

LAND USE COMMISSION

STATE OF HAWAII

October 25, 2018

Commencing at 8:00 a.m.

Courtyard by Marriott

King Kamehameha's Kona Beach Hotel
Ballroom #1

75-5660 Palani Road, Kailua-Kona, Hawaii 96740

AGENDAVI. Continued Hearing and Action (if necessary)
A06-767 Waikoloa Mauka LLC (Hawai'i)VII. Adoption of Order - DR18-62 Kualoa Ranch, Inc.
Inc. IAL(Oahu)

VI. Adjournment

BEFORE: Jean Marie McManus, CSR #156

APPEARANCES

COMMISSIONERS:

JONATHAN SCHEUER, Chairperson
NANCY CABRAL, Vice Chair
LEE OHIGASHI
EDMUND ACZON
GARY OKUDA
DAWN N.S.CHANG

RANDALL S. NISHIYAMA, ESQ.
Deputy Attorney General

STAFF:

DANIEL ORODENKER, Executive Officer
RILEY K. HAKODA, Chief Clerk/Planner
SCOTT A.K. DERRICKSON, AICP
RASMI AGRAHARI, Planner

STEVEN LIM, ESQ.
NATALIA BATICHTCHEVA
JOEL LaPINTA
For A06-767 Waikoloa Mauka

DAWN APUNA, ESQ.
RODNEY FUNAKOSHI, Planner
Deputy Attorney General
State of Hawai'i

RON KIM, ESQ.
JEFF DARROW, Planning Program Manager
Deputy Corporation Counsel
County of Hawai'i

IRINA McGRIFF
Russian interpreter

CALVERT G. CHIPCHASE, IV, ESQ.
Cades Schutte
For DR18-62 Kualoa Ranch, Inc.

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1 CHAIRPERSON SCHEUER: Good morning.

2 This is the October 25th, 2018 portion of
3 October 24th-25th, 2018 Land Use Commission Meeting.

4 The first order of best I would like to
5 take up is the motion to adjust the agenda to first
6 take up the adoption of order for Docket No. DR18-62
7 Kualoa Ranch before resuming proceedings for Docket
8 No. A0-767.

9 VICE CHAIR CABRAL: So moved.

10 CHAIRPERSON SCHEUER: Is there a second?

11 COMMISSIONER OHIGASHI: Second.

12 CHAIRPERSON SCHEUER: Motion made by
13 Commissioner Cabral and seconded by Commissioner
14 Ohigashi.

15 Is there any discussion? Hearing none, all
16 in favor say "aye", any opposed, say "nay".

17 Thank you.

18 So we are going to now move to agenda item
19 VII which is to adopt form of the order for Docket
20 No. DR18-62 Kualoa Ranch's Petition for Declaratory
21 Order.

22 MR. CHIPCHASE: Good morning, Chair,
23 members. Cal Chipchase for Kualoa Ranch.

24 CHAIRPERSON SCHEUER: Good morning.

25 Just to finish for the record, the

1 announcement, the Petition for Declaratory Order is
2 to designate Important Agricultural Lands for
3 approximately 761.55 acres at Oahu, Hawai'i,
4 identified by the following TMK(1)4-9-002-001,
5 4-9-004-002, 4-9-005-001, 5-1-001-001, 5-1-001-016,
6 5-1-001-025, 5-1-004-001 and 5-1-007-001, a portion
7 of all of those.

8 The Petitioner is here, and the Office of
9 Planning is here. There is nobody here from the City
10 and County of Honolulu, I presume.

11 Seeing and hearing none.

12 The Chair notes that on October 19, 2018,
13 the Department of Agriculture notified the Commission
14 it would not be present for today's meeting.

15 Let me update record.

16 On August 8, 2018, the Commission met on
17 Oahu and granted Kualoa Ranch's Petition for
18 Declaratory Order to Designate Important Agricultural
19 Lands.

20 On October 15, 2018, the Commission mailed
21 the agenda notice for the October 24-25, 2018 meeting
22 to Parties, Statewide, Oahu and Hawaii mailing lists.

23 Is there anybody from the public who wishes
24 to provide testimony this morning on this matter?

25 Seeing none.

1 Do you have anything that you wanted to
2 state for the record, Mr. Chipchase, before we go
3 into deliberation?

4 MR. CHIPCHASE: Chair, Members, the Morgans
5 just asked me to convey again their thanks and
6 appreciation for your work, and for granting their
7 Petition.

8 We submitted the Order. We think it's an
9 appropriate form, and we ask the Commission to adopt
10 it.

11 CHAIRPERSON SCHEUER: So, Commissioners,
12 before you is the form of the Order in this Docket
13 DR18-62. The form of the Order is the form submitted
14 by the Petitioner with some technical and
15 non-substantive changes.

16 I will entertain a motion to approve the
17 form of the Order in this matter.

18 Commissioner Aczon.

19 COMMISSIONER ACZON: Mr. Chair, I would
20 like to move to --

21 VICE CHAIR CABRAL: Excuse me, point of
22 order. I have horses. I really want to move --

23 CHAIRPERSON SCHEUER: However, Commissioner
24 Aczon is the Island Commissioner for Oahu. I will
25 suggest that the horse can follow second, if that's

1 okay.

2 However you wish to do it. The two of you
3 are adults.

4 Commissioner Cabral.

5 VICE CHAIR CABRAL: Thank you for indulging
6 me.

7 I would like to move that we adopt this
8 Order, and speak on behalf it in the light of the
9 fact that in this day and age, to continue to do
10 anything in the ranching community, and in the spirit
11 of paniolo and enable to be in business, I think they
12 have done an amazing job of trying to multitask
13 themselves and diversify to survive in today's world
14 and economy. So I would like to make a motion that
15 we adopt.

