

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

LAND USE COMMISSION MEETING

STATE OF HAWAII

Held on November 4, 2015

Commencing at 9:30 a.m.

West Hawaii Civic Center

Council Chambers

74-5044 Ane Keohokalole Highway

Conference Room G

Kailua-Kona, Hawaii 96740

REPORTED BY: Jean Marie McManus, CSR #156

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

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

LAND USE COMMISSION HEARING

MOTION TO RELEASE

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

BEFORE: Jean Marie McManus, CSR #156

1 APPEARANCES:

2 EDMUND ACZON, CHAIRPERSON
3 ARNOLD WONG, VICE CHAIR

4 COMMISSIONERS:

5 NANCY CABRAL
6 KENT HIRANAGA
7 CHAD McDONALD
8 LINDA ESTES
9 ARNOLD MAHI

DIANE ERICKSON, ESQ.
Deputy Attorney General

10 STAFF:

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

14 ROBERT J. SMOLENSKI, ESQ.
15 DAVID ELBOGEN
16 JAMES McCLEAN
17 1628 Davies Pacific Center
18 841 Bishop Street
19 Honolulu, Hawaii 96813

20 Attorney for Petitioner

21 AMY G. SELF, ESQ.
22 Deputy Corporation Counsel
23 County of Hawaii
24 DUANE KANUHA, Planning Director
25 County Planning Department

For County of Hawaii

BRYAN YEE, ESQ.
Dept. of Attorney General, Office of Planning
LORENE MAKI, Office of Planning

For State of Hawaii, Office of Planning

AGENDA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I	Adoption of Minutes	Page 6
II	Public Testimony (none)	
III.	Tentative Meeting Schedule	Page 6
III	A89-693 McClean Honokohau	Page 7

INDEX.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PETITIONERS WITNESSES	PAGE
JAMES McCLEAN	
Direct Examination	17
Cross-Examination/OP	27
Redirect Examination	41

1 CHAIRPERSON ACZON: Good morning. This
2 is the Land Use Commission. First order of business
3 is adoption of October 22, 23rd, 2015 minutes. Any
4 correction or comments on that? If not, are there is
5 a motion?

6 COMMISSIONER ESTES: So moved.

7 COMMISSIONER MAHI: Second.

8 CHAIRPERSON ACZON: Motion has been moved
9 by Commissioner Estes and seconded by Commissioner
10 Mahi to adopt minutes. All in favor say "aye". Any
11 opposed?

12 The minutes are unanimously adopted.

13 The next agenda item is the tentative
14 meeting schedule. Mr. Orodener.

15 EXECUTIVE DIRECTOR: November 18th and 19th
16 scheduled to be at Maui Arts and Cultural Center to
17 consider the acceptance of the FEIS for A10-786
18 Olowalu LLC; November 19th also on Maui for the
19 Special Permit Extension Lanai Landfill.

20 December 9th and 10th, again on Maui at DOT
21 meeting room. September December 9th Status Report
22 A94-706 Ka'onoulu Ranch and December 10th a site
23 visit Ma'alaea Plantation.

24 In January we have tentatively schedule
25 Ma'alaea Plantation.

1 That takes us through February.

2 CHAIRPERSON ACZON: Thank you.

3 This is a continued action hearing on
4 Docket A89-693 McClean Honokohau Properties Motion to
5 Release, Discharge and Delete all Conditions in the
6 Land Use Commission's Findings of Fact, Conclusions
7 of Law, Decision and Order, Entered April 16, 1991.

8 Well the parties identify themselves for
9 the record?

10 MR. SMOLENSKI: Robert Smolenski for the
11 Petitioner McClean Honokohau Properties.

12 With me is Dave Elbogen and Jim McClean who
13 are general partners. And they were sworn in as
14 witnesses at the initial hearing date.

15 MS. SELF: Good morning, Deputy Corporation
16 Counsel Amy Self on behalf of the Planning Director
17 and Planning Department who should be here shortly.

18 MR. YEE: Good morning, Deputy Attorney
19 General Bryan Yee on behalf of Office of Planning.
20 With me is Lorene Maki from office of planning.

21 CHAIRPERSON ACZON: Thank you. Let me
22 update recent record in this docket:

23 On September 10, 2015, the Commission began
24 its hearing on this docket and received a Stipulation
25 deletion for Certain Conditions 4, 5, 7, 9, 10 and 14

1 filed by the Parties.

2 At its September 10th, 2015 meeting the
3 Commission unanimously voted to release Conditions
4 4,5, 7, 9 and 10.

5 The Commission recognized, as a part of the
6 motion, that it still needed to address the remaining
7 Conditions.

8 During the course of the September 10, 2015
9 hearing, the Petitioner orally requested that the
10 Conditions 1 and 12 be withdrawn from its motion, the
11 effect being that Petitioner is no longer requesting
12 it be released from Conditions 1 and 12.

13 Petitioner's request was accepted by the Commission.

14 The meeting was adjourned and this Docket
15 was to be set for further hearing at a later date.

16 On October 27, 2015, the Commission mailed
17 the November 4th, 2015 LUC meeting agenda notice to
18 the Parties and the Statewide, and Hawai'i mailing
19 lists.

20 Let me briefly describe procedure for today
21 on this docket.

22 First we will call individuals desiring to
23 provide public testimony to identify themselves. All
24 such witnesses will be called in turn to the witness
25 box where they will provide their testimony.

1 After the public testimony, the Commission
2 will hear argument on the Motion to Release,
3 Discharge and Delete All Conditions. We will first
4 hear from the Movant, then County and finally OP.

5 The Movant will present oral argument on
6 Conditions 2, 3, 6, 8, 11 and 13 through 16
7 consecutively and in order without interruption. No
8 additional evidence or witnesses are required. At
9 the completion of its argument the Commissioners will
10 be given the opportunity to ask questions.

11 Once the Petitioner's present is complete
12 and the Commissioners have completed their
13 questioning, the County shall give its presentation
14 in the same manner. The Commissioners will then be
15 allowed to ask questions.

16 Once the County has completed its
17 presentation and the Commissioners have completed
18 their questions, OP will present its case in the same
19 manner. The Commissioners will then ask questions.

20 Once the Commissioners have completed their
21 questioning of OP the Petitioner will be given a
22 chance for a short rebuttal. The Commissioners will
23 again be given the opportunity to ask questions.

24 At the conclusion of oral argument, and
25 after questions from the Commissioners and the

1 answers thereto, the Commission will conduct its
2 deliberations.

3 Are there any questions on our procedure
4 for today?

5 MR. SMOLENSKI: Mr. Chair, you had stated
6 that no witnesses are necessary. We have two
7 witnesses here. We had proceeded upon the
8 understanding that we would be able to have
9 witnesses; and if that changes, we feel that we
10 actually will be disadvantaged because we would have
11 submitted affidavits as part of the record.

12 I expect it's going to be very brief today.
13 It would only be Jim McClean, because he was here
14 from the beginning with his dad Bob McClean, and not
15 only explain what was done relating to a couple of
16 the remaining conditions, but also answer any
17 questions historically.

18 So we would request, because of that, and
19 you know, we were asked to submit witness lists and
20 exhibit list, which we did, and our understanding
21 always was that we would be able to have witnesses.

22 So we would request that Mr. McClean be
23 allowed to testify today.

24 CHAIRPERSON ACZON: Mr. Smolenski, any
25 information that comes from the witnesses that was

1 not submitted to parties for review will be subject
2 to cross-examination by all parties. Do you
3 understand this requirement.

4 MR. SMOLENSKI: I'm sorry, I don't
5 understand. Anything that the witness says will be
6 subject to cross-examination. I understand that,
7 sure.

8 CHAIRPERSON ACZON: Whatever new
9 information that you give today will be subject to
10 cross-examination.

11 MR. SMOLENSKI: Yes, of course, and any
12 questions Commissioners may have. What we would like
13 to do is --

14 CHAIRPERSON ACZON: Are these witnesses
15 here to provide new information that has not been
16 previously supplied to the Commission?

17 MR. SMOLENSKI: Yes, because it relates to
18 the conditions we haven't gotten to yet, which are
19 only a handful of conditions.

20 CHAIRPERSON ACZON: I would like to remind
21 you if the witness does not have any new information
22 that then there is no reason to testify. The
23 Commission takes notice of their presence today and
24 will ask questions of them should they feel it is
25 necessary.

1 MR. SMOLENSKI: Yes, this will be new
2 information. It was not presented before.

3 CHAIRPERSON ACZON: Will the witness be
4 able to speak directly to compliance of the condition
5 and point to any written proof that has been provided
6 to documents and compliance to this by government
7 agency?

8 MR. SMOLENSKI: Yes.

9 CHAIRPERSON ACZON: Can you tell the
10 Commission these conditions this witness will be
11 addressing?

12 MR. SMOLENSKI: I believe we're going to
13 start with number 6 today, and I will say before
14 that, number 2, and we have told the County this,
15 we're going to withdraw our request of number 2 to be
16 released at this time.

17 CHAIRPERSON ACZON: Can you just tell me--

18 MR. SMOLENSKI: That's why I'm saying we're
19 starting with number of 6 because we are not going to
20 deal with number 2.

21 CHAIRPERSON ACZON: Would you like to
22 proceed with your argument right now?

23 MR. SMOLENSKI: Yes, I will. If I may, we
24 would like to put up basically the map so we can
25 point out which increment we're talking about again.

1 CHAIRPERSON ACZON: If you can just give me
2 a moment.

3 Let me remind you that the Commission is
4 addressing the specific matter of whether or not to
5 grant the Motion to Release, Discharge and Delete
6 Specific Conditions, which, because previous action
7 of the Commission and request by the Petitioner, are
8 limited to 3, 6, 8, 11 and 13 through 16.

9 This is not an evidentiary hearing.

10 Let me go through the public testimonies
11 first, if there is any, then we can continue with the
12 procedure. Okay?

13 For public witnesses who are testifying,
14 the Commission would appreciate it if you could
15 confine your testimony to issues consistent with this
16 matter and avoid repetitive testimony. Is there any
17 public testimony?

18 EXECUTIVE OFFICER: No one has signed up,
19 Mr. Chair. You may want to ask if there's anybody.

20 CHAIRPERSON ACZON: Anybody in the audience
21 wish to testify? Thank you.

22 Mr. Smolenski, before you proceed with your
23 argument, I would like to emphasize again that this
24 is not an evidentiary hearing. Also at our prior
25 hearing on this matter, you presented argument with

1 regards to Conditions 2 and 3, which is already part
2 of the record. Unless you have anything new to add,
3 I believe you may begin with Condition 6 and proceed
4 directly to Conditions 8, 11, 13 through 16.

5 MR. SMOLENSKI: That's my understanding
6 also.

7 CHAIRPERSON ACZON: You may proceed.

8 MR. SMOLENSKI: Thank you. Again, just to
9 summarize quickly, we are talking about Increment 1.
10 Only the conditions relating to Increment 1.
11 Incremenet II has its own set of conditions.

12 The highway is on the left, and Increment 1
13 is basically in yellow. So we are not talking about
14 release of any conditions relating to Incremenet II.

15 We have a stipulation as to certain
16 conditions, and withdrawn certain conditions. What I
17 provided is a copy of Exhibit No. 22, which you
18 should all have for simplicity. It just lists the
19 conditions, so you don't have to dig through a bunch
20 of other material. What we're trying to do is make
21 this as quickly and easily as possible.

22 We'll start with -- just for clarification,
23 what we left last time is, we had arguments on
24 Conditions number 2 and 3. Both the County and OP
25 presented their arguments. And at that point we

1 ended the hearing.

2 So my understanding is I'll have a chance
3 to respond to those when I respond to their arguments
4 on these other conditions, is that correct?

