may be required by and to the satisfaction by the  
11 county.

12 Have you been requested to provide this  
13 thus far?

14 A Not yet.

15 Q Is it your understanding that if you are  
16 requested, there are county ordinances and  
17 regulations where they could be enforced if you do  
18 not provide it?

19 A Yes.

20 Q But you do intend to provide it?

21 A If asked, yes.

22 Q Petitioner shall participate in an air  
23 quality monitoring program as specified by Department  
24 of Health.

25 Have you done that?



1           A     We did participate in that.

2           Q     Our Exhibit 5 is November 29, 2000 letter  
3     from Clean Air Branch of Department of Health  
4     indicating compliance.

5                     No. 14: Petitioner shall give notice to  
6     the Commission of any intent to sell, lease, assign,  
7     or otherwise alter the ownership interest in the  
8     property prior to development of the property.

9                     Have you done that?

10          A     Yes.

11          Q     And do you intend to do that in the future?

12          A     We do.

13          Q     Do you have any intent to sell any of the  
14     property?

15          A     Not at this time, but some day in the  
16     future, it's possible.

17          Q     But no current plans?

18          A     Oh, no.

19          Q     And I'm going to ask you about the  
20     ownership just for a quick background on this.

21                     The property really was developed by Bob  
22     McClean, Jim's father, Dave's father-in-law. And  
23     it's owned now by the family. These two are general  
24     partners, together with Jim's sister, Dave's wife.

25                     So it's a family-owned operation. Bob died

1 five years ago. He was very active in doing all of  
2 this. I had the privilege of working with him. I  
3 didn't get into all the details, because a lot of it  
4 was with the county. He did it himself. He was very  
5 good.

6 He also tried to cooperate as far as  
7 conditions go, some of the conditions that we're  
8 asking release of, but he was very concerned about  
9 making sure the right thing was done.

10 So the property has been owned by the  
11 McCleans for a long period of time, and for the  
12 foreseeable future. There's another generation that  
13 has, I believe, limited partnership interest in, but  
14 these are the guys running it.

15 So I've covered those. If you have any  
16 questions on the ones that have been stipulated to,  
17 I'll try to answer them.

18 CHAIRPERSON ACZON: Any parties have any  
19 questions? County?

20 MS. SELF: No questions.

21 CHAIRPERSON ACZON: OP?

22 MR. YEE: No questions.

23 CHAIRPERSON ACZON: Do the Commissioners  
24 have any questions? Commissioner Wong.

25 COMMISSIONER WONG: Mr. McClean, in terms

1 of Condition 14, which is the owning, leasing,  
2 selling of the property, you have said not at this  
3 time, but in the future, you don't know?

4 THE WITNESS: I'm 63.

5 COMMISSIONER WONG: I'm assuming you'll  
6 live forever. (Laughter.)

7 THE WITNESS: Right now, we have no plans  
8 to sell.

9 COMMISSIONER WONG: But let's say down the  
10 road your grandchildren, they may say I don't care  
11 about these conditions. I don't care about soil  
12 erosion. I don't care about aquifer. That could be  
13 a possibility too, right?

14 THE WITNESS: I would like to say no, but I  
15 can't.

16 COMMISSIONER WONG: I'm just concerned  
17 about that condition that in case, you know, heaven  
18 forbid, you pass away so soon, that another 20 years,  
19 that whoever takes your place says, "I don't care  
20 about these conditions".

21 That's what I'm concerned about that they  
22 don't care how you are concerned about the  
23 environment and the future. That's the only thing  
24 I'm concerned about. So I just wanted to make a  
25 statement on that fact.

1                   MR. SMOLENSKI: I would like to follow up  
2     on that with Jim.

3           Q     You have sold two lots in the past,  
4     correct?

5           A     Three.

6           Q     We will get to them, but there is  
7     conditions relating to the sale which also relate to  
8     the lessees that you have that basically insure that  
9     they do not violate any of the environmental laws,  
10    and take care of the property the way it's supposed  
11    to be taken care of; is that correct?

12          A     Yes, it is.

13          Q     And if you sold property in the future,  
14    your intent -- which you have no intent to do now --  
15    will you include those provisions that would be  
16    binding?

17          A     As we did before, yes.

18               MR. SMOLENSKI: Those would be -- they were  
19    in the past filed with the deeds, so there are  
20    restrictions on the property. We'll get into that a  
21    little bit more on another condition. So there are  
22    no intent but protecting it.

23               CHAIRPERSON ACZON: Any other questions  
24    from the Commissioners?

25               COMMISSIONER ESTES: My question is, it

1 just says you shall inform the Commission. Doesn't  
2 say you have to get our permission or anything like  
3 that. So why is that such a big deal?

4 MR. SMOLENSKI: Well, I guess none of us  
5 thought it was a big deal to release it, and they  
6 have done that in the past.

7 We filed annual reports every year since  
8 1992 relating to Increment I, also another increment,  
9 Increment II. And we reported it when there have  
10 been a sale. So we have notified them in those  
11 instances.

12 Why are we really even filing this Motion  
13 to Release Conditions? I mentioned Bob McClean did  
14 all of this. I helped him on legal matters, and I  
15 have some knowledge of it. That knowledge disappears  
16 with years.

17 And some of these conditions we felt we  
18 wanted to clean up. And we wanted to take care of  
19 them now while we still have some institutional  
20 memory on it, and go forward.

21 We also feel that there are provisions in  
22 the zoning ordinance that take care of several of the  
23 conditions that we pointed out. So it's not as  
24 though we expect a release condition to release an  
25 obligation under zoning ordinance.

1                   And we would actually request that that be  
2     made clear in the Commission's Order that there's no  
3     intent to release those, and in fact, a release of a  
4     condition, a LUC condition that's referenced in the  
5     ordinance, for example, the ordinance says you shall  
6     do X and Y as set forth in LUC condition so and so.

7                   We would like to have it clear in the  
8     record that that does not release the obligation of  
9     the ordinance. We look at those references as  
10    definition only.

11                  So what we are trying to do is we're trying  
12    to clean this up. If there were a sale at some  
13    point, somebody might say, well, have you done this  
14    or that, or why are these conditions there.

15                  So we want to make sure that the protection  
16    is for the property. But that's the reason that  
17    we're going forward with the release of the  
18    conditions so that we can get release.

19                  COMMISSIONER ESTES: I was only talking  
20    about No. 14.

21                  MR. SMOLENSKI: Yeah. But it applies to  
22    that one and to the others.

23                  CHAIRPERSON ACZON: Commissioner Cabral.

24                  COMMISSIONER CABRAL: I'm new to the  
25    Commission, so I have some basic questions.

1                   Obviously your family in some form has held  
2     the property for a long time, yet you say you have no  
3     intention of selling it. But clearly you're making  
4     economic investments into the infrastructure as  
5     requested by these releases.

6                   So what is the intention? I mean, are you  
7     going to create an industrial subdivision that would  
8     become an association? What is the ultimate vision?  
9     Or you have no ultimate vision, just holding on to  
10    this for the great grand kids? Where you are going?

11                  These are basic questions. If you have an  
12    association, do you have conditions, covenants and  
13    restrictions that are being developed for those, for  
14    the future of these properties?

15                  MR. SMOLENSKI: Dave has been sworn in  
16    also. Dave, would like to respond?

17                  Perhaps he should be sworn in.

18                  CHAIRPERSON ACZON: Do you swear that you  
19    be truthful in your testimony?

20                  MR. ELBOGEN: Yes.

21                                 DAVE ELBOGEN

22    Was called as a witness by and on behalf of the  
23    Petitioner, was sworn to tell the truth, was examined  
24    and testified as follows:

25                                 -o0o-

1 DIRECT EXAMINATION

2 THE WITNESS: Basically right now we hold  
3 all of the property in Increment I as comprises  
4 Honokohau Industrial Park. And so we basically hold  
5 all of that property as income property.

6 So it's a combination of we have developed  
7 some of it as light industrial warehouse space. A  
8 lot of it is ground leases. And so for the  
9 foreseeable future we intend to maintain it as such,  
10 as income property for the family.

11 COMMISSIONER CABRAL: Thank you.

12 CHAIRPERSON ACZON: Any other questions?  
13 Thank you, Mr. McClean. What is the Commissioners'  
14 contemplation with Conditions 4, 5, 7 and 9?

15 MR. YEE: Are you going to accept argument  
16 and statements from other parties before  
17 decision-making?

18 COMMISSIONER HIRANAGA: Should a motion be  
19 made? I'm not sure. There is no motion on the  
20 floor.

21 CHAIRPERSON ACZON: Do you have any  
22 argument on this stipulation?

23 MR. YEE: We would stand by the  
24 stipulation. But if I had an opportunity, I just  
25 want to clarify.



1           First of all, Office of Planning, in  
2   reference to Condition 5, submitted OP Exhibit 5.  
3   And in reference to Condition 10, we submitted OP  
4   Exhibit 12 in factual support for the release of  
5   those two conditions.