16 CHAIRPERSON SCHEUER: A motion has been
17 made by Commissioner Cabral. Is there a second?

18 COMMISSIONER ACZON: Mr. Chair, I'm very
19 glad to second.

20 CHAIRPERSON SCHEUER: A motion has been
21 made by Commissioner Cabral and seconded by
22 Commissioner Aczon.

23 Is there any discussion on the motion?
24 Hearing none, Mr. Orodener, will you poll the
25 Commission?

1 EXECUTIVE OFFICER: Thank you, Mr. Chair.
2 The motion is to adopt the order.
3 Commissioner Cabral?

4 VICE CHAIR CABRAL: Yes.

5 EXECUTIVE OFFICER: Commissioner Aczon?

6 COMMISSIONER ACZON: Yes.

7 EXECUTIVE OFFICER: Commissioner Chang?

8 COMMISSIONER CHANG: Yes.

9 EXECUTIVE OFFICER: Commissioner Ohigashi?

10 COMMISSIONER OHIGASHI: Yes.

11 EXECUTIVE OFFICER: Commissioner Okuda?

12 COMMISSIONER OKUDA: Aye.

13 EXECUTIVE OFFICER: Chair Scheuer?

14 CHAIRPERSON SCHEUER: Aye.

15 EXECUTIVE OFFICER: Thank you. Mr. Chair,
16 the motion passes.

17 MR. CHIPCHASE: Thank you. I've never seen
18 Commissioners fight over who gets to make the motion
19 before, that was a pleasure. Thank you all.

20 A06-767 WAIKOLOA MAUKA LLC

21 CHAIRPERSON SCHEUER: So we will now go
22 back to Docket A06-767. It's all downhill from here.

23 When we left off yesterday, we had actually
24 not -- I failed to dismiss or excuse the final
25 witness.

1 Do the Commissioners have any final
2 questions for Mr. LaPinta?

3 So we're done with that, and then we can go
4 onto provide closing arguments. I'm going to give
5 each parties -- Mr. Lim.

6 MR. LIM: Thank you, Mr. Chair. Steven
7 Lim, with my client, Waikoloa Highlands today.

8 I was going to recall Mr. Grigoryants just
9 to address one issue, and then we will be closing.

10 CHAIRPERSON SCHEUER: Sorry about that
11 everybody. The procedure will be Mr. Lim will recall
12 Mr. Grigoryants, then we will proceed to
13 presentations from the County, Office of Planning and
14 then closing argument.

15 And I'll remind Mr. Grigoryants and
16 interpreter that you remain under oath.

17 VALERY GRIGORYANTS

18 Was recalled as a witness on behalf of the
19 Petitioner, having been previously sworn, was
20 examined (through interpreter) and testified as
21 follows:

22 REDIRECT EXAMINATION

23 BY MR. LIM:

24 Q Mr. Grigoryants, yesterday in the written
25 testimony of Julia Alos there was submitted a 2014

1 article about the sale of the Petition Area by
2 someone named Remington Chase as the manager for
3 Waikoloa Mauka, LLC, which is the entity that owned
4 the Petition Area at that time.

5 Do you know who Remington Chase is?

6 A Yes, I know.

7 Q Was Remington Chase ever the manager of
8 Waikoloa LLC who has authorized to sell the Petition
9 Area?

10 A He was never the manager. He's a friend of
11 Stefan Martirosian.

12 Q So has Waikoloa Mauka LLC or Waikoloa
13 Highlands, Incorporated, ever authorized sale of the
14 Petition Area since the 2008 Decision and Order?

15 A Me and my brother never authorized them to
16 do that.

17 Q We confirm Waikoloa Highlands,
18 Incorporation, intends to seek a development partner
19 to assist in developing the Petition Area.

20 A Yes, I confirm.

21 Q The question was asked by one of the
22 Commissioners yesterday about the concern that
23 although you have a \$45 million bank commitment
24 letter that has been submitted into evidence, how
25 could the Petitioner assure the Commission that the

1 money would be used to develop the project?

2 A Well, first of all, before coming here, I
3 secured a letter from the bank stating that this
4 funds are available and, you know, as I mentioned,
5 that my brother is the owner of the bank, 100 percent
6 owner of the bank, and he's the owner of Company
7 Arch. They're the owner of Waikoloa Highlands.

8 That's why, as I said, that the bank has
9 the funds, and they are available at any time. And I
10 guarantee that the amount that is necessary will be
11 available every year to spend, and my brother also
12 has interest to do that.

13 Q Lastly, on the recent discussions with the
14 County's Office of Housing, can you recommit that you
15 will negotiate in good faith with the County for the
16 sale of an additional three to four acres for the
17 affordable housing project?

18 A I told yesterday, and I confirm today.

19 Q Do you have anything more to say to the
20 Commission?

21 A No, I don't have anything additional.

22 Q Thank you. No further questions.

23 CHAIRPERSON SCHEUER: Are there any final
24 questions for the witness from the County?

25 MR. KIM: No questions from the County for

1 the witness.

2 CHAIRPERSON SCHEUER: Office of Planning?

3 MS. APUNA: No questions.

4 CHAIRPERSON SCHEUER: Commissioners?

5 Commissioner Okuda.

6 COMMISSIONER OKUDA: Thank you, Mr. Chair.

7 Good morning, Mr. Grigoryants.

8 THE WITNESS: Good morning.

9 COMMISSIONER OKUDA: Taking your answers in
10 reverse order.

11 First of all, has the bank guaranteed under
12 all circumstances that the \$45 million will be
13 available?

14 THE WITNESS: Yes. The bank guarantees
15 \$45 million if Waikoloa will have opportunity to
16 develop the project.

17 COMMISSIONER OKUDA: Is this an irrevocable
18 commitment, meaning that the bank in writing has
19 stated that it will not change its mind regarding
20 this commitment?

21 THE WITNESS: The bank will not change that
22 their mind. And bank will make money available if
23 Waikoloa Highlands will have opportunity to develop
24 their project.

25 COMMISSIONER OKUDA: Have you or your

1 lawyers presented to the Commission a document
2 stating that the bank's commitment is irrevocable and
3 will not change?

4 THE WITNESS: We provided a letter from the
5 bank, it should be in the files, that states that
6 bank will provide funds.

7 COMMISSIONER OKUDA: Switching to your
8 testimony that you gave about developers.

9 Please name or list all the developers that
10 you, your brother, or anyone acting on your behalf
11 has talked to about working with regarding this
12 development.