5 CHAIRPERSON ACZON: That's correct. If you
6 have any additional comment on that, I will give time
7 and then you can proceed with Condition number 6.

8 MR. SMOLENSKI: I was going to proceed with
9 number 6 and have rebuttal all at the same time.

10 CHAIRPERSON ACZON: That would be good.

11 MR. SMOLENSKI: Thank you.

12 Condition number 6 says that the Petitioner
13 shall coordinate with the County of Hawaii and DOH to
14 establish appropriate systems to contain spills and
15 prevent material associated with light industrial
16 uses from leaching into storm drainage systems and
17 adversely affecting the coastal waters.

18 We had talked in number 3 before about
19 procedures and systems to limit rainwater and runoff.
20 That is different than this condition. This
21 condition specifically addresses pollutants, and
22 we're required to coordinate with the state and the
23 county to establish appropriate systems.

24 We believe we have done that. An
25 appropriate system for an industrial park, which this

1 is, is for the owner -- normally the owner does not
2 operate an entire industrial park, and that's the
3 case here. They have tenants. So an appropriate
4 system is a system that requires the tenants of the
5 various parcels, depending on their uses, to have
6 requirements to prevent spills, basically. That's
7 what we have done.

8 We have, as an exhibit, the rules relating
9 to tenant's responsibilities. These were actually
10 requested to be reviewed by the county in 2008, as
11 we've set forth in the record, and we have a letter
12 from the county saying that with regard to this
13 condition, please send us a copy of your tenant rule.
14 That was from the Director of Planning.

15 It's of the record. And we submitted
16 those, and Jim McClean will state that everything has
17 been fine with the county with regard to the review
18 of those tenant rules. And the county has not --
19 does not object to the release of this condition.

20 The county -- excuse me, that was
21 August 18, 2000 letter from Planning Director,
22 Exhibit 14 of Petitioner's exhibits.

23 I would like to have Jim McClean just state
24 briefly as to how these rules are enforced by the
25 Petitioner for the tenant's properties. May he sit

1 here? He has been sworn before.

2 CHAIRPERSON ACZON: That's fine. Just want
3 to remind you that you're still under oath.

4 JAMES McCLEAN

5 Having been previously called as a witness by the
6 Petitioner, had been sworn before, was examined and
7 testified as follows:

8 DIRECT EXAMINATION

9 THE WITNESS: We have these rules in place
10 for our tenants. And we are there every day walking
11 through the park and through the warehouses where the
12 actual industrial uses are as far as -- you need to
13 give me a question.

14 BY MR. SMOLENSKI:

15 Q Have you required or assisted any of the
16 tenants with regard to preventing the spills or
17 making sure that they don't get into the groundwater?

18 A Yes. We put in filters in the drainage
19 systems of the parking lots to catch oil and other
20 petroleum products. We furnish these to the tenants
21 that they need them as by their uses and maintain
22 them. We have been for eight years or so.

23 And any additional spills that may happen
24 inadvertently, they have ways to sop it up.

25 Q How often do you inspect the property?

1 A I walk through there three times a week,
2 and I drive through it daily. But I walk through it,
3 which at a walking speed you see a lot more.

4 Q Again, Jim, you were involved basically
5 from the beginning with your dad in the development
6 of the property?

7 A Yes.

8 Q And you've lived in Kona and still do for a
9 long time?

10 A 42 years.

11 Q So you're on-site most of the time?

12 A Correct.

13 Q The county has pointed out to its
14 ordinance, there is a rezoning ordinance that we
15 talked about before that's applicable to the property
16 and it's Ordinance 99-89.

17 And, again, there was some of the
18 provisions and the conditions of the ordinance refer
19 to land use conditions. For example, it would say as
20 set forth in the Land Use Commission so and so, you
21 have to do this.

22 We have, to alleviate any concern that a
23 release of a condition would release the
24 responsibility to comply with the ordinance, what
25 we've suggested is part of the Commission's order

1 that any conditions, LUC conditions that are
2 released, that are referred to in the ordinance, do
3 not release those ordinance conditions, okay?

4 And Duane Kanuha, in his testimony on the
5 10th of September, agreed with that position, that
6 they don't. So we want to make clear that although
7 we may ask for release of a Land Use Commission
8 condition, we're not asking for release of an
9 ordinance condition, that continues to be applicable.

10 CHAIRPERSON ACZON: Mr. Yee.

11 MR. YEE: Thank you. At this time, I would
12 like to either get clarity or submit an objection.
13 If you're completed with your examination, that's
14 fine, but I don't know think the examination has been
15 completed and that he's not been subjected to
16 cross-examination. If he's not completed with
17 examination we object to the interspersing of
18 arguments in between the questions.

19 So either ask all the questions is our
20 suggestion and finish up. Or let us know that you're
21 finished and have him available for
22 cross-examination, but don't ask a question then
23 engage in an argument and ask a question and engage
24 in argument. That's our concern.

25 CHAIRPERSON ACZON: The Chair agrees with

1 that.

2 MR. SMOLENSKI: I did not consider it an
3 argument. It was really a clarification. We had
4 said this before, because it's been a while, and
5 everyone has day jobs.

6 CHAIRPERSON ACZON: Let's proceed.

7 Q (By Mr. Smolenski): Have you had any
8 serious spill that has created a problem?

9 A No, we haven't had any problems, no
10 notification from DOH or the county.

11 Q I have no further questions of Mr. McClean
12 relating -- well, I do have a further question.

13 With regard to the tenant rules and the
14 requirements, you have actually sold a couple of
15 parcels; is that correct?

16 A Correct.

17 Q And did you include those provisions in the
18 deeds?

19 A Yes.

20 Q So they are applicable to the land that has
21 been sold, right?

22 A Yes.

23 Q My understanding is you have no present
24 intent to sell any property at this point?

25 A Not at this time.

1 Q If you did in the future, would you include
2 these?

3 A Yes.

4 CHAIRPERSON ACZON: Please proceed with
5 Condition number 8, please.

6 MR. SMOLENSKI: I was going to make some
7 argument, and if now is the time for
8 cross-examination, the witness, I'm done with the
9 witness on this particular question, but I would like
10 to say some more things.

11 CHAIRPERSON ACZON: Mr. Smolenski, are you
12 done with the witness?

13 MR. SMOLENSKI: Yes, I am, but I would like
14 to say some more things about Condition number 6, but
15 Mr. Yee said he would like to cross-examine before I
16 make any argument.

17 MR. YEE: Just for clarification. I heard
18 Mr. Smolenski say he's done with this issue. I want
19 to be clear he's completed the examination of the
20 witness on all issues?

21 MR. SMOLENSKI: No, we have additional
22 conditions.

23 MR. YEE: Then I would ask that he
24 completes his examination on all conditions for this
25 witness.

1 MR. SMOLENSKI: What I was going to do was
2 complete the presentation on Condition number 6,
3 which was my understanding of how you would like to
4 do it. If you would like to have the witness testify
5 as to the other conditions, I can come back and make
6 my argument on number 6 and the others. I'm happy to
7 proceed that way.

8 CHAIRPERSON ACZON: The Chair calls for a
9 short break.

10 (Recess taken.)

11 CHAIRPERSON ACZON: Back on the record.

12 Mr. Smolenski, are you done with the
13 witness?

14 MR. SMOLENSKI: On number 6. I would like
15 to proceed with the witness to Condition number 8.
16 My understanding is I would like to have him testify
17 to all of his conditions.

18 CHAIRPERSON ACZON: Finish all your witness
19 then so that they can cross-examine.

20 MR. SMOLENSKI: Understood, yes.

21 CHAIRPERSON ACZON: So are you done with
22 Mr. McClean?

23 MR. SMOLENSKI: No. I have questions for
24 him relating to Condition number 8. We've covered
25 number 6. No further questions for him on number 6.

1 CHAIRPERSON ACZON: Go ahead.

2 MR. SMOLENSKI: Subject to
3 cross-examination, if something comes up.

4 Q Condition number 8 says Petitioner shall
5 stop work on impacted areas and that it will contact
6 state -- the Petitioner shall immediately stop work
7 on impacted area and contact the State Historic
8 Preservation Office, if any archaeological
9 resources -- and there is some specifics -- are
10 encountered.

11 Mr. McClean, were you involved during a
12 review by your expert regarding archeological
13 resources?

14 A I was. I walked the property with them.

15 Q And could you tell us the result of that
16 examination?

17 A They found iwi on lot 9 ine. They found a
18 mandible bone at top of the property which is in
19 Incremenet II. They relocated the mandible bone to
20 the site where the iwi was, and we put a wall around
21 it and it's in perpetuity protected.

22 Other than that, minimal was found and it
23 was all in the report.

24 Q Which is one of the exhibits that we put
25 in?

1 A Correct.

2 Q What is the -- you took a photo, is that
3 correct, of the property?

4 A Actually that was my father.

5 Q He took a photo. That's one of the
6 exhibits. What does that photo show?

7 A That photo shows the result of quarrying
8 property for 20 years or less, in which we're down
9 and graded out well below the original surface of the
10 property.

11 Q To what depth? How many feet?

12 A Between ten and 70 feet.

13 Q Has all of the property basically been
14 excavated to the point it will be?

15 A In Increment 1 it is completed done and
16 graded. It's done.

17 Q Is Increment 1 the development of it,
18 complete?

19 A Yes.

20 Q Now, you do have some lots; is that
21 correct?

22 A We have lots with warehouses on them, and
23 we have other lots where we rent space.

24 Q Is there a need or a request for open area
25 for storage that utilizes those?

1 A I'm fully rented.

2 Q Do you re receive requests in excess of the
3 amount of open space you have?

4 A I get calls every day. Unfortunately, I
5 can't help them.

6 Q Is it your position that Increment I has
7 been completely developed?

8 A Yes.

9 Q Have you ever received any complaints or
10 information from anyone with regard to any artifacts
11 that may still be remaining?

12 A No.

13 Q Is it your opinion that nothing else can be
14 found based on the excavation?

15 A It's unlikely, highly unlikely that
16 anything would be found, because it would have to
17 have been in well in the ground before we came to
18 start quarrying.

19 Q And if something were found, what would you
20 do?

21 A We would stop. If we were not excavating
22 any more. But if that happens somehow, we would stop
23 immediately.

24 Q I have no questions on number 8 at this
25 point. I would like to go to number 11, Condition

1 No. 11.

2 Condition No. 11 requires the Petitioner to
3 implement effective soil erosion and dust control
4 measures during all phases of the development.

5 Have you done that?

6 A Yes.

7 Q And how did you do that when you were
8 developing?

9 A During construction we had different best
10 management practices, silk fences and different
11 things to control water prior to building the roadway
12 system with its drainage features in it.

13 Q What did you do with regard to dust?

14 A A lot of water.

15 Q Again, it's a requirement that you do it
16 during all phases of development. Did you?

17 A Yes.

18 Q And it's your position that the development
19 is now complete on Increment I?

20 A Correct.

21 Q I have no further questions subject to the
22 cross-examine and maybe a response to that?

23 CHAIRPERSON ACZON: So you're done with the
24 witness?

25 MR. SMOLENSKI: Yes, subject to again

1 listening to the cross-examination.

2 CHAIRPERSON ACZON: So you don't have any
3 questions for the rest of the conditions for the
4 witness?

5 MR. SMOLENSKI: No, I do not.

6 CHAIRPERSON ACZON: Thank you. County, do
7 you have any questions.

8 MS. SELF: We have no questions.

9 CHAIRPERSON ACZON: Mr. Yee.

10 MR. YEE: Thank you.

11 CROSS-EXAMINATION

12 BY MR. YEE:

13 Q Just for the record, you referred to a
14 photo, which I think, is that an exhibit in this case
15 and --

16 MR. SMOLENSKI: Yes, it is an exhibit.

17 MR. YEE: Just for the record, would you
18 identify the exhibit number?

19 MR. SMOLENSKI: I can, and I will.

20 MR. YEE: While you're doing that, perhaps
21 I can proceed with some other questions.

22 Q Very quickly I think, regarding Condition
23 6, can you tell me when was the last time you spoke
24 with the Department of Health to coordinate the spill
25 prevention system?

