

## 1 LAND USE COMMISSION

2 STATE OF HAWAI'I

3  
4 TRANSCRIPT OF PROCEEDINGS

5 Video Conference

6  
7 SP-407 Solarcity Corporation PV LLC )

8 Kauai Special Permit - Adoption of Order)

9 \_\_\_\_\_)

10  
11 The above entitled matter was held on January 27, 2016  
12 at 9 a.m at the following video conference centers  
13 simultaneously on O'ahu-Kalanimoku Building, 1151  
14 Punchbowl St, Room B10, Honolulu, Hawai'i; 96813  
15 Kaua'i, Lihue's State Office Bldg., 3060 'Eiwa Street,  
16 Basement, Lihu'e, Hawai'i, 96766; Maui- State of  
17 Hawai'i Department of Transportation District Office,  
18 650 Palapala Dr., Kahului, Hawai'i 96732; Hawai'i-  
19 Hilo State Office Bldg. 75 Aupuni Street, Hilo,  
20 Hawai'i 96720.

21  
22 Reported by: HOLLY M. HACKETT CSR, RPR

23 Certified Shorthand Reporter

24

25

## A P P E A R A N C E S

COMMISSIONERS:

EDMUND ACZON  
LINDA ESTES  
NANCY CABRAL  
KENT HIRANAGA  
AARON MAHI  
CHAD McDONALD  
JONATHAN SCHEUER  
ARNOLD WONG

EXECUTIVE OFFICER: DAN ORODENKER

CHIEF CLERK: RILEY HAKODA

STAFF PLANNER: SCOTT DERRICKSON

DEPUTY ATTORNEY GENERAL: DIANE ERICKSON

Docket No. SP-407 Solarcity PV LLC

For the Petitioner: BENJAMIN MATSUBARA, ESQ.  
CURTIS TABATA, ESQ.

For the State: BRYAN YEE, ESQ.

1 CHAIR ACZON: (gavel 9:15) Good morning.  
2 Before we commence with our proceedings I want to take  
3 a moment. Commissioner Cabral, you want to do that?

4 COMMISSIONER CABRAL: Yes. I would just  
5 like to ask as we are a state body, a board  
6 commission, and we have very recently lost a very dear  
7 senator from Hilo, Senator Gil Kahele. I'd like to  
8 ask for a moment of silence, and then I will compose  
9 myself. Thank you for this moment of silence.  
10 (Pausing) Thank you.

11 CHAIR ACZON: Good morning, again. This  
12 is the January 27th, 2016 Land Use Commission meeting.  
13 Before we commence with the proceedings the Chair  
14 would like to entertain a motion to make a correction  
15 to the title on the agenda from "SP15-54 Solarcity PV,  
16 LLC" to "SP-407 Solarcity Corporation."  
17 Can I have a motion?

18 COMMISSIONER MAHI: I move.

19 CHAIR ACZON: Any second?

20 COMMISSIONER McDONALD: Second.

21 CHAIR ACZON: A motion has been made by  
22 Commissioner Mahi and seconded by Commissioner  
23 McDonald. Any discussion?

24 MR. ORODENKER: Commissioner Wong.

25 CHAIR ACZON: Commissioner Wong. Sorry.

1 Hearing none, all in favor? "Aye" All opposed?

2 "Aye". The agenda is amended. Thank you.

3 The next order of business is the adoption  
4 of the January 13, 2016 minutes. Are there any  
5 corrections or comments on them? If not, is there a  
6 motion to adopt the January 13, 2016 minutes?

7 COMMISSIONER ESTES: So moved.

8 COMMISSIONER MAHI: I second.

9 CHAIR ACZON: A motion has been made by  
10 Commissioner Estes and seconded by Commissioner Mahi  
11 to adopt the January 13, 2016 minutes. All in favor  
12 say aye. "Aye". (off-island screens' feedback) "aye,  
13 aye")

14 Any opposed? (None.) The minutes for  
15 January 13, 2016 are unanimously adopted.

16 The next agenda is the tentative meeting  
17 schedule. Mr. Orodenger.

18 MR. ORODENER: Thank you, Mr. Chair. On  
19 February 9th we will be in Kona for the Waikoloa  
20 Development Special Permit. And on February 10th we  
21 will be on O'ahu for the Ko Olina Motion for  
22 Consideration.

23 February 24th we'll be on Maui for  
24 DR15-54 Punanoa Homeowners Association. And we also  
25 have a site visit to Ma'alaea in that afternoon.

1 February 25th is not scheduled at this time. March  
2 9th we'll be at the Honolulu Airport Conference Room  
3 No. 3 for an update on the Waimanalo Gulch matter.

4 And on March 23rd, and 24th we will be in  
5 Kona overnight for the Queen Lili'uokalani Trust  
6 Motion for Order Modifying Findings of Fact and  
7 Conclusions of Law.

8 On April 13th and 14th we have a  
9 tentative date for Ma'alaea on Maui. And the schedule  
10 from there is to be determined.