6           With respect to Condition 14, which the  
7   Office of Planning also had no objection to the  
8   release, I wanted to point out that Condition 14 is a  
9   standard condition imposed on all district boundary  
10   proceedings, including any notice of intent to assign  
11   or sell that notice be provided to Land Use  
12   Commission for any intent to sell prior to the  
13   development of the property.

14           Once the property is fully developed, the  
15   condition no longer has -- basically has been  
16   satisfied.

17           So with respect to this Increment I,  
18   although there are some of the lots that are fairly  
19   open spaces, so there could be further construction  
20   that goes on by new tenants, nevertheless, it has  
21   been graded, and so it's sufficiently developed for  
22   the Office of Planning, and we felt that Condition 14  
23   was satisfied.

24           That's the reason the Office of Planning  
25   feels it's okay to release Condition 14 but, of

1 course, we have other concerns regarding some of the  
2 other conditions. Thank you.

3 CHAIRPERSON ACZON: Mr. Smolenski, any  
4 comments?

5 MR. SMOLENSKI: No. I appreciate the  
6 clarification. The condition is prior to development  
7 of the property. That's when we have --  
8 substantially we set forth that it has been  
9 substantially developed. So I think it is  
10 appropriate.

11 And perhaps it's up to the Commission, but  
12 if the Commission is focused on these now and perhaps  
13 vote on it now, then we can go through the others.

14 Maybe that would move us along faster.

15 CHAIRPERSON ACZON: County, do you have a  
16 comment?

17 MS. SELF: We stand by the stipulation as  
18 well. Just wanted to point out that although the  
19 county's ordinance doesn't have a condition exactly  
20 like that, we do have a condition that requires  
21 annual progress records.

22 And so the Planning Department will be in  
23 communications through those annual reports to make  
24 sure that everything occurs with it.

25 And also our Condition A makes all the

1 conditions in our Zoning Ordinance 99-89 applicable  
2 not only with the Applicant, but with its assessor or  
3 assigns to comply with all these conditions.

4 So we have LUC conditions and also have  
5 county conditions. So there is some overlap which is  
6 why we were willing to stipulate to releasing some of  
7 these conditions.

8 CHAIRPERSON ACZON: Commissioners, any  
9 follow up?

10 COMMISSIONER WONG: Mr. Smolenski, the  
11 question I have is the motion is for the entire  
12 project, not just Phase I or Phase II; is that  
13 correct?

14 MR. SMOLENSKI: No. I'll just point out,  
15 you have Exhibit 18, but this is just a blowup. You  
16 may not be able to see that, but the entire property  
17 that we're talking about is the yellow here  
18 (indicating.)

19 And here is Queen Kaahumanu Highway, the  
20 property, and then Increment I. Increment II, which  
21 we are not addressing now, is this portion up here  
22 (indicating), including the proposed Main Street,  
23 which has to be built yet.

24 So that's all we're talking about right  
25 now.

1                   COMMISSIONER WONG: Thank you. I thought  
2 we were talking about both.

3                   MR. SMOLENSKI: No, just Increment I. We  
4 have conditions on Increment II, which we're not  
5 requesting any deletion of. In fact, we're  
6 suggesting that the condition connected to Main  
7 Street are put in Increment II, really where it  
8 belongs.

9                   CHAIRPERSON ACZON: Any further questions?  
10 Commissioner Hiranaga, I understand you have a  
11 motion.

12                  COMMISSIONER HIRANAGA: You want to make a  
13 motion? I'll defer to you.

14                  COMMISSIONER CABRAL: I understand that's  
15 our privilege on this island, to represent our  
16 island.

17                  So I have -- thank you for that  
18 clarification, because I was unclear that it was just  
19 Increment I. You're talking about requesting this  
20 release for.

21                  So you're saying that all of that area in  
22 yellow then is already basically developed, that you  
23 have it leased, you have it developed, you have it  
24 graded, you have it ready for lease, if not leased  
25 out as land leases or built out as warehouses that

1     you lease out the warehouse on.

2                 So any vacant space has already met all the  
3     county ordinances and is prepared to be leased to  
4     have a building put on it or something?

5                 MR. SMOLENSKI: Yes, the answer is yes.

6                 COMMISSIONER CABRAL: Okay, thank you.

7                 I will speak to No. 14 that I don't see a  
8     real problem on that, although I can appreciate that  
9     leases can happen, you know, not real fast, but that  
10    it's not the same as selling a piece of property  
11    where you have a lot more due diligence time period.

12                But I would like to go ahead and clarify  
13    and make one motion, and then that might take care of  
14    a block of items, and then we can discuss others.

15                I would like to go ahead and make a motion  
16    to release Conditions No. 4, 5, 7, 9, and 10, because  
17    you, as Petitioners, have provided sufficient  
18    information and justification supporting the fact  
19    that you have complied with those; and that otherwise  
20    all other conditions should remain in course until  
21    either evidence has been submitted that they have  
22    been complied with, or that it's clear that many of  
23    these need to be held probably forever for yourselves  
24    as well as future potential owners.

25                COMMISSIONER ESTES: Second.

1                   CHAIRPERSON ACZON: Moved and seconded,  
2 moved by Commissioner Cabral and seconded by  
3 Commissioner Estes.

4                   To clarify, this is just for 4, 5, 7, 9 and  
5 10?

6                   COMMISSIONER CABRAL: Yes, for Increment I.

7                   CHAIRPERSON ACZON: To release?

8                   COMMISSIONER CABRAL: Yes, release.

9                   CHAIRPERSON ACZON: Moved and seconded.  
10 Discussion?

11                  COMMISSIONER HIRANAGA: The maker of the  
12 motion should have discussion, if she wishes, first.

13                  COMMISSIONER CABRAL: If you like  
14 discussion, I'm open for discussion.

15                  COMMISSIONER HIRANAGA: My only comment  
16 would be to condense that motion. You sort of added  
17 some thoughts afterwards. Maybe make your motion a  
18 little bit more concise, but just release Conditions  
19 4, 5, 7, 9 and 10. Leave it at that.

20                  CHAIRPERSON ACZON: We still have to  
21 discuss the rest.

22                  COMMISSIONER CABRAL: I'll clean that all  
23 up. Release 4, 5, 7, 9 and 10 for Increment I.

24                  COMMISSIONER ESTES: Second.

25                  CHAIRPERSON ACZON: Would you please poll

1 the Commission?

2 COMMISSIONER HIRANAGA: Chairman, the  
3 motion was amended, so I think it's appropriate to  
4 open it back to discussion. I don't have anything to  
5 discuss.

6 CHAIRPERSON ACZON: Anybody?

7 COMMISSIONER WONG: Just wanted to make the  
8 parties clear this is for only Increment I, this  
9 motion now, not Increment II.

10 MR. SMOLENSKI: That's correct.

11 CHAIRPERSON ACZON: Mr. Orodanker.

12 EXECUTIVE OFFICER: Thank you, Mr. Chair.

13 The motion is to release Conditions 4, 5,  
14 7, 9 and 10 for Increment I only.

15 Commissioner Cabral?

16 COMMISSIONER CABRAL: Yes.

17 EXECUTIVE OFFICER: Commissioner Estes?

18 COMMISSIONER ESTES: Yes.

19 EXECUTIVE OFFICER: Commissioner Mahi is  
20 absent.

21 Commissioner Wong?

22 COMMISSIONER WONG: Yes

23 EXECUTIVE OFFICER: Commissioner McDonald?

24 COMMISSIONER McDONALD: Yes.

25 EXECUTIVE OFFICER: Commissioner Hiranaga?

1 COMMISSIONER HIRANAGA: Aye.

2 EXECUTIVE OFFICER: Chair Aczon?

3 CHAIRPERSON ACZON: Yes.

4 EXECUTIVE OFFICER: Motion carries with six  
5 votes.

6 CHAIRPERSON ACZON: Thank you,  
7 Commissioners.

8 Mr. Smolenski, please proceed with the rest  
9 of your argument.

10 MR. SMOLENSKI: Thank you, Mr. Chair.

11 We proceed with Condition No. 1. But  
12 before we do that, we have set forth in our  
13 memorandum, and I've stated already that we believe  
14 that the Ordinance 99-89 will not be affected by the  
15 release of conditions.

16 We feel that that ordinance also covers  
17 landscaping, but we defer to the county and the  
18 county's response. And what we want to make sure is  
19 that we work with the county on landscaping, and any  
20 concerns that anyone has. So we will not be  
21 requesting now a release of Condition 1.

22 And we look forward to perhaps in the  
23 future perhaps requesting that, but we want to work  
24 with the county on that.

25 Trying to move this along. So if there is



1 questions, please let me know, but I think we can  
2 take that one off the list.

3 No. 2 is to participate in the funding and  
4 construction of local and regional transportation  
5 improvement on a pro rata basis as determined by the  
6 State Department of Transportation.