1 A No.

2 Q Do you have an estimate of how long ago it
3 was?

4 A That I spoke with Department of Health --

5 Q Regarding spill prevention systems?

6 A We haven't for -- since I've been in
7 charge, my father left, I don't know that we have
8 actually talked to them.

9 Q How long has that been?

10 A Five years.

11 Q With respect to Condition 8, I think you
12 said there's a need for open space and so some of the
13 lots are leased out as open space; is that right?

14 A Correct.

15 Q At the expiration of that lease, is it
16 possible that those lots would be leased out to
17 someone else for a different purpose?

18 A Yes.

19 Q Would those other purposes include perhaps
20 warehouse or other uses which would require
21 buildings?

22 A We would not lease a land to someone to
23 build the warehouse. We would build the warehouse,
24 but it's always possible we would build another.

25 Q If other buildings are built, further

1 excavation would be needed?

2 A No, it's a graded lot. Excavation would be
3 footings and the like. But pretty much all the lots
4 are flat which is what we wanted to accomplish.

5 Q Fair enough. I understand it's graded, but
6 when you built buildings, you would need to dig down
7 for foundation?

8 A Correct.

9 Q And could we have the identification of the
10 exhibit.

11 MR. SMOLENSKI: Exhibit 16 in color, a
12 photo.

13 MR. YEE: Thank you. Just for the record,
14 thank you, I have nothing further.

15 CHAIRPERSON ACZON: Commissioners, any
16 questions?

17 COMMISSIONER WONG: I have a question about
18 the storm drain you were talking about.

19 So is it -- how is it -- where does it
20 empty out to, that storm drain? Is the storm
21 drainage in the warehouse parking lot or the
22 injection wells in the roadway?

23 So talking about the storm drainage, so if
24 there is any thing that comes out, oil or -- it goes
25 to the storm drain; is that correct?

1 THE WITNESS: In the event it does get
2 washed to the storm drain, that's why we have the --
3 okay, like filters that sit inside there that absorbs
4 it.

5 COMMISSIONER WONG: That's those sock
6 filters?

7 THE WITNESS: Yes.

8 COMMISSIONER WONG: Is that a Department of
9 the Health approved filter or is that just a standard
10 filter? How is who approved the filters' use in the
11 case of any leakage of petroleum after it goes
12 through the filter system?

13 THE WITNESS: I don't know of any approval
14 process.

15 COMMISSIONER WONG: So after it's filtered,
16 there could be any particulates still going through
17 the storm drain --

18 THE WITNESS: It's --

19 COMMISSIONER WONG: -- into the water?

20 THE WITNESS: It's not flowing anywhere.
21 Just a little box there in the event there is extra
22 water, it goes in there, the filter catch any
23 petroleum. It filters slowly into the ground.

24 COMMISSIONER WONG: No like a pump, not
25 like a cement box?

1 THE WITNESS: No, like gravel bottom
2 drainage feature. It's small. It's just to trap
3 water in the parking lot temporary.

4 COMMISSIONER WONG: I'm just wondering
5 because I know the conditions that the Department of
6 Health has to approve this condition, release this
7 condition. And so I was wondering because Mr. Yee
8 asked the question about Department of Health.

9 Department of Health was ever asked or was
10 there any letter saying Department of Health,
11 everything okay, or --

12 THE WITNESS: I believe the Department of
13 Health doesn't require this. We do it on our own on
14 top of that. The drainage features are what the
15 Department of Health requires as far as I know. This
16 is our own.

17 COMMISSIONER WONG: On your own?

18 THE WITNESS: On our own. We do everything
19 best management practices.

20 MR. SMOLENSKI: Chair, may Mr. Elbogen
21 answer the question?

22 CHAIRPERSON ACZON: No, Mr. Smolenski.

23 COMMISSIONER WONG: It says in the
24 condition, the Petitioner shall coordinate with the
25 County of Hawaii and State Department of Health to

1 establish appropriate systems for the spills. That's
2 why I was asking if Department of Health has ever
3 said that's good enough, or you know, we finish, you
4 guys did everything you need to do?

5 THE WITNESS: That was done many years ago.
6 I don't know that there's an on-going dialogue.

7 COMMISSIONER WONG: Thank you.

8 CHAIRPERSON ACZON: Commissioner Cabral.

9 COMMISSIONER CABRAL: I have some questions
10 on number 6 also in regards to that same issue.

11 So if you did, what you just said that you
12 established something with the county and the
13 Department of Health, is that something that's in
14 writing so you know what your conditions are for
15 yourself?

16 And then it's kind of unclear. You own
17 most of it, but some of those lots in yellow you have
18 sold to individuals and they own it now as fee simple
19 ownership?

20 THE WITNESS: Correct.

21 COMMISSIONER CABRAL: Are they part of like
22 your light industrial subdivision with CC&R's that
23 they have to follow?

24 THE WITNESS: Yes.

25 COMMISSIONER CABRAL: You say you have ways

1 to sop it up. So my question is then: If you have
2 ways and then you said you supply filters to the
3 tenants, is there anything in your association
4 management -- I'm assuming you self-manage your
5 association. You don't pay a property management
6 company to do that?

7 THE WITNESS: Correct.

8 COMMISSIONER CABRAL: Anything going on in
9 that regard that you have, let's say you also said in
10 September you said you have an office there.

11 So do you have like a closet or a
12 warehouse, like if something happened and you're not
13 walking through the property at that moment two or
14 three times a week, is there something that someone
15 could get?

16 My concern is that stuff happens when you
17 least expect it, and oil spill could be from
18 certainly any kind of vehicle, but diesel in
19 particular and a large truck can carry a lot of fuel.
20 I manage properties and I have oil spills in
21 residential areas that don't invite trucks in.

22 So I'm concerned about the supply of
23 filters and whether in fact as an association
24 management, those conditions, that you should
25 establish with the Department of Health should

1 require actual recordkeeping or testing or checking,
2 are you applying them? I'm just concerned that there
3 is not -- everything there if people all are perfect,
4 but not every tenant is going to be perfect, not
5 every owner is going to be perfect and have their
6 okay there to sop it up at the right moment.

7 I'm concerned about that in the big picture
8 if something happened, how rapidly the response would
9 happen before it gets into the soil and gets down
10 into your national park.

11 I don't know if you have any answer for
12 that on ways to prevent that in a more organized
13 manner.

14 THE WITNESS: When a tenant has a problem,
15 and they are all set up the same. It's not me that
16 has to run out there. When I said spilled oiled I'm
17 picturing a little oil spill and they have this
18 material that you put on it and it gets scooped up
19 and taken away.

20 That's not getting into the drainage
21 feature. That's just like -- it's in our warehouse
22 and if they spill something, got material looks like
23 kitty litter. That's all I was referring to. They
24 all have their own.

25 COMMISSIONER CABRAL: What about in the

1 parking lot? Like because you're light industrial
2 you could have a large number of vehicles or
3 something there. One of them has a substantial --
4 it's parked overnight and diesel tank leaks 50
5 gallons of diesel onto the ground, it then runs out
6 because it happens to be running at that moment or
7 either through the asphalt overnight, is there
8 anything in place to help that kind of action be
9 taken care of in a more organized manner?

10 THE WITNESS: Again, they just have the
11 materials to sop it up. If they come to work one
12 morning and there's a leak, if it reaches the
13 drainage features, it's going to get in the sock, if
14 it doesn't, it will get socked up on the HC.

15 COMMISSIONER CABRAL: I'm just concerned
16 about the Health Department having your organized
17 rules.

18 CHAIRPERSON ACZON: Thank you.
19 Commissioner Mahi.

20 COMMISSIONER MAHI: Aloha, good morning.
21 Mr. McClean, I have a few questions relative to
22 number 8 of the Petitioner requesting to be, I
23 guess -- what's the right word -- released. That
24 means no responsibility. Is that what that means?
25 That means I'm not going to be responsible, right?

1 Just say yes. Somebody say yes.

2 COMMISSIONER CABRAL: Yes.

3 COMMISSIONER MAHI: What do you think?

4 THE WITNESS: I think we're fully
5 responsible.

6 COMMISSIONER MAHI: Then why do you want to
7 get out of it? Simple question, brother.

8 THE WITNESS: I understand. We believe
9 that because of the quarrying of the property and the
10 fact of the archeological before we did anything, we
11 just believe that if we dig 20 feet down, not going
12 to find anything.

13 COMMISSIONER MAHI: Anything what? Clarify
14 what that means "anything".

15 THE WITNESS: Any resources.

16 COMMISSIONER MAHI: Water resources? Car
17 system probably, right? Is that what you're
18 referring to?

19 THE WITNESS: I'm referring to what I'm
20 seeing here which is artifacts, shell, bone, charcoal
21 deposits, human burial, which we found and preserved,
22 that's what I'm referring to.

23 COMMISSIONER MAHI: I wasn't in on the
24 September 10th meeting, and so I kind of have to
25 catch up on a few things.

1 No. 1, do you have on file an AIS report,
2 meaning Archeological Inventory Survey?

3 THE WITNESS: Yes.

4 COMMISSIONER MAHI: How about relevant to
5 the nine laws of the 116, are those on file
6 somewhere? Can I look at those, read that?

7 THE WITNESS: I'm not familiar with that.

8 COMMISSIONER MAHI: Okay. When did you
9 start this project? Go back to when your father
10 started this project.

11 THE WITNESS: Around 1988.

12 COMMISSIONER MAHI: '88, these laws didn't
13 come in until 1990, maybe that's why some of these
14 things. I know probably now we would apply the 9
15 law, and this is relative to H and S peoples burials
16 and so on.

17 Another question I have is who was your
18 archeologist that filed the report?

19 THE WITNESS: I believe it was Rosenthal.

20 COMMISSIONER MAHI: Have you had any other
21 contact or conversations or we say in Hawaii, kind of
22 talk story, which is English. We say kukakuka, our
23 language, discussions about what took place at the
24 start -- have you made contact with people that grew
25 up in that area, the families that grew up in that

1 area? Have you had that kind of relationship or your
2 dad?

3 THE WITNESS: I'm not sure about my father.

4 COMMISSIONER MAHI: You didn't know that
5 your father made those kind of contacts?

6 THE WITNESS: I didn't know everything he
7 did.

8 COMMISSIONER MAHI: Oh, that's important
9 because now you have the responsibility.

10 THE WITNESS: Correct.

11 COMMISSIONER MAHI: And that's a very big
12 responsibility. Okay.

13 I just want to kind of flush some of this
14 stuff out. So have you had contact with some of our
15 peoples that lived there before, traversed that area,
16 the Kings Highway, for example? You know, the trail
17 that connects from Hawi all way down to come through
18 Kona, have had any contact with the families that
19 once lived there, once owned that property?

20 THE WITNESS: Other than being friends with
21 a bunch of them.

22 COMMISSIONER MAHI: Do you know there
23 names?

24 THE WITNESS: I know a lot of names. Hako,
25 Kanuha, Alapai. I worked with all these people for

1 30 years.

2 COMMISSIONER MAHI: Okay, good. And you've
3 had contact with them?

4 THE WITNESS: All the time.

5 COMMISSIONER MAHI: And you have a
6 continued relationship with them?

7 THE WITNESS: Correct.

8 COMMISSIONER MAHI: That's important to
9 have that now that you have kuleana over this area.
10 That's good. I wanted to find that out. Any
11 Kia'aina family?