13 THE WITNESS: I think this question can be
14 addressed to LaPinta because he lives here, we live
15 in Russia. So we ask him to conclude negotiation,
16 and it looks like there is no concrete information
17 yet.

18 COMMISSIONER OKUDA: So just so that I
19 understand your answer, are you able to tell the
20 Commission the names of local developers that you
21 have contacted about possibly working with your
22 companies regarding the development?

23 THE WITNESS: You know, like to repeat that
24 personally I did not talk to anyone.

25 And LaPinta is in charge of this issue.

1 And if there is any concrete information, I would
2 know about it.

3 COMMISSIONER OKUDA: Finally, when or
4 during the time Stefan Martirosian was acting or in
5 charge of the development, did you or your brother or
6 anyone acting on your behalf tell him that he could
7 not hire people?

8 THE WITNESS: I personal did not. My
9 brother told him, and it was really obvious that he
10 could not hire anyone without our approval. And he
11 knew about it.

12 COMMISSIONER OKUDA: Was Mr. Martirosian
13 told that in writing?

14 THE WITNESS: No, it was verbally.

15 COMMISSIONER OKUDA: Thank you very much.
16 I have no further questions. Thank you very much for
17 coming so far from Moscow to testify here.

18 THE WITNESS: Thank you.

19 CHAIRPERSON SCHEUER: Commissioners, any
20 further questions for this witness?

21 Only because prompted by Commissioner
22 Okuda, I have one small set of questions.

23 Your consultant, Mr. LaPinta, was offered
24 and we qualified him as an expert in real estate
25 development yesterday.

1 He testified that the proposed development
2 will be developed in increments, and so that the
3 capital needs would be provided in the later stages
4 from sales from the earlier stages of the
5 development.

6 And I believe Mr. LaPinta testified that
7 the maximum funds, capital available or necessary
8 would be just under \$16 million. And I believe he
9 also testified that nobody would ever finance it with
10 \$45 million up-front.

11 So I'm confused as to why the bank would
12 promise \$45 million and apparently not consistent
13 with standard real estate practice?

14 THE WITNESS: We understood that we need
15 less amount, but just to be on the safe side, you
16 know, sometimes we have our fears. We wanted to be
17 reassured that we have enough.

18 And just like you ask, if we could put 45
19 million in escrow, yes, we can. We wanted to provide
20 with maximum amount just to be safe. We are business
21 people.

22 CHAIRPERSON SCHEUER: Thank you very much.

23 Nothing further from the Commissioners?
24 We're going --

25 MR. LIM: I have one redirect question. I

1 don't know if the translation came through correctly.

2 REDIRECT EXAMINATION CONTINUED

3 BY MR. LIM:

4 Q Are you willing to put \$45 million in
5 escrow?

6 A No. I just mentioned that there was a
7 conversation about putting 45 million in escrow, but
8 we're all business people and it's not business
9 decision.

10 MR. LIM: Thank you. No further questions.

11 CHAIRPERSON SCHEUER: Thank you, Mr. Lim.

12 Thank you Mr. Grigoryants. You're excused.

13 We can now proceed with the County of
14 Hawaii's presentation.

15 MR. KIM: Just for clarification, are you
16 asking for presentation of evidence or presentation
17 of our position?

18 CHAIRPERSON SCHEUER: Position.

19 MR. KIM: Thank you.

20 The County -- first of all, I would like to
21 thank all of the Commissioners for your service on
22 this Commission. And, you know, this case really
23 shows some of the tough calls you have to make as
24 Commissioners.

25 As a personal matter, the County's position

1 is that Petitioner has not shown substantial
2 commencement of the project. What the evidence
3 showed presented by Petitioner is that there was work
4 on the project prior to the D&O, and then it looked
5 like some work started with the affordable housing
6 prior to the Order to Show Cause.

7 And then after the Order to Show Cause,
8 there has been more work from Petitioner, but it just
9 simply doesn't meet any standard of substantial
10 commencement based on County's read of the Aina Le'a
11 case.

12 So if Petitioner doesn't show substantial
13 commencement, then we proceed under -- or the
14 Commission will proceed under HRS 20-54(g) for the
15 Order to Show Cause, and the County respects the
16 Commission's authority and jurisdiction in this
17 matter.

18 It is the Commission's Decision and Order
19 the Commission is seeking to enforce.

20 So when looking at the standard of
21 205-4(g), legally, it does not appear that Petitioner
22 has developed the project area or completed buildout
23 or made substantial steps towards completing buildout
24 of the project area.

25 The evidence showed that Petitioner has

1 done some studies. Petitioner did take the good
2 faith action of donating 11 acres to what was
3 supposed to be a nonprofit entity but, in fact, was
4 not a nonprofit entity.

5 And Petitioner has been approaching the
6 County and discussing proceeding on the project with
7 the County in good faith. The County does believe
8 that.

9 However, Petitioner simply has not
10 developed or completed the buildout of the project
11 area which the Decision and Order defined as the
12 infrastructure, the backbone for the project.

13 So the County would have difficulty seeing
14 how the subject area should not be reverted under
15 strictly legal standard of 205-4(g).

16 With that said, the County did express a
17 preference for the property to remain Rural because
18 that would be consistent with the County's General
19 Plan.

20 However, it is this Commission's Decision
21 and Order which the Commission is seeking to enforce,
22 not the County's preference. And the General Plan
23 does reflect what's there now and future growth too.
24 So whether Petitioner, now Petitioner with a slightly
25 revised project, or a different owner who comes in

1 for this area to be developed, the County believes
2 that it will have the State Land Use and County
3 zoning and plans aligned eventually to allow
4 development to go forward.

5 If there is any leeway for the Commission
6 to consider the equities, it still would be a tough
7 decision, in the County's opinion. On the one hand
8 Petitioner has presented allegations of fraud, and
9 there are the County's preferences as to zoning and,
10 you know, allowing us the affordable housing project
11 that's presently proceeding to go forward.

12 Even if that doesn't fully meet the
13 County's requirements, the County has been
14 negotiating in good faith with Petitioner to increase
15 the project area to allow the affordable housing
16 requirements to be met.