11 CHAIR ACZON: Thank you. Any questions  
12 about the schedule? Thank you. I will now call for  
13 those individuals desiring to provide public testimony  
14 on Docket SP15-407 to identify themselves. All such  
15 individuals will be called in turn to our witness box  
16 where they will be sworn in prior to their testimony.

17 Do we have any? We don't have anyone  
18 here. Anybody? Is there anyone in the audience who  
19 desires to provide public testimony on this matter?  
20 (pause) Thank you.

21 \*\*\*\*\*  
22  
23  
24  
25

1                   This is a meeting on Docket No. SP15-407  
2   Solarcity Corporation Kaua'i to Adopt the Form of the  
3   Order for a Special Permit for real property situated  
4   at Kapai'a, Hanamaulu, Lihu'e, Kaua'i, Hawai'i  
5   identified by Kaua'i Tax Map Key No, (4)3-8-002  
6   portion of lot 2.

7                   Will the Applicant or its representative  
8   please identify themselves for the record.

9                   MR. TABATA: Good morning, Chair, Members  
10   of the Commission. Curtis Tabata and Benjamin  
11   Matsubara appearing on behalf of Solarcity.

12                  MR. YEE: Good morning. Deputy Attorney  
13   General Bryan Yee on behalf of the Office of Planning.  
14   With me is Rodney Funakoshi and Lorene Maki from the  
15   Office of Planning.

16                  CHAIR ACZON: Anyone from the County?

17                  MR. ORODENKER: No. The County has  
18   notified us they will not be present today.

19                  CHAIR ACZON: Okay. On January 13, 2016  
20   the Applicant presented a summary of its proposed  
21   Project requiring a special permit at the State Office  
22   Building Meeting Rooms A and B in Lihue, Kaua'i,  
23   Hawai'i. In addition, the Commission received Kaua'i  
24   County and OP's comments on this matter.

25                  After questions and discussion, the

1 Commission voted to approve the recommendation of the  
2 County of Kaua'i Planning Commission to approve the  
3 Applicant's petition for the Special Permit with  
4 modifications.

5 On January 19, 2016 the Commission sent  
6 the January 27th, 2016 LUC agenda notice to the  
7 Parties and to the Statewide, O'ahu, Maui, Hawai'i,  
8 and Kaua'i mailing lists.

9 On January 26, 2016 the Commission  
10 received correspondence from OHA commenting on this  
11 matter. Commissioners, do you have any comments on  
12 the OHA letter?

13 VICE CHAIR SCHEUER: Chair?

14 CHAIR ACZON: Yes, Commissioner Scheuer.

15 VICE CHAIR SCHEUER: Regarding the OHA  
16 letter. I'd like to move that we go into executive  
17 session with our counsel pursuant to section 92-5 HRS.

18 CHAIR ACZON: Is there a second?

19 COMMISSIONER WONG: Second.

20 CHAIR ACZON: Motion has been made by Vice  
21 Chair Scheuer and Vice Chair Wong for executive  
22 session. Those in favor say aye. "Aye". Opposed?  
23 Motion carries. Staff, could you please clear the  
24 room please and the neighbor islands, please.

25 (Off the record 9:10). (Gavel).

1                   We're back on the record. (9:30).

2                   CHAIR ACZON: Mr. Tabata for the  
3 applicant, do you have any comments at this time?

4                   MR. TABATA: Yes, thank you, Mr. Chair.

5                   CHAIR ACZON: Go ahead.

6                   MR. TABATA: We've reviewed the OHA letter  
7 which we just received. And we note that this is  
8 coming in very late. We haven't had an opportunity to  
9 have a more thorough review of this letter. But we  
10 note that the thrust of this letter is that there are  
11 2 historical sites that were recorded in 1981 during  
12 the Waialua River Hydropower Project, and that are not  
13 reflected in our Archaeological Inventory Survey.

14                   We've been able to contact the client and  
15 confirm that these sites are not located on the  
16 50 acres of our Project. We note that the letter  
17 states that these historic sites were identified by  
18 inputting the TMK for the Project, the Tax Map Key  
19 number, parcel number.

20                   But the parcel in question is 5,300 acres  
21 plus. So that's why it comes up. These sites come up  
22 on the TMK parcel, but they do not impact or reflect  
23 upon or are located on our 50-acre Project. That's  
24 why it's not reflected in an Archaeological Inventory  
25 Survey.



1           So we don't believe that these historic  
2 sites will change the conclusion of our  
3 Archaeological Inventory Survey. In that conclusion  
4 there's no historic properties affected by our  
5 proposed Project. So we do not feel that it is  
6 necessary to continue this hearing, this matter, as a  
7 result of this late letter. We feel the Land Use  
8 Commission can proceed as scheduled.

9           CHAIR ACZON: Thank you. Is that all?

10          MR. TABATA: Yes, thank you, Mr. Chair.

11          CHAIR ACZON: Commissioners, before you is  
12 the Form of the Order approving the recommendation of  
13 the County of Kauai Planning Commission to approve the  
14 State Special Use Permit Petition with modification in  
15 this docket No. SP15-407.