7 We have set forth as an exhibit an  
8 agreement with Department of Transportation that  
9 provided for construction, and I would like to have  
10 Jim McClean just give a quick history on what was  
11 done and what needs to be done with regard to Main  
12 Street portion of that.

13 And, Jim, just describe briefly.

14 CHAIRPERSON ACZON: You're still under  
15 oath.

16 JAMES McCLEAN

17 DIRECT EXAMINATION CONTINUED

18 BY MR. SMOLENSKI:

19 Q Jim, the condition of the property when you  
20 first started.

21 A The condition of the property when we first  
22 started was raw land out past the harbor.

23 We moved out there to get away from banyans  
24 where the old concrete plant was and there was lots  
25 of problems.

1                   So they arranged for us to move out of  
2     town. No roads or anything. We cut the road up from  
3     Queen Kaahumanu Highway up to the property. Years  
4     later we constructed the roadway systems.

5           Q     Can you walk over to what is Exhibit 18 and  
6     just point out quickly what you did or contributed  
7     to, even if it wasn't on your property?

8           A     We started down here and paved this  
9     portion -- excuse me -- graded this portion. It was  
10    a graded road for years. Eventually cutting the road  
11    here, and then all the way to the end (indicating).

12                   Constructed a roadway for county standards  
13    here and here, and then eventually here (indicating).  
14    Attached to this, was improved by these guys,  
15    (indicating). And I believe that's --

16          Q     Kamanu Street has not been dedicated yet,  
17    is that correct?

18          A     That's correct.

19          Q     And why is that?

20          A     We felt it was -- we maintain it well, and  
21    we had a quarry, a lot of trucks, so we just kept the  
22    road in our possession so we could make sure  
23    everything will -- that will then eventually go  
24    through to Lanihau property.

25          Q     And would you point out where that is, and

1 the timing of how that will be connected?

2 A The timing is a matter of money. They were  
3 already going to construct it a couple years ago.  
4 The roadway starts here at the Parkway, goes through  
5 our property, and then goes over mauka of COSTCO to  
6 Lanihau.

7 They had plans to build this. They will  
8 build it eventually. When they do, they will  
9 dedicate it to the county and we will dedicate our  
10 portion to the county.

11 Q Is that why you have not dedicated it?  
12 Waiting to dedicate it all?

13 A Yes. We had a meeting with Lanihau and  
14 prepared to do that, and it got shoveled due to  
15 funding.

16 Q Is the public allowed to use the roadways  
17 that you've constructed on the property?

18 A The county requested that we give  
19 right-of-way through Honokohau Street and Kamanu  
20 Street to alleviate congestion from the high school.

21 So we're a major roadway basically. More  
22 than the Parkway, we are a major roadway for  
23 everybody going north.

24 Q And did you -- you had a responsibility to  
25 do a Mid-Level Road?

1           A     Correct. The Mid-Level Road is a part of  
2     it, but it's physically located on the second  
3     increment, and would be constructed as a part of  
4     that.

5           Q     That's Main Street, isn't it?

6           A     I'm sorry?

7           Q     The Mid-Level Road?

8           A     Mid-Level Road, we graded the Mid-Level  
9     Road years ago to expedite the construction of the  
10    Mid-Level Road when it came to pass. And then the  
11    county got the funds and they built this road through  
12    our property.

13          Q     And that's the highway now?

14          A     That is the current highway.

15          Q     And we are very close to it, correct?

16          A     Well, it subdivides our property, and we  
17    gave the land up and we graded it, yes.

18          Q     Now, with regard to the agreement that is  
19    Exhibit 2 that we submitted, talks about Road G,  
20    Kamanu, and you've gone over that, and it will be  
21    dedicated. The Mid-Level Road is the highway, and  
22    you've gone over portions on that.

23                   The other was Main Street, and you  
24    mentioned before, but can you point out where Main  
25    Street is?

1           A     Yes. This would be Main Street  
2     (indicating), which has to go through the state land,  
3     and then through our property, and I think it  
4     terminates here (indicating). So we plan to build  
5     that when we develop this 29 acres (indicating).

6           Q     Is it your understanding that in order to  
7     get county approval to develop on that portion of  
8     Increment II, that you would have to put in the --

9           A     When we go for zoning, we will propose that  
10    we will build that road because it's -- yes. What we  
11    will have to do is get right-of-entry through here  
12    (indicating), which will be the first part. Our part  
13    is graded, theirs is not.

14          Q     We pointed out in our memos that we believe  
15    that the requirement will be -- it will be required  
16    under the county. In order to get permission to do  
17    that, we believe that -- well, I won't state anything  
18    for the county.

19                If someone was concerned about it, what we  
20    suggested is that we release a condition with regard  
21    to Increment I, but we're happy to include it onto  
22    Increment II because that's where the road is that it  
23    would have to be required.

24                How would we do this? Well, if the  
25    Commission set that forth in the Order, what we would

1 do is we would file an Amended Declaration of  
2 Conditions. We have a Declaration of Conditions of  
3 the ones we're talking about that relate to Increment  
4 I. It's recorded with the Bureau of Conveyances.

5 We would do an amended one and put this  
6 condition, just add it onto the conditions we have  
7 for Increment II, none of which we're requesting  
8 being released now.

9 So No. 1, we feel that the county  
10 requirements would insure, as a practical matter,  
11 that Main Street be built, and if there were concerns  
12 about that, we've suggested it could be put onto  
13 Increment II. We have no intent of not doing Main  
14 Street, we just feel it's inappropriate now to be  
15 attached to Increment I.

16 CHAIRPERSON ACZON: Any questions from the  
17 Commissioners?

18 COMMISSIONER CABRAL: I have a question on  
19 your map there.

20 Your lot in yellow, the one that attaches  
21 to Main Street there, how do you have access to that?  
22 Or is that not leased out yet? Because it's yellow,  
23 it's part of Increment I, but how does anybody get to  
24 that lot without Main Street?

25 THE WITNESS: It's like a flag lot. This

1 is a roadway, this is a roadway and this is another  
2 roadway across (indicating). It's not a county road,  
3 so.

4 COMMISSIONER CABRAL: Private part of that  
5 lot?

6 THE WITNESS: Yes.

7 COMMISSIONER CABRAL: Since that's such a  
8 big parcel, and it would be attached to Main Street  
9 eventually, any visions that particularly large  
10 parcel might be changed and have access off the Main  
11 Street once you develop Main Street?

12 THE WITNESS: Absolutely. The lot really  
13 doesn't get to go anywhere before it gets Main  
14 Street.

15 COMMISSIONER CABRAL: That's what it would  
16 appear on this map.

17 THE WITNESS: It's just kind of a place for  
18 storing stuff.

19 COMMISSIONER CABRAL: Thank you.

20 CHAIRPERSON ACZON: Any other questions?  
21 Commissioner Wong.

22 COMMISSIONER WONG: For the county, now,  
23 which portion of the road is county? Which one is  
24 state? Which one is proposed to be county road and  
25 which one will be State DOT road?

1 MS. SELF: There is no state --

2 MR. SMOLENSKI: I think Jim McClean, I  
3 think from discussions, would testify --

4 THE WITNESS: The Parkway is the only state  
5 roadway. As far as I know, all the other roadways  
6 are county.

7 So the county, for instance, Kamanu is  
8 county roadway, and so will Main Street, and also Ane  
9 Keohokalole, a county road.

10 COMMISSIONER WONG: So the question for  
11 county then is this condition -- I mean, there is  
12 no -- something in writing from the Petitioner to  
13 state that I am going to give you this piece of  
14 roadway in writing or an affidavit or anything else?  
15 Just a statement of fact? Or how is it besides this  
16 condition -- it's not -- I mean it's built, it's  
17 graded. Anything that has an exhibit?

18 MS. SELF: The county subdivision addresses  
19 that. Once the road is built, then the county must  
20 accept it as a county road. But it's up to --  
21 actually it has to be approved by the County Council,  
22 and then it's accepted, then it becomes a county road  
23 once approved by Council.

24 COMMISSIONER WONG: So let's say the  
25 Petitioner says, county, I'm going to give this, but



1 County Council don't act on it. That street could be  
2 in limbo for X amount of years; is that correct?

3 MS. SELF: Well, if it couldn't be a county  
4 road, it would be a --

5 COURT REPORTER: I can't hear you.

6 COMMISSIONER WONG: So if that occurred --

7 MR. SMOLENSKI: May I? The condition that  
8 we're talking about on Main Street was part of the  
9 letter agreement with DOT. Said Main Street shall be  
10 extended from Kealahou Parkway to the northern  
11 property of the boundary. Construction is  
12 conditioned upon the receipt of appropriate zoning of  
13 lands from the county, and securing a construction  
14 right-of-way entry for the road improvements from  
15 Housing and Community Development Corporation of  
16 Hawaii.

