

LAND USE COMMISSION

STATE OF HAWAII

September 6, 2018

Commencing at 9:30 a.m.

Natural Energy Laboratory Hawai'i Authority

73-987 Makako Bay Drive

Hale 'Iako Training Room #119

Kailua-Kona, Hawaii 96740

AGENDA

I. Call to Order

II. Adoption of Minutes

III. Tentative Meeting Schedule

IV. Action-A06-767 Waikoloa Mauka LLC, (Hawai'i)
Consideration and action on A06-767 Waikoloa
Highlands, Inc's Motion to Continue Hearing on
Order to Show Cause

VI. Adjournment

BEFORE: Jean Marie McManus, CSR #156

APPEARANCES

COMMISSIONERS:

JONATHAN SCHEUER, Chairperson

LEE OHIGASHI

EDMUND ACZON

GARY OKUDA

ARNOLD WONG

DAWN CHANG

RANDALL S. NISHIYAMA, ESQ.

Deputy Attorney General

STAFF:

DANIEL ORODENKER, Executive Officer

RILEY K. HAKODA, Chief Clerk/Planner

SCOTT A.K. DERRICKSON, AICP

STEVE LIM, ESQ.

NATALIA BATICHTCHEVA

JOE LaPINTA

For A06-767 Waikoloa Mauka

DAWN APUNA, ESQ.

Deputy Attorney General

State of Hawai'i

RON KIM, ESQ.

Deputy Corporation Counsel

County of Hawai'i

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1 CHAIRPERSON SCHEUER: Aloha, good morning.

2 This is the September 6, 2018 Land Use
3 Commission Meeting.

4 Our first order of business is adoption of
5 the August 8, 2018 minutes. Are there any
6 corrections or comments on the minutes?

7 Hearing none, is there a Motion to Adopt?

8 COMMISSIONER WONG: Move.

9 CHAIRPERSON SCHEUER: Motion has been made
10 by Commissioner Wong.

11 COMMISSIONER OHIGASHI: Second.

12 CHAIRPERSON SCHEUER: Seconded by
13 Commissioner Ohigashi. Any discussion?

14 All in favor say "aye", opposed? The
15 minutes are unanimously adopted.

16 Next is our tentative schedule. Mr.
17 Orodanker.

18 EXECUTIVE OFFICER: Thank you, Mr. Chair.

19 On September 13th we will be on Maui for
20 the Hale Mua Order to Show Cause.

21 On September 27, we will be on Big Island
22 for Mauna Kea, Motion to Extend Time and Adoption of
23 the Form of the Order on this matter.

24 On October 24th we will tentatively be here
25 on Big Island again for any continued matters

1 associated with this docket number.

2 On November 14th, we will be on Oahu for
3 Kapolei Motion to Extend.

4 And on Thursday 15th we will be on Maui for
5 the Emmanuel Lutheran Motion to Amend.

6 And on November 28th, we will be here once
7 again for the HHFDC matter.

8 And on the 29th, we will again be on Maui
9 for adoption of orders and any outstanding matters.

10 On December 12th, I believe the Honoua'ula
11 Ranch status report is also heard on Maui.

12 That takes the calendar up to the end of
13 the year.

14 CHAIRPERSON SCHEUER: Are there any
15 questions? Thank you, Dan.

16 Our next agenda item Hearing and Action
17 Meeting on Docket No. A06-767, Waikoloa Mauka LLC to
18 consider a Motion to Continue Hearing on Order to
19 Show Cause as to why approximately 731.581, Tax Map
20 Key No. (3)6-8-02:016 (portion), should not revert to
21 its former land use designation or be changed to a
22 more appropriate classification.

23 Will the parties please identify themselves
24 for the record?

25 MR. LIM: Good morning, Mr. Chairman,

1 Members of the Commission, Steven Lim representing
2 the Petitioner Waikoloa Highlands, Incorporated.

3 MS. BATICHTCHEVA: (Unidentifiable words).

4 COURT REPORTER: I'm sorry, I didn't
5 understand anything that was just said.

6 CHAIRPERSON SCHEUER: Mr. Lim, would you
7 introduce your --

8 MR. LIM: Sure. Seated to my right is the
9 representative for this Petition, Natalia
10 Batichtcheva. I still can't say it right.

11 To her right is our project manager Joe
12 LaPinta.

13 MR. KIM: Ron Kim, Deputy Corporation
14 Counsel appearing on behalf of the County and
15 Planning Director in this matter.

16 Accompanying me is Mr. Jeff Darrow, who is
17 Planning Program Director with the Planning
18 Department -- Manager, Planning Program Manager at
19 the Department.

20 MR. DARROW: Just got promoted.

21 CHAIRPERSON SCHEUER: Congratulations.

22 MS. APUNA: Good morning, Chair and members
23 of the Commission, Deputy Attorney General Dawn Apuna
24 on behalf of State Office of Planning.

25 CHAIRPERSON SCHEUER: You've been sent

1 unaccompanied today. Thank you.

2 Let me update the record.

3 On May 23rd, 2018, this Commission held a
4 meeting to hear a status report on this docket. No
5 Petitioner representatives appeared to provide a
6 status report. The Commission voted in favor of a
7 motion to prepare an Order to Show Cause why the
8 property should not be reverted to its former land
9 use classification or be changed to a more
10 appropriate land use classification.

11 On June 13th, 2018, the Commission received
12 Notice of Representation correspondence from
13 Carlsmith Ball, Mr. Steven Lim.

14 On July 2, 2018, the Commission mailed or
15 emailed an Order to Show Cause Notice to Appear to
16 the Petitioner, its representative, as well as to
17 Office of Planning and County officials.

18 On July 16th, 2018, the Commission received
19 an email advising of a new email address for Natalia
20 Batichtcheva.

21 On July 24th, 2018, the Commission received
22 Petitioner's Motion to Continue Hearing on an Order
23 to Show Cause Hearing.

24 On July 25th, the Commission received a
25 digital file of the Motion to Continue Hearing.

1 On August 14th, 2018, a Land Use Commission
2 agenda notice for August 22-23, 2018 meeting was sent
3 to the Parties and Statewide and Hawai'i mailing
4 lists.

5 On August 15, 2018, the Commission received
6 a County of Hawai'i's statement of No Objection to
7 the Petitioner's Motion to Continue the Hearing.

8 On August 16th, 2018, the Commission
9 received Petitioner's Letter and 2017-2018 Annual
10 Report and attachments dated August 15, 2018.

11 On August 17, 2018, Parker Ranch advised
12 the Commission by telephone voicemail that it would
13 not be attending the August 22, 2018 meeting.

14 On August 20th, 2018, Hawai'i Water Service
15 advised the Commission by telephone that West Hawaii
16 Water Company and West Hawaii Sewer Company would not
17 be attending the August 22, 2018 meeting.

18 On August 21st, 2018, the Commission
19 received public testimony from Cindy Kester and Julia
20 Alos via email.

21 Around 5:20 on August 21st, the Governor
22 announced that he was going to close all state
23 offices because of the pending hurricane, which led
24 to the cancellation of our August 22nd meeting.

25 On September 4th, 2018, the Commission

1 received additional public testimony from Julia Alos.

2 Now, let me briefly run over our procedure.

3 First, I'm going to provide for public
4 testimony calling for those who desire to provide
5 public testimony for this motion to identify
6 themselves.

7 When I call you, you will be called in turn
8 to our witness box, and I will swear you in prior to
9 your providing testimony. Please be aware that the
10 public testimony at this juncture is limited to
11 testimony on the Motion for Continuance. If the
12 Motion is denied, we will -- excuse me.

13 After today's hearing, we will schedule a
14 hearing on the Order to Show Cause. The public will
15 again be offered an opportunity to, at that
16 subsequent hearing, to provide testimony on the Order
17 to Show Cause itself, and to provide comments on the
18 substantive matters before the Commission.

19 The Commission will then begin proceedings
20 on the Motion to Continue Docket No. A06-767 starting
21 with the Petitioner presenting its case, followed by
22 County Planning Department as well as the Office of
23 State Planning.

24 The Petitioner may reserve a portion of
25 their time to respond to any comments made by the

1 County and the State Office of Planning.

2 It is the Chair's intent to close the
3 evidence on this Motion and for the Commission to
4 make a decision today on whether or not to continue
5 this Hearing.

6 If we decide to grant the Motion to
7 Continue, we may establish a date to continue
8 proceedings other than the planned future proceedings
9 date of October 24-25, or we may retain that date.

10 If the Commission denies the motion, the
11 Commission will begin proceedings on the Order to
12 Show Cause on October 24th and 25th.