16          The Form of the Order is the form  
17 (electronic feedback) submitted by the Petitioner with  
18 amendments adopted by the Commission and other  
19 technical, non-substantive changes. (electronic  
20 feedback) The Chair will entertain a Motion to  
21 Approve the Form of the Order in this matter.

22          Commissioners, what is your pleasure?

23          VICE CHAIR SCHEUER: Mr. Chair,  
24 procedurally before a motion gets to be heard we ask  
25 the Applicant for comments. Is it possible to hear if

1 OP has comments on the OHA letter? Or do we have to  
2 make a motion first?

3 CHAIR ACZON: Yeah. Let's do the motion,  
4 then we can do the discussion.

5 COMMISSIONER ESTES: I move approval.

6 COMMISSIONER CABRAL: I second.

7 CHAIR ACZON: A motion has been made by  
8 Commissioner Cabral and seconded by Commissioner  
9 Estes. Any discussion?

10 COMMISSIONER CABRAL: No, the other way  
11 around. Commissioner Estes made the motion and Cabral  
12 seconded it. I think it's important that the island  
13 representative be noted in the proper order.

14 CHAIR ACZON: Thank you. A motion has  
15 been made by Commissioner Estes and seconded by  
16 Commissioner Cabral, is that correct? Any discussion?

17 COMMISSIONER ESTES: Yes.

18 CHAIR ACZON: Any discussion?

19 COMMISSIONER HIRANAGA: Mr. Chair?

20 CHAIR ACZON: Commissioner Hiranaga.

21 COMMISSIONER HIRANAGA: Mr. Chair, I would  
22 like you to ask OP if they have any comments.

23 CHAIR ACZON: OP? (echo and electronic  
24 feedback)

25 MR. YEE: Thank you. Like the Applicant,

1 the Office of Planning did not receive the letter when  
2 we got here this morning. (echo) I think our  
3 comments, therefore, is not related so much to the  
4 facts alleged in the letter as much as due process.

5 So it's true the letter came in late. The  
6 decision, we did issue an oral decision. But it is an  
7 important issue, of course. What we do note in the  
8 process is that the issue of whether or not the AIS  
9 was sufficient, may be decided by the coun-- or would  
10 have to be decided by the county prior to the issuance  
11 of their grading permits. (background feedback echo)

12 So while it's unfortunate the County's not  
13 here to provide sort of some input on this, it  
14 certainly would be appropriate that a copy of this  
15 letter be sent to Hawai'i County to make sure that  
16 prior to any grading activity, the issue of whether or  
17 not the AIS was sufficient is appropriately addressed.  
18 We don't -- I'm not questioning the veracity of the  
19 representation made today. (electronic feedback  
20 continuing)

21 But because of the lateness of the  
22 document we haven't had an opportunity and it's sort  
23 of unfair to the Applicant in a way--(reporter has  
24 electronic feedback) -- you asked for comments. Is it  
25 possible to hear if OP has comments -- it's difficult

1 to engage in factual fact-finding today.

2 We do think there's enough information to  
3 look forward to the decision making. (redundant  
4 echos) But we just wanted to note for you the process  
5 by the issue of the sufficiency of the AIS. Let me  
6 backtrack a step. One of the issues I take is if  
7 there are no archeological inventory sites, then  
8 consultation with SHPD isn't *legally* required. It may  
9 be done because it's a good thing to do because it's a  
10 good prudential move. But it's not legally required  
11 by the county. (feedback sounds)

12 CHAIR ACZON: Can you guys hear, neighbor  
13 islands? (echos)

14 COMMISSIONER ESTES: I can't hear you.

15 COMMISSIONER HIRANAGA: Is someone  
16 speaking?

17 MR. ORODENKER: Yeah, we were having  
18 difficulty with feedback. So I apologize for that.  
19 (echo)

20 MR. HAKODA: Try if neighbor island  
21 Commissioners mute your mic, please.

22 MR. ORODENKER: There's an internal echo.

23 VICE CHAIR SCHEUER: But their mics were  
24 muted.

25 CHAIR ACZON: It's okay now?

1 COMMISSIONER ESTES: Yes.

2 MR. HAKODA: Neighbor Island Commissioners  
3 raise your hand if you can hear us. (raising hands)  
4 Okay.

5 MR. YEE: Assuming you at least heard some  
6 of what I said, just to quickly summarize. The issue  
7 of the AIS may be decided by the county and should be  
8 decided by the county prior to the issuance of their  
9 building permit -- ah, grading permit.

10 And so this issue should be analyzed in  
11 more detail before any earth moving or grading  
12 activity occurs. So it certainly would be appropriate  
13 for Kauai County to get a copy of this letter so they  
14 can address this issue prior to any reversible action.

15 If it is true that there are no  
16 archaeological inventory sites within the 50-acre  
17 parcel, and, frankly, located not so close that they  
18 would be impacted by any earth moving within the  
19 Petition Area or Permit Area, then further approval by  
20 SHPD is not legally required.

21 It would be better to have that addressed,  
22 I think, by the county prior to their grading permits.  
23 And the Office of Planning doesn't think this  
24 necessarily needs to be decided or doesn't necessarily  
25 need to impede the decision today.