17 It doesn't actually say anything more than  
18 that. As a practical matter, it will be dedicated,  
19 but we feel that we have complied with the condition  
20 which talks about pro rata contribution to  
21 transportation and roadways.

22 And as far as the agreement that we have  
23 with DOT, it just says what it says in Exhibit 2.

24 So we need a construction right-of-way for  
25 the road improvements from actually Housing and

1     Community Development Corporation and a construction  
2     right-of-entry, and actually we need grading permits  
3     and other permits.

4             So it doesn't actually -- there's nothing  
5     that says it shall be dedicated and accepted in that  
6     letter agreement. It will have to, but what we're  
7     saying is we have substantially complied with what we  
8     agreed to with DOT.

9             And the only issue here is Main Street and  
10    whether it should be considered to be part of the  
11    Increment II.

12            CHAIRPERSON ACZON: I'll let the county  
13    finish its response.

14            MS. SELF: Like I was saying, the  
15    dedication has to go to the County Council, and the  
16    it's up to the County Council to approve that. It's  
17    unlikely that they would not approve it to have the  
18    county take it over, but we don't control the County  
19    Council. And stranger things have happened, but it's  
20    unlikely that it would happen.

21            COMMISSIONER WONG: Still trying to  
22    formulate where is DOT in this issue? Because DOT is  
23    part of Kaahumanu Highway, so where do they come in  
24    part of this mix of Main Street and everything else?

25            MR. YEE: Chair, if I could respond? Take

1 a brief step back and then move forward.

2 Condition 2 specifically says: Petitioner  
3 shall participate in the funding and construction of  
4 local and regional transportation improvements on a  
5 pro rata basis.

6 So the Petitioner and Department of  
7 Transportation have -- and the Petitioner proposed a  
8 compromise and said, okay, instead of paying on a pro  
9 rata basis and sort of come up with the standard of  
10 method, why don't we do the following things, and  
11 that will satisfy our pro rata basis.

12 Instead of contributing ten percent here  
13 and four percent there, 40 percent somewhere else, we  
14 are just going to do these particular improvements.

15 So in Petitioner's Exhibit 2, you have a  
16 letter dated December 11, 2000, which it says: We  
17 accept the proposed compromise. In there, there are  
18 three streets that are described.

19 There is Road G, which is Kamanu, and that  
20 is -- that requirement was you will construct it and  
21 it shall be dedicated to the county upon its  
22 completion. That's the requirement of DMOA.

23 The second was a Mid-Level Road, now Ane  
24 Keahokalole Highway, which requires them to have that  
25 extended. So that part is done.

1                   And the third requirement is that Main  
2     Street shall be extended from Kealakehe Parkway to  
3     the northern property boundary as part of the  
4     development of the surrounding area. The definition  
5     of the surrounding area is lot 13 on one side, and  
6     part of the Increment I and lot 14 part of Increment  
7     II.

8                   So the agreement is that this construction  
9     is conditioned upon receipt of appropriate zoning and  
10    other things. So obviously the timing of  
11    construction is important to developers, because you  
12    can't do all of this infrastructure immediately. So  
13    construction is conditioned upon appropriate zoning,  
14    securing of the construction right-of-entry from  
15    Housing and Community Development Corporation of  
16    Hawaii.

17                  So based upon that, this Condition 2 is  
18    satisfied by complying with this December 11, 2000  
19    letter.

20                  I will note that Increment II does not have  
21    a DOT condition, so this Condition 2, which is only  
22    applicable to Increment I, is the only Department of  
23    Transportation condition that exists for any of these  
24    things.

25                  So that's why it was important to the

1 Office of Planning that Condition 2 remain. And the  
2 proposal -- well, I'm going a little afar.

3 If I might, the proposal to attach to  
4 Increment II, we think, requires an amendment to the  
5 Land Use Commission's Decision which approved  
6 Increment II. There is no motion before you to amend  
7 the Decision and Order relating to Increment II, it's  
8 only a motion to release conditions for Increment I.

9 So the discussion about how it applies to  
10 Increment II is at best premature, because such a  
11 motion does not exist before you today.

12 CHAIRPERSON ACZON: Thank you, Mr. Yee.

13 The Chair would like to hear the  
14 Petitioner's argument for the rest of the arguments,  
15 and then we will give the county and OP time to put  
16 forth their argument.

17 MR. SMOLENSKI: On the rest of the  
18 conditions?

19 CHAIRPERSON ACZON: Yes.

20 MR. SMOLENSKI: That's fine.

21 The next one is Condition No. 3, drainage  
22 and erosion control and construct the necessary  
23 drainage improvements to control drainage within the  
24 property -- that's the key part -- and to maintain  
25 ocean water quality to the satisfaction of the State

1 Department of Health.

2 We have submitted written testimony from  
3 Cheryl Palesh, and some of you may know her. If you  
4 had a chance to look at her CV or resume, you see  
5 that she was eminently qualified. She's been  
6 involved in this area.

7 And in summary then I'm going to turn it  
8 over to Dave Elbogen. She has gone through and  
9 described in that letter in some technical detail  
10 what was done in order to get the permits, get the  
11 construction improved, and complete the drainage and  
12 erosion control plan to control drainage within the  
13 property.

14 And it set out in some detail -- I'm not  
15 going to read it or go into more detail, although I  
16 would ask Dave Elbogen to supplement with some  
17 comments as to what has been done, and as examples.

18 DAVID ELBOGEN

19 DIRECT EXAMINATION CONTINUED

20 THE WITNESS: Thank you.

21 I would like to briefly summarize what we  
22 did to control drainage within the property, and to  
23 maintain ocean water quality to the satisfaction of  
24 the Department of Health.

25 The primary drainage feature was a series

1 of 11 injection dry wells that were developed and  
2 constructed. That started with the development of a  
3 drainage control plan, drainage plan developed by  
4 Belt Collins, our engineer. They developed the  
5 drainage plan.

6 That drainage plan, site drainage plan  
7 along with several other pieces of information were  
8 submitted to the Department of Health as part of an  
9 underground injection control, or UIC Permit  
10 Application.

11 Upon satisfactory review of that  
12 application, the Department of Health approved that  
13 series of injection wells for construction. And  
14 basically those injection wells, you would see those  
15 as a series of the familiar cutouts that you see  
16 along the curb on our roadway.

17 So at various strategic points along Kamanu  
18 Street and Honokohau Street you see those cutouts.  
19 Beneath those are the various injection dry wells.

20 Once we received that approval to proceed  
21 with construction, those wells were all constructed.  
22 A series of supervised tests were performed on each  
23 of those injection wells. The test results were  
24 submitted to Department of Health as part of our  
25 Final Report. And then finally in response to that

1     Final Report, we received samples of all of these  
2     documents which were included in our Exhibit 8. We  
3     received the letter from the Department of Health  
4     authorizing us to operate those dry wells.

5             And so the intent of those dry wells is to  
6     basically insure that any water, storm water, et  
7     cetera, entering the roadways in that increment would  
8     be contained and would not flow off of the property.

9             Over time, as any individual lots were  
10    developed, those lots would each have their own  
11    drainage plans. Those drainage features would also  
12    be constructed, those drainage plans.

13            And in the meantime, as described in Ms.  
14    Palesh's letter, there was also the introduction of  
15    the MPDES Permit process. As part of that process,  
16    the drainage and erosion control plans that are also  
17    submitted to the county for the permitting process,  
18    those permits and/or plans also get submitted to the  
19    Department of Health as part of the MPDES Permit  
20    process.

21            And so all of the subsequent grading and  
22    all of the subsequent drainage features on each of  
23    the lots are also subject to DOH review. And, in  
24    fact, all subsequent construction, grading, et  
25    cetera, that involves more than one acre on the



1 property, requires MPDES permit. And all of those  
2 get reviewed by DOH and approved by DOH.

3 So it's through that combination of  
4 features and activities throughout the development of  
5 the project that we have been able to successfully  
6 manage and control our drainage.

7 And to the success -- and I think even from  
8 the public testimony you heard, we have been  
9 successful in doing so, and there has been no  
10 indication from any of those testifiers that there  
11 have been any problem to date from runoff from our  
12 property.

13 MR. SMOLENSKI: Thank you, Dave.

14 I would like to point out that in  
15 conclusion Cheryl Palesh said: The requirements of  
16 the conditions to control drainage within the  
17 property to maintain the coastal water quality to the  
18 satisfaction of DOH have been and will continue to be  
19 met under the current state and county regulations,  
20 and having LUC condition is no longer necessary based  
21 on implementation of the state's MPDES permit  
22 program.

23 That's her testimony both as experience in  
24 providing some of these construction plans that were  
25 submitted, and also as an expert witness in this

1 area.

2 So I guess the question is: Does what they  
3 have done work? And Dave was not here during the  
4 rains recently. I was on Oahu like most of you  
5 looking for leaks, finding some.