13 Are there any questions on our procedures
14 for today?

15 MR. LIM: None for the Petitioner.

16 COMMISSIONER OHIGASHI: I have to make a
17 disclosure.

18 Mr. Lim, I have known him for many years
19 since I think law school, and we have -- we have had
20 what you call a social relationship during that time.
21 Mr. Lim did represent me in an incident or a matter
22 in the 1990's, 20 some years ago, which he was
23 properly compensated for.

24 However, that relationship and that
25 incident has nothing to do with the issues that are

1 before this body, and I feel that I can render a full
2 and fair decision in this matter.

3 CHAIRPERSON SCHEUER: Thank you,
4 Commissioner Ohigashi, for your disclosure.

5 Mr. Lim, any objection to Commissioner
6 Ohigashi's participation in the hearing?

7 MR. LIM: No objection.

8 CHAIRPERSON SCHEUER: Hawai'i County?

9 MR. KIM: No objection.

10 CHAIRPERSON SCHEUER: Could you move, just
11 for our audio purposes, closer to the microphone?
12 Almost kissing it seems to work well.

13 MR. KIM: No objection from the County.

14 MS. APUNA: No objection.

15 CHAIRPERSON SCHEUER: Thank you very much.
16 Any other disclosures by the Commission? Thank you,
17 Mr. Ohigashi.

18 So we are now to public testimony.

19 Are there any individuals desiring to
20 provide public testimony on the Motion for
21 Continuance?

22 Please come up to the public witness box.

23 Good morning. I will swear you in. I will
24 then ask you too identified yourself.

25 Do you swear or affirm that the testimony

1 you're about to give is the truth?

2 THE WITNESS: Yes, I do.

3 CHAIRPERSON SCHEUER: Please go ahead.

4 CINDY KESTER

5 Was called as a public witness, was sworn to tell the
6 truth, was examined and testified as follows:

7 DIRECT EXAMINATION

8 THE WITNESS: My name is Cindy Kester.

9 Good morning, on behalf of Julia Alos, I
10 Cindy Kester, wish to submit Ms. Alos's revised
11 testimony as she is traveling out of state, unable to
12 attend today's Land Use Commission hearing
13 rescheduled for September 6, 2018.

14 Regarding Docket A06-767 Waikoloa Mauka LLC
15 Show Cause, I wish to hereby respectfully request via
16 this testimony dated September 4th, 2018, a Motion to
17 Continue the Order to Show Cause Hearing to a future
18 date when I will be able to attend.

19 I wish to be present to better observe,
20 prepare and participate with future testimony on a
21 new date. I have grave concerns that the
22 Petitioner's lack of progress in developing the
23 property as approved continues to negatively impact
24 my community at Waikoloa Village.

25 I hope the Land Use Commission will favor

1 this motion requesting continuance and schedule a new
2 date no sooner than September 12, 2018.

3 Mahalo for your consideration.

4 Respectfully, Julia A. Alos.

5 CHAIRPERSON SCHEUER: Mahalo.

6 Are there any questions for the witness,
7 Petitioner?

8 MR. LIM: Just a couple.

9 CHAIRPERSON SCHEUER: Like the other
10 people, can you move as close to the microphone as
11 possible?

12 CROSS-EXAMINATION

13 BY MR. LIM:

14 Q I'm Steve Lim, the attorney for Petitioner.

15 Do you know where Julia Alos lives?

16 A She lives at Waikoloa Village.

17 Q Do you know what her specific issue with
18 the project is?

19 A The specific issue with the project is that
20 the delay that isn't getting anything done, means
21 that the roundabout has now been constructed at the
22 intersection of Paniolo, Waikoloa Road and Puu --
23 (inaudible).

24 Q Thank you very much. No further questions.

25 CHAIRPERSON SCHEUER: Thank you. County?

1 MR. KIM: No questions from the County.

2 CHAIRPERSON SCHEUER: Office of Planning?

3 MS. APUNA: No questions.

4 CHAIRPERSON SCHEUER: Commissioners? Don't
5 mind my twisting around. Our set up is a little
6 unusual. Thank you very much.

7 Are there any other public witnesses?
8 Seeing none, that's the completion of public
9 testimony.

10 Mr. Lim, you can proceed?

11 MR. LIM: First of all, we would like to
12 thank the Commission for scheduling a special meeting
13 for us. We know that it was challenging for all
14 parties to try to get to this day.

15 We would like to apologize on behalf of
16 Petitioner for the nonappearance at the May 23rd
17 original hearing.

18 As you hear our presentation, and I think
19 you've seen from some of our pleadings, essentially
20 what we are doing is starting with a brand new
21 development team. Everybody that was subsequently
22 involved in the project previous to this is gone, and
23 we can't find the records for the most part.

24 We do thank you for your consideration.
25 One procedural request up-front is I'd like to

1 request that the Commission formally accept into the
2 record for this hearing both the pleadings that we
3 filed on July 24th, a Motion to Continue the Hearing,
4 and on August 6th, a statement of position on the OSC
5 so that those pleadings and exhibits are in the
6 record for the purpose of this Motion to Continue.

7 CHAIRPERSON SCHEUER: Are there any
8 objections from County or Office of Planning?

9 MR. KIM: No objection from the County.

10 MS. APUNA: No objection.

11 CHAIRPERSON SCHEUER: Any comments from the
12 Commissioners?

13 Hearing none, they are accepted into the
14 record.

15 MR. LIM: Another procedural
16 clarification -- because I'll forget to say it as I
17 go through the presentation -- we request that the
18 Commission consider that all references in Waikoloa
19 Heights, Incorporated, pleadings and hearing
20 testimony and argument regarding a person named
21 Stephan Martirosian, the former director of Waikoloa
22 Mauka, are merely allegations of misconduct and not
23 representations of fact as Mr. Martirosian, although
24 he's in jail in Russia, has not been convicted of any
25 crimes to date.

1 To be clear, Waikoloa Heights, the current
2 Petitioner, has absolutely no current relationship
3 with Mr. Martirosian or Mr. Michael Miroyan of
4 Hawaiian Riverbend, who has also been mentioned in
5 some of the news articles that we have seen on this
6 project. Thank you very much.

7 The Waikoloa Highlands project that you've
8 seen today is a very unusual project. Typically you
9 will see a project come in that has vacant land
10 coming in for the State Land Use change from
11 Agricultural to Conservation to Urban or maybe Rural.
12 In this case, the Petition Area was first zoned
13 Residential Agricultural one acre, the way it is
14 today, 28 years ago in 1990. So it's been zoned, the
15 same has been zoned today with the County of Hawaii
16 since 1990.

17 Since then it's gone through another
18 approximately four amendments of the rezoning
19 ordinance to address certain infrastructure issues
20 and timing.

21 The last amendment was in 2013, which was
22 after the Decision and Order was issued in this case
23 in 2008.

24 In fact, the reason why -- the very reasons
25 why this project is in front of Land Use Commission

1 was that in the County's rezoning in 2007, the zoning
2 ordinance had a condition of approval that required
3 reclassification of land from its State Land Use
4 Agricultural to the Rural classification, and that's
5 why we ended up here in the first place.

6 So I would like the Commission to remember
7 these historical facts when it comes to considering
8 our eventual request on the Motion to Continue.

9 The Petitioner's development team is
10 entirely new. This project is -- Ms. Batichtcheva is
11 representative of the owner in the United States, and
12 the owners are in Russia. They make all the
13 decisions on the project, she just implements.

14 With the departure of Mr. Martirosian, who
15 was the former director and ran the company for over
16 ten years, I think. He was a trusted associate. He
17 had ultimate discretion to deal with the project. As
18 you probably read it in the Tummons articles, he did
19 a lot of things that were not proper, and that's why
20 there's lawsuits, criminal indictments against him
21 both in Russia and the United States.

22 The new Waikoloa team consisting of Natalia
23 and Mr. LaPinta here is reviewing the project with
24 new eyes. Usually you see a developer, they've been
25 working on the project for ten years, maybe more,

1 20 years in some cases.

2 In fact, what you are seeing is the
3 development team right now that started work in June
4 and July of this summer, just 60 days ago probably,
5 and that is why we've come up with a different
6 request regarding the OSC.

7 We have discussed this briefly with the
8 County and with OP. And I can go through that in
9 more detail the later portion of my presentation.

10 Much has been written about this project.
11 The Petitioner found in July 2018 edition of the
12 Environmental Hawai'i called it "Stanger than Fiction
13 - the Waikoloa" --

14 However, all of that is, I think, a
15 distraction to what we are trying to do here, what
16 we're trying to accomplish with our current
17 development team. Waikoloa has allegedly (inaudible)
18 -- both criminal and civil, and the courts are taking
19 care of those issues.

20 The main focus of the Petition now is to
21 recover what they can of the project's work product
22 and take the necessary steps to amend both the County
23 zoning and the Commission's Decision and Order to
24 reflect the current status of the project.