1           Whether you want to require Kauai County  
2 to look at that issue as part of the initial  
3 condition, of course is your choice. But we don't  
4 think that would prevent or should prevent you from  
5 making a decision, and from the Office of Planning's  
6 view point approving with conditions the Application.  
7 Thank you.

8           CHAIR ACZON: Thank you, OP. Any other  
9 questions? Commissioner Hiranaga?

10           COMMISSIONER HIRANAGA: I have a comment.  
11 So I found it very informative to know that those  
12 previously identified sites are not on the subject  
13 area. I guess for clarity as far as protocol Kauai  
14 County should have notified OHA, but they did not. Is  
15 that correct?

16           MR. TABATA: If I may, Mr. Chair.

17           CHAIR ACZON: Go ahead, Mr. Tabata.

18           MR. TABATA: Thank you, Chair. Kauai  
19 County made a decision (echo) to not seek SHPD review  
20 because the conclusion of noise to our property is  
21 affected with the result of the Project. What they  
22 relied upon was the Walmart case where the  
23 Intermediate Court of Appeals of Hawai'i ruled --  
24 (echo) -- that where historic properties are not  
25 affected that SHPD review is not required under

1 Chapter 6E of the Hawaii Revised Statues.

2 Therefore, we agree with the county that  
3 SHPD review for *this* Project is not required. Thank  
4 you, Mr. Chair.

5 CHAIR ACZON: Okay. Any other questions?

6 COMMISSIONER HIRANAGA: So, Mr. Chair.

7 CHAIR ACZON: Go ahead, Commissioner  
8 Hiranaga. (echo resuming)

9 COMMISSIONER HIRANAGA: So if SHPD should  
10 have the issue with this it's between them and the  
11 County of Kauai?

12 CHAIR ACZON: Say that again.

13 COMMISSIONER HIRANAGA: Because SHPD was  
14 not notified in a timely fashion, if they have an  
15 issue with this it would be between them and the  
16 County of Kauai? Is that what I'm hearing?

17 COMMISSIONER McDONALD: The letter -- oh,  
18 I'm sorry, Mr. Chair.

19 CHAIR ACZON: Go ahead, Commissioner.

20 COMMISSIONER McDONALD: In our discussion  
21 the letter's actually from OHA and not from the  
22 Department of Land and Natural Resources Historic  
23 Preservation Division. So I really don't know if  
24 actually SHPD has an issue. The issue is being raised  
25 by OHA.

1 CHAIR ACZON: That was my question earlier  
2 to SHPD as a comment. My question is: Are we  
3 responsible to notify OHA or are we *required* to notify  
4 OHA?

5 MR. ORODENKER: We, in this process --  
6 Mr. Chair, if I may, since the actual evidentiary  
7 process takes place at the county level, the county  
8 level is -- the county is responsible for making sure  
9 that all interested parties are present. We provided  
10 OHA with notice that we were gonna take up the matter  
11 as a matter of course. Chief Clerk Sonoda. Is OHA on  
12 our list?

13 MR. HAKODA: Yes, they are.

14 MR. ORODENKER: So we sent them a notice  
15 that we were taking up the matter. But since it was  
16 not an evidentiary proceeding we're not responsible  
17 for taking their comments at that time. If they have  
18 an issue, then they know they can come and testify.

19 CHAIR ACZON: So that was OHA's  
20 responsibility to call the Commission.

21 MR. ORODENKER: Or to appear and make  
22 their concerns known.

23 CHAIR ACZON: Okay. Vice Chair Scheuer?

24 VICE CHAIR SCHEUER: So I'm gonna speak  
25 against the motion, respectfully, to my colleagues on



1 Kauai and Hawai'i Island. It doesn't have to do -- I  
2 think the project is very worthwhile. I don't want to  
3 see this project delayed without a good purpose. The  
4 problem for me is not the OHA letter. I want to say  
5 this is a pattern with OHA notifying us late.

6 I'd like to specifically request the  
7 Executive Director talk to OHA about they can't just  
8 keep chiming in late and disturbing the process. And  
9 for me, actually the issues in the OHA letter are not  
10 so much of what they allege should be in the EIS or  
11 how it should have been reviewed.

12 My problem is we only have to make it --we  
13 can only *really* make a decision based on what is on  
14 the record. And the record, unfortunately, from Kauai  
15 County, was just really silent as to, as I discussed  
16 last time in particular, whether or not there's valued  
17 cultural or natural resources in the area, the extent  
18 to which those resources might be used by  
19 practitioners as well as *if* there's an effect from the  
20 proposed project what we can do, if anything, to  
21 mitigate any impacts.

22 Now, I don't think, based on my  
23 understanding of the process of the site, that there  
24 is anything. But there's no findings that we can rely  
25 on. And that's, I think, the standard that we're

1 supposed to follow. So I'm gonna vote against the  
2 Motion to Approve.