17 The County would note that it has its own
18 requirements for Petitioner, notwithstanding this
19 Commission's requirements through a rezoning
20 ordinance that the County has been going through
21 Petitioner since the '90's. We've amended the
22 ordinance several times.

23 And on the other side of an equity
24 equation, this Commission does have deadlines. It
25 does have interest in enforcing its deadlines and its

1 orders.

2 And validating community expectations where
3 we've heard testimony from the community that they've
4 been waiting for certain pieces of this project, such
5 as the transportation and affordable housing to go
6 forward.

7 Just as a final note, the County does have
8 some concerns presently about potential stale studies
9 referred to during the presentation of Petitioner's
10 case in chief. The archaeological study and the
11 water stood out.

12 And as a final note, the water, the Land
13 Use Commission's condition on water and the Decision
14 and Order did require Petitioner to obtain the
15 approval of the Department of Water Supply, the
16 County's Department of Water Supply for the plan, how
17 they're going to supply water to the project. And to
18 this date, Petitioner has not obtained Department of
19 Water Supply's approval for its plans, although it is
20 negotiating with a private water company.

21 Just as one final note too, you know,
22 Petitioner has not fulfilled a number of conditions
23 as outlined in the State Office of Planning's
24 Position Statement.

25 So that is the County's position. I can

1 respond to questions.

2 CHAIRPERSON SCHEUER: Thank you. Are there
3 questions from the Petitioner?

4 COMMISSIONER OHIGASHI: Mr. Chairman,
5 before -- just a point, the County doesn't have any
6 witness, so we don't need to swear anybody in, or
7 will the Planning Department be a witness?

8 CHAIRPERSON SCHEUER: We're going to take a
9 five-minute break.

10 (Recess taken.)

11 CHAIRPERSON SCHEUER: We're back on the
12 record.

13 County of Hawaii.

14 MR. KIM: Thank you for the recess. The
15 County would like to call Jeff Darrow as a witness.

16 CHAIRPERSON SCHEUER: If you would approach
17 the witness stand.

18 Mr. Darrow, do you swear or affirm that the
19 testimony you're about to give is the truth?

20 THE WITNESS: I do.

21 CHAIRPERSON SCHEUER: Thank you. Please
22 proceed.

23 JEFF DARROW

24 Was called as a witness by and on behalf of the
25 County of Hawai'i, was sworn to tell the truth, was

1 examined and testified as follows:

2 DIRECT EXAMINATION

3 THE WITNESS: Good morning, Mr. Chairman.
4 Good morning, members of the Planning Commission -- I
5 mean Land Use Commission. I'm so used to saying --
6 BY MR. KIM:

7 Q Could you please state your name for the
8 record?

9 A My name is Jeff Darrow.

10 Q Mr. Darrow, who is your present employer?

11 A Currently I'm employed by the County of
12 Hawai'i Planning Department.

13 Q What is your position within the Planning
14 Department?

15 A Currently I am the Planning Program Manager
16 for the Planning Division.

17 Q And how many years have you been with the
18 County's Planning Department?

19 A I've been with the County Planning
20 Department approximately 20 years.

21 Q Thank you.

22 And just briefly one more background
23 question.

24 Can you identify the positions that you
25 held over the 20 years that you've been with the

1 Planning Department?

2 A Originally I started off, I was a police
3 officers with County of Hawaii Police Department.
4 Then I transferred to the Planning Department as a
5 zoning inspector. And then from there with my
6 background in education, I was able to be promoted to
7 a planning -- a planner, and that was about 2002, I
8 believe.

9 And I've been a planner, worked up the
10 ranks. Started as a Planner 4, then Planner 5,
11 Planner 6, and currently the manager.

12 Q Thank you.

13 My first question to you is very broad.
14 Can you describe the interplay between County zoning
15 and State Land Use classification?

16 A Okay. In Hawai'i we have a dual land use
17 system. We have the State Land Use designations as
18 well as the County designation. We work together,
19 and it overlaps.

20 Normally you have the broad State Land Use
21 zoning that overlays the islands, the state, more
22 specifically the County of Hawaii. There are four
23 designations. We have Conservation, Rural, Urban and
24 Agriculture. The main one on the Big Island is
25 Agriculture.

1 From there, there are the different County
2 zonings that underlay the State Land Use zoning.
3 These work in conjunction. The hope and direction is
4 that they are consistent with each other, but there
5 are times where these two different zoning
6 designations will conflict.

7 For example, you may have an Agricultural
8 State Land Use designation with an Urban-type County
9 zoning, and so it causes conflicts.

10 The goal is that we are consistent in these
11 two zoning designations. And a lot of us, a lot of
12 what drives that consistency is our General Plan to
13 give us direction as the long-range planning
14 document.

15 Q When you say long-range planning, can you
16 elaborate on that as far as the General Plan goes?

17 A Our General Plan gives us our direction for
18 a long range plan. I mean, that's the direction.
19 Whenever we make decisions in the County moving in
20 the future, as far as our direction for land use.
21 Every ten years we do a General Plan update to make
22 adjustments.

23 We are currently beginning. We have been
24 in the process for a year doing our General Plan
25 update where we see that there are areas we need to

1 adjust. That occurs during the County plan, the
2 County General Plan Amendment process.

3 Q Thank you.

4 My next question to you is, are you aware
5 of the Decision and Order which is the subject of the
6 Order to Show Cause today?

7 A Yes.

8 Q Are you aware of the affordable housing
9 condition in the Decision and Order?

10 A Yes.

11 Q Do you know the County's position on
12 whether or not Petitioner has fulfilled the
13 affordable housing condition?

14 A Currently our position is that they have
15 not complied with the affordable housing requirement.

16 Q Do you know whether the County believes
17 that Petitioner is working towards fulfilling the
18 affordable housing requirement?

19 A My understanding is that they are working,
20 making a good faith effort to comply with the
21 affordable housing requirement.

22 Q Thank you. Those are all the questions I
23 have for you.

24 CHAIRPERSON SCHEUER: Are there questions
25 for the witness from the Petitioner?

1 MR. LIM: Thank you, Mr. Chairman.

2 CROSS-EXAMINATION

3 BY MR. LIM:

4 Q Good morning, Mr. Darrow.

5 A Good morning, Mr. Lim.

6 Q The Commission's Decision and Order in this
7 Docket Number, Condition 9, basically states that the
8 Petitioner shall provide affordable housing
9 opportunities in accordance with the applicable
10 affordable housing requirements of the County.