25 The difficulty that we have had, because of

1 the short timeframe, is because not only do we have
2 decision-makers in Russia, but also have a relatively
3 new development team. We have been trying to meet
4 with the Planning Department for the past month or
5 so, and we only met with them and their counsel this
6 past Tuesday, day before yesterday. They have been
7 hard at work basically pulling double jobs doing
8 their jobs at the County, plus helping out the Civil
9 Defense emergencies. I know the Corporation
10 Counsel's office has been out with Civil Defense. I
11 know Jeff Darrow has been pulled aside to do a lot of
12 emergency response things for the County. So we were
13 not able to meet with them before this week.

14 We think we have come up with a plan, and
15 I'll outline that for you with respect to this OSC.

16 Essentially what we have done is to -- and
17 this was at the request of State Office of Planning
18 originally -- was to try to find a middle ground
19 where the State Office of Planning would be
20 comfortable that no further groundwork would be done
21 at the project, and we could have the freedom to do
22 certain things on the land that were needed in terms
23 of entitlements and things, and that in the meantime
24 we would process land use entitlements so that we
25 could essentially reinvigorate the project and

1 address the issues that you raised in the Order to
2 Show Cause.

3 I've discussed with them a stipulation of
4 the parties that we would continue the hearing on the
5 Order to Show Cause on the substantive merits of the
6 Order to Show Cause until the earlier of the
7 following:

8 Number one, the Waikoloa Heights
9 Incorporated receives Final Approval from the County
10 of Hawaii of amendments to Zoning Ordinance 13-29; or
11 the Commission's first scheduled meeting in
12 September 2019, about a year from now, or any date
13 thereafter as determined by the Commission.

14 CHAIRPERSON SCHEUER: Are you reading from
15 your proposed stipulation language that you provided
16 immediately prior to this hearing to the Office of
17 Planning and County?

18 MR. LIM: That's correct. I have a couple
19 copies. We just a received approval from the client
20 15 minutes ago to propose this. I'll go through the
21 explanation.

22 I'll pass a copy to the County's
23 attorney -- excuse me -- I passed a copy to the
24 Commission's attorney and a copy to the Chair.

25 Essentially, rather than me read it, I'll

1 try to explain.

2 Essentially, what we would do is, in light
3 of the new project development team coming on board,
4 we would like to go back to the County to refresh the
5 zoning, because both the State Land Use Commission
6 and County zoning had time limits in them, and both
7 time limits have run out, so we have to change both.

8 The substantive issues on the development
9 with respect to the roundabout that was mentioned
10 earlier, on the timing of the phasing, how big Phase
11 I would be, those types of things are County zoning
12 issues and subdivision issues.

13 That's why we're suggesting that we go
14 there first and then come back to the Commission with
15 a Motion to Amend to effectively refresh the project
16 in your eyes.

17 So I know that's different than usually.
18 Usually the Land Use Commission action happens first,
19 then the County zoning, but because of the issue of
20 the project that's been zoned for 28 years now, and
21 the County has gone through four rezoning amendments
22 on the project, we think it's better to get those
23 issues resolved with the County.

24 Until we know that the County is going to
25 approve these amendments as proposed -- and we still

1 don't know what the range of the amendments are --
2 then there's no sense in us coming to the Land Use
3 Commission to try to tell you what we are going to
4 do, because we really don't know.

5 So that's why we're suggesting the
6 stipulation, and that the Commission will approve
7 this, which is essentially give us about a year to go
8 to the County to do the rezoning. If we don't finish
9 it by that time, we will come back September of next
10 year on the Order to Show Cause.

11 If we haven't shown adequate progress, then
12 we will proceed with the Order to Show Cause.

13 In the meantime, we would agree, the
14 Petitioner would agree not to conduct any groundwork
15 on the land of the Petition Area until the conclusion
16 of the Order to Show Cause or other resolution of
17 those issues.

18 We also have in the stipulation,
19 notwithstanding the other provisions to protect my
20 clients, the stipulation to stop work would
21 effectively be terminating automatically as of
22 December 31, 2019.

23 During the pendency of this rezoning
24 process we would retain the rights to do certain
25 activities and I listed them, and they are:

1 Land use permitting at the State and County
2 levels, fencing of the Petition Area, that's to keep
3 out goats and other -- to try -- if we need to try to
4 establish pasturage.

5 Environmental and engineering studies for
6 Petition Area, which will need to be continued.

7 Prior prevention measures. As you saw in
8 Waikoloa, there's a big danger for those who have
9 elected to (inaudible) -- and establishing a dry land
10 forest nursery within the Petition Area to raise
11 drought-resistant plants for landscaping of the
12 Petition Area.

13 That's all part of the plan for the project
14 landscaping.

15 As you may know, if you've ever driven up
16 towards Waikoloa Village, it is on the south side,
17 the Kona side of Waikoloa Road, and is very dry
18 there, very windy.

19 And finally, that nothing in the
20 stipulation would waive the Applicant's --
21 Petitioner's right to argue in the Order to Show
22 Cause proceedings that Waikoloa Mauka and Waikoloa
23 Highlands have substantially commenced the use of the
24 Petition Area as we have argued in our pleadings thus
25 far.

1 So that's essentially the nuts and bolts of
2 it. I apologize for essentially springing it on you
3 at the last minute. We didn't get word, like I said,
4 until five minutes before the hearing started from
5 our clients back in Russia.

6 The difficulty the Hawai'i team has had in
7 communicating, it's not only a language difficulty,
8 it's a substantive knowledge difficulty. Like I
9 said, usually you're dealing with developers who are
10 very experienced; they've been working on the project
11 for ten or 15 years by the time you call them in on
12 the Order to Show Cause.

13 Effectively what you've got now is a
14 Petitioner that's been worked on the project for 60
15 days or so. We have tried to get the project
16 documents from their files, both in California and
17 Russia, and have been unsuccessful.

18 We have had to recreate the project files
19 by going back to the consultant, such as the
20 engineers and archaeology, and getting copies of the
21 documents from them because they didn't have it in
22 the file.

23 Those are the challenges that we have been
24 working with, and that is why we are asking for the
25 Commission's approval for us to return to the County

1 to refresh the zoning, and then come back to the
2 Commission to amend the Decision and Order with
3 appropriate conditions.

4 Essentially that's our presentation on the
5 Motion to Continue, and I'll be ready for any
6 questions.

7 CHAIRPERSON SCHEUER: Thank you, Mr. Lim.

8 I will ask the parties to provide
9 questions. I just want to at this point clarify for
10 the record, because you have just handed over two
11 copies of this to the Land Use Commission Attorney
12 General and one copy for the Commission, that is not
13 part of the record yet.

14 County, do you have questions?

15 MR. KIM: The County doesn't have
16 questions.

17 CHAIRPERSON SCHEUER: Or comments?

18 MR. KIM: No, no real comments, no.

19 CHAIRPERSON SCHEUER: Office of Planning.

20 MS. APUNA: We don't have any questions,
21 but I would probably provide a little bit of
22 comments. I know I have time later to provide our
23 position, but I would just say that looking at the
24 stipulation, OP wouldn't sign it or agree to that
25 based on what's in the stipulation.

1 Maybe I'll just wait to provide our
2 conditions.

3 CHAIRPERSON SCHEUER: Thank you.
4 Commissioners? Mr. Ohigashi.

5 COMMISSIONER OHIGASHI: Does the County of
6 Hawaii agree to the stipulation?

7 MR. KIM: There's some language that I
8 might actually ask to have changed.

9 COMMISSIONER OHIGASHI: So no?

10 MR. KIM: Not in its present form, but
11 generally speaking, I think we could agree to the
12 concept of it.

13 CHAIRPERSON SCHEUER: Commissioner Chang.

14 COMMISSIONER CHANG: My preference is to
15 hear Office of Planning's substantive statements
16 before posing any questions to Mr. Lim, because I
17 would like to hear what Office of Planning's comments
18 are.

19 MS. APUNA: Thank you. Well, first --

20 CHAIRPERSON SCHEUER: Please proceed.

21 MS. APUNA: Office of Planning does not
22 oppose the original motion for continuance, but what
23 we would like to ask the Petitioner is that they halt
24 any development on the land as well as any
25 entitlements until the Order to Show Cause hearing,

1 and that's basically all that we are asking for.

2 CHAIRPERSON SCHEUER: Commissioner Chang.

3 COMMISSIONER CHANG: Thank you.

4 As I understand it, I think substantively
5 one of the main -- as I understand the proposed
6 stipulation, it is to hold that Order to Show Cause
7 hearing for a year, at which time they would be
8 doing -- they would be proceeding on basically a lot
9 of their entitlement and compliance.

10 So is OP's position to oppose that one-year
11 continuance? Because it does seem contradictory to
12 OP's position about no development activities and not
13 pursuing any entitlements.