12 THE WITNESS: Oh, yes. Kia'aina, important
13 name.

14 COMMISSIONER MAHI: Let's see what else did
15 I have. Was anyone from SHPD, did they at any point
16 have -- well, did they connect you with the Hawaii
17 Island Burial Council?

18 THE WITNESS: That's who handled the iwi
19 when we found it. He reinterred the mandible to Lot
20 9.

21 COMMISSIONER MAHI: What time -- when was
22 that, the year, the month?

23 THE WITNESS: In the nineties.

24 COMMISSIONER MAHI: So since then you
25 haven't had any discovery of iwi?

1 THE WITNESS: No.

2 COMMISSIONER MAHI: That's good for me for
3 now. Mahalo.

4 CHAIRPERSON ACZON: Thank you, Commissioner
5 Mahi. Commissioner McDonald.

6 COMMISSIONER McDONALD: James --

7 THE WITNESS: Mr. Mahi, it turns out it was
8 2001. There is a letter here from Don Hibbard of the
9 State Historic Preservation completion of historic
10 preservation requirements November 29, 2001.

11 COMMISSIONER MAHI: Thank you.

12 THE WITNESS: The Exhibit number is
13 Exhibit 4.

14 CHAIRPERSON ACZON: Go ahead, Commissioner
15 McDonald.

16 COMMISSIONER McDONALD: What happens if one
17 of your tenants doesn't comply with CC&Rs with regard
18 to haz materials, disposal, waste, what happens in
19 those instances?

20 THE WITNESS: Then we get DOH involved.

21 COMMISSIONER McDONALD: Who contacts DOH?

22 THE WITNESS: Us if they don't.

23 COMMISSIONER McDONALD: Chair, will county
24 and state be providing arguments?

25 CHAIRPERSON ACZON: Yes.

1 COMMISSIONER McDONALD: I'll hold on
2 further questions.

3 CHAIRPERSON ACZON: Anybody else? Do you
4 have any other witnesses?

5 MR. SMOLENSKI: No. But I do have some
6 redirect.

7 CHAIRPERSON ACZON: Go ahead.

8 REDIRECT EXAMINATION

9 BY MR. SMOLENSKI:

10 Q Jim, you were asked by Mr. Yee if you build
11 foundations. You would for warehouses, is that
12 correct?

13 A If you build a warehouse, you have to dig
14 in a foundation, correct.

15 Q And about how deep would that be, do you
16 know?

17 A It could be as much as three feet.

18 Q As far as the fillers, my understanding
19 from your testimony, they're in a box, is that
20 correct, filter with gravel?

21 A Yes, correct.

22 Q Do the filters meet EPA standards? Is it
23 your understanding that on Condition number 8, that
24 Commissioner Mahi asked you about, that you continued
25 to be covered by the County Rezoning Ordinance as far

1 as regarding anything if you did find it when you dug
2 a foundation?

3 A Absolutely.

4 Q That's your understanding of that
5 ordinance?

6 A Yes.

7 Q So I take it you're not asking to be
8 released from the obligation, just from this land use
9 condition; is that correct?

10 A Correct.

11 Q And not from the ordinance condition?

12 A Correct.

13 Q With regard to the review of the letter
14 from Don Hibbard of State Historic Division, is that
15 correct?

16 A Correct.

17 Q Is it your understanding that at that point
18 that the recovery and the examination had been
19 completed?

20 A Yes.

21 Q Thank you.

22 I have no further questions of the witness.

23 CHAIRPERSON ACZON: Thank you. You may
24 proceed with your argument.

25 MR. SMOLENSKI: The remaining conditions

1 are less than we had before. I have stated that we
2 are withdrawing -- we had argument on Condition No. 2
3 before, and I know that I have a chance to respond on
4 that, but I've also stated that based on the county's
5 concern and its wish to keep that condition, we're
6 withdrawing our request to remove Condition No. 2,
7 and that relates to the road and the Main Street
8 which will be in Incremenet II that we discussed on
9 September 10th.

10 CHAIRPERSON ACZON: Are you -- you just
11 mentioned Condition 2. Are you withdrawing it?

12 MR. SMOLENSKI: Yes, we're withdrawing our
13 request to release Condition 2.

14 The county had -- we had subsequent
15 discussion with the county. It's important to the
16 county to keep it in there for their purposes, and we
17 understand that, so we're withdrawing our request to
18 release Condition No. 2.

19 CHAIRPERSON ACZON: Okay, thank you.

20 MR. SMOLENSKI: We also have withdrawn our
21 request to release Condition No. 12. And Condition
22 No. 12 is an important condition, and we understand
23 that. It relates to on-site facilities, maintaining
24 them so that nearshore, offshore and deep ocean
25 waters remain in pristine condition. And the

1 requirement was that the Petitioner develops and
2 maintains its on-site facilities to make sure that
3 they stay in pristine condition. We believe we have
4 done that.

5 When we filed our initial motion, we
6 requested that all of the conditions be removed. We
7 historically, I mentioned the Isamoto property, which
8 is just makai of McClean property was developed as
9 you -- if you drive that road, which you may not
10 have, through this Increment 1, you would have passed
11 a service station, there's various other operations
12 going on on that property.

13 A motion was filed to release all of those
14 conditions before, and they were all released. So
15 that was a precedent. We understand that times
16 change also, and that there's perhaps more focus
17 concern on things.

18 So basically we were doing the same thing
19 that another property did that was even closer to the
20 ocean, closer to the highway where it's visible.

21 However, we understand the concern about
22 the environment, and just so you know, I think he's
23 here from the national park, Jeff at the last meeting
24 said if you ever want a tour of the park, happy to do
25 so. I happened to take a few days off a couple of

1 weeks ago with my family and I called him and Dave
2 Elbogen and his wife who is Jim's sister, the other
3 general partner you haven't seen. We all had a very
4 informative and nice tour of the park, and we
5 understand that. And Jim has lived here for many,
6 many years. And we all want to make sure that
7 nothing happens to the waters. We understand all of
8 that. We understand all the historic archeological
9 concerns.

10 Our feeling is that Condition No. 12 being
11 in there requires -- continually requires the
12 Petitioner to maintain its facilities to ensure that
13 those waters remain in pristine condition. And I'm
14 going to make the distinction.

15 So that is there, okay, that is all
16 encompassing. They have to maintain that.

17 Condition No. 3, which relate to drainage
18 and erosion, drainage and erosion control, we've gone
19 over those at the last hearing.

20 CHAIRPERSON ACZON: That's correct.

21 MR. SMOLENSKI: And I probably shouldn't
22 argue on that now. I think that I can respond to Mr.
23 Yee, presumably will have some things to say after my
24 argument, then I would like to respond to his
25 argument before on Condition 3. I get a chance to

1 respond to it, so I will leave Condition 3 alone.

2 Condition No. 6, again, which we have
3 talked about, and there's concern about what happens
4 if pollutants spill.

5 We want to make sure that we have
6 established appropriate systems. We believe we've
7 coordinated with the County of Hawaii and the State
8 Department of Health to establish appropriate
9 systems. I believe that that's the requirement of
10 No. 6. We believe that we have satisfied No. 6.
11 That doesn't mean that the protection is not there
12 under condition 12 that I just mentioned. If there
13 was something that escaped the system which has been
14 put in and approved, Condition No. 12 requires us not
15 to allow that to happen.

16 Condition No. 6 also is enforced by the
17 county. The county ordinance also would require
18 compliance to make sure that this doesn't happen.

19 So we believe that we've complied with
20 coordination and establishment of the systems, and
21 the only reasonable way you can have a system when
22 you have tenants is to require the tenants to do
23 things. And we feel we have done that with the
24 conditions. We have them that are exhibits and
25 Exhibit 3 has standard terms for all tenants,

1 Exhibit 3 that's in your exhibits.

2 We also have in the exhibits there's
3 Exhibit C that has the covenants and restrictions.
4 All of those are binding on the tenants. They have
5 been incorporated in the deeds to the properties that
6 have been sold.

7 So we believe that we've done everything
8 that you can do as an owner of an industrial park to
9 require the tenants to contain spills. And Jim
10 McClean has testified he goes around and checks it at
11 least three times a week.

12 So we believe we've a satisfied No. 6. And
13 again, if a spill occurred that wasn't caught by
14 this, Condition No. 12 still is there, and it
15 requires us to make sure that nothing gets to the
16 waters to contaminate it.

17 With regard to Condition No. 8, the county
18 has expressed no objection to that. They have
19 pointed out in their response that they also have a
20 requirement in the rezoning ordinance. The county
21 has stated that it is a certified local government in
22 initial caps, okay, maintaining a Historic
23 Preservation Commission, and also has a program,
24 meeting federal and state.

25 The county has stated that if something

1 happens, they inform the State Historic Preservation
2 Office, and together they coordinate a proper
3 mitigation.

4 So hopefully to alleviate concern, we feel
5 that we have complied with this as far as the Land
6 Use Commission is concerned. But if something came
7 up, they still have a requirement, and they would
8 anyway because they're good citizens, but they have a
9 requirement to notify the county, and then the county
10 through this procedure is a certified local
11 government coordinates with the state.

12 So actually the State Historic Preservation
13 Office is in the picture even under the county
14 ordinance. So we believe that Condition No. 8 should
15 be released because the protection is still there.
16 We believe with this very detailed report that's part
17 of the record, and the letter in Exhibit 4, it states
18 our records -- from Don Hibbard Administrator of
19 State Historic Preservation Division, Exhibit 4 --
20 Completion of Historic Preservation Requirements.
21 And it says our records indicate that the Historic
22 Preservation review process for the two parcels has
23 been conclude.

24 Jim McClean has explained was is done.
25 After that we were found and the current condition.

1 So I think that there is no risk that if something
2 were found, which is highly unlikely because of the
3 development that has already occurred, they would, it
4 would be required to report it to the county and the
5 county would coordinate with the state.

6 So we believe that that condition should be
7 released also.

8 With regard to Condition No. 11. Condition
9 11 states the Petitioner shall implement effective
10 soil erosion and dust control measures during all
11 phases of the development. During all phases of the
12 development.

13 No. 1, Jim McClean has testified that they
14 have done that. He's also testified that the
15 development has been completed.

16 So we believe that condition clearly has
17 been satisfied, and can be released. Again,
18 Condition No. 11, as far as if there were grading to
19 be done, you can't do grading without a grading
20 permit from the county. If you're going to do the
21 kind of building that was discussed, maybe a
22 possibility to do a warehouse, have to get county
23 approval. If you're going to do, move any dirt, you
24 have to get a grading permit. Those requirements,
25 soil erosion is covered by Chapter 10, erosion and

1 sedimentation control, which is in the county's
2 ordinances. So normal type of a zoning control on
3 that.

4 So we feel that as far as the development
5 goes, it's completed, taken care of the correct way.
6 And the soil and dust erosion, dust control condition
7 should be released at this point.

8 No. 13 is another condition that we feel
9 should be released. It says Petitioner shall develop
10 the property in substantial compliance with
11 representations made to the Commission in obtaining
12 the reclassification of the property. The
13 representations that were made was that it would be
14 an industrial property, an industrial subdivision.
15 And that's what it is. Those are the
16 representations.

17 They didn't do something other than that.
18 If they were to change from an industrial
19 subdivision, they would have to get zoning approval.
20 In any event, but we said, McClean said we're going
21 to develop this as industrial property. They have
22 done that. They haven't done anything else, and we
23 believe that should be released.

24 Again, this is Increment I. Not Incremenet
25 II.

1 Increment II has its own set of conditions
2 relating to the environment, and they're very
3 specific, okay. So this has nothing to do with
4 Increment II and we're not asking for any conditions
5 to be released from Increment II at this point. We
6 look at, Increment I is pau. And anything that might
7 be changed, you go in for rezoning, permission from
8 the county, just like you would in any other
9 property.