11 Is that your understanding?

12 A Yes.

13 Q Are you aware that the Petitioner entered
14 into an affordable housing agreement that would cover
15 the proposed development?

16 A Yes.

17 Q And are you referring to the Affordable
18 Housing Agreement that's been attached as Exhibit
19 No. 8 to the Petitioner's Position Statement --
20 Statement of Position, excuse me -- dated December 1,
21 2016.

22 You're familiar with that document?

23 A Yes.

24 Q Were you involved in the preparation of the
25 document?

1 A No.

2 Q Were you involved in negotiations over the
3 document?

4 A I was not.

5 Q Who would have been the person from the
6 County that would be responsible for that?

7 A This would have been the members of the
8 Office of Housing and Community Development, as well
9 as our Corporation Counsel, and I believe the Mayor
10 as well, and the parties, the Applicant themselves.

11 Q So those would be the individuals on the
12 signature page?

13 A Correct.

14 Q That would be Susan Akiyama, Housing
15 Administrator at the time?

16 A Yes.

17 Q And Amy Self, Deputy Corporation Counsel at
18 the time?

19 A Correct.

20 Q What was the purpose of that December 1st,
21 2016 agreement?

22 A My understanding it was to comply with the
23 Condition 9 in the D&O, as well as the condition in
24 the Change of Zone Ordinance.

25 Q That's the County Change of Zone Ordinance?

1 A Correct.

2 Q That was for the proposed development of
3 approximately 386 plus or minus
4 residential-agricultural lots, correct?

5 A 398 or 386?

6 Q 386 for the agreement.

7 A Okay, correct.

8 Q Are you also familiar with the subsequent
9 document called the Affordable Housing Release
10 Agreement, that's Exhibit 11, Petitioner's Exhibit
11 11?

12 A Yes.

13 Q July 20th, 2017 Release Agreement. And
14 what's your position? You stated earlier that the
15 Petitioner is in the process of satisfying the
16 affordable housing requirements for the project.

17 A That's my understanding.

18 Q And so why was this Affordable Housing
19 Release Agreement executed by the County?

20 A I can't answer that question.

21 Q Who can?

22 A I would believe that the Administrator of
23 the Office of Housing and Community Development could
24 answer that question.

25 Q Would that be Neil S. Gyotoku, Housing

1 Administrator?

2 A Correct.

3 Q And possibly Amy D. Self, Deputy
4 Corporation Counsel?

5 A Yes.

6 Q Those parties signed the Affordable Housing
7 Release Agreement, correct?

8 A Correct.

9 Q So is the County's position that if the
10 Petitioner developed up to 386
11 residential-agricultural lots on the Petition Area,
12 that the Affordable Housing Release Agreement we have
13 been speaking about does not satisfy the affordable
14 housing requirements of both State Land Use
15 Commission and the County of Hawaii zoning?

16 A At the time the agreement was signed and
17 released, it was the understanding that that
18 agreement would satisfy the affordable housing
19 requirements for both the D&O as well as the County
20 zoning ordinances.

21 Q And why the change of position?

22 A A question has arisen on the transfer of
23 the 11.8 acres to an entity that was not considered a
24 nonprofit entity.

25 Q Are you aware that the County Office of

1 Housing and Community Development, which I'll call
2 OHCD, prepared all the documents for the transfer?

3 A I am not aware of that.

4 Q Who would be aware of that?

5 A I would believe that the administrator of
6 OHCD would be aware of that.

7 Q So because of that conveyance to a non --
8 to an entity that wasn't a nonprofit organization,
9 that's why the County has changed its position?

10 A That's my understanding.

11 Q Do you know whether or not the County and
12 its Corporation Counsel reviewed the Warranty Deed
13 that was conveying the 11.7 acres to Plumeria at
14 Waikoloa LLC?

15 A I can -- I would believe they would have.
16 I mean, I can't testify to that fact, because I
17 wasn't a party or a part of that transfer or
18 agreement or deed.

19 But, again, that would be my understanding
20 of the process.

21 Q So I guess is it fair to state that the
22 intent of the Affordable Housing Agreement was to
23 convey 11.7 acres to an entity that would develop
24 affordable housing equivalent to the approximately 80
25 affordable housing units that would be required under

1 the County's Chapter 11 of the Hawaii County Code?

2 A That would be what my understanding the
3 agreement would end up fulfilling.

4 Q And you're clear that the Petitioner here
5 wasn't required to build any affordable housing?

6 A That's my understanding.

7 Q What was their duty under the Affordable
8 Housing Agreement?

9 A The agreement that we were referring to was
10 to transfer 11.8 acres to this entity of Plumeria
11 LLC.

12 Q And did that in fact occur?

13 A Yes.

14 Q I'm going to change the subject now.

15 Is it correct that the Petition Area has
16 been zoned RA-1A, residential-agriculture 1 acre
17 minimum lot size since 1990?

18 A Yes.

19 Q Do you know what was zoned prior to that
20 date?

21 A It was previously zoned unplanned.

22 Q Was it zoned multi-family residential and
23 open?

24 A I'm sorry, I stand corrected. It was zoned
25 unplanned and multiple-family residential as well.

1 Q If the Land Use Commission reverts the
2 Petition Area to the Agricultural District, what
3 happens to its RA-1A zoning?

4 A If the State Land Use Commission reverts
5 the State Land Use designation from Rural to
6 Agriculture, you will essentially remain -- you will
7 essentially revert back to the way it was prior to
8 2005 or 2006, which the zoning at that time was RA
9 one acre open zoning. The State Land Use was
10 Agriculture, correct?

11 In 2005, up from 1990 to 2005 the State
12 Land Use designation for this particular property was
13 Agriculture.

14 In 2005 the Council, through an ordinance,
15 placed in a condition requiring the Applicant to come
16 to the Land Use Commission to change the State Land
17 Use designation from Agricultural to Rural.