14 MS. APUNA: Yeah, I think the timing of
15 this draft right before the hearing caught us off
16 guard. We were going on the assumption that this
17 would be a continuance for 30 days or whatever the
18 Commission decides.

19 So, yeah, that could be -- would be
20 contradictory to our position. We just want no
21 further development or entitlements until the Order
22 to Show Cause hearing, which we had assumed to be 30
23 days from now.

24 CHAIRPERSON SCHEUER: Commissioners?
25 Commissioner Wong.

1 COMMISSIONER WONG: I have several
2 questions. First to OP.

3 The Petitioner stated that they are
4 going -- want to go back to do the zoning issue with
5 the County. Would that be considered substantial
6 compliance in your eyes, in your opinion?

7 MS. APUNA: I don't think I can give you an
8 answer to that. Substantial commencement is on a
9 case-by-case basis. And my client, they're able to
10 waive the different factors to decide that, and I
11 wouldn't have an answer to whether that --

12 COMMISSIONER WONG: Okay.

13 Now, to the Petitioner. Would you consider
14 that substantial commencement?

15 MR. LIM: It's part of substantial
16 commencement, it could be, but, you know, once you
17 get into an Order to Show Cause box at the Land Use
18 Commission, it's very paradoxical, because here we
19 are, the Petitioner, with a new team that wants to
20 develop the project, and everybody is saying don't
21 develop the project.

22 It's a little bit of a confusing situation
23 for us. We are ready to proceed. We have gotten the
24 plans from the engineers, hired the archeologist.
25 There's been a lot of things that's already been done

1 for the project.

2 We submitted a drainage plan. They have
3 satisfied affordable housing requirements. They have
4 agreement to satisfy the park's requirement for the
5 County, but we are not sure we are going to follow
6 through with that because we don't understand the
7 deal on that, so we may change that and implement the
8 park at another location.

9 But there are things that we would like to
10 do to proceed with development of the project. I
11 think it's not the usual situation, where you have
12 the developer, the same person essentially not
13 proceeding with their project.

14 This was a project that was delayed by
15 fraud and mismanagement, allegedly. And essentially
16 I think now the owners in Russia do understand what
17 the Land Use entitlement process is in Hawai'i much
18 better, and that's why we are proceeding with what we
19 recommend to the Commission.

20 COMMISSIONER WONG: Because this was before
21 I was here in the Land Use, sitting in this seat. So
22 who's the owners? I mean, I know we have the
23 representative, but who are the owners of this
24 project or the land?

25 MR. LIM: The technical owner of the land

1 is Waikoloa Islands, Incorporated, and its
2 representative is here, and the president is
3 Batichtcheva -- I hope I say it right -- but we're
4 representing to the Commission that the decision
5 makers are back in Russia, and are -- they are not
6 part of Waikoloa Heights, Incorporated other than to
7 own the stock.

8 COMMISSIONER WONG: Let me go through this
9 because it's taking some time.

10 So the representative is here, but the
11 owners of the stock is in Russia, the big company?

12 MR. LIM: The companies that own the stock,
13 yes.

14 COMMISSIONER WONG: So they direct your
15 client from Russia, is that the way you stated
16 before; Is that correct?

17 MR. LIM: Now they do, that's correct.
18 Previous to 2017 they were leaving everything in Mr.
19 Martirosian's hands, and essentially found out during
20 2017 he was allegedly stealing money and conducting
21 business not in their business interest. They're
22 still uncovering things that they haven't known
23 before.

24 COMMISSIONER WONG: The question I have is,
25 my limited thinking right now because I just came

1 back, is do we have any statement or seal saying you
2 are the representative or you are -- you know,
3 something from the stockholders to say you own, you
4 are representing us, instead of this other guy?

5 How do we -- you know, some sort of
6 paperwork or something saying you are the guy now
7 instead of another guy?

8 MR. LIM: I think we have given you the
9 articles of incorporation in Colorado.

10 COMMISSIONER WONG: But nothing from
11 Russia?

12 MR. LIM: No, and like most corporations,
13 you won't have something from Japan or Korea or
14 Russia.

15 COMMISSIONER WONG: Usually when we work
16 with people here, they're here, the guy is here. So
17 you can reach out, touch them, not reach out and
18 phone somebody.

19 The second thing I was going to ask is,
20 this was 2008 the project was approved. Was there an
21 EIS done, or is the EIS considered still now? Or do
22 we have to redo the EIS?

23 MR. LIM: The project -- we did an EIS and
24 the Land Use Commission accepted it and it's still
25 consistent with the project.

1 COMMISSIONER WONG: Even after so many
2 years? Because I know there's in the Turtle Bay
3 issues and other issues where things get stilled and
4 they have to be re-reviewed.

5 MR. LIM: This is now about a ten-year old
6 EIS, which in EIS terms is not that long. Turtle Bay
7 I think was something like 20 years.

8 COMMISSIONER WONG: Just because you said
9 you may tweak the project, so that wouldn't have a
10 trigger to do a new EIS then, right?

11 MR. LIM: It could. We just don't know.
12 Like I said, we are just on the project for 60 days
13 now. We're seeing there's certain things we would
14 like to change, timing of certain improvements we'd
15 like to change, but that's all County level. That's
16 why we requested time to go down, do the change in
17 zoning, and then come back to the Commission to amend
18 the D and O.

19 COMMISSIONER WONG: I'm good, thank you.

20 CHAIRPERSON SCHEUER: Commissioner Okuda.

21 COMMISSIONER OKUDA: Thank you, Mr. Chair.

22 Mr. Lim, my questions are just focused on
23 the narrow issue here on a Motion to Continue the
24 OSC. So I'm going to try, if possible, to stay away
25 from the merits or lack of merits of the project or

1 things like that, but if I do ask questions, it's
2 simply intended to go to the issue of the Motion to
3 Continue.

4 Can I first ask you a standard or review
5 question?

6 What standard should the Commission apply
7 in determining or deciding whether to continue this
8 motion? Would you agree that it's an abuse of
9 discretion standard?

10 MR. LIM: Clearly erroneous abuse of
11 discretion standard, I think.

12 COMMISSIONER OKUDA: Okay, so just to put
13 it in plain English, it's one of the lower standards
14 as far as an appellate court overturning the
15 Commission's decision whether to grant the
16 continuance or deny the continuance, correct?

17 MR. LIM: Correct, it's not like a strict
18 scrutiny or the other higher levels of scrutiny.

19 COMMISSIONER OKUDA: If I can follow up on
20 a question Commissioner Wong raised.

21 Even though of course the rules of circuit
22 court don't apply here, the reason -- my thought
23 process is I think like Rule 12.1 of the rules of
24 circuit court kind of supports what Commissioner Wong
25 is asking.

1 Can you give us, and spell out for the
2 record the names of the specific people, specific
3 individuals who are considered the decision-makers
4 with respect to this project on behalf of your
5 client?

6 You did reference that you had to seek
7 approval of decision-makers outside of Hawai'i, and
8 there's nothing wrong with, you know, people from
9 outside of Hawai'i, law makes no distinction one way
10 or the other, but I think just for the record, we
11 should know the specific names of the specific people
12 who are considered by you as the decision-makers.

13 MR. LIM: My clients and their
14 decision-making team is Natalia, sitting next to me,
15 and Valeriy, V-A-L-E-R-I-Y.

16 COMMISSIONER OKUDA: Is that first name or
17 last name?

18 MR. LIM: First name.

19 COMMISSIONER OKUDA: What about the last
20 name of this person Valeriy?

21 MR. LIM: Grigoryands.

22 COMMISSIONER OKUDA: Can you spell that for
23 the record?

24 MR. LIM: G-R-I-G-O-R-Y-A-N-D-S.

25 COMMISSIONER OKUDA: What is that person's

1 connection with your client Waikoloa Highlands,
2 Incorporated?

3 MR. LIM: Those are shareholders. The
4 representative shareholder is Ovasafyan Aykaz, and
5 I'll spell that, O-V-A-S-A-F-Y-A-N A-Y-K-A-Z.

6 COMMISSIONER OKUDA: The people that you
7 spelled out, are they all the decision-makers with
8 respect to this project, or are there anyone else who
9 are considered decision-makers regarding this
10 project?

11 MR. LIM: That's all that I'm aware of.

12 COMMISSIONER OKUDA: In your moving papers,
13 you made certain statements about the fact that your
14 client, Waikoloa Highlands, Incorporated, is an
15 entity separate from the original Petitioner Waikoloa
16 Mauka LLC, correct?

17 MR. LIM: It's a separate company.

18 COMMISSIONER OKUDA: Did these companies at
19 any time, at any time, have shareholders or identical
20 shareholders even if the amount of shares might have
21 been different?