10 We had asked for other conditions to be
11 released. No. 15, provide for annual reports. We
12 have already said that we agree that some conditions
13 should not be released at this point. So we know we
14 will have to file an annual report. So we're not
15 asking that that one be released, but we are asking
16 that any annual reports only relate to the conditions
17 that are still there, obviously.

18 Again, each year we filed, and actually
19 I've been involved in the filing of every single one
20 of these annual reports from the beginning.

21 Also since Increment II was redistricted,
22 we also filed the annual report that covers all the
23 conditions in Increment II. So we have combined
24 that, we get one report.

25 So we're not asking that No. 15 be removed

1 at this point, because we have conditions.

2 CHAIRPERSON ACZON: You're withdrawing
3 Condition 15?

4 MR. SMOLENSKI: Yes, we will withdraw that,
5 if that makes it easier.

6 No. 16, we're withdrawing our request that
7 that be released, because that provides the Land Use
8 Commission may release conditions. So we want that
9 to stay there, because we feel we're going to
10 eventually work things out with the county on the
11 roads. We'll dedicate those roads. We will build
12 Main Street.

13 At that point in time it will be
14 appropriate to possibly request the removal of the
15 condition. So we don't want that one removed.

16 Now, there's another one, Condition No. 14.
17 And Condition No. 14 provides the following:
18 Petitioner shall give notice to the Commission of any
19 intent, lease -- to sell, lease, assign, place in
20 trust or otherwise voluntarily alter the ownership
21 interest in the subject property covered by the
22 petition, prior to the development of the property.
23 And the evidence is that the property has been
24 developed.

25 We have a stipulation among all parties

1 that there's no objection to the removal of that.
2 However, the stipulation covered six of the
3 conditions, five were approved at the last meeting.
4 We request that No. 14, there is no objection from
5 the parties. We have a signed stipulation. It's
6 part of the record. It was filed on the 10th that
7 that No. 14 be released at this point.

8 Again, the language, I think the language
9 in these conditions is important. And it says prior
10 to development of the property.

11 Now, the property has been developed.
12 Again, Increment I, but not Increment II. So we're
13 just talking about Increment I.

14 As a practical matter in the annual reports
15 we have stated that if a property were sold, sort of
16 an update in the annual reports, we reported that
17 just in the past.

18 Now, I have -- I do have some responses to
19 Mr. Yee with regard to Condition No. 3, but he's made
20 his argument, so I think at this point, I think
21 it's -- I've finished my argument on the other
22 conditions. I reserve the right to respond to their
23 arguments.

24 And also I would answer any questions the
25 Commission might have of me at this point.

1 CHAIRPERSON ACZON: Any questions from the
2 county?

3 Commissioners any questions?

4 COMMISSIONER CABRAL: I wanted some
5 clarification. Dropped on my seat this morning was
6 an Exhibit 22. Is this from you folks?

7 MR. SMOLENSKI: Yes, it is. That is an
8 exhibit, it's part of your package, your record.
9 That's been filed. And it's a matter -- I talked to
10 Dan Ordenker and I said I thought it might be helpful
11 to have that one separate so that when we are talking
12 about conditions, you wouldn't have to go through
13 your files, it would just be there.

14 It's a copy of the record, for convenience,
15 so you can see what's been stipulated to, take a look
16 at the conditions we're referring.

17 COMMISSIONER CABRAL: I was going to say it
18 seems -- so it is intentionally everything that's
19 been before --

20 MR. SMOLENSKI: Absolutely, yes. And it is
21 an exhibit that we filed as part of the pleadings.

22 COMMISSIONER CABRAL: Thank you very much.

23 CHAIRPERSON ACZON: Anybody else?

24 Commissioner Mahi.

25 COMMISSIONER MAHI: Just wanted to go down

1 the list that you're withdrawing one more time, if we
2 can just review that.

3 MR. SMOLENSKI: If you have your Exhibit 22
4 sheet, No. 1, we withdrew that. It has to do with
5 landscaping. We will work with the county on that.

6 Today I mentioned that we're withdrawing
7 No. 2 relating to the roads.

8 No. 3 I'm going to present further response
9 to Mr. Yee on, so we're not withdrawing that.

10 We have a stipulation, and the motion of
11 the Commission to release No. 4.

12 Release No. 5.

13 No. 6 we're still requesting to be
14 released.

15 No. 7 we have a stipulation among the
16 parties, and the Commission approved at the meeting
17 the release of No. 7.

18 No. 8 is historic preservation that we have
19 discussed recently. We're still requesting the
20 release of that.

21 No. 9 is covered by the stipulation, and
22 covered by the motion that released that one on
23 September 10th.

24 No. 10 is covered by a stipulation and that
25 was released.

1 Number 11 we're requesting the release of.
2 We just discussed that, soil erosion and dust control
3 during all phases of the development.

4 We withdrew No. 12. We're not requesting
5 release of that, and I think I would ask the
6 Commissioners in their deliberations to really look
7 at that carefully, because we believe that that is
8 appropriate. And that will remain in there. And it
9 talks about maintaining the conditions to protect the
10 waters which would protect the park.

11 No. 13, we're requesting to be released.

12 No. 14 is covered by the stipulation, but
13 it was not acted on by the Commission, on the motion
14 on September 10th, so we would ask that the
15 Commission, since there is no objections from any of
16 the parties, release No. 14.

17 No. 15 I've stated that we know we're going
18 to have to file annual reports, so if it's important
19 for the record to release that request, we will
20 release that request. We know we're going to have to
21 file them.

22 And then we do not want No. 16 released.
23 That's the one where the Commission may release
24 conditions in the future. So we will release any
25 request to release condition No. 16, withdraw it.

1 Okay?

2 Now that covers all the conditions. If you
3 have any questions.

4 COMMISSIONER MAHI: I just wanted to know,
5 I got little confused on what release meant and
6 withdraw and I just want withdraws, that will keep me
7 in order. I got No. 2, I have No. 4. Was No. 5 --

8 MR. SMOLENSKI: Yes, withdrawn.

9 COMMISSIONER MAHI: I saw it scratched out.

10 CHAIRPERSON ACZON: No. 5 approved already.

11 MR. SMOLENSKI: Okay, we can -- they're
12 covered by the stipulation, the ones that are no
13 longer in action, okay? That's the way I look at it.

14 CHAIRPERSON ACZON: Let me just repeat
15 those withdrawals.

16 I understanding you're withdrawing
17 Conditions 1, 2, 12, 15 and 16; is that correct?

18 MR. SMOLENSKI: Correct.

19 CHAIRPERSON ACZON: Does that answer your
20 question, Commissioner Mahi?

21 COMMISSIONER MAHI: Not 15, 16, that's
22 withdraw right?

23 CHAIRPERSON ACZON: Yes.

24 COMMISSIONER MAHI: Okay, mahalo.

25 CHAIRPERSON ACZON: Anything else,

1 Commissioners?

2 MR. SMOLENSKI: We withdrew those, and then
3 the stipulation covers others, five of which have
4 been acted on, one of which we're still requesting
5 release.

6 CHAIRMAN ACZON: The Chair calls for a
7 short break.

8 (Recess was taken.)

9 CHAIRPERSON ACZON: Back on the record.
10 Ms. Self, please proceed with county's
11 argument.

12 MS. SELF: This is stated in our response
13 to the Petitioner's request for conditions released.
14 The county has no objection to Condition 6, Condition
15 8, Condition 11, Condition 13.

16 We have already signed a stipulation to
17 release Conditions 4, 5, 7, 9, 10 and 14.

18 And I think all the other ones have been
19 already withdrawn by the Petitioner. So we just
20 stand by our response. Thank you.

21 CHAIRPERSON ACZON: Commissioners, any
22 question for the county?

23 Mr. Yee, please proceed with your argument.

24 MR. YEE: Thank you.

25 This is a motion to release conditions.

1 And in this particular case that we're looking at is
2 whether or not the conditions have been satisfied.

3 And normally we look for the evidence that the
4 development moved forward. Very often we're looking
5 for letters or statements or permits that are
6 ratified by various state or county agencies.

7 In this case, actually much of the response
8 from the state agencies were lacking, so we did go
9 back to some of the state agencies to ask them what
10 their views are. And we got some responses, and
11 those responses are included in our filings including
12 from the Department of Health, Department of Natural
13 Resources, Department of Hawaiian Home Lands.
14 National Park Service was also included. And those
15 responses are available, and you've probably reviewed
16 them.

17 In this particular case, the Office of
18 Planning's position that are relevant for you today
19 are regarding Conditions 3, 6, 8, 11 and 13.

20 Condition 4 was the issue of whether or not
21 there is a drainage and erosion control plan.

22 MR. SMOLENSKI: Chair, I believe that Mr.
23 Yee has made his argument on Condition 3 already the
24 other day, and I just point that out. I thought he
25 was done on that one.

1 MR. YEE: And I will be going very quickly
2 over Condition 3.

3 CHAIRPERSON ACZON: Go ahead.

4 You can have rebuttal later, Mr. Smolenski.

5 MR. SMOLENSKI: Thank you.

6 MR. YEE: Just so Condition 3, as you
7 remember was the requirement to prepare drainage and
8 erosion control plan, and to do the necessary
9 drainage improvements to the satisfaction of the
10 Department of Health.

11 We should you that there was not -- or
12 Department of Health did not provide us with that
13 approval. Their response was, well, we have a new
14 UIC permit, and we have in MPDES permit, and as I
15 explained the MPDES permit is not for not for
16 operation, only during construction. So that doesn't
17 apply. And UIC looks at impacts to the aquifer,
18 looks at impact to potable water. It does not look
19 at impacts to maintain ocean water quality as set
20 forth in Condition 3. Three says prepare drainage
21 and erosion control plan to maintain ocean water
22 quality to the satisfaction of the State Department
23 of Health.

24 So the UIC permit does not constitute
25 special approval because UIC permit does not look at

1 the maintenance of ocean water quality.

2 Moving onto Condition 6. Condition 6, of
3 course, is the requirement to coordinate, with among
4 others, the Department of Health to make sure they
5 maintain uncontrolled spills from any leaching into
6 the storm drainage system or adversely affect the
7 groundwater and coastal waters.

8 This is important because that is an
9 industrial subdivision. Its uses are somewhat
10 different than say residential or retail. And so
11 issues of pollution are particularly important to
12 these type of uses. So a specific condition was
13 imposed for this.

14 The condition is relatively general in the
15 sense it says coordinate with, and then create
16 systems. You can contrast perhaps with Increment II
17 which has -- if you look on pages 13 to 17 of
18 Increment II, it says use best management practices,
19 then has a whole laundry list of specific best
20 management practices that has to be done.

21 This particular Increment I did not have
22 that laundry list, just said you have to have an
23 appropriate system to contain spills and prevent
24 pollution and to coordinate with Department of
25 Health, again, to prevent leaching into the storm

1 drainage system or adversely affecting groundwater or
2 coastal waters. The resource obviously is important.
3 Submitted letters from the National Park Service,
4 DLNR, DHHL, all of whom think this condition should
5 be maintained.

6 The Petitioner has responded by saying we
7 have licensing agreements and covenants and this is
8 our appropriate system to contain spills and prevent
9 material associated with light industrial uses from
10 leaching into the storm drainage system or affecting
11 the groundwater, coastal waters.

12 The Office of Planning's position is that's
13 not the system that's referred to, it's referring to
14 the physical systems, it's referring to the actual
15 practices that have to be done.

16 Today, for the first time, we learned that
17 there is apparently some filter, that it's put into a
18 parking lot. As far as we can tell, there's been no
19 coordination with Department of Health for that.

20 But the licensing system or the licensing
21 and covenants that they have showed to us, it's not a
22 system as envisioned in this condition.