18 So this would be reverting it back to that
19 time prior to 2000 and -- I believe prior to 2008
20 when the D&O was finally approved.

21 Q So bear with me, I'm not understanding.

22 So the Land Use Commission reverts the
23 property to the State Land Use Commission
24 Agricultural District. If I come in tomorrow with a
25 subdivision application for, let's say, 50 lots, one

1 acre in size, could I process my development?

2 A Given the current situation with the County
3 Zoning Ordinance, you could not.

4 Q Why is that?

5 A Because the current Zoning Ordinance, the
6 timing conditions have lapsed.

7 Q Let's assume that I'm successful. If the
8 Commission allows us to defer action on the OSC. And
9 go back down to the County, and we're successful in
10 getting the Rezoning Ordinance refreshed to allow us
11 additional time, could I then apply for the
12 subdivision and subdivide and sell lots?

13 A We're assuming that you've gone through
14 that process of coming back to the Commission and
15 Council to refresh your timing condition.

16 Through that process, if the State Land Use
17 designation has reverted back to Agriculture, we look
18 at -- the County will relook at consistency with all
19 the plans, not just the current State Land Use zoning
20 designation, but also the General Plan as well as the
21 South Kohala Community Development Plan that has been
22 implemented prior to the latest ordinance.

23 So the difficulty in getting the time
24 refreshment will be the conflicts of inconsistencies
25 with now the State Land Use designation of

1 Agriculture and our General Plan is currently Rural
2 and Open consistent with the current zoning.

3 Q So what would be the end result? Could I
4 proceed under my RA-1A zoning even as I refreshed it?

5 A I would believe that what would happen is
6 the County would request that the Applicant change
7 the General Plan to what it was prior, which was
8 extensive agriculture prior to 2005 when that was
9 changed, as well as change the zoning from RA one
10 acre to a zoning that would be consistent with the
11 State Land Use as well as the new General Plan that
12 hopefully would be amended, which the more
13 appropriate zoning at that point would be Family
14 Agricultural one acre.

15 Q So staying with the same process. The
16 Petitioner would have to go for a General Plan
17 Amendment first, and then seek the rezoning to FA-1A
18 instead of RA-1A?

19 A Correct.

20 Q Is that the rule at the County?

21 A I'm not sure what you mean by "rule".

22 Q Is that a practice that's always followed
23 by the County?

24 A There has been, again, this discussion
25 earlier on conflicts and inconsistencies. So I can't

1 say it's 100 percent, but that is the direction. We
2 try to seek consistency with the State Land Use
3 designation, with the General Plan, with the County
4 zoning. So that would be our direction that we would
5 be moving towards.

6 Q So bear with me. I'm going to cite you
7 some dates.

8 I'll represent to you that in approximately
9 February of 2005 the General Plan was adopted on its
10 ten-year refreshment, and that the Petition Area was
11 then designated to the Rural and Open Districts,
12 correct?

13 A General Plan?

14 Q Yeah, 2005 General Plan. Change the
15 Petition Area to Rural --

16 A Right, to stay consistent with the current
17 zoning.

18 Q Then after that, in December of 2005,
19 Rezoning Ordinance 05-157 was adopted which provided
20 a ten-year extension for condition compliance to the
21 developer. And Condition H required the processing
22 with the State Land Use Commission of the District
23 Boundary Amendment from Agricultural to Rural; is
24 that correct?

25 A Correct.

1 Q At that time did the County change the
2 zoning from RA to FA-1A?

3 A Did the County change the zoning?

4 Q Did the County require the change of zone
5 from RA-1A to FA-1A at that time?

6 A No.

7 Q In September of 20th, 2007, County Rezoning
8 Ordinance 07-127 was amended to further provide time
9 extensions and a construction for a roundabout.

10 Did the County require the change in zoning
11 from RA-1A to FA-1A at that time?

12 A I would say no, but I would like to
13 elaborate.

14 The reason why we would not request that
15 the Applicant revert the zoning from RA-1 acre to
16 Family Agriculture one acre is because it would
17 become inconsistent with the current State Land Use
18 which is now Rural, as well as the General Plan,
19 which is now Rural and Open for the subject property.

20 Q That's why I'm asking the question. Based
21 upon your statement, shouldn't the County have
22 required the FA-1A zoning in both 2005 and 2007?

23 A No.

24 Q Why is that? Because the General Plan was
25 amended to Rural prior to those dates.

1	A	Correct.
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2 Q So why is that? Maybe I'm --

3 A If you're talking before 19, 2005.

4 Q No these are -- let me back up again.

5 If February 2005 the General Plan is
6 adopted, changing the Petition Area to Rural and
7 Open.

8 In 2005, later in the year in December, in
9 Rezoning Ordinance 05-127 the County amends the
10 rezoning but keeps it at RA-1A.

11 In 2007 an Ordinance 07-127, the County
12 again amends the ordinance for the Petition Area and
13 keeps the zoning RA-1A.

14 So why is the County keeping the zoning at
15 RA-1A after the General Plan has been amended?

16 A Because it's consistent.

17	0	Consistent with what?
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18 A I guess I'm not following your line of
19 questioning. But let me -- I can understand if you
20 were asking why the County did not ask the Applicant
21 to come in and change the zoning from RA one acre to
22 Family Agriculture one acre or Ag one acre prior to
23 2005, because it was inconsistent for 15 years,
24 correct? I'm sorry, asking it.

25 CHAIRPERSON SCHEUER: To be fair, I will

1 need to warn you.

2 THE WITNESS: Thank you.

3 So to bring consistency in the matter,
4 there was the General Plan, because the zoning was
5 already RA one acre. The General Plan, through the
6 comprehensive update in 2005, aligned the General
7 Plan to be consistent with the current zoning, and
8 then the ordinance in 2005 required the Applicant to
9 go to the Land Use Commission to seek a D&O to be
10 able to change it from Agricultural to Rural so
11 everything would be consistent.

12 It wouldn't make sense at that point for
13 the County to require the Applicant to go to FA one
14 acre, because everything was beginning to be
15 consistent.