22 MR. LIM: Waikoloa Mauka was a limited
23 liability company, so they had membership interest.
24 But I think -- I'm not sure about any time, but as
25 far as I'm aware for the relevant time the Land Use

1 Commission has been looking at this, I believe
2 they're the same control group.

3 I think we can say that they have the same
4 control group with the exception of Mr. Martirosian.

5 COMMISSIONER OKUDA: With the exception of
6 Mr. Martirosian, in other words, the group that was
7 controlling Waikoloa Mauka LLC was and is the same
8 group that controls Waikoloa Highlands, Incorporated;
9 is that correct?

10 MR. LIM: Essentially, yes.

11 Like I said, I don't have the roster of the
12 members versus stockholders, but I believe it's the
13 same people.

14 COMMISSIONER OKUDA: So we are basically
15 dealing with the same people that were involved with
16 Waikoloa Mauka LLC with the exception of Mr.
17 Martirosian, correct?

18 MR. LIM: Yes, but effectively -- that's
19 why I made that presentation earlier, Mr. Martirosian
20 was the face of Waikoloa Mauka LLC during the
21 proceedings, and effectively had control of the
22 project, and the owners back in Russia didn't know
23 what he was doing.

24 COMMISSIONER OKUDA: I understand that.
25 But at the same time you stated for the record that

1 those are only allegations, not a finding of an
2 applicable court, whether it's criminal or civil,
3 whether in Russia or any other country; correct?

4 MR. LIM: Correct.

5 COMMISSIONER OKUDA: So even getting away
6 from the issue of whether or not an agency of the
7 State of Hawaii is bound by a finding or judgment of
8 a foreign court, the bottom line is we're not even
9 dealing with that, so these are just allegations, and
10 for purposes of this record, they're still unproven
11 allegations; correct?

12 MR. LIM: True. It's something we are
13 alleging is true and, of course, like I said, Mr.
14 Martirosian has been in Russian jail for the last
15 several months.

16 COMMISSIONER OKUDA: I don't want to debate
17 this.

18 Do you agree that the Land Use Commission
19 should not be making decisions, not only in this
20 case, but any other case, based on allegations, but
21 we have to make our decision based on evidence that's
22 recognized by the statutes and the cases as set forth
23 in the cases and the statutes of Hawai'i?

24 MR. LIM: Right. We are alleging the acts
25 that are the bad acts, we're standing by our

1 position.

2 COMMISSIONER OKUDA: Yeah, but again, these
3 are allegations, not findings; correct?

4 MR. LIM: There is not a court finding yet.

5 COMMISSIONER OKUDA: If we took a decision
6 because somebody alleged -- and I'm not saying this
7 is true -- that you're a bad guy and we shouldn't
8 believe you, I mean, you would take offense to us
9 making a decision based that way; correct?

10 MR. LIM: Sure, but I think the record
11 shows that the acts that are alleged resulted in the
12 failure to develop the project in a timely basis.

13 COMMISSIONER OKUDA: And, again, maybe that
14 would be an issue in an Order to Show Cause Hearing,
15 but can I ask you this?

16 Can you point to any authority, statutory
17 or case, that indicates fraud or mismanagement or
18 stupidity of a member of an applicant discharges or
19 excuses compliance with a condition imposed by the
20 Land Use Commission?

21 MR. LIM: I can't cite a case right now,
22 but that is a fact. That's simply what happened.

23 COMMISSIONER OKUDA: But you do agree that
24 the Land Use Commission should take actions only if
25 it's authorized either by statute or case law to take

1 those actions; correct?

2 MR. LIM: Of course.

3 CHAIRPERSON SCHEUER: Commissioner Okuda, I
4 want to take a break within five minutes or so, just
5 to give you a sense of timing.

6 COMMISSIONER OKUDA: Let me just ask a
7 couple more questions. Let me do this, let me yield
8 the floor to somebody else. I've asked a bunch of
9 questions.

10 CHAIRPERSON SCHEUER: We can go back to
11 Commissioner Wong.

12 COMMISSIONER WONG: I have a question that
13 the gentleman Martin --

14 MR. LIM: Martirosian.

15 COMMISSIONER WONG: He has no position with
16 the company at all, no connection no shareholder's
17 interest at all?

18 MR. LIM: None at all. He was a director
19 and he was running the company, but because of his
20 fraudulent and criminal acts that are alleged, he was
21 fired and subsequently he was taken to prison based
22 upon criminal charges.

23 COMMISSIONER WONG: But is there a document
24 to say he was -- you know how you get released and
25 sometimes the corporation will say you're released,

1 he has no connection.

2 Is there any document to show that?

3 MR. LIM: We don't have the resignation
4 papers, but I think we can get that for the
5 Commission if that's desired.

6 COMMISSIONER WONG: Yes, please, as soon as
7 possible if you can show us that documentation, send
8 it to the staff.

9 CHAIRPERSON SCHEUER: Slightly out of
10 order, but because of this flow, I'll just point out,
11 Mr. Lim, your Exhibit 5 that was appended to your
12 statement of position, it didn't contain the
13 appointment of Ms. Batichtcheva, is that correct,
14 appointing her to manage the affairs? And it shows
15 that Ovasafyan Aykaz was 80 percent owner of the
16 company, and that Mr. Martirosian was still a
17 20 percent owner of the company.

18 So you've provided nothing to us so far.
19 While you said in the record he has nothing to do
20 with the company, you've not yet provided anything to
21 us to substantiate that.

22 MR. LIM: My client is telling me they have
23 documentation but not here.

24 CHAIRPERSON SCHEUER: Commissioners, any
25 questions before we take a break? Commissioner

1 Chang.

2 COMMISSIONER CHANG: Mr. Lim, I'll try to
3 keep it short. This is a Motion to Continue, and
4 what you've presented today is a request to
5 essentially continue the Order to Show Cause for a
6 year, upon which you would do several things that
7 you've identified in the stipulation.

8 And one of them was meeting with the
9 County. Personally I'm very uncomfortable with the
10 year continuance given the lack of -- the delay. But
11 on the other hand too, if you do have the ability to
12 do this project in compliance with the Land Use
13 Commission, the conditions I think that's -- I have
14 no objections to that. But the year I have a real
15 difficulty.

16 Meeting with the County, because I
17 understand that is a fundamental resolution to
18 whether the project can proceed.

19 Now, what can you accomplish with the
20 County in 30 to 60 days?

21 MR. LIM: I can't accomplish much. We will
22 have to file a rezoning application under the plan
23 proposed. I probably need 60 days to get an updated
24 traffic report, things that are needed for the
25 rezoning application. So maybe 60 to 90 days and I'd

1 file the application.

2 Typically a rezoning application from the
3 date you file it takes somewhere in the neighborhood
4 of ten months or so. That's why I asked for the
5 12-month period was the three months to get ready to
6 file the application and process it for another maybe
7 eight or nine months.

8 And we would be willing to come back to the
9 Commission within six months with a status report,
10 whatever it takes. But unless we are allowed to go
11 forward on that basis, then we're just into the Order
12 to Show Cause substance of the hearing and nothing is
13 getting done on the project. Our position is we want
14 to move forward with the project.

15 CHAIRPERSON SCHEUER: Let's take a
16 five-minute recess.

17 (Recess taken.)

18 CHAIRPERSON SCHEUER: We're back on the
19 record. And we are in the portion of the hearing
20 where we're asking questions of Mr. Lim and the
21 Petitioner.

22 COMMISSIONER OHIGASHI: Mr. Chair, since we
23 haven't had a chance to review what Mr. Lim has
24 submitted, and our Attorney General here has a draft,
25 take a look at it, I'd like to move for Executive

1 Session to consult with our attorney regarding the
2 terms and conditions of the stipulation and the
3 effect it has on today's proceedings.

4 CHAIRPERSON SCHEUER: Is there a second?

5 COMMISSIONER CHANG: Second, I second the
6 motion.

7 CHAIRPERSON SCHEUER: A motion to go into
8 Executive Session has been made by Commissioner
9 Ohigashi, seconded by Commissioner Chang.

10 Discussion of the motion? Hearing none,
11 all in favor? Any opposed? Motion carries. The
12 Commission will go into executive session.

13 (Executive Session.)

14 CHAIRPERSON SCHEUER: We're back on the
15 record. Continuing with questions for the
16 Petitioner. Mr. Okuda.

17 COMMISSIONER OKUDA: Thank you.

18 Mr. Lim, can I ask you, what is your offer
19 of proof regarding documents that you seek from
20 foreign lands?

21 MR. LIM: Our offer of proof on documents
22 from foreign lands, it is really the project files.
23 We haven't been able to locate any of the project
24 files either in California or Russia to date.