6 JAMES McCLEAN

7 DIRECT EXAMINATION CONTINUED

8 BY MR. SMOLENSKI:

9 Q But, Jim, would you -- were you here and  
10 did you observe what was going on, on the property?

11 A Yes.

12 Q Describe it.

13 A It rained hard. All of our drainage  
14 features worked. I drove around during one of the  
15 current rain storms that we had to see how things  
16 were going, and everything worked just fine.

17 We've had our dry wells cleaned in the  
18 past, that's part of the maintenance of them, and  
19 they worked just fine. To my knowledge no water goes  
20 down Honokohau Street at all.

21 Q Honokohau Street is --

22 A Towards the ocean (indicating).

23 Q I appreciate you pointing it out, because  
24 that's very important to the state, to the community  
25 and to the park service.

1                   It's the one that goes makai and down the  
2     hill. And no one has seen any runoff there. We  
3     don't believe there has been any runoff down there.  
4     So we have done what we feel has been required. We  
5     feel the condition has been satisfied.

6                   We think that there are other regulations  
7     in place, both federal and state and county, if there  
8     were a problem, but we believe that the construction  
9     of the dry wells and the control of the flooding has  
10    been successful, and I think we've shown that.

11                  Because otherwise it would have been  
12    heading down towards Queen Kaahumanu Highway, is that  
13    right?

14           A     True.

15           Q     We're trying to move along. I know this is  
16    a technically complex one here, but do the  
17    Commissioners have questions?

18                  CHAIRPERSON ACZON: Any Commissioners have  
19    questions on Condition No. 3?

20                  COMMISSIONER WONG: Is there, besides the  
21    dry well, is there any place such as a catchment pond  
22    area?

23                  THE WITNESS: On each lot we have a well,  
24    wherever we've developed or paved, to keep the water  
25    on the lot. These dry wells or injection wells are

1       basically for on the roadway itself.

2                   So for the lots, they contain their own  
3       water through what is really a dry well; and the  
4       injection wells keep the water -- the roadway water  
5       from flowing.

6                   COMMISSIONER WONG:   For the catchment area,  
7       is it lined or is it just --

8                   THE WITNESS:   Just a big concrete box with  
9       drainage at the bottom.

10                  COMMISSIONER WONG:   Thank you.

11                  CHAIRPERSON ACZON:   Commissioner Hiranaga.

12                  COMMISSIONER HIRANAGA:   First a question of  
13       protocol, because I'm just wondering, does the  
14       Petitioner provide their testimony and it goes  
15       through the county, state, and then the Commission  
16       asks questions, or do we ask questions now?

17                  CHAIRMAN ACZON:   Ask questions now.   Later  
18       on I'll give the other parties to present their  
19       arguments.

20                  COMMISSIONER HIRANAGA:   Thank you.

21                       So dry wells, injection wells.   Injection  
22       wells, my understanding is when water is forced  
23       subsurface, but you seem to be using injection wells/  
24       dry wells interchangeably.

25                       So what is the current term for the system

1     that's been constructed? Is it dry well or injection  
2     well?

3                 WITNESS ELBOGEN: The system in the  
4     roadways are injection wells, and I believe the  
5     definition for dry well is dry wells are what we have  
6     within the lots.

7                 As I understand the laymen's definition is  
8     injection well is deeper than it is wide; and a dry  
9     well is wider than it is deep.

10                And I know there are technical  
11    specifications in terms of 15 to 20 feet deep for  
12    injection wells, et cetera. So as far as it being  
13    injected and pressure, it's only a matter of depth,  
14    there is not actually applied pressure on the  
15    injection well.

16                COMMISSIONER HIRANAGA: Thank you for that  
17    clarification.

18                And so when you say there is no water going  
19    down that street that goes --

20                WITNESS ELBOGEN: Honokohau Street.

21                COMMISSIONER HIRANAGA: So are your dry  
22    wells, injection wells, I guess, designed for a  
23    100-year storm, a 50-year storm?

24                You say no water. It's capturing  
25    100 percent of the storm runoff that's generated by

1       rainfall. That's difficult for me to believe.

2                   WITNESS ELBOGEN: I don't know what the  
3       standard is that they were engineered to. The  
4       engineers, I know, have a standard that they engineer  
5       that to. And they submit calculations to the  
6       Department of Health as part of that application  
7       process. And that's part of what is reviewed before  
8       we receive the approval to proceed with construction.

9                   But an engineer would have to say exactly  
10      what those calculations consist of.

11                  COMMISSIONER HIRANAGA: A statement was  
12      made that no water exited the property.

13                  I find that difficult --

14                  WITNESS McCLEAN: This roadway is raised.  
15      This comes down, and there is quite an up. So we  
16      have two sets of injection wells. And then there  
17      is -- it stops the water. Any water that got past  
18      the injection wells is stopped by the raise of the  
19      roadway. So it's contained right there.

20                  So from there we have injection wells down  
21      there that handle this smaller part that is not as  
22      steep. It seems to work.

23                  COMMISSIONER HIRANAGA: So no water exiting  
24      the property?

25                  WITNESS McCLEAN: To the best of my

1 knowledge.

2 WITNESS ELBOGEN: You observed no water.

3 WITNESS McCLEAN: I observed no water.

4 I was driving around. I was looking at all  
5 the drainages to make sure that there was no ponding.

6 COMMISSIONER HIRANAGA: This was when it  
7 was raining?

8 WITNESS McCLEAN: During the rain, after  
9 the rain. Our office is located right here  
10 (indicating.)

11 CHAIRPERSON ACZON: Any other questions?

12 Let me just --

13 COMMISSIONER McDONALD: I see that  
14 Condition 3, it was probably crafted with a whole  
15 water quality issue in mind, but I see two things.

16 You mentioned MPDES. MPDES is a permit  
17 process with Department of Health during the  
18 construction process, some things that the contractor  
19 needs to follow in terms of not allowing illegal  
20 discharge into the ocean county storm drain and all  
21 that stuff.

22 The other component is the UIC, underground  
23 injection control. And that's something that's  
24 administered or permitted through the Department of  
25 Health through different type of design testing and

1     whatnot.

2                   And I'm not sure if you address this, but  
3     is that permit -- does that permit actually need to  
4     be renewed after a certain amount of years?

5                   WITNESS ELBOGEN:   The authorization letter  
6     that we received from Department of Health, I believe  
7     that is included in Exhibit 8, basically said that  
8     under their standards, based on the size of number of  
9     wells, injection wells that we had, that we were  
10    exempt.

11                  So it was an authorization to operate, and  
12    we were exempt from the requirements in terms of the  
13    reporting, renewal or other -- so it was basically we  
14    did not have those requirements.   They said basically  
15    we are authorized to operate.

16                  COMMISSIONER McDONALD:   So no annual  
17    reporting?   No renewal after five years?   So  
18    basically you folks are on your own with the  
19    maintenance and testing proceeding?

20                  WITNESS ELBOGEN:   Correct.

21                  COMMISSIONER McDONALD:   And regards to the  
22    drainage system.   I assume that, you know, when you  
23    folks initially develop the property, it was to  
24    county standards.   You guys had to go through the  
25    grading permit process, and through county review?



1                   WITNESS ELBOGEN: County standards as well  
2 as Department of Health standards.

3                   COMMISSIONER McDONALD: At that time I  
4 don't believe that the county had adopted any type of  
5 post construction best management practices.

6                   And I think currently the county has maybe  
7 recently adopted, within the last few years, water  
8 quality standards for new developments.

9                   Again, like your attorney had mentioned,  
10 it's a difficult condition to release, but I also say  
11 it's difficult from the Commission's standpoint from  
12 monitoring enforcement.

13                   So to me I'm a little concerned about the  
14 actual release of this condition. But, again, I  
15 don't see how the state could actually monitor it and  
16 enforce it, because like you said, you have no  
17 reporting to Department of Health.

18                   The only thing that would come about is a  
19 complaint that's filed against you folks as a  
20 property owner to Department of Health or EPA.  
21 That's essentially kind of out of the Land Use  
22 Commission's hands.

23                   Right now I'm just trying to validate the  
24 process in my mind, because you folks are requesting  
25 release of conditions.

1                   MR. SMOLENSKI: At this point I'd like to  
2 point out that we feel that the Condition No. 3 has  
3 been satisfied and can be released. However, we're  
4 aware of everyone has concern about the ocean  
5 quality. We're aware of the park's concern.

6                   I had a telephone conference with Jeff and  
7 their attorneys, and we talked through these things.  
8 And we talked about the conditions that they  
9 requested.

10                  And what we feel, although we asked for the  
11 release of all conditions, what we decided to do is  
12 not to request the release of Condition No. 12, which  
13 really is the one that says:

14                  Petitioner shall develop and maintain  
15 on-site facilities to insure that the nearshore,  
16 offshore and deep ocean waters remain in pristine  
17 condition.