16 Q So to wrap up this subject, is it fair to
17 state that if the Commission reverts the Petition
18 Area to the Agricultural District, that in order for
19 the project to go forward and to participate with the
20 affordable housing development, that the Petitioner
21 will be required to go through substantial hurdles in
22 terms of land use entitlements to include the General
23 Plan Amendment, a refreshment of the zoning ordinance
24 and other things?

25 A I would say that those steps would need to

1 be taken, whether the Applicant would be taking them
2 in regards to the General Plan, that could be
3 possibly considered through the current General Plan
4 Amendment update, because during that time no other
5 amendments can be done.

6 So the Applicant would work with the County
7 to see if that could be a consideration in the
8 update. And then, yes, they would have to come back
9 in to change the zoning from RA one acre to Family
10 Agricultural one acre to be consistent.

11 Q When is the County's General Plan going to
12 be coming up for a hearing?

13 A I'm not sure.

14 Q Can you estimate it? Is it a year from
15 now?

16 A I mean, that's the hope is within a year.
17 But I mean, to be honest with you, there's been a lot
18 of activity on this island that was unexpected, so
19 things have been pushed back.

20 Q So the last General Plan was in 2005?

21 A Correct.

22 Q What was the General Plan prior to that?

23 A The General Plan prior for this subject
24 property was extensive agri --

25 Q No, what was the date of the General Plan

1 prior to the 2005 version?

2 A I'm guessing, but I think it was 1989.

3 Q I think you're correct.

4 So that was also supposed to be a ten-year
5 General Plan update, correct?

6 A I can't remember where I was in 1989.

7 Q Are you familiar a little bit with the Aina
8 Le'a project?

9 A Yes.

10 Q And when the Commission reverted that
11 project back down to Agriculture, what did the County
12 do with the zoning for that project?

13 A I'm not sure if they did revert it. I
14 mean, my understanding it's still the same.

15 Q Let's assume that it was reverted for a
16 period of time.

17 A Okay.

18 Q During that period of time, did the County
19 do anything with the zoning for that project?

20 A No.

21 Q No changes were made?

22 A There's been multiple -- many meetings
23 working with the Applicant to try to get through this
24 process.

25 Q When the County overhauled its zoning code

1 to delete the zoning categories for the Agricultural
2 zoning for less than five acres in size, what did the
3 County do with the properties that are still zoned
4 A1-A2, Agriculture one-acre, two-acre, three-acre
5 lots?

6 A They're still the same zoning.

7 Q Those would be considered nonconforming
8 zonings?

9 A Yes.

10 Q Why wouldn't the Waikoloa Heights project
11 be considered a nonconforming zoning?

12 A Because of the conditions that were placed
13 on it.

14 Q Like what conditions?

15 A The condition to require the Applicant to
16 go back to the Land Use Commission to revert it -- I
17 mean, to change the State Land Use designation from
18 Agriculture to Rural.

19 And additionally, the General Plan
20 Amendment, it changed the property from Extensive
21 Agriculture to Rural and Open.

22 Q The County's Position Statement stated that
23 the Petition Area has not been -- the County's
24 Position Statement stated that the Petition Area has
25 not shown substantial commencement of development.

1 Is that correct?

2 A Yes.

3 Q Does the County of Hawaii have any
4 definition of "substantial commencement" of use of
5 the land in its zoning code, or in any other County
6 rules, regulation or statutes and ordinances?

7 A Not that I'm aware of.

8 Q So the only -- going back to the Affordable
9 Housing Agreement satisfaction. The only issue the
10 County had with the method of satisfying the
11 affordable housing requirement was that the
12 conveyance was made to a for-profit company rather
13 than nonprofit company?

14 MR. KIM: If I may object to this question.
15 This is beyond the witness' realm of knowledge as to
16 all of the grounds that the County might believe that
17 the Affordable Housing Agreement is not valid.

18 CHAIRPERSON SCHEUER: Where are you trying
19 to go?

20 MR. LIM: I'm just trying to -- you can
21 obviously understand that the Petitioner is very
22 concerned that we had an agreement. We did what was
23 required. And now the County is saying you didn't
24 quite do everything that you needed, even though we
25 filled a release.

1 So I'm trying to determine from the
2 witness, because they made the statement that we
3 haven't fully satisfied the agreement.

4 I'm trying to determine what exactly they
5 want us to do.

6 CHAIRPERSON SCHEUER: You can ask the
7 witness if he has any further knowledge about other
8 concerns the County has.

9 Q (By Mr. Lim): What else do you want the
10 Petitioner to do to satisfy the affordable housing
11 requirement?

12 A I have to agree with counsel. I don't
13 think I'm the right person to answer that question.
14 I think the administrator of OHCD would be the person
15 to answer that.

16 Q So your position here could be right or it
17 could be wrong?

18 A Again, the position that we have is that
19 currently in looking at the release agreement and
20 looking at Chapter 11, which is the housing code, is
21 that there is a conflict, and that needs to be
22 resolved.

23 Q Are you aware that on October 19th, as
24 testified by Mr. LaPinta, that representatives of the
25 Petitioner met with Neil Gyotoku, the Housing

1 Administrator for OHCD, along with his Corporation
2 Counsel representative and other members of his
3 staff?

4 A I was made aware through testimony.

5 Q Are you also aware that at that meeting
6 that the director -- I mean Housing Administrator
7 confirmed that the affordable housing requirements
8 for this project had been satisfied, and that they
9 were asking the developer to voluntarily cooperate by
10 subdividing or contributing an additional three to
11 four acres to assist the affordable housing developer
12 adjacent to the property on the 11.7 acres?

13 A I was aware of the request for the
14 transfer. I was not aware that the administrator had
15 said that the affordable housing agreement was
16 satisfied.

17 Q No further questions.

18 CHAIRPERSON SCHEUER: Office of Planning?

19 MS. APUNA: No questions.

20 CHAIRPERSON SCHEUER: Commissioners?

21 Commissioner Okuda.

22 COMMISSIONER OKUDA: Thank you, Mr. Chair.

23 And the question, with the Chair's
24 indulgence, can also be answered by counsel. But can
25 you list the specific facts which show that the

1 Petitioner has not satisfied the affordable housing
2 condition in the Land Use Commission's D&O? I just
3 need a list of the facts.