3 CHAIR ACZON: Thank you. Anybody else?

4 COMMISSIONER HIRANAGA: Mr. Chair?

5 CHAIR ACZON: Commissioner Hiranaga.

6 COMMISSIONER HIRANAGA: Just for clarity  
7 did the County of Kauai receive a copy of OHA's  
8 letter?

9 CHAIR ACZON: We don't know.

10 COMMISSIONER HIRANAGA: 'Cause I think if  
11 they did receive a copy of the letter I would be  
12 disappointed that they are not present to ask  
13 questions.

14 MR. ORODENKER: If I can respond to that.  
15 They were not cc'd directly on the letter. And even  
16 if they were, like I said, it came in at 4:30 last  
17 night. And they had already directed their efforts  
18 elsewhere. I would agree it would be better if they  
19 were here.

20 CHAIR ACZON: We don't have any control of  
21 that. Commissioner Estes.

22 COMMISSIONER ESTES: Can I speak?

23 CHAIR ACZON: Go ahead.

24 COMMISSIONER ESTES: I'm satisfied with  
25 the job that the county did. And I'm not gonna change

1 how I feel about that because of the late minute --  
2 when did we get it 4:30 yesterday afternoon -- so I  
3 support the motion strongly.

4 CHAIR ACZON: Thank you. Anybody else?

5 COMMISSIONER WONG: Chair?

6 CHAIR ACZON: Vice Chair Wong. (echo)

7 COMMISSIONER WONG: I too am very  
8 concerned about OHA's last minute chiming in. So I  
9 want to support Vice Chair Scheuer's request for the  
10 Executive Director to talk to OHA.

11 I was wondering if I could make a friendly  
12 amendment after listening to OP on the motion, to add  
13 a condition regarding that the county must inform SHPD  
14 and get some sort of written response back by SHPD  
15 about this Project before continuing on the Project.

16 CHAIR ACZON: Commissioner Estes, are you  
17 acceptable of the friendly amendment?

18 COMMISSIONER ESTES: No, I don't accept  
19 the amendment.

20 CHAIR ACZON: Commissioner Cabral?

21 COMMISSIONER CABRAL: Hello. Yes. As the  
22 seconder of the motion I would accept such a motion  
23 but with a condition that SHPD be given some type of  
24 time limit from when they received the request to  
25 basically verify that the areas of historical concern

1 are outside of the area under consideration.

2 Because I would hate to have another, what  
3 I feel in my world, level of potential bureaucratic,  
4 you know, endeavors take 6 months or something, you  
5 know. And those types of things sometimes can do  
6 that.

7 So I don't know what their normal  
8 timeframe is to do something. But as a person who's  
9 sold large parcels of real estate I absolutely know it  
10 is not difficult once you've located something to know  
11 where one area begins and one ends when you're talking  
12 5,000 acres. You know, it should not be a difficult  
13 thing to find out that these are miles apart from each  
14 other.

15 So I'm not opposed to such a motion if  
16 that is what makes the entire Commission more  
17 comfortable. At the same time I'm satisfied with the  
18 motion as it is because it would be noted in our  
19 record that we have been informed that this area of  
20 concern is outside of the subject area. And that  
21 everybody else is aware of that already.

22 And it just seems like maybe OHA, because  
23 they didn't get their official paperwork, has not been  
24 aware of that fact.

25 CHAIR ACZON: Commissioner Cabral, are you

1 suggesting a different amendment at this time?

2 COMMISSIONER CABRAL: No. I'm comfortable  
3 with the amendment as is. But I would rather have  
4 some type of action move forward either with the  
5 amendment as it is or make an amendment to that; or a  
6 different amendment with a condition. But the  
7 condition needs to be somewhat specific in terms of  
8 timeframe for SHPD to be able to respond to verifying  
9 that they have no concern.

10 CHAIR ACZON: Thank you, Ms. Cabral.

11 COMMISSIONER CABRAL: Thank you.

12 COMMISSIONER HIRANAGA: Mr. Chair?

13 CHAIR ACZON: If you don't have an  
14 additional amendment, Commissioner Cabral, the maker  
15 of the motion will now accept the friendly amendment.  
16 (echo) Commissioner Hiranaga.

17 COMMISSIONER HIRANAGA: Mr. Chair. So  
18 just for clarity once again. The County of Kauai had  
19 the right, they had the right to determine that  
20 notification to SHPD was not required based upon their  
21 determination. They had that legal right to do that?

22 MS. ERICKSON: Yes.

23 CHAIR ACZON: The AG said, "Yes".

24 MS. ERICKSON: But the issue, I guess, is  
25 that OHA raised the issue that *they* were not notified.

1 (electronic feedback)

2 COMMISSIONER HIRANAGA: Then was the  
3 County of Kauai required to notify OHA? Legally were  
4 they required to notify OHA?

5 MS. ERICKSON: I would have to defer to  
6 the County of Kauai.

7 CHAIR ACZON: That was my question  
8 earlier.

9 MS. ERICKSON: I would think that they  
10 would, but I would defer to the county.

11 CHAIR ACZON: Go ahead. (electronic  
12 feedback) But OHA is in the -- go ahead.

13 COMMISSIONER HIRANAGA: Another question  
14 is if this motion fails and there's a Motion to  
15 Reconsider and that's adopted, I think Diane mentioned  
16 there's like a -- it goes back to square 1 as far as  
17 timelines. Is that correct? 45 days and ....