23 Furthermore, even if it was a system, the
24 OP did not find those to be adequate for at least two
25 reasons.

1 First is rules and covenants are private
2 agreements made by private parties. They can change
3 without any governmental approval. So that is not
4 adequate.

5 And the second, frankly, if you look at the
6 specific requirements, there's nothing specific about
7 them. The tenants are required to indemnify the
8 Petitioner. The tenants are told they have to follow
9 the laws. Tenants are told you shouldn't allow
10 spills. But it doesn't set out any particular
11 systems that are required to be done, no approval
12 system that has to be done to look at the specific
13 pollution control systems for each parcel. It really
14 puts the onus responsibility for making this
15 determination and installing and maintaining them
16 upon the individual tenants.

17 And while that's good for the Petitioner to
18 forward that responsibility to someone else, it
19 doesn't answer this particular Condition 6 that
20 requires that the Petitioner is to protect our
21 groundwater and coastal waters.

22 So for the Office of Planning Condition 6
23 should not be released.

24 He does talk about Condition 12 as being
25 perhaps an adequate substitute. Just briefly,

1 Condition 6 is different in the sense that Condition
2 6 specifically addressed the issue of light
3 industrial, whereas 12 is more, general develop and
4 maintain sites to ensure that ocean waters remain in
5 pristine condition.

6 The Office of Planning is always concerned
7 when we look at these older cases, that the
8 conditions are specific enough that they will be
9 enforceable. In the Lanai case the Supreme Court
10 found that the definition of potable water was not
11 sufficiently clear that it could be properly
12 enforced. And they said conditions had to be
13 specific and understandable, so that -- and frankly,
14 now that we look at older conditions, we're also
15 concerned that some of the general issues tended to
16 cover a variety of issues, sort of encompass it into
17 one general condition.

18 So we're always concerned that those
19 general conditions might be attacked later, maybe not
20 by this developer, but land is sold and new owners
21 come in, new uses occur.

22 So we think Condition 6, while it is not
23 just -- Condition 12 is not a substitute for
24 Condition 6. And even if it was, we think Condition
25 6 adds another layer of confidence so that they don't

1 argue the condition is too vague. It's not certain
2 enough.

3 With respect to Condition 8, this is an
4 obligation to stop work should they discover cultural
5 or archeological resources. It should obviously go
6 without saying that the archeological cultural
7 resources are obviously very valuable. They are
8 protected.

9 I know that's frustrating sometimes to
10 developers, but we protect them for a good reason.
11 Yes, archeological inventory survey was done and
12 accepted, but Condition 8 is not applicable to the
13 archeological inventory survey per se.

14 What Condition 8 is meant to do is to say,
15 yes, and AIS was done, but things happen. An
16 archeological inventory surveys don't necessarily
17 find every single archaeological and cultural
18 artifacts on the property.

19 We know that. We know as you excavate,
20 things are often found. And so Condition 8 says if
21 that happens, you must inform State Historical
22 Preservation Division.

23 There is a county requirement that if these
24 cultural, archeological resources are found, that
25 developer is required to inform the county, but it

1 does not require the developer to inform State
2 Historic Preservation. Certainly we hope county will
3 inform SHPD of this, but that does not, I think,
4 relieve the owner of that property from making that
5 notification itself to the State Historic
6 Preservation.

7 They did submit a photo regarding
8 excavation. We have had discussion with the
9 Petitioner regarding the excavations. The photo in
10 question shows a portion of the property has been
11 excavated to a depth of 20 feet. It does not show
12 that the entire petition area was excavated to a
13 depth of 20 feet.

14 In fact, it appears to us that about
15 two-thirds of the property approximately, or
16 substantial portion of the property at least was not
17 part of the excavation site, as far as we can tell,
18 and certainly nothing in the record that shows that
19 the entire parcel was is excavated to 20 feet.

20 This is important because, and bear with me
21 a bit. Archeological inventory survey has two major
22 components. The first is a surface review. People
23 walk the entire petition area, they do now. There is
24 also an underground issue. Many times archeological
25 resources are under the ground, and so they'll dig a

1 trench and do an audit, if you will, and subject to
2 some interpretation, and see what they see, but they
3 don't excavate the entire area, obviously.

4 But we know that things are often found on
5 the Big Island, whether it's a carst system, or lava
6 tube or crevice which the Native Hawaiians may have
7 used to bury the bones. These are things which you
8 know much better than I, but these are things that
9 will not be found in an archeological inventory
10 survey. So you need this requirement for inadvertent
11 discoveries.

12 Condition 11 deals with basically dust, and
13 that deals with the fact that as the witness
14 discussed, there's some open space on the property.
15 Actually this relates to Condition 8 as well.

16 There's some open space on the property
17 where there are no buildings. And if you were to put
18 on a building, you're going to need to dig down maybe
19 three feet, and that will create dust. This is of
20 particular importance to DHHL, because DHHL is
21 adjacent landowner and they're planning to put in
22 residential areas.

23 There's always going to be some issues
24 involving industrial adjacent to residential. And
25 that just has to be understood by DHHL. But they

1 want to make sure that if there is further
2 development and more buildings are built, there could
3 be substantial amounts of open space, that the issue
4 of dust are being appropriately handled so that it
5 does not conflict with the future residential plans
6 by DHHL.

7 So from the state's perspective,
8 recognizing our trust obligations to the Native
9 Hawaiians, we felt it was important to keep Condition
10 11 as well.

11 Condition 13 relates to substantial
12 compliance with representations, and the
13 representations are more than just, here's the
14 proposed industrial subdivision use. There are a
15 variety of representations made to you that you rely
16 on in order to make your decision. And Condition 13,
17 as it does in every other case, says the developer,
18 if you make a representation to us, we're going to
19 rely on it; and if you violate that representation,
20 we might -- not saying we will -- but we might go
21 back and look at that and could revert the property
22 back.

23 That's important. That's -- and it's more
24 than just light industrial, it's a variety of things.
25 So from the Office of Planning's viewpoint, we need

1 to continue to rely on those representations and
2 support them, maintain this condition on the
3 property.

4 With that, I have nothing further to say.
5 Thank you.

6 CHAIRPERSON ACZON: Commissioners, any
7 questions?

8 COMMISSIONER CABRAL: I don't know if I
9 caught it, your position on No. 14, that is still
10 pending. Do you have a position on 14?

11 MR. YEE: Office of planning signed a
12 stipulation. We have no objection to deletion of the
13 condition.

14 COMMISSIONER CABRAL: Thank you.

15 CHAIRPERSON ACZON: Any other questions?

16 COMMISSIONER McDONALD: I guess, Mr. Yee, I
17 was trying to review some of the exhibits submitted
18 by the Office of Planning as it relates to the
19 Department of Health. Some discussion regarding the
20 jurisdiction or the participation and engagement of
21 Department of Health to the developer's Condition 3,
22 Petitioner shall prepare a drainage and erosion
23 control plan and shall fund and construct the
24 necessary drainage improvements to control drainage
25 within the property and to maintain ocean water

1 quality to the satisfaction of the State Department
2 of Health.

3 I'm just trying to determine what trigger
4 or what vehicle the Petitioner, the Movant has as it
5 relates to any type of review and approval from
6 Department of Health to satisfy this condition.

7 MR. YEE: I think it would fall outside of
8 the regulatory review that Department of Health
9 follows pursuant to statute. So if sort of asking is
10 there a specific permit that would need to be
11 granted, I think the answer is no.

12 So I think this condition basically
13 requires more than what the law requires. It
14 requires that the Department of Health be able to
15 review their proposed system and say, yes, that's
16 acceptable to us, at least coordinate with them.

17 So as far as we can tell, there's never
18 been an attempt to coordinate with the Department of
19 Health on their pollution control systems.

20 You asked what's the vehicle. The vehicle
21 would have to be sort of a separate letter saying I
22 am proposing to do this, here's the Land Use
23 Commission condition, would this be acceptable to
24 you, or do you have any comments? And please review
25 it and let us know. But as far as we can tell, we

1 have not be been able to find any correspondence on
2 that. Because it's a little old, so we wondering
3 maybe there might be something in the past that it
4 happened, but we couldn't find anything that had.

5 COMMISSIONER McDONALD: I guess that goes
6 hand and hand with Condition 6?

7 MR. YEE: Yes.

8 COMMISSIONER McDONALD: Does the Movant
9 have any type of documentation as it relates to
10 coordination with Department of Health?

11 MR. SMOLENSKI: Yes, we do.

12 COMMISSIONER McDONALD: I'm not talking
13 about MPDES or UIC.

14 MR. SMOLENSKI: No, we do not have a
15 letter, whether there was one and Bob McClean
16 received it, we don't know. But we do have the
17 written testimony of our expert Cheryl Palesh about
18 the procedures which indicates, that as Bryan Yee
19 acknowledges, there is no real requirement for a
20 letter back.

21 You do the MPDES, and you also do the UIC,
22 and, you know, her opinion is -- and she was involved
23 with it -- that all of that has been complied with
24 and coordinated with DOH, and that's the requirement.

25 COMMISSIONER McDONALD: I think what --

1 MR. SMOLENSKI: And we have a letter from
2 DOH saying that you submitted this and it's exempted.

3 COMMISSIONER McDONALD: Again, I'm not
4 referring to the UIC or MPDES.

5 So as Mr. Yee has stated, there's actually
6 no real vehicle or permit to address these
7 conditions. So it's basically something that's
8 required outside of the regulatory, current
9 regulatory requirements.

10 And my question to him was, if there was
11 any type of coordination or engagement with
12 Department of Health as it relates to specifically
13 Condition 3 and 6, and these are not specific to the
14 MPDES or UIC.

15 MR. SMOLENSKI: No, I understand. And,
16 again, I think we have to just look at the language
17 of the condition. And it says, you know, says
18 prepare drainage and erosion control plan to the
19 satisfaction of the State Department of Health.

20 And our testimony, our written testimony
21 from Cheryl Palesh is that those were submitted to
22 the Department of Health. It's the satisfaction, the
23 drainage and erosion control plan, and the
24 construction of it, is to the satisfaction of the
25 State Department of Health. I think Mr. Yee would

1 like to read it to maintain the water quality is to
2 the satisfaction, but I don't think that's what the
3 language says. It says construct this, and construct
4 it to the satisfaction of the State Department of
5 Health.

6 As Cheryl Palesh testified in her written
7 testimony, which I would like to go over, that's what
8 we have done. Again, UIC and MPDES we submitted.
9 Although UIC, Mr. Yee argues that has to do with
10 drinking water, you would think that if the drinking
11 water is okay, it's probably going to be okay for the
12 ocean quality-wise.

13 But that's all the involvement that DOH has
14 in this particular situation. I think that's it --
15 that's why we don't have letter that we're aware of.

16 COMMISSIONER McDONALD: The way I look at
17 it is the submittal to Department of Health was
18 specific to those regulatory requirements, and Office
19 of Planning is looking for something other than those
20 regulatory requirements. And it could be a letter of
21 concurrence that the developer has met this
22 condition. I mean, it could be something that
23 simple.

24 MR. SMOLENSKI: Well, we do have
25 evidence -- I'm sorry.

1 COMMISSIONER McDONALD: To me, because it's
2 outside the norm of what developers may go in for
3 permitting, it may be a matter of semantics at this
4 point, and it's unfortunate. It's outside the
5 regulatory requirements is what I'm getting it.

6 I was just trying to get clarification if
7 there was any type of vehicle which Mr. Yee had
8 responded to, and if there's any type of engagement
9 from the developer's side with Department of Health
10 other than MPDES and UIC. That's all.