25 I do not know whether they can be found.

1 Like I said, this is situation where Mr. Martirosian
2 controlled everything.

3 COMMISSIONER OKUDA: Can you be more
4 specific? Can you be more specific as far as what
5 you believe these documents that you're seeking the
6 continuance to get, what would these documents show?

7 In other words, when I ask for offer of
8 proof, it's what would these documents show?

9 MR. LIM: The documents would show that the
10 Petitioner in this case proceeded with substantial
11 commencement of the development of the project.

12 We have been able to obtain some of the
13 documents on our own through Mr. LaPinta, dealing
14 with engineers and archeologists. Those are the
15 types of things that you would normally think would
16 be in the company files, but they are not. Those
17 would prove the substantial commencement of the
18 project.

19 COMMISSIONER OKUDA: Can you be more
20 specific as far as what specific types of documents?
21 Can you describe the documents that you believe that
22 you could state in an offer of proof would show
23 substantial commencement with respect to the project?

24 MR. LIM: As I detailed in my memo, this is
25 a proposed subdivision of 396 -- 398 lots in

1 Waikoloa. And there is not going to be any vertical
2 structures, basically lots only subdivision.

3 So when your objective is to subdivide and
4 sell the lots, as I detailed in the memo, you can get
5 subdivision approval and enter into contingency
6 contracts and sell the lots, presell the lots, and
7 then go into construction plan approvals, which we
8 submitted already to the County, drainage plan we
9 submitted to the County, those are the things that we
10 don't have, and we had to recreate.

11 The planning and engineering documents are
12 the things that show substantial commencement on
13 vacant lot subdivision. Once I get those plans
14 approved by the County, we can then mark construction
15 cost estimates, County approves those construction
16 cost estimates, then that becomes the basis for the
17 bond for the subdivision.

18 Once I post the subdivision bond and do the
19 agreement with the County to complete the project,
20 again, get final subdivision approval and we can sell
21 all the lots.

22 COMMISSIONER OKUDA: I don't mean to
23 interrupt but I guess I am.

24 Those documents that you're describing,
25 those documents are documents that should be in the

1 government file; correct?

2 MR. LIM: Some of them. Once they had been
3 filed, there are certain documents that we are aware
4 of because we have seen the invoices that we know
5 were prepared, but we don't have copies of.

6 COMMISSIONER OKUDA: Can you specifically
7 tell me what documents that you cannot obtain locally
8 in the State of Hawaii or elsewhere in the United
9 States, which you believe exists only in a location
10 outside of the United States? Can you give me an
11 offer of proof, if you can specifically describe
12 those documents?

13 The reason why I'm asking the question is
14 to determine whether or not we should exercise our
15 discretion in granting the request for continuance or
16 not. I think we have to evaluate whether or not in
17 fact that you really have documents which you can
18 obtain elsewhere; and number two, that the documents
19 in fact are relevant to the hearing on the Order to
20 Show Cause.

21 In other words, what documents can you
22 state or describe with specificity that you cannot
23 obtain here in the United States or State of Hawaii?

24 MR. LIM: I think that we can probably
25 obtain within the State of Hawaii. I think even in

1 California there's not going to be that much because
2 we have looked and there's nothing, so we could
3 recreate the file, and those would be things like the
4 construction drawings and the engineering plans.
5 There's a roundabout, and there's plans for that. We
6 know that the County has it, so we can get that.

7 But I cannot tell you that there is a magic
8 bullet, one document that's out there that we know is
9 out there. We don't have any foundation, don't have
10 any basis for what's there.

11 COMMISSIONER OKUDA: Thank you for your
12 answer.

13 CHAIRPERSON SCHEUER: Further questions,
14 Commissioners? Commissioner Wong.

15 COMMISSIONER WONG: So following up on
16 Commissioner's questioning. I'm still confused.

17 So the representations that you made today
18 for your client, and the representatives that you
19 have here, whatever they say can't be found?

20 MR. LIM: That's correct.

21 COMMISSIONER WONG: Let's say, they say
22 we're going to do this. That's guaranteeing that
23 whoever the stockholders are, are not going to say,
24 no, you can't see that?

25 MR. LIM: We have authorization to proceed

1 on the plan that I outlined to you before the recess.

2 CHAIRPERSON SCHEUER: Commissioner
3 Ohigashi, then Chang.

4 COMMISSIONER OHIGASHI: I'm not going to
5 call it a stipulation. So the document that you
6 provided was not for the purposes of agreement by the
7 parties at this point, it was for the purposes of
8 showing that this is your proposed plan?

9 MR. LIM: That is correct. And we started
10 to work on a stipulation maybe two weeks ago, when
11 the Office of Planning's attorney called me to
12 suggest that. So we just never got -- the big thing,
13 we just never got to meet with the County. We just
14 did that this week, like I said. So draft up the
15 stipulation and sent it out to my clients in Russia
16 and only got approval ten minutes before the hearing
17 started today.

18 COMMISSIONER OHIGASHI: Assuming we grant
19 the continuance, what is your proposal with regard to
20 a hearing date on the OSC, absent the agreed upon --

21 MR. LIM: If we're not allowed to go for
22 the rezoning?

23 COMMISSIONER OHIGASHI: The question is,
24 right now, this is a continuance, so absent the
25 conditions that you have outlined in there, in your

1 document you provided, because it's not been agreed
2 upon by all the parties, the question is:

3 Assuming that we grant the continuance, how
4 long after continuance to prepare for an OSC hearing
5 do you feel?

6 MR. LIM: We asked for no less than 60 days
7 originally when we first filed the motion, and that's
8 probably our request in this course if we have to go
9 and defend on the OSC.

10 We want to develop the project and we're
11 representing that to the Commission, and we will come
12 back every six months or whatever you want with
13 status reports on rezoning.

14 COMMISSIONER OHIGASHI: Assuming that there
15 is a continuance of 60 days, the question turns to me
16 is that during that 60-day period, are the parties --
17 and I only address the question to you, but I'm kind
18 of addressing it to everybody.

19 Are the parties going to be able to look at
20 a proposed stipulation prior to the OSC and discuss
21 this matter?

22 MR. LIM: We will try. I can't speak for
23 the County, but I believe that they are generally in
24 agreement with the concept. I don't know whether the
25 State is in agreement or not, but we would pursue

1 that.

2 COMMISSIONER OHIGASHI: Will we have
3 indication of where they're going on that from Dawn.

4 I don't have any further questions.

5 CHAIRPERSON SCHEUER: Commissioner Chang.

6 COMMISSIONER CHANG: Thank you.

7 Commissioner Ohigashi actually had
8 presented my question.

9 I wanted to confirm that notwithstanding
10 the draft stipulation that you presented today, your
11 moving papers before us was for 60 days to prepare
12 for the Order to Show Cause?

13 MR. LIM: Yes.

14 COMMISSIONER CHANG: And would you agree
15 that with respect to a determination of substantial
16 compliance that's really facts specific, and that it
17 would be dependent upon the facts up until that time?

18 MR. LIM: Correct, substantial
19 commencement, yes.

20 COMMISSIONER CHANG: Okay. So, again, your
21 original moving papers was for 60 days, and that was
22 filed on July 24th. So I believe that would take us
23 into October, whatever that 60 days from your
24 request?

25 MR. LIM: Yes.

1 COMMISSIONER CHANG: Thank you.

2 CHAIRPERSON SCHEUER: Are there further
3 questions from the Commissioners? If not, I have a
4 few.

5 Mr. Lim, I have a few questions.

6 I want to be clear that I'm understanding
7 things as you've stated them or I heard them.

8 First thing I want to get to is if I
9 understood you correctly in your statement earlier,
10 Batichtcheva is authorized to implement decisions
11 made by the owners of the company that is the
12 Petitioner, but she only can implement decisions made
13 by them, she is not a decision-maker?

14 MR. LIM: I believe that's essentially
15 correct.

16 CHAIRPERSON SCHEUER: So one of the
17 conditions of the Land Use Commission's approval in
18 the District Boundary Amendment for this parcel was
19 that we bind the Petitioner to their representations.

20 I'm not entirely clear how you or Ms.
21 Batichtcheva can make statements that we can bind you
22 by, given the significant qualification on Ms.
23 Batichtcheva's role with the company that you
24 explained in your opening statement.

25 MR. LIM: I think she's not authorized to

1 make independent decisions, but she is authorized to
2 make representations that are binding the company.

3 CHAIRPERSON SCHEUER: But only if those
4 decisions have been previously agreed to by the
5 owners?

6 MR. LIM: That's correct, like most
7 companies.

8 CHAIRPERSON SCHEUER: So you would however
9 understand the problem that if we have to stop a
10 hearing at any moment where you have to communicate
11 with somebody not in Hawai'i, this would create
12 significant problems for us, including with today's
13 proceedings, because we are relying on an oral
14 communication presumably, or perhaps some email that
15 has not been submitted on the record that you have
16 received approval for this draft stipulation.