18 MS. ERICKSON: It depends on what the  
19 Motion to Reconsider does or what any subsequent  
20 motion after the Motion to Reconsider does. (echos)

21 CHAIR ACZON: We can discuss that after.

22 COMMISSIONER HIRANAGA: So hypothetically  
23 can we defer this matter to the next meeting? Is that  
24 an option if the Motion to Approve fails?

25 MS. ERICKSON: I believe that your 45 days

1 is going to expire in one or two days.

2 COMMISSIONER HIRANAGA: So failure to take  
3 action would basically adopt the motion or allow them  
4 to proceed if no motion is approved or granted?

5 MR. ORODENKER: If we do not make a  
6 decision today then the special permit is granted with  
7 automatic conditions. And those conditions are those  
8 contained in our rules.

9 MS. ERICKSON: There are about 23 of those  
10 conditions.

11 CHAIR ACZON: Commissioner Estes?

12 COMMISSIONER ESTES: Yes. Number 1, I  
13 don't think a Motion for Reconsideration is on the  
14 floor. That motion was never made, was it?

15 CHAIR ACZON: No. We're just discussing  
16 it.

17 COMMISSIONER ESTES: The motion was for  
18 approval. Am I correct?

19 CHAIR ACZON: Yes. That was the question  
20 under discussion. Vice Chair Scheuer? (echo)

21 COMMISSIONER ESTES: If we had the motion  
22 for approval and it fails then we're back to square 1,  
23 is that right?

24 CHAIR ACZON: That's correct.

25 COMMISSIONER ESTES: Or the project is not

1 approved.

2 CHAIR ACZON: That's correct.

3 COMMISSIONER ESTES: Okay. I will withdraw  
4 my Motion for Approval and listen to a Motion to  
5 Reconsider, but I'm only against the Motion to  
6 Reconsider. I don't think we should reconsider. I  
7 think we should approve this today.

8 CHAIR ACZON: So what's your pleasure?

9 COMMISSIONER CABRAL: Can I have a  
10 question, procedure question?

11 CHAIR ACZON: Commissioner Cabral.

12 COMMISSIONER CABRAL: If we have a call  
13 for the question and we take a vote if this motion's  
14 up or down then we would know, then we could entertain  
15 another motion if necessary. Is that correct?

16 MS. ERICKSON: Correct.

17 CHAIR ACZON: Correct.

18 COMMISSIONER CABRAL: Correct. Okay.  
19 Just trying to simplify the process.

20 CHAIR ACZON: Commissioner Estes.

21 COMMISSIONER ESTES: Then that's true. If  
22 the Motion to Approve fails then we can hear another  
23 motion?

24 MS. ERICKSON: Yes.

25 CHAIR ACZON: That's correct. Vice Chair



1 Scheuer?

2 VICE CHAIR SCHEUER: Last comment. To be  
3 really clear to my fellow Commissioners and Applicant  
4 it gives me absolutely no pleasure to speak against  
5 the motion at all. But I think just to mark our  
6 discussion today about what's in the OHA letter and  
7 what the process is. This is all outside our official  
8 record. The problem we have is, well, the County of  
9 Kauai did many things right. I just have to  
10 respectfully disagree they did not hand us a good  
11 record that we can point to to say that these things  
12 were addressed.

13 And we have this duty. No matter how it  
14 seems unlikely to us right now, we have this duty to  
15 make these findings or see that those findings were  
16 made in the course of our decision making. And we're  
17 just -- to me our hands are tied because the record  
18 handed to us by the county was unfortunately very  
19 insufficient, in my opinion.

20 CHAIR ACZON: Anybody else? Let me just  
21 be clear. Commissioner Estes, you're still sticking  
22 with your motion, right?

23 COMMISSIONER ESTES: I'll stick with it.  
24 Okay. Yes. I move approval of the project.

25 CHAIR ACZON: Okay. Any further

1 discussion?

2 MS. ERICKSON: Actually, it's the Form of  
3 the Order.

4 CHAIR ACZON: Go ahead, Commissioner.

5 COMMISSIONER McDONALD: I just have a  
6 quick comment. I understand where Commissioner  
7 Scheuer's coming from. As always I appreciate his due  
8 diligence in researching and his full attention to a  
9 lot of these cultural matters that a lot of us are not  
10 in tune to.

11 However, as our Attorney General just  
12 stated that it's not under -- well, Kauai County made  
13 the decision with regards to acceptance of the AIS.  
14 And as confirmed by our Attorney General that's under  
15 their purview. It didn't necessarily need to go to  
16 State Historic Preservation Division which I was under  
17 the impression it *needed* to. So in that regard I feel  
18 the record is complete enough to move forward with the  
19 Decision on the Form of the Order.

20 CHAIR ACZON: Thank you. Vice Chair Wong.

21 COMMISSIONER WONG: I guess I also am  
22 concerned about Kauai County's lack of filing the  
23 proper procedures especially on public trust issues.  
24 But they still, I think, I believe they still have to  
25 do an Archaeological Inventory Study as OP mentioned

1 prior to the grading permits.