11 MR. SMOLENSKI: And I can tell you
12 historically, because I was involved with it, when
13 the Land Use Commission put out the draft conditions,
14 Bob McClean said fine. We didn't try to make it less
15 requirements or anything on it. He just said, that's
16 fine. So it is a matter of the language that was
17 drafted.

18 But there is evidence that is in the
19 record, and Cheryl Palesh, who was our expert
20 witness, I just like to read this one sentence.
21 After she goes through what was done with the
22 coordination with the Department of Health, the
23 requirements of the condition to control drainage
24 within the property and to maintain ocean water
25 quality to the satisfaction of the State Department

1 of Health have been and will continue to be met under
2 current state and county regulation, and having LUC
3 condition is no longer necessary, based on
4 implementation of the state's MPDES permit program.

5 So that is the evidence. There's no
6 contrary evidence to that.

7 COMMISSIONER McDONALD: Thank you.

8 CHAIRPERSON ACZON: Commissioner Wong.

9 COMMISSIONER WONG: Mr. Yee, I have a
10 question on Condition 11, regarding this whole issue.

11 The motion is for only Phase I, is that
12 correct?

13 MR. YEE: Correct.

14 COMMISSIONER WONG: But Condition 11 says
15 during all phases. So if we take that out, release
16 that condition, would it still be applicable to Phase
17 II?

18 MR. YEE: It would not be.

19 MR. SMOLENSKI: May I respond. There is a
20 separate condition in Increment II that covers that,
21 and we pointed that out in our pleadings.

22 CHAIRPERSON ACZON: You can have rebuttal,
23 Mr. Smolenski.

24 COMMISSIONER WONG: The other question I
25 have is, you know, the McCleans are very good

1 stewards of the land. They attempt to follow the
2 law. They follow the rules, putting a storm
3 drainage, all these injection wells and all these dry
4 wells and all this to help protect the water in
5 general.

6 Mr. Yee, have you ever seen anyone else do
7 all this for any other conditions like this?

8 MR. YEE: I'm sorry, could you --

9 COMMISSIONER WONG: What happened is the
10 McCleans did all this injection well, dry wells and
11 storm water, the filter and all that.

12 Have you ever seen any other landowners do
13 this for any other projects?

14 MR. YEE: I guess what's hard for us is on
15 the one hand I think every developer prepares
16 drainage plans. Everyone has to be concerned about
17 flooding. So on the Big Island underground injection
18 wells are fairly common.

19 So it's not unusual to us that there is an
20 underground injection well on this project.

21 The City and County of Honolulu is covered
22 by something called M.S. 4 Permit, regulates storm
23 water pollutants. That is not applicable to the Big
24 Island. It does not have those kinds of
25 requirements. So we cannot rely upon that regulatory

1 system to control or to prevent pollution from going
2 into the waters.

3 I will also say on light industrial areas,
4 just looking at Increment II of this project, and
5 there's a substantial number of specific pollution
6 prevention requirements, in addition to the general
7 requirement for best management practices that are
8 imposed.

9 So when you ask have I seen anyone do this,
10 I'm thinking, well, it's not so very much for light
11 industrial division from our perspective.

12 COMMISSIONER WONG: So the other question I
13 have. In previous construction of other projects,
14 does Department of Health sign off on these, if they
15 do storm water injection wells, or even in the City
16 and County of Honolulu?

17 MR. YEE: As I said, it's outside the
18 regulatory system. So that's another reason why we
19 think LUC created the condition, that is if it was
20 already required by law, you really don't need LUC
21 condition. So you put in conditions to cover areas
22 that you think might not be adequately covered by
23 existing regulations.

24 So this would require the Department of
25 Health to look at a proposal from developer and then

1 send a letter saying we have no objection to the
2 release. I have to say -- well, I'll leave it at
3 that.

4 These conditions specifically for DOH
5 review, however, I think are not unique to this area
6 around the Honokohau, National Park Service. So this
7 condition has been imposed in other cases for
8 petition areas in this area.

9 COMMISSIONER WONG: The question then is,
10 so Department of Health would have to sign off for
11 other projects around this area then?

12 MR. YEE: Yes.

13 COMMISSIONER WONG: Thank you.

14 CHAIRPERSON ACZON: Thank you, Commissioner
15 Wong. Any other questions, Commissioners?

16 Mr. Smolenski, you may provide your
17 rebuttal.

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

19 I will respond first on the last comment
20 that DOH, there is no requirement as Mr. Yee said,
21 it's sort of outside the regulatory provisions for
22 DOH to get back and say you've complied with this.

23 What I would like to refer to is our
24 exhibit, it's number 21, which is our expert Cheryl
25 Palesh, and she's with Belt Collins, and she is

1 someone, if you go through to the fourth page of that
2 exhibit, whose resume shows that she's prominently
3 the preeminent person in Hawaii as a civil and
4 sanitary engineer in this whole area.

5 In her resume, she has been hired by the
6 state. She's been hired by DOH, DOT. She was
7 involved in the design of infrastructure of Villages
8 Laiopua, nearby here. The Honokohau properties
9 makai, which is -- that's the makai end of course,
10 the highway just mauka of us, the Bluffs at Mauna Kea
11 subdivision.

12 There's a whole list of where she's been
13 hired by the state. And she puts down her MPDES
14 compliance background. She's done best management
15 practices plans for the State Department of
16 Transportation. The storm water management plans for
17 the State Department of Transportation, and others,
18 okay.

19 Bob McClean hired, what he felt, was the
20 best firm to do this, to make sure it was done right.
21 And it wasn't cheap. I remember him making comments
22 about that, that it wasn't cheap.

23 And she was gone through in our
24 September 9th letter, Exhibit 21, she has stated the
25 condition that Petitioner shall prepare a drainage

1 and erosion control plan to control drainage,
2 maintain ocean water quality, prepare that plan to
3 the satisfaction of the State Department of Health.

4 And she goes through that and explains how
5 that was done historically. And first there was no
6 nonpoint source pollution program initially. It was
7 the state, and then the MPDES permit application
8 program came in. And at each stage, as this
9 development progressed, she explains in that letter
10 how the UIC, MPDES documents were submitted to the
11 state. And did the state -- did we get letters back?
12 Yes, we do have letters back. And it says we looked
13 at this and we've looked at the report, and the UIC
14 it's okay, it's exempt. In other words, you can go
15 ahead and do it. Okay.

16 That was the requirement at first. And the
17 MPDES, every time that there was an additional
18 segment of the property, she prepared those
19 documents. They went to the state, and there was
20 coordination with the state. Do we have a letter
21 back? Not one that I've seen. But Mr. Yee
22 acknowledges that that's not a requirement that we're
23 aware of.

24 So our position on not only No. 3, but No.
25 6 is that Belt Collins was involved in this on all of

1 these steps as set forth. And that what we have done
2 is, we've complied with the condition because it
3 says, prepare a drainage and erosion control plan,
4 fund it and construct it. That has been done.
5 That's complete.

6 As far as if something happens to it, we
7 have condition No. 12. If there were a problem
8 although the testimony --

9 CHAIRPERSON ACZON: Mr. Smolenski, I think
10 we covered all this already. Keep the --

11 MR. SMOLENSKI: He was talking about No. 3.
12 He made his main argument on No. 3 back on September
13 10th, and there was no time to respond. So that's
14 why I've gone over this. I didn't go over this
15 before.

16 But these comments also apply to Condition
17 No. 6. We've done what we can on No. 6 as far as the
18 tenants are concerned. We provided copies of the
19 documents, the conditions that are applicable and
20 very specific what they can't do, okay.

21 So we feel that we have complied with
22 setting up the system that is reasonable, that's what
23 you can do as far as complying with Condition No. 6.
24 And, again, it says No. 6 is to establish appropriate
25 systems. And we feel that we have demonstrated that.

1 Jim McClean has testified as to how he goes
2 around and checks it. We have gone above and beyond,
3 as far as putting in filters, that's not required.
4 The question was has it been approved by DOH or have
5 you let them know.

6 Well, as far as I know, we haven't, but on
7 the other hand that shouldn't be a negative mark. We
8 have done something above and beyond to make sure
9 that nothing happens.

10 I think that the condition has been
11 complied with, it should be removed. Again, the
12 county does not have a problem with it. And we have
13 the ordinance provisions that are enforceable if
14 there were a problem.

15 In addition to Condition No. 12 of the Land
16 Use Commission, which has been -- our request has
17 been withdrawn as far as releasing that.

18 So what this required us to do was to set
19 it up, the system, and we have done that. Compliance
20 is covered by other provisions now and other laws,
21 and we have to comply with it.

22 With regard to Condition No. 8, it talks
23 about stopping work, contracting the State Historic
24 Preservation Office should any resources be found
25 during the project development. And Mr. McClean has

1 testified that the development is pau.

2 We have some open area, but that's
3 necessary, it's necessary for the community. He has
4 more requests than we have open area. So we feel we
5 have complied with that. And also there is a
6 requirement, as I mentioned, to notify the county if
7 anything were found, and then the county coordinates
8 with the state.

9 I refer to Condition M of the rezoning
10 ordinance, which states: Should any unidentified
11 sites or remains such as artifacts, shells, bones and
12 they go through the list, the immediate area -- in
13 that immediate area, the work shall cease and the
14 Planning Department shall be immediately notified.
15 That requirement is there with the county.

16 Then subsequent work shall proceed upon an
17 archaeological clearance from Planning Department
18 when it finds sufficient mitigative methods have been
19 taken. The county has stated in its response, it's
20 on file, how it coordinates after it gets notice. So
21 I think we're --

22 CHAIRPERSON ACZON: I believe you're just
23 repeating your arguments. Do you have any direct
24 rebuttal on Mr. Yee's argument?

25 MR. SMOLENSKI: That's what this is he

1 argued.

2 CHAIRPERSON ACZON: You're just repeating
3 your arguments earlier.

4 MR. SMOLENSKI: I've completed my argument
5 on No. 8.

6 With regard to the dust, to the extent
7 there was a concern about Increment No. 2, I
8 indicated that there is a requirement on No. 2 for
9 dust.

10 On here the concern expressed by Mr. Yee
11 was what if they need to dig on something, it is
12 absolutely clear and part of the record, that the
13 grading permit is required. You cannot -- basically
14 you can't move dirt around without getting a grading
15 permit. That's just a normal county function.

16 CHAIRPERSON ACZON: You made that statement
17 earlier.

18 MR. SMOLENSKI: With regard to No. 13,
19 which was the last one, we believe that the
20 requirement was: Shall develop the property in
21 substantial compliance with the representations. And
22 we are at a point in Increment I where the property
23 has been developed. So we've developed it as we have
24 stated in compliance with the representations. The
25 development of Increment I is complete. So we

1 believe that Condition 13 can be released at this
2 point.

3 That concludes my argument. However, if
4 any of the Commissioners have questions, I'm happy to
5 answer.

6 CHAIRPERSON ACZON: Commissioners, any
7 further questions to all the parties?

8 COMMISSIONER HIRANAGA: I have a question
9 for Mr. Smolenski.

10 Getting back to the original reason for you
11 to file this Motion to Release, Discharge and Delete
12 all conditions in the LUC Findings of Fact,
13 Conclusions of Law, Decision and Order, so this
14 Motion to Release and Discharge and Delete all
15 conditions, you concede will not occur because you
16 have withdrawn your request on several conditions?

17 MR. SMOLENSKI: Yes.

18 COMMISSIONER HIRANAGA: So what was the
19 original intent to file this motion? Was it to no
20 longer have the requirement for an annual report?

21 MR. SMOLENSKI: Well, no, we continue to
22 have the requirement for annual report, because it
23 covers Increment II also.

24 As we went through this, we would, in our
25 annual reports, which we file every single year,

1 indicate when we had completed something. And we
2 said we request the release, we request the release
3 of conditions.