18                  That would cover, I think, anything -- as I  
19 understand your concern would be what about the going  
20 forward after this is done. So we feel that we've  
21 satisfied Condition 6.

22                  We're not requesting now, because it's also  
23 probably hard for the Commission to listen to the  
24 Park Service and other people testify and remove  
25 Condition 12. We understand that. We don't want you

1 to be in that position.

2 So we're saying, we're withdrawing our  
3 request to release Condition 12, but we feel that  
4 that encompasses these concerns that you have after  
5 we have complied with the construction if something  
6 happens. That condition will still be there.

7 I don't know if I've said too much to make  
8 it less clear. I think Condition 12 takes care of  
9 sort of the problem of any condition.

10 COMMISSIONER McDONALD: Understood.

11 If I may, I know Office of Planning did  
12 quite a bit of coordinating with the state agencies,  
13 so I appreciate if somebody points that OP can bring  
14 up to help clarify or be clear, make clear if we  
15 decide to remove the condition.

16 CHAIRPERSON ACZON: I'll give them a time  
17 to --

18 MR. SMOLENSKI: I have not mentioned this  
19 to Bryan Yee or anyone that we were withdrawing our  
20 request to remove Condition 12.

21 COMMISSIONER CABRAL: I have one comment.

22 Based on gravity being what it is, I have  
23 some concerns about Condition 3, which is closely  
24 linked to Condition 6, which is definitely linked to  
25 Condition 12. And in releasing things from Increment

1 I, which wasn't really clear to me at the beginning  
2 that there was a difference between releasing for one  
3 versus the overall plan.

4 I think I would be more comfortable after,  
5 if ever, Increment II is developed and finalized and  
6 we have more history on possibly from the Parks and  
7 what have you, because no one is really going to know  
8 what's going down into the ground of your tenants, of  
9 the occupants, the actual users of the land, until  
10 Increment I and II are built on it and actually  
11 developed and kind of settled in.

12 So I would, at this point, because  
13 everything from II will eventually float under I,  
14 eventually float down to the ocean, I would sort of  
15 be in favor of maintaining 3, 6 and 12 at this point.  
16 Thank you.

17 CHAIRPERSON ACZON: Let me --

18 MR. SMOLENSKI: Could I just mention one  
19 thing?

20 With regard to the county's ability to  
21 enforce Paragraph 8, Section 8 of the County  
22 Ordinance, which is in our Exhibit 6 says:

23 The drainage system shall be installed  
24 meeting with the approval of the Department of Works.

25 In paragraph I: As required by the State

1 Land Use Commission Decision and Order, the drainage  
2 and erosion control plan shall be prepared to control  
3 drainage within the property and maintain ocean  
4 quality.

5 That's the perfect example of what I was  
6 saying. We do not believe that the release of the  
7 condition, the Land Use Commission condition affects  
8 that, and we feel that that is the jurisdiction and  
9 the requirement to do the same thing. And we believe  
10 that it stays in place and intend to comply with it.

11 So we don't think that the land -- we think  
12 that we have completed the construction. We put that  
13 in. But this condition is right here so it can be  
14 enforced by the county.

15 CHAIRPERSON ACZON: Commissioner Wong.

16 COMMISSIONER WONG: I have a question.

17 Now, we're talking about drainage and  
18 erosion and all that injection well.

19 Is that hooked up to the sewer system or is  
20 there a cesspool?

21 WITNESS ELBOGEN: Actually, in this case,  
22 neither. Sewer and cesspool are dealing with  
23 wastewater, whereas this is dealing with storm water.  
24 So these, in both cases, storm water is intended to  
25 go directly into the ground.

1                   COMMISSIONER WONG: So it goes into the  
2 ground. Because there is an aquifer underneath, how  
3 do you protect the aquifer and the storm water?

4                   WITNESS ELBOGEN: Storm water is intended  
5 to go -- ultimately filters into the ground and  
6 ultimately -- just like rainwater --

7                   COMMISSIONER WONG: Like a leaching field?  
8 So the water goes into that area?

9                   WITNESS ELBOGEN: It filters through the  
10 rock just as if it were rainwater puddling in the  
11 ground and ultimately being absorbed into the lava.

12                  COMMISSIONER WONG: So then on the map -- I  
13 Googled the map just to see -- it's light industrial,  
14 so you have motor pools and other things, and  
15 sometimes they have oil and heavy metals, so that  
16 would leach down into the aquifer also then?

17                  WITNESS ELBOGEN: So that is why Condition  
18 6 requires us, and we believe we have put in place  
19 systems to insure that oil and pollutants do not mix  
20 in, and do not flow into our dry wells and into the  
21 injection wells along with the storm water.

22                  COMMISSIONER WONG: Sorry, just trying to  
23 figure this out.

24                  So Department of Health has a Clean Water  
25 Branch that deals with the aquifers and drinking

1 water and all this other things.

2 So I'm going to go to OP and ask what is  
3 Department of Health's position because --

4 CHAIRPERSON ACZON: Let me just, while we  
5 are -- I'm going to give them time to rebut, so let  
6 me -- maybe you going to be covering those questions.  
7 Sorry about that, Commissioner Wong.

8 Mr. Smolenski, let me just clarify.

9 You are withdrawing Condition No. 1,  
10 correct?

11 MR. SMOLENSKI: Yes, No. 1.

12 We will work with the county, and when the  
13 county feels comfortable and everybody feels  
14 comfortable, we may ask for release of that.

15 CHAIRPERSON ACZON: Looking at the time, I  
16 don't think we're going to have time to finish, but I  
17 want to give the other parties, the county and OP,  
18 time to give their argument for Condition 2 and 3.  
19 Can we do it? County.

20 MR. SMOLENSKI: May I just mention one  
21 thing?

22 Dave just said this. The systems that we  
23 put in for Condition 6 also would be -- it all ties  
24 together. And we feel that by releasing Condition  
25 12, we complied with 3 and 6, but the protection is

1 still there with Condition 12.

2 CHAIRPERSON ACZON: Duly noted. County.

3 COUNTY OF HAWAII ORAL ARGUMENT

4 MS. SELF: I would like to have -- let me  
5 summarize real quickly, then have the Director sworn  
6 in.

7 So the county did stipulate to release  
8 Condition 4, 5, 7, 9, 10 and 14. But there are other  
9 conditions that Petitioner's counsel say they're not  
10 going to release, Condition 1 and 12. So we rule out  
11 those.

12 I would like to ask some questions of the  
13 Planning Director. Please swear in Duane Kanuha.

14 DUANE KANUHA

15 Was called as a witness by and on behalf of the  
16 County of Hawaii, was sworn to tell the truth, was  
17 examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MS. SELF:

20 Q Mr. Kanuha, you recall that in the county's  
21 response to the Petitioner's Motion to Release the  
22 LUC conditions, that the response from the county was  
23 that we were not -- we were concerned about releasing  
24 Condition No. 2 regarding transportation on the  
25 roadway.



1 Do you recall that?

2 A Yes.

3 Q And since hearing the testimony today, has  
4 your position on LUC Condition No. 2 changed at this  
5 point?

6 A No.

7 Q Would you like to expand on that?

8 A Condition No. 2, I think what the  
9 Commission has to understand is that there is a  
10 linkage between the Commission's D and O which was  
11 issued for this project in 1991. So fast forward, we  
12 are in 2015.

13 During that interim the Petitioner came in  
14 and got a rezoning for the property to coincide with  
15 the Commission's D and O to the Urban District.

16 At the time they got that rezoning, they  
17 were -- the Rezoning Ordinance had a number of  
18 conditions related to the development of that  
19 property. And the normal procedure for the county is  
20 to try to incorporate all of the Land Use  
21 Commission's conditions as closely as possible into  
22 the Rezoning Ordinance.

23 Basically -- it's basically from the  
24 perspective that once the Commission grants a  
25 redistricting, that when the property comes in for

1 rezoning, it's primarily the county's responsibility  
2 to insure that it is implemented both to be  
3 consistent with what the Land Use Commission  
4 conditions are and the conditions of the county.

5 So that's why, in our position, you'll see  
6 we're supporting release of some conditions, and  
7 remaining control of others.

8 This condition, particular condition,  
9 Condition 2, is an interesting one. It might help  
10 answer Commissioner Wong's question about what DOT's  
11 involvement was if these connector roads that go on  
12 to the next increments are connected to county roads.

13 The simple answer is when the petition was  
14 granted by the Land Use Commission in 1991, these  
15 roads weren't there. Access to this property was  
16 only through Queen Kaahumanu Highway. So when they  
17 came in for a rezoning, that's why the county  
18 condition requires -- it's specific.

19 It takes the same language from the  
20 Department of Transportation, and then what we would  
21 do is we would incorporate those recommendations into  
22 the county recommendation at the time of final  
23 subdivision approval.

24 So that's related to why, when the roads  
25 are constructed, if they're up to standards, then the

1 county would take -- that's usually the requirement.