2 CHAIR ACZON: That's correct.

3 COMMISSIONER WONG: So, you know, I  
4 totally agree with Commissioner McDonald on his  
5 statements about Commissioner Scheuer, Commissioner  
6 Mahi's point that they're better than me on this  
7 issue. But the AIS I believe it still has to be done  
8 for a grading permit. So I'm gonna support this  
9 motion.

10 CHAIR ACZON: Anybody else?

11 COMMISSIONER HIRANAGA: Mr. Chair?

12 CHAIR ACZON: Commissioner Hiranaga.

13 (echos)

14 COMMISSIONER HIRANAGA: Mr. Chair? Yes.  
15 So just a quick comment. So I'm an advocate of Home  
16 Rule with, you know, the various islands and counties.  
17 Being on this Commission I've learned that each county  
18 has their own style of operating. You may not agree  
19 with the amount of detail that was provided by the  
20 County of Kauai, but I will be voting in favor of the  
21 motion.

22 I think if there is issues raised, serious  
23 issues later by OHA or SHPD, that really will be  
24 between them and the County of Kauai. I will be  
25 voting in favor of the motion.

1 CHAIR ACZON: Thank you. Anybody else?  
2 Commissioner Mahi.

3 COMMISSIONER MAHI: I'll be voting against  
4 the motion only in that that I will be a Pontius  
5 Pilot, just wash my hands and say, "Take him if you  
6 want him." That's what my feeling is right now so I  
7 will vote *against* the motion.

8 CHAIR ACZON: Thank you, Commissioner  
9 Mahi. The Chair will -- is gonna be supporting this  
10 motion. I'm very disappointed with OHA for this last  
11 minute communication. I'm more of the maintaining the  
12 integrity of the process. With due respect to OHA, if  
13 anybody else comes with this late in the public,  
14 coming this late notice what would we do, you know?  
15 So that's kinda pretty much.

16 Where is the end of this, you know? OHA  
17 did this twice already on us. So I will be voting for  
18 the motion. Any further discussion? If there's no  
19 further discussion, Mr. Orodenger.

20 MR. ORODENER: Mr. Chair, the motion is  
21 to Adopt the Order on SP15-407 Solarcity, the  
22 approving the County's granting of a special permit.  
23 Commissioner Estes?

24 (Commissioners talking over one another)

25 COMMISSIONER MAHI: They cannot talk like

1 that. Who's she talking to? I asked the question,  
2 Chair. Who...is...Commissioner Estes...reporting...

3 CHAIR ACZON: We don't know.

4 COMMISSIONER MAHI: Our...deliberation?  
5 We should find out. I *demand to find out!*

6 CHAIR ACZON: You lost some at recess.

7  
8 COMMISSIONER MAHI: I will -- is gonna be  
9 supporting this motion. I'm very disappointed with  
10 OHA for this last minute communication. I'm more of  
11 the maintaining the integrity of the process. With  
12 due respect to OHA, if anybody else comes with this  
13 late in the public, comes with this late notice, what  
14 would you do, you know?

15 So that's kinda pretty much "where is the  
16 end of this"? OHA did this twice already on us so I  
17 will be voting for the motion. Any further  
18 discussion? If there's no further discussion,  
19 Mr. Orodanker?

20 MR. ORODENKER: Mr. Chair, the motion is  
21 to Adopt the Order on SP15-407 Solarcity approving the  
22 County's granting of a Special Permit. (Two  
23 Commissioners speaking over each other)  
24 Commissioner Estes-- Mahi and....

25 COMMISSIONER MAHI: You cannot talk like

1 that. Who is she talking to? *I asked the question,*  
2 *Chair. Who...is...Commissioner Estes...reporting our*  
3 *deliberation?*

4 CHAIR ACZON: We don't know.

5 COMMISSIONER MAHI: We should find out. I  
6 *demand to find out! I demand to find out!*

7 MR. HAKODA: Can we get a recess?

8 COMMISSIONER MAHI: Get them back on.

9 VICE CHAIR SCHEUER: Second.

10 CHAIR ACZON: Recess. (During recess  
11 Commissioner Hiranaga left the room) (gavel)

12 CHAIR ACZON: We're back on the record.

13 MR. ORODENKER: Mr. Chair, Commissioner  
14 Mahi had a question.

15 CHAIR ACZON: Commissioner Estes,  
16 Commissioner Mahi has a question.

17 COMMISSIONER MAHI: We heard you  
18 discussing who was for and who against. My name was  
19 mentioned and so was Mr. Scheuer's name. So are you  
20 reporting to someone over there?

21 COMMISSIONER ESTES: No! I didn't mention  
22 your name!

23 COMMISSIONER MAHI: You did. Did you all  
24 hear not my name? Say "aye". (Commissioners saying  
25 "aye".) We know you were in conversation with

1 someone. You were in *direct* conversation with  
2 someone.

3 CHAIR ACZON: Commissioner Estes, could  
4 you identify the person with you.

5 MR. BELLES: Oh. My name is Michael  
6 Belles. I'm an attorney with the Applicant Solarcity.  
7 I was the attorney before the Planning Commission of  
8 the County of Kaua'i.