4 But we hadn't completed the development of
5 the property, so the decision when Bob McClean was
6 alive until five years ago, I was involved with him.
7 I hate to tell you how long, but it was 1970's,
8 35 years ago, that we have gone through this, the
9 decision was to wait until everything was done.

10 We had substantial completion of Increment
11 I, and we demonstrated that to the Commission in
12 order to get the redistricting of Increment II. That
13 was the requirement. And finding by the Commission
14 that there had been substantial completion.

15 Bob passed away five years ago. We still
16 had these conditions. Dave Elbogen, Bob's
17 son-in-law, and Jim and Dave's wife are now general
18 partners.

19 If we are going to clean up these
20 conditions to show that it had been taken care of, we
21 wanted to do it now while I still have some
22 institutional memory about what happened. And they
23 weren't here for the whole thing. So we wanted to
24 clean that up. There was not any immediate -- there
25 was to intent to sell the property now, but we want

1 to take care of it while people can still find
2 documents and still remember what happened.

3 The reason that we requested all of them, I
4 said before it was just a precedent for the more
5 makai property, and we call that the Isamoto
6 property. And we think that that had the potential
7 much more to cause problems, but that was a different
8 time, we understand that.

9 We understand that there's more concerns.
10 And we all want to make sure that the surrounding
11 properties are not harmed in any way, particularly,
12 the National Park Service, the waters.

13 So that's why we have withdrawn our request
14 for --

15 COMMISSIONER HIRANAGA: Let me rephrase my
16 question.

17 So the motivation to file this motion is to
18 clean up conditions which you feel are no longer
19 applicable?

20 MR. SMOLENSKI: They're no longer
21 applicable, in the sense that we believe they have
22 been satisfied. That's the point that I'm trying to
23 make with the language that we have done these to the
24 extent that anyone had concern about monitoring and
25 going forward, it's covered by other provisions. But

1 all we are required to do is what the language says.

2 So we feel we have complied with the
3 conditions and satisfied them, the ones we are
4 requesting.

5 COMMISSIONER HIRANAGA: My interpretation
6 of Condition 3, 6, 8 and 11 basically does not
7 require any action on your part unless some
8 triggering event requires enforcement of the
9 condition.

10 So I guess I'm having difficulty
11 understanding why you're arguing to have these
12 particular conditions released, because if there is
13 no triggering event, there's really no impact to your
14 property.

15 MR. SMOLENSKI: There's no intent to sell
16 the property.

17 COMMISSIONER HIRANAGA: I'm talking about
18 contamination, contact or discovery of archeological
19 items. I mean, all of these have triggering events
20 for them to become activated, and as long as you
21 don't trigger the event, create the event to occur,
22 these conditions don't get triggered. So I don't see
23 why you're arguing to have these things removed.

24 MR. SMOLENSKI: Well, I'm viewing these
25 differently. I don't think that there's triggering

1 event. I think those conditions have been complied
2 with. If there is a, quote, triggering event,
3 suppose there is some dust that occurs, you know,
4 it's covered by zoning, that you have to have a
5 grading permit.

6 The reason, you know, if we ever had a
7 question down the road, if it's the property or
8 portion the property were ever sold, and somebody
9 said well, did you comply with these conditions that
10 you do this. Well, yes, we did, okay.

11 And that's what we're saying now. We
12 complied with the conditions as they are written.
13 We're not saying that there is not a continuing
14 obligation under the ordinance requirements, and also
15 Condition 12 to make sure if there were, what you
16 referred as possible triggering event, that's
17 covered, there is other protection there.

18 CHAIRPERSON ACZON: Thank you. Any other
19 questions?

20 COMMISSIONER HIRANAGA: Maybe one specific
21 question regarding Condition No. 8, which is the SHPD
22 condition.

23 As far as my understanding regarding SHPD's
24 jurisdiction, and on the Island of Maui it may be
25 different than here on the Big Island, but the Maui

1 Burial Council does not become involved unless iwi is
2 encountered, whereas SHPD basically becomes involved
3 with anything of a historic nature is encountered
4 which could be pottery or anything that's of historic
5 significance that's not iwi.

6 So I think, and I don't know the Big
7 Island's jurisdictional procedures, but whenever
8 something of a historical significance is
9 encountered, it's just saying you need to notify
10 SHPD.

11 I mean, you can cc the Big Island county
12 government, but I don't see why you would want the
13 condition removed.

14 MR. SMOLENSKI: Well, again, I didn't read
15 the Condition M of the zoning ordinance, but it says,
16 this is the requirement that will be in place if 8 is
17 removed. Should any unidentified sites or remains
18 such as artifact, shell, bones or charcoal deposits,
19 human burial, rock or coral alignments, paving or
20 walls be encountered, work in the area shall cease
21 and the Planning Department shall be immediately
22 notified. That's the requirement.

23 And as Jim McClean said, when the iwi were
24 found, did have communications, you know, as
25 appropriate -- although for burial -- although it

1 wasn't specifically required, that's what they did.

2 But the way this works now is, this is all
3 encompassing of anything that would be found there,
4 work has to stop. County has to be notified, county
5 has stated what it does. It's officially designated
6 as the county that can act and interact with the
7 state, then coordinates with the state as far as
8 mitigation goes.

9 So we feel we have complied with it. We
10 had a very expensive and thorough examination from
11 Rosenthal. Went over it. We got state historic, we
12 got their letter that says it's been complied with.
13 So we did it.

14 Historically it's unlikely now that
15 anything would be found, but if it is, it's covered
16 by this ordinance, and coordination with the State
17 historic still goes on. So I think --

18 CHAIRPERSON ACZON: Does that satisfy your
19 question?

20 COMMISSIONER HIRANAGA: I appreciate the
21 answer. I don't necessarily agree with your
22 statements, but I'm not going to argue it at this
23 point. Thank you.

24 CHAIRPERSON ACZON: Thank you. Any further
25 questions of Commissioners?

1 Commissioners, what is your pleasure?

2 COMMISSIONER CABRAL: I would like to make
3 a comment. Kind of listening to all of this and
4 understanding that there's been a long number of
5 years, so it appears maybe some of these conditions
6 are requiring things to be met that are not clearly
7 easily to be released, because there is not the
8 proper agency or the proper vehicle for release in
9 the future.

10 So I don't know, there might need to be
11 creative ways to address some of these requirements.
12 As I see our position on the Land Use Commission, our
13 obligation is to protect the lands, protect the
14 public over and above anything and above everything
15 else when there is a concern or variation of
16 opinions.

17 And I wanted to say too, it's been said
18 before, I think that there is obviously a lot of
19 responsibility and aloha here with the current
20 ownership, but as verified by your exhibits and by
21 your statements, every parcel could be sold,
22 therefore, you could have a large variety of
23 different people showing up on the property and then
24 enforcement of these different items would be up to
25 either self-managed association or a whole lot of

1 individuals that only are looking for what are their
2 simple profit is.

3 So that's a concern about what the future
4 might hold down the road. We're already down the
5 road 30-40 years, someone else down the road 30-40
6 years from now saying why did they let this happen?

7 Yeah, and the fact that a lot of these are
8 outside of the safety net of some of these other
9 government agencies to actually catch a problem or
10 comply with or have some agency check up on. I'm not
11 usually in favor of more government bureaucrats, but
12 it's almost like you need to have more safety nets to
13 check on things.

14 But based on all of this, and again, back
15 to government bureaucrats, No. 13 and 14 seem to be
16 somewhat almost unnecessary, but because there
17 continue to be conditions involved, the Land Use
18 prefers to be directly connected or reported to when
19 things happen rather than having to go check tax
20 records to find out that someone changed ownership,
21 if you don't notify them.

22 There are still going to be a number of
23 conditions that will not be released. I would like
24 to go ahead and make a motion. Sorry for all that
25 pre-motion talk.

1 I would like to move that, with the
2 understanding that the Petitioner has withdrawn its
3 request to release Conditions 1, 2, 12, 15 and 16,
4 and that the Commission has already approved releases
5 of Conditions 4, 5, 7, 9 and 10, I would move to deny
6 the motion with regards to Conditions 3, 6, 8, 11, 13
7 and 14 because Petitioner has not provided adequate
8 authoritative evidence supporting that the compliance
9 will continue for the duration of their ownership of
10 the land or of that ownership of future owners.
11 Thank you.

12 CHAIRPERSON ACZON: Any second?

13 COMMISSIONER MAHI: I wanted to hear the
14 numbers again.

15 COMMISSIONER CABRAL: I would deny 3, 6, 8,
16 11, 13 and 14.

17 CHAIRPERSON ACZON: Is there a second.

18 COMMISSIONER WONG: Second.

19 CHAIRPERSON ACZON: Motion has been made by
20 Commissioner Cabral and seconded by Commissioner Wong
21 to deny Conditions 3, 6, 8, 11 13 and 14.

22 Any discussions?

23 COMMISSIONER HIRANAGA: I have a question
24 maybe for staff. So what is the test that we must be
25 satisfied in order to remove a condition? What's the

1 language? Is there a specific language?

2 EXECUTIVE OFFICER: It's an evidentiary
3 standard. In most cases there has to be affirmative
4 evidence that the condition has been satisfied, and
5 in certain cases that's a letter or some kind of
6 communication from the agency that's responsible for
7 either monitoring or enforcing the condition.

8 Certain conditions such as the annual
9 report conditions are automatically released when all
10 the other conditions have been met. And so that's
11 not something that requires evidence. But with
12 regard to specific conditions with specific
13 requirements that are referred to other government
14 agencies for enforcement usually require a letter.
15 OP usually provides us an argument with regard to
16 those things.

17 COMMISSIONER HIRANAGA: So would you say
18 without a reasonable doubt that a condition has been
19 satisfied?

20 EXECUTIVE OFFICER: I'm not sure there is a
21 reasonable doubt standard that's an evidentiary
22 standard, best evidence. I hesitate to use criminal
23 law standards in these proceedings.

24 CHAIRPERSON ACZON: Any other discussions?
25 Everybody's quiet. No further discussion.

1 Mr. Orodener, please poll the Commission.

2 EXECUTIVE OFFICER: Thank you, Mr. Chair.

3 The motion is to deny Petitioner's motion with regard
4 to Conditions 3, 6, 8, 11, 13 and 14.

5 Petitioner has withdrawn their request to
6 release Conditions 1, 2, 12, 15 and 16, and the
7 Commission has already released Conditions 4, 5, 7, 9
8 and 10.

9 Commissioner Cabral?

10 COMMISSIONER CABRAL: Yes.

11 EXECUTIVE DIRECTOR: Commissioner Wong?

12 COMMISSIONER WONG: Aye.

13 EXECUTIVE OFFICER: Commissioner Mahi?

14 COMMISSIONER MAHI: Aye.

15 EXECUTIVE OFFICER: Commissioner McDonald?

16 COMMISSIONER McDONALD: Yes.

17 EXECUTIVE OFFICER: Commissioner Hiranaga?

18 COMMISSIONER HIRANAGA: Aye.

19 EXECUTIVE OFFICER: Commissioner Estes?

20 COMMISSIONER ESTES: Aye.

21 EXECUTIVE OFFICER: Chair Aczon?

22 CHAIRPERSON ACZON: Aye.

23 EXECUTIVE DIRECTOR: Mr. Chair, the motion
24 passes unanimously.

25 CHAIRPERSON ACZON: Thank you.

1 Any other business, staff commissioners?

2 No further business, I declare this meeting
3 adjourned.

4 Thank you everybody.

5 (The proceedings ended at 12:01 p.m.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on November 4, 2015 at 9:30 a.m., the proceedings contained herein was taken down by me in machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct copy of the proceedings had in the foregoing matter.

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

Dated this 4th day of November, 2015, in Honolulu, Hawaii.

JEAN MARIE McMANUS, CSR #156