17 MR. LIM: That was in a phone call just
18 prior to the hearing.

19 CHAIRPERSON SCHEUER: What is -- the second
20 question I have. What is the relationship between
21 your previous statement of position and the draft
22 stipulation that you presented us today?

23 Does the draft stipulation supersede, and
24 basically you're withdrawing the statement of
25 position from before?

1 MR. LIM: No, I think we still want to
2 continue the hearing on Order to Show Cause. It's an
3 evolving situation, like I said. We are 60 days in
4 as the Petitioner's representative are on this
5 project, and it was at the time we filed the Motion
6 to Continue, as soon as I began to understand that I
7 wouldn't be getting documents from the client because
8 of the proximity of the record or not being able to
9 find them at all. That's why we filed a motion.

10 So the current proposal that's in the draft
11 stipulation that you've been reviewing today is an
12 evolution, after I talked to the County on how best
13 to handle this, how best to let the project move
14 forward.

15 CHAIRPERSON SCHEUER: Specifically I
16 believe you argued in your statement of position that
17 achieving zoning approvals from the County would work
18 towards and was -- and your previous work towards
19 getting zoning approvals from the County was evidence
20 of substantial commencement?

21 MR. LIM: It could be.

22 CHAIRPERSON SCHEUER: But you're now
23 arguing in your draft stipulation that you should be
24 given time to get those very same approvals in lieu
25 of, in the form of a request for continuance of Order

1 to Show Cause Hearing?

2 MR. LIM: That's why I called it a paradox.
3 The Commission wants the developer to develop their
4 projects. Once you get into the Order to Show Cause
5 phase, then the Commission doesn't want you to
6 develop the project. That's the paradox we are in.

7 In this particular case we think it's a
8 different situation for the Commission. The facts
9 are different. We are -- I think we have a good
10 reason why the project didn't proceed. We have a new
11 team committed to do that. And that's why we
12 proposed what you saw in the draft stipulation today.
13 We believe that's the best way to handle this. The
14 Commission will always maintain this Order to Show
15 Cause hammer. You know, we will submit -- every
16 three months we will submit a progress report on the
17 zoning, if you would like, and you can tell us at any
18 time, come back in because you are not proceeding.

19 We just believe that's the intent I think
20 of the law, intent of the Land Use Commission is to
21 see that projects do get developed in a timely
22 fashion, and we're offering the Commission a way
23 through to get to that point and getting stuck in the
24 paradox of the Order to Show Cause is, at least in
25 our mind, not a way to go.

1 CHAIRPERSON SCHEUER: Thank you. Then last
2 thing I'll note for the record.

3 In your -- having read thoroughly your
4 statement of position, I'll also note that when you
5 referred to the physical description of the location
6 of the project, you referred to it as being both
7 mauka Mamalahoa Highway and makai of Queen Kaahumanu
8 Highway, which is somewhere in the position or
9 somewhere in the slopes of Mauna Kea.

10 MR. LIM: Sorry.

11 CHAIRPERSON SCHEUER: Any further questions
12 from the Commissioners? If not, we will proceed to
13 the County.

14 MR. LIM: I'm reserving comments after
15 parties make statements.

16 CHAIRPERSON SCHEUER: County.

17 MR. KIM: Just confining the County's
18 comments to the Motion to Continue at hand. Again,
19 the County would repeat that it wouldn't object to
20 the continuance requested in the motion.

21 CHAIRPERSON SCHEUER: Commissioner Wong.

22 COMMISSIONER WONG: So the motion for the
23 60 days is not the year one?

24 MR. KIM: Correct.

25 COMMISSIONER WONG: One other thing. So

1 there was a document that was handed to us in the
2 beginning of this session that they wanted to go for
3 rezoning.

4 Is the County amenable to do that during
5 that year period? Or how long does it take? Or what
6 is your thoughts on this issue?

7 MR. KIM: On the timing of rezoning?

8 COMMISSIONER WONG: Yes.

9 MR. KIM: We amend the existing rezoning,
10 what they would be asking for, and I think primarily
11 initially it would be, again, moving deadlines back
12 basically to make sure that they're in compliance
13 just because of the process, and I know when we're
14 doing this process, we have to go through our
15 Windward -- Leeward Planning Commission, and then
16 council.

17 So just because it's a process, I would
18 think it would take a number of months, possibly up
19 to a year. But, again, I have to kind of talk
20 through that with County people involved to clarify.
21 It's kind of going to depend too on what exactly
22 they're doing with their rezoning, because when we
23 met with the Petitioner, there were a couple
24 different paths it could go down.

25 COMMISSIONER WONG: So right now it's still

1 a little fuzzy?

2 MR. KIM: Yes, that's correct.

3 CHAIRPERSON SCHEUER: Commissioner
4 Ohigashi?

5 COMMISSIONER OHIGASHI: I ask to be
6 excused.

7 CHAIRPERSON SCHEUER: One moment.

8 Commission, any other questions from the
9 Commissioners?

10 (Commissioner Ohigashi leaves.)

11 COMMISSIONER CHANG: Mr. Chair, I guess my
12 question to the County is, have you been providing --
13 has the Petitioner been requesting documents that are
14 within the custody of the County, and have you been
15 cooperating and providing the Petitioner whatever
16 documents you may have related to this project?

17 MR. KIM: Yes. I was not personally aware
18 of it.

19 COMMISSIONER CHANG: Thank you.

20 CHAIRPERSON SCHEUER: Commissioner Wong.

21 COMMISSIONER WONG: I have a question.

22 Is the County comfortable with the
23 Petitioner and the representations of who they're
24 being represented?

25 MR. KIM: Yes, the County is comfortable.

1 With that said, I think with the caveat that the
2 proceeding at hand is Order to Show Cause basically
3 for the Land Use Commission, so I can understand why
4 the Commissioners want to dive deeper during this
5 proceeding.

6 COMMISSIONER WONG: Thank you.

7 CHAIRPERSON SCHEUER: Any further questions
8 for the County?

9 Any further statements from the Office of
10 Planning?

11 MS. APUNA: No, thank you.

12 CHAIRPERSON SCHEUER: Any further questions
13 for the Office of Planning?

14 Mr. Lim, you reserved time.

15 MR. LIM: I guess in order to wrap up, we
16 urge the Commission to let this project proceed. We
17 think we have the development team and the plans to
18 move forward on it. We understand the issues raised
19 by Commissioner Okuda. These are the same owners,
20 and what they were doing for the last ten years, they
21 were relying in fact on a trusted representative who
22 allegedly stole millions of dollars from them.

23 So now they're hopefully going to handle
24 that in the court system, and they have now assumed
25 control of the project and have authorized us to move

1 forward.

2 So one of the things when you go into the
3 Order to Show Cause substantive issues at the
4 hearing, is what does the Land Use Commission revert
5 this project to? Do you take it from Rural back to
6 Agriculture?

7 There's several findings in the Decision
8 and Order that speak to the fact that the
9 Agricultural District is not proper for this project.
10 If you've been up to Waikoloa Road and looked out
11 towards Kailua across the street from Waikoloa
12 Village, it's a pretty barren area. And doing
13 agriculture over there, and whether Agriculture or
14 Rural, maybe Rural is the proper classification for
15 this property.

16 So that's the types of issues that we feel
17 that the Commission doesn't have to address, if we
18 are allowed to proceed with the rezoning. Like I
19 said, we're willing to do the three-month reporting,
20 keep you posted on status, and we're hoping to move
21 quickly through the County process, but it will take,
22 like I said, anywhere between ten to 12 months total
23 I believe.

24 If we are close to resolution, and it comes
25 up on the 12-month period, then we will come back to

1 the Commission to ask for more time. But those are
2 the -- basically in our mind -- the best way to
3 handle this and the State Land Use law in the
4 process.

5 CHAIRPERSON SCHEUER: Commissioners, any
6 further questions for any of the parties?

7 COMMISSIONER CHANG: Mr. Chair.

8 Mr. Lim, you mentioned the new team. Was a
9 new team brought on board only after the State's
10 Order to Show Cause decision?

11 MR. LIM: That's correct. Trying to
12 recall, about June or so, I believe, June of this
13 year, after my client's status conference in May. I
14 was contacted by Mr. LaPinta, and together we
15 discussed the importance of the Land Use Commission's
16 orders and the Order to Show Cause.

17 And until that time I don't think that the
18 clients understood truly what they were facing with
19 the Land Use Commission compliance. We have done our
20 best to try to educate them. I think they understand
21 that unless they resolve County zoning and State Land
22 Use Commission Decision and Order issues, they cannot
23 do anything with the project.

24 So that's why they made the decision to
25 reserve valuing the property and try to get it to the

1 point where they can start development. The rezoning
2 would be the first step.