2 So that's with regard to Condition No. 2.

3 And because the project is still moving to  
4 the next increment, that's why our position is to  
5 retain that condition, because that's the linkage  
6 between our rezoning condition and the Land Use  
7 Commission conditions.

8 Q Then in our response to the Motion to  
9 Release for conditions, LUC Conditions 3, 6, 8, 11,  
10 13 and 16, and you took 12 off the table. So 3, 6,  
11 8, 11, 13 and 16 the county did not have a problem  
12 with releasing those because most of these are  
13 covered by other laws within the county. And with  
14 the exception of No. 16, the only reason we would  
15 want to not be concerned about releasing No. 16 is  
16 only if the LUC determined that they're going to  
17 release all the conditions.

18 Is that still your position?

19 A That's correct.

20 COMMISSIONER HIRANAGA: Mr. Chair, excuse  
21 me. I apologize, but I need to excuse myself. But  
22 just for clarity, I believe for discussion at this  
23 point we're just discussing Conditions 2 and 3?

24 CHAIRPERSON ACZON: That's correct.

25 COMMISSIONER HIRANAGA: Again, I must

1       excuse myself.   Excuse me.

2                   CHAIRPERSON ACZON:   Thank you, Commissioner  
3       Hiranaga.

4                   (Commissioner Hiranaga leaves the  
5       proceedings.)

6           Q       (By Ms. Self):   Specific to Condition No. 3  
7       regarding the drainage and erosion, is it still your  
8       position that county doesn't have a problem with that  
9       particular condition being removed?

10          A       Not necessarily that we don't have any  
11       problem with regard to conditions on erosion,  
12       sedimentation, drainage, things like that.   We defer  
13       to state agencies which are responsible for those  
14       components, Department of Health primarily.   The  
15       county ordinances network along those lines through  
16       Chapter 10, which are the controlled ordinance that  
17       Public Works has.

18                   So it's for that reason that we have no  
19       objections to the release of the conditions.   But  
20       what happens is, because this project has been  
21       implemented, partially implemented, but because it's  
22       ongoing, as we review the upcoming increments of the  
23       project, we'll probably take a longer term, a  
24       comprehensive look at whether or not requirements in  
25       these areas need to be upgraded or brought together

1 more as a rule, especially given the long time frame  
2 of this project. It's been going a long time.  
3 Standards have changed over time. Requirements have  
4 changed over time.

5 So our position is that as we review the  
6 subsequent increments, if necessary, then we'll see  
7 what needs to be upgraded if possible for the  
8 subsequent.

9 COMMISSIONER CABRAL: I have a question,  
10 the more I'm learning about this.

11 Do you, as the county, feel that there  
12 would be a differentiation between releasing like  
13 Condition No. 2 for Increment I for the roads already  
14 built, versus not releasing it for the roads that  
15 have not been built to county standards, because  
16 there is clearly different levels of development that  
17 have presumably been successfully completed.

18 So I'm sort of confused. It came to me  
19 like a blanket across-the-board to release it period  
20 for the whole project, but I think it would be easier  
21 for me to get a grasp on it if we were to separate  
22 Increment I versus II, and Condition No. 2, it might  
23 be something we could release. And I guess an  
24 ability to release to just kind of clean up and  
25 eliminate more and more concerns for your future, if

1     that is what the request is, that if we could  
2     possibly take Condition No. 2 and release it for the  
3     roadways that have been built in Increment I to a  
4     current county standard.

5             Now, I might warn you that they may want to  
6     get it dedicated before the county changes its county  
7     standards. But I think that there is a difference  
8     here, and I want to see what the county thinks about  
9     some of those releases at incremental levels.

10            THE WITNESS: I think what you're  
11     suggesting makes sense. However, we're supporting  
12     the retention of that condition because it's the only  
13     linkage back to the original coordination of roadway  
14     improvements and what the pro rata requirements would  
15     be for the project as it moves forward.

16            COMMISSIONER CABRAL: Okay, I understand.

17            MR. SMOLENSKI: May I ask a question?

18            CHAIRPERSON ACZON: I'll give rebuttal  
19     later. I want to go ahead with this.

20            MR. SMOLENSKI: Just a clarification  
21     question.

22            CHAIRMAN ACZON: Go ahead.

23            MR. SMOLENSKI: I would just ask you, do  
24     you feel comfortable with our proposal that the order  
25     say that the reference in the ordinance to the

1 conditions doesn't release the county's conditions?  
2 Because that's clearly our intent. You guys control,  
3 we don't want to release anything that you have in  
4 your ordinances.

5 THE WITNESS: Correct, I agree with that  
6 statement.

7 CHAIRPERSON ACZON: Amy.

8 MS. SELF: That's all the county has.

9 CHAIRPERSON ACZON: Thank you. Mr. Yee,  
10 please present your argument.

11 OFFICE OF PLANNING ORAL ARGUMENT

12 MR. YEE: With respect to Conditions 2 and  
13 3 -- first I did want to take a step back to look at  
14 Motions to Amend and how they fit in the context of  
15 the Land Use Commission.

16 Normally, of course, you have your District  
17 Boundary Amendment decision, and that often is the  
18 last time you'll see the case.

19 Sometimes they will come in and they'll ask  
20 to amend to release some of the conditions, some or  
21 all of the conditions that were imposed. The most  
22 common reason for doing so -- I'm sorry -- your rule  
23 simply says they can do that for good cause. It's a  
24 very general standard. But there are, as applied,  
25 some more specific understanding of what a successful

1 Motion to Amend should include.

2 The most common, which is the one here, the  
3 argument that the condition has been completed, all  
4 done. Nothing further to be done. Release me from  
5 the condition because I've done everything fast.

6 The second will be a little more  
7 complicated. A change in circumstance. For example,  
8 UH West Oahu was going to build in a particular  
9 location. They changed the location and now they  
10 want to have, instead of an educational system, a  
11 commercial or residential use.

12 And that then requires -- it gets more  
13 complicated because you have to look at the new uses,  
14 impact from new uses. Look at whether the old  
15 conditions still are applicable, or whether new  
16 conditions should be imposed.

17 But you'll sometime see that happen  
18 especially with older cases where development did not  
19 occur and conditions changed.

20 A third, which is occasionally there is  
21 essentially like a reconsideration. If a developer  
22 comes in, they look at conditions. They say I don't  
23 like this condition any more. I need to get that  
24 released.

25 Now, that is not looked upon particularly



1 favorably, because as you can imagine, there is a  
2 value to a finality of the decision. And you have in  
3 your rules a requirement that if you want to  
4 reconsider a decision, you have to come back within  
5 seven calendar days, and you have to show it's either  
6 unreasonable, unlawful or unreasonable. It's a high  
7 standard, because obviously a decision gets made,  
8 people just need to accept it and then move on.

9 But sometimes, for example, you might have  
10 a condition which says affordable housing shall be 60  
11 percent of the residential project. And new owners,  
12 new developers look at that, I just can't do that. I  
13 just cannot develop with 60 percent affordable  
14 housing requirement.

15 So they come to you. You look at it. You  
16 may impose some other requirements or change the  
17 requirements, but essentially reconsidering that 60  
18 percent requirement in changing it.

19 I will note though that there are those  
20 circumstances -- this is often a one-way street --  
21 it's always in the favor of the developer. So when  
22 we come back, we look at especially older cases,  
23 saying there is no affordable housing requirement  
24 here. The Office of Planning does not come to you  
25 and say impose a 20 percent affordable housing

1 requirement, because the decision got made. You  
2 didn't impose a requirement. We are not going to  
3 come in later and impose a new one.

4 So these type of cases which they  
5 essentially ask you to reconsider a requirement, it's  
6 a one-way street, generally in favor of the  
7 developer.

8 There are a few other more minor examples,  
9 when you need to clarify a condition, for example,  
10 because it's just unclear, and the declaratory  
11 petition is just not -- and a few others. But those  
12 are the major reasons why we have motions to amend.  
13 And how we apply the good cause standard in your  
14 rules.

15 In this particular case, as I said, the  
16 primary argument is we completed the condition. With  
17 respect to Conditions 2 and 3, the Office of Planning  
18 does not believe they have completed the condition.

19 Condition 2 says, provide the pro rata  
20 share for transportation, and they executed an  
21 agreement saying we will do the following things in  
22 order to satisfy Condition 2.

23 One of the things was have Road G built and  
24 dedicated to the county. It hasn't been dedicated to  
25 the county. The second thing was build Main Street.

1 The timing of Main Street is later, they're not in  
2 violation of Condition 2, but they are required to  
3 build Main Street. They have not built Main Street.  
4 So they have not completed.

5 They have not accomplished Condition 2, so  
6 they can't come to you and say, oh, I finished all my  
7 requirements for Condition 2, because they have not.