9 (pause)

10 COMMISSIONER MAHI: Is this procedural?  
11 Is this correct procedure?

12 MS. ERICKSON: He is allowed to attend as  
13 a member of the public.

14 COMMISSIONER MAHI: And have discussion  
15 with the Commissioner, have an *open* discussion in  
16 terms of what was proceeding, in terms of how we're  
17 gonna vote on this issue? Is that proper?

18 MR. BELLES: Commissioner, just for the  
19 record, I only asked who the second vote was and that  
20 was it. That was the extent of my discussion with the  
21 Commissioner on Kauai.

22 COMMISSIONER MAHI: This is mud!

23 COMMISSIONER ESTES: I apologize, Aaron.  
24 I didn't even remember doing that. No, it certainly  
25 is not appropriate for me to talk to anybody about the

1 voting. And I apologize. I did not recall doing  
2 that. I was --when we were off the air I was talking  
3 with Mr. Belles about Mexico. So if I did that I --

4 COMMISSIONER MAHI: I *distinctly* heard --I  
5 *distinctly heard*, Commissioner Estes, "We have 2 and  
6 6!" I heard that! "We have 2 for -- I mean 4 *for it*  
7 *and 2 against*." You said, "*Mahi and Scheuer are*  
8 *against it*." I heard that. That's... a... very...  
9 plain... and...open...discussion. And I'm *embarrassed*  
10 that you took *that liberty to expose the proceedings*  
11 *of our deliberations. I protest!!*"

12 COMMISSIONER ESTES: Ari, I think you're  
13 absolutely right. I apologize. You're absolutely  
14 right. In politics I'm a natural vote counter. But  
15 you're absolutely right. I never should have said  
16 anything. Totally apologize.

17 COMMISSIONER MAHI: Thank you.

18 CHAIR ACZON: Thank you, Commissioner  
19 Mahi. Can we move on, Mr. Orodenger?

20 MR. ORODENKER: Thank you, Mr. Chair.  
21 Once again the motion is to adopt the order approving  
22 Solarcity Corporation's Special Permit for real  
23 property situated on Kapai'a, Hanamaula, Lihu'e,  
24 Kaua'i. Commissioner Estes?

25 COMMISSIONER ESTES: Yes.



1 MR. ORODENKER: Commissioner Cabral?

2 COMMISSIONER CABRAL: Yes.

3 MR. ORODENKER: Commissioner Mahi?

4 COMMISSIONER MAHI: Nay!

5 MR. ORODENKER: Commissioner Wong?

6 COMMISSIONER WONG: Aye.

7 MR. ORODENKER: Commissioner Scheuer?

8 VICE CHAIR SCHEUER: No.

9 MR. ORODENKER: Commissioner McDonald?

10 COMMISSIONER McDONALD: Yes.

11 MR. ORODENKER: Commissioner Hiranaga?

12 COMMISSIONER HIRANAGA: Aye.

13 CHAIR ACZON: Aye.

14 MR. ORODENKER: Thank you, Mr. Chair. The  
15 motion carries 6 votes to 2.

16 CHAIR ACZON: Thank you. The motion  
17 passed. Is there any other business for the day?

18 VICE CHAIR SCHEUER: Mr. Chair, I'd like  
19 to ask that on our next agendas through the  
20 legislative session we add to the agenda an update on  
21 any bills or other legislative action that might be  
22 affecting the Land Use Commission?

23 CHAIR ACZON: Yes. The staff will be  
24 doing that.

25 MR. ORODENKER: Mr. Vice Chair, we will

1 make an effort to do that and make sure that that  
2 happens.

3 CHAIR ACZON: If there's no further  
4 business I declare this meeting adjourned. Thank you,  
5 everybody.

6 (Proceedings adjourned at 10:00 a.m.)

7 --00--

8  
9 COMMISSIONER ESTES: There was a tremendous  
10 amount of detail consideration. I'd like to just  
11 thank everybody on this group who gives to the matters  
12 at hand. And while we might not always agree I think  
13 that it's a level of acceptance of open discussion and  
14 consideration that things be done right is very  
15 admirable. And I thank you all for your good efforts  
16 to be honest and ethical.

17 CHAIR ACZON: Thank you, Commissioner.

18 (Gavel. Proceedings adjourned at 10:00 a.m.)

19  
20 --00--

21  
22  
23  
24  
25

## C E R T I F I C A T E

I, HOLLY M. HACKETT, CSR, RPR, in and for the  
State of Hawai'i, do hereby certify;

That I was acting as court reporter in the  
foregoing LUC matters on the 27th day of January 2016;

That the proceedings were taken down in  
computerized machine shorthand by me and were  
thereafter reduced to print by me;

That the foregoing represents, to the best  
of my ability, a true and correct transcript of the  
proceedings had in the foregoing matters.

DATED: This 3rd of February 2016

---

HOLLY M. HACKETT HI CSR, RPR  
Certified Shorthand Reporter

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

HOLLY M. HACKETT RPR, CSR