3 COMMISSIONER CHANG: And the owners in
4 Russia, do you believe they understand the
5 consequence of the order -- what the Commissioner's
6 authority under the Order to Show Cause and that it
7 could revert back?

8 MR. LIM: That's correct. And that was
9 part of the initial representation. The difficulty
10 in the initial representation is trying to explain
11 something that they had really frankly not paid much
12 attention to, because of Mr. Martirosian's
13 involvement. But now I think that they understand
14 the significance of that, so they have committed to
15 spend dollars to take the rezoning application
16 through the process.

17 COMMISSIONER CHANG: Thank you.

18 CHAIRPERSON SCHEUER: Any further questions
19 for any of the parties from any of the Commissioners?
20 Seeing none, Commissioners, please remember if a
21 motion is made to grant the continuance of the
22 hearing, that you establish a date to continue the
23 proceedings.

24 We can move on to discussion or entertain a
25 motion and then discussion as you wish. Commissioner

1 Wong.

2 COMMISSIONER WONG: I would like to make a
3 motion to move to have the Order to Show Cause on
4 October 24th, and if need be, October 25th.

5 CHAIRPERSON SCHEUER: Motion has been made
6 by Commissioner Wong. Is there a second?

7 COMMISSIONER OKUDA: Mr. Chair, I'll second
8 that motion. Just for clarification, so this is a
9 Motion to Continue the hearing, which is presently
10 scheduled for today on the Order to Show Cause to the
11 date stated by Commissioner Wong, correct?

12 CHAIRPERSON SCHEUER: Mr. Okuda, if I heard
13 you correctly, and at the risk of making this more
14 confusing, it is to actually hold the Order to Show
15 Cause hearing on those dates in October.

16 COMMISSIONER OKUDA: That's my question.
17 That's the motion, correct?

18 COMMISSIONER WONG: Yes.

19 COMMISSIONER OKUDA: Okay, I second it.

20 CHAIRPERSON SCHEUER: There has been a
21 motion made and seconded. Commissioners, discussion.

22 COMMISSIONER WONG: Chair, so at this
23 hearing, if it does pass on October 24th, I would
24 like the Petitioner to give us more information just
25 to ensure that we know -- sorry, for me who is, you

1 know, running this --

2 MR. LIM: We will do that. We were
3 thinking something like an organizational chart. We
4 will provide the Commission with that evidence.

5 COMMISSIONER WONG: Also if your
6 representations are binding, they can bind it or not.

7 Also the person who is in jail, forgot his
8 name, or you know, the gentleman, he is no longer
9 part of this Petition at all, some sort of
10 representation or documentation.

11 Also if you are going to do any
12 stipulations, that all parties have had a time to
13 talk about it and has agreed upon it. So those are
14 my issues that I wanted to bring up.

15 MR. LIM: Understood.

16 CHAIRPERSON SCHEUER: Any further
17 discussion from the Commissioners? Mr. Okuda.

18 COMMISSIONER OKUDA: Chair, the reason why
19 I seconded the motion is, I believe, following a
20 standard, or abuse of discretion standard. I believe
21 that there's sufficient evidence here to grant that
22 motion for the time stated. In particular I would
23 take into account the public testimony where the
24 public was interested in giving input, and I believe
25 that that evidence of public input is important in

1 deciding an issue with respect to Order to Show
2 Cause.

3 In support of this motion, I just like to
4 make one point, and that's about this paradox of the
5 OSC. Actually I don't believe there is a paradox.
6 The Hawai'i Supreme Court in DW Aina Le'a versus
7 Bridge Aina Le'a case at pages 211 to 212, and 739 to
8 740, Hawai'i Supreme Court quoted from the underlying
9 legislative history and a report from the Senate
10 Committee on education and natural resources. This
11 is what the Hawai'i Supreme Court quoted:

12 Said that the committee, and I quote,
13 specifically noted that, quote, vacant land with the
14 appropriate State and County Land Use Designation is
15 often subjected to undesirable private land
16 speculation and uncertain development schedules,
17 close quote.

18 And, quote, such speculation and untimely
19 development inflates the value of land, increases
20 development cost, and frustrates Federal, State and
21 County, and private coordination of planning efforts,
22 adequate funding, public services and facilities.

23 In other words, I believe the Supreme Court
24 has stated that one of the legal reasons why the
25 Commission must strictly review and enforce these

1 conditions that have been stated is that in certain
2 cases -- and I'm not prejudging this case here -- but
3 in certain cases as described by the Hawaii Supreme
4 Court, allowing developments to basically lie there
5 without compliance to conditions, and where these
6 conditions aren't complied with sometimes for decades
7 really does not give the benefit to the community
8 which has been represented in connection with the
9 boundary amendment or the zoning change, and frankly,
10 contributes to land speculation, driving up prices in
11 this community and statewide without concurrent
12 benefit.

13 So I think we should be aware of the policy
14 that's stated by the Hawai'i Supreme Court in its
15 ruling, because as an administrative agency, we are
16 bound to follow the dictates and the admonitions of
17 the Hawai'i Supreme Court.

18 For those reasons and good reasons in the
19 record, I am inclined to vote in favor of this
20 motion.

21 CHAIRPERSON SCHEUER: Anything further from
22 any of the Commissioners? Discussion. Commissioner
23 Chang.

24 COMMISSIONER CHANG: Thank you, Mr. Chair.

25 I guess I would like to, just in line with

1 Commissioner Okuda -- I don't want the Petitioner to
2 presume that it is LUC's intention with the Order to
3 Show Cause to revert the property. I think that is a
4 remedy that the Commission has. I think the
5 Commission -- I'll only speak on my behalf.

6 I think I would like to see Commission
7 conditions, or developments proceed in a timely
8 fashion. But I am not predetermining the outcome of
9 this, but I do -- it is clear that I think the owners
10 understand the risk or the significance of this Order
11 to Show Cause.

12 I would urge the Petitioner, as well as the
13 County and OP at the Order to Show Cause that there
14 be very clear presentation and findings with respect
15 to if there is an allegation, if substantial
16 compliance on those conditions, that they be very
17 clearly articulated to the Land Use Commission. I
18 know that would be very important for me at the
19 hearing.

20 But I too would like to give the Petitioner
21 an opportunity to present its case to us, and I think
22 I would support this motion as it is consistent with
23 the Petitioner's original request.

24 CHAIRPERSON SCHEUER: Further discussion,
25 Commissioners?

1 I'll also use the opportunity to perhaps
2 slightly less articulately than Commissioner Okuda
3 echoed my reasons why I support this motion.

4 You know, we are volunteers on the Land Use
5 Commission. We don't get paid. "Please schedule me
6 another meeting" is not what I would generally go out
7 and say. But our duties, when we swore to uphold the
8 Constitution of the State of Hawai'i and its laws,
9 and particularly the Land Use Law, it's a very solemn
10 duty that this Commission has when we move land from
11 the Agricultural or Conservation District into the
12 Rural or Urban District, and we do so deliberately
13 and thoughtfully. And we do so with conditions that
14 are put in place, not to burden landowners, but to
15 make sure that substantial public interests are held
16 up.

17 And one of those conditions is that these
18 developments will go forward within a specified
19 timeframe. So I think it's entirely appropriate that
20 the public has consistently shown up, and provided
21 testimony saying that there has not been substantial
22 commencement in any meaningful form, that we proceed
23 to an Order to Show Cause, and then consider formally
24 in that process.

25 If there is no further discussion on the

1 motion, Mr. Executive Officer, please do the roll
2 call vote.

3 EXECUTIVE OFFICER: Thank you, Mr. Chair.

4 The motion is to move the motion -- hold
5 the Motion to Show Cause Hearing on October 24th.

6 Commissioner Wong?

7 COMMISSIONER WONG: Aye.

8 EXECUTIVE OFFICER: Commissioner Okuda?

9 COMMISSIONER OKUDA: Yes.

10 EXECUTIVE OFFICER: Commissioners Cabral,
11 Mahi and Ohigashi are absent.

12 Commissioner Chang?

13 COMMISSIONER CHANG: Aye.

14 EXECUTIVE OFFICER: Commissioner Aczon.

15 COMMISSIONER ACZON: Yes.

16 EXECUTIVE OFFICER: Chair Scheuer?

17 CHAIRPERSON SCHEUER: Aye.

18 EXECUTIVE OFFICER: Thank you, Mr. Chair.
19 The motion passes with five affirmative votes.

20 CHAIRPERSON SCHEUER: Thank you.

21 If there is no additional business, we are
22 adjourned for the day.

23 (The proceedings adjourned at 11:28 a.m.)
24
25

CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on September 6, 2018, 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 6th day of September, 2018, in Honolulu, Hawaii.

/S/ Jean Marie McManus
JEAN MARIE McMANUS, CSR #156