8 Instead, they have come to you and said,  
9 oh, let's just have it applicable to Increment II.  
10 And I know you would ask, well, could you just  
11 release the roadways built for Increment I? But the  
12 condition is to provide -- you have to read the  
13 specific requirement -- that is provide a pro rata  
14 share for transportation improvements, that's sort of  
15 a general requirement.

16 And we have a specific agreement about what  
17 has to be done. We have an agreement about the  
18 specific roadways that have to be built. But all of  
19 them have to be built in order to satisfy Condition  
20 2.

21 So I don't think you can release it just  
22 with respect to the roads being done. I think you  
23 have to get it all done and then Condition 2 in total  
24 can get released. If Condition 2 had been drafted  
25 differently, if Condition 2 said, build Road G, A.

1 B, have it dedicated to the city. C, grade Ane K  
2 Highway. You could have released part of the  
3 condition drafted in that way, but that's not how we  
4 drafted the condition.

5 So I don't believe you can release  
6 Condition 2 in part. They argue, as I mentioned  
7 before, we could have it applicable to Increment II.  
8 But as I noted before, taking a step back again, we  
9 had one decision that reclassified Increment I. A  
10 separate decision that reclassified Increment II.  
11 The second decision to reclassify Increment II does  
12 not have a transportation requirement. There is  
13 nothing in Increment II that requires them to provide  
14 a pro rata share of transportation improvements.  
15 It's all based upon the condition in Increment I,  
16 which they're asking that you release.

17 So the Office of Planning, since  
18 transportation is very important to us, objects to  
19 the release of Condition 2 because it's not been  
20 satisfied, and we don't believe there is a way for  
21 you to simply apply it to Increment II. Certainly  
22 not where there's no motion before you.

23 With respect to Condition 3, the  
24 requirement for Condition 3 is that they get DOH  
25 approval of the erosion and drainage plan. And they

1     say well, we submitted one with our underground  
2     injection control application. What we tried to  
3     point out and what's confirmed, I think, by their  
4     expert is the well. Except the UIC program looked at  
5     drinking water.

6             Condition 3 looks at ocean water quality.  
7     Those are different analyses. Those are different  
8     criteria. So whether the water goes into the aquifer  
9     and stays, and goes below the freshwater lens, goes  
10    into the brackish or saltwater, whether that water  
11    affects the salinity levels for anchialine ponds,  
12    whether that will affect nearshore waters, are not  
13    looked at by the UIC permit.

14            So the review by Department of Health for  
15    the UIC permit was not for the purpose of Condition 3  
16    to maintain ocean water quality. So that does not  
17    satisfy Condition 3.

18            Now, we did talk about the county  
19    requirements. So the county did pass ordinances as  
20    Mr. Kanuha stated. The county ordinances try to  
21    incorporate as much as possible the LUC conditions.  
22    This is an issue that arose in our discussions that I  
23    had in which I was looking at ways, well, what can we  
24    agree on? What are ways in maybe the Office of  
25    Planning can agree to release some of the conditions?

1           As we talked about before, some conditions  
2   are conditions that sort of extend from their  
3   obligations to maintain, obligations that are not  
4   simply construction is done, it's when you're done,  
5   to hold it, to keep it, to maintain it, operate it,  
6   continuously.

7           And I raise the question of, well, there's  
8   a county condition to maintain it. Maybe I can go  
9   back to the state agency and say, well, if there is a  
10   county agency, a county ordinance that requires that  
11   they maintain, would that satisfy you?

12           They sort of took that and made a different  
13   argument. What they said is, well, maybe we didn't  
14   satisfy the condition, but we have got another county  
15   condition in addition to the LUC. That is not an  
16   acceptable argument to Office of Planning.

17           So, for example, you pass the D and O, you  
18   put in conditions, the parties go to the county, they  
19   insert wholesale the LUC conditions in zoning, and  
20   then come back and say, okay, I would like to release  
21   all the LUC conditions. The answer is no. The LUC  
22   conditions are not satisfied simply because the  
23   county incorporated them. It's still separate and  
24   independent obligation to perform that that provides  
25   a forum for people who may be injured or may be

1     concerned about it, so that the only agency is the  
2     county.

3             In addition, as they pointed out, with  
4     respect to Condition 3, we did not consider the  
5     county ordinance to be the same, and there are two  
6     things.

7             One is that the county ordinance does say,  
8     you know, as required by the Land Use Commission, do  
9     the following. And I understand that this Petitioner  
10    says, well, put in your order that the deletion of  
11    this condition doesn't affect the enforcement of the  
12    county condition, because the Office of Planning had  
13    concerns that if it said as required by the Land Use  
14    Commission do this, and if the LUC no longer requires  
15    it, then there's no longer an applicable county  
16    condition.

17            Now, that's an issue which can be argued.  
18    I'm not trying to tell you one way or another which  
19    is the appropriate way to do it. All I'm trying to  
20    say is there's an ambiguity. And there is no  
21    particular reason to keep the ambiguity when you can  
22    avoid the whole thing by keeping the LUC order.

23            So where -- and by simply by you saying  
24    that, oh, I think this doesn't affect the county  
25    condition, I don't know if it's going to be

1 applicable to subsequent landowners. If they change  
2 their minds, that's actually most often occurs.  
3 That's what the state landowner is -- most often  
4 occurs when the land gets sold or broken up into  
5 pieces, and the new land owners come in, I got this  
6 argument. Then they raise the issue, and then maybe  
7 the county will eventually win. But we are saying  
8 don't make the county go through that, keep the Land  
9 Use Commission.

10 With respect to 2 and 3, Office of Planning  
11 is opposed.

12 CHAIRPERSON ACZON: Thank you.

13 I think we're going to be running out of  
14 time, so Mr. Smolenski, can you give us a quick  
15 rebuttal, because we have to adjourn.

16 MR. SMOLENSKI: I have a question about not  
17 having all of the Commissioners here that are  
18 required. Are we going to have to redo this part or  
19 not? I'm just asking because that was expressed  
20 before.

21 EXECUTIVE OFFICER: The Commissioners who  
22 are not present can, in this case, read the  
23 transcript and gain information from the transcript.

24 MR. SMOLENSKI: I understand.

25 EXECUTIVE OFFICER: But obviously we are



1 not going to make a vote today.

2 CHAIRPERSON ACZON: Not going to vote now.

3 So we are going to give the Commissioners who have  
4 questions time to ask questions at the next hearing.

5 MR. SMOLENSKI: Well, its anticipated then  
6 this hearing is going to be continued?

7 CHAIRPERSON ACZON: Yes.

8 MR. SMOLENSKI: I would ask actually to  
9 have the rebuttal when we have the full number of  
10 Commissioners here, because then if I say something,  
11 if that Commissioner had a question for me, I could  
12 respond.

13 If we are going to be stopping anyway, and  
14 we all have the opportunity to meet again, I think  
15 that's how we would prefer to do it.

16 And I do have some responses, but I think  
17 maybe that's the best way to do it.

18 CHAIRPERSON ACZON: We apologize for  
19 running out of time. And we will inform the parties  
20 when the next hearing will be.

21 MR. SMOLENSKI: Do you have any -- while  
22 we're all here, do you have any indication of when it  
23 might be?

24 CHAIRPERSON ACZON: We are looking at  
25 September early.

1           MR. YEE: For the Commission, I will not be  
2 present, but I'll try to have a substitute.

3           MR. SMOLENSKI: Based on your comments,  
4 let's have it then. (Laughter.)

5           EXECUTIVE OFFICER: We will get back to the  
6 parties with that time and date.

7           CHAIRPERSON ACZON: We have a scheduled  
8 meeting that day, video conference.

9           MR. SMOLENSKI: We would like to thank all  
10 of you Commissioners. It's not easy. The pay is not  
11 great, and we appreciate the Commissioners that have  
12 been on for awhile, and the new ones who knew when  
13 they raised their hands, they were volunteering.

14           Thank you all. We really appreciate you  
15 and appreciate your questions also.

16           CHAIRPERSON ACZON: Commissioners, any  
17 other questions before we adjourn? Call this meeting  
18 adjourned.

19           (The proceedings recessed at 12:51 p.m.)

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## 1 CERTIFICATE

2 STATE OF HAWAII )  
 ) SS.  
3 COUNTY OF HAWAII )

4 I, JEAN MARIE McMANUS, do hereby certify:

5 That on September 10, 2015, at 9:30 a.m., the  
6 proceedings contained herein was taken down by me in  
7 machine shorthand and was thereafter reduced to  
8 typewriting under my supervision; that the foregoing  
9 represents, to the best of my ability, a true and  
10 correct copy of the proceedings had in the foregoing  
11 matter.

12 I further certify that I am not of counsel for  
13 any of the parties hereto, nor in any way interested  
14 in the outcome of the cause named in this caption.

15 Dated this 10th day of September, 2015, in  
16 Honolulu, Hawaii.

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JEAN MARIE McMANUS, CSR #156

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