4 MR. KIM: The main factual problems with
5 the agreement are that it doesn't comply with its own
6 terms or the County code.

7 The County cannot contract to trump its own
8 code basically. Hawaii County Code Section 11-5
9 requires that if a developer is to donate land
10 through either County or nonprofit entity in lieu of
11 building the required affordable housing, that the
12 conveyance be made to either the County or a
13 nonprofit entity.

14 In this case the conveyance was to a LLC
15 that was not a nonprofit, and that's evidenced by
16 DCCA filings, and the fact that it turned around and
17 sold the property for reported \$1.5 million.

18 And the other problem with the property
19 that was conveyed actually fulfilling affordable
20 housing conditions is that the property is not
21 supposed to have any unusual characteristics which
22 would make it difficult to develop.

23 Yesterday Mr. LaPinta testified to the
24 substantial drainage easement encumbering the
25 property which makes it difficult to develop, and

1 also the regular shape of the property which makes it
2 difficult to develop.

3 And finally, the land donated is supposed
4 to be sufficient to accommodate the number of
5 affordable housing units which the developer is
6 required to build. And in this case the actual owner
7 now of the property is saying that he can only build,
8 I believe the number we had yesterday in testimony
9 was 32 affordable housing dwellings.

10 So those are the problems that I see with
11 the agreement. And the agreement, also by its own
12 terms, the first affordable housing agreement did
13 claim that Plumeria at Waikoloa LLC was a nonprofit,
14 which was not true. So those are the issues with the
15 agreement.

16 However, you know, I think we have a
17 different understanding with Petitioner as to the
18 agreement. But if we could come to the same end
19 result, if Petitioner does go through the process in
20 the County's eyes it would be to fulfill its
21 affordable housing requirement.

22 In Petitioner's eyes it would be a
23 gratuitous act to donate the additional three acres,
24 then it sounds like Petitioner will be able to meet
25 affordable housing requirements, because there will

1 be -- the projection are that it will be 80 or above
2 for dwellings.

3 COMMISSIONER OKUDA: As a followup
4 question, and so that this is not deemed to be a
5 trick question or hiding the ball here, these
6 questions or question goes to the issue of estoppel,
7 that term being defined by cases including County of
8 Hawai'i -- sorry, Ravelo, R-A-V-E-L-O, versus County
9 of Hawaii.

10 Would it be -- would you believe it could
11 be reasonable for the Petitioner to have believed
12 that it had satisfied the affordable housing
13 condition because of the fact that the County
14 executed the release, whether or not that release was
15 a good idea or a bad idea for the County to have
16 signed?

17 MR. KIM: I respectfully would submit that
18 the County cannot be bound by estoppel for an act
19 which is against the law, because in my mind at least
20 there was an ultra vires act.

21 COMMISSIONER OKUDA: So in other words,
22 even if the Petitioner might have been misled into
23 believing that it had complied with the affordable
24 housing condition, because the County was not
25 authorized to take the action, it's kind of like,

1 it's Petitioner's tough luck.

2 MR. KIM: Unfortunately, yes. The code is
3 published. The code was available for Petitioner to
4 review. And if the Petitioner had read the code,
5 they would understand that they did not fulfill the
6 code with the way that transaction occurred.

7 CHAIRPERSON SCHEUER: Mr. Okuda, because we
8 have the witness sitting here, and I know that the
9 County wants to redirect, and the County would then
10 presumably finish presentation and we'd have a chance
11 to ask that general question of the County.

12 COMMISSIONER OKUDA: Sorry, Mr. Chair.
13 This last set of questions is directed to the
14 witness.

15 If, in fact, the only choice the Commission
16 has under the Bridge Aina Lea case is either to
17 revert the property to its prior designation, or not
18 revert the property, which action reversion or
19 non-reversion is most consistent with the County's
20 General Plan.

21 THE WITNESS: The most consistent option
22 would be to keep it in the Rural State Land Use
23 District.

24 COMMISSIONER OKUDA: In other words, the
25 most consistent action for the Commission to take,

1 consistent with the County's General Plan would be to
2 not revert the property. Is that your testimony, or
3 not revert the designation?

4 THE WITNESS: At this time the General Plan
5 for the property is Rural and Open, consistent with
6 the Rural County zoning, as well as it would be
7 consistent with the Rural State Land Use designation.

8 COMMISSIONER OKUDA: And if the choice or
9 the only choices that the Land Use Commission has
10 under the Bridge Aina Lea case is to revert the
11 designation or not revert the designation, which
12 action would be most consistent with the Kohala Plan?

13 THE WITNESS: The Kohala Community
14 Development Plan didn't have a direction for this
15 property, it just referenced it as it was identified.
16 So it referenced it as the Waikoloa Mauka, Waikoloa
17 Highlands project, which was at that time currently
18 zoned Rural and State Land Use Rural, County General
19 Plan Rural and Open, County zoning Residential
20 Agriculture one acre.

21 COMMISSIONER OKUDA: And given your
22 experience in the Planning Department and as a
23 planner, if the only choices that the Land Use
24 Commission has is either to revert the designation or
25 not revert the designation, which choice do you

1 believe, as a professional planner, is in the best
2 interest of the citizens of the County of Hawai'i?

3 THE WITNESS: As mentioned previously by
4 counsel, the preference of the County is that it
5 remains in rural. But, again, it does defer to the
6 authority of the State Land Use Commission.

7 COMMISSIONER OKUDA: I understand that, and
8 we respect the fact that you defer to our authority,
9 but the question: What is in the best interest of
10 the citizens of this County, taking all facts into
11 account in your view as a professional planner,
12 revert or not revert?

13 THE WITNESS: The preference would be to
14 keep it in State Land Use Rural District.

15 COMMISSIONER OKUDA: So not revert?

16 THE WITNESS: Correct.

17 COMMISSIONER OKUDA: I'm sorry, one last
18 question. If there is all this noncompliance going
19 on, why hasn't the County taken enforcement actions
20 instead of just leaving us to do what amounts to what
21 some people consider the death penalty in land use
22 law?

23 THE WITNESS: The County, when you -- when
24 I look at the history of this particular project,
25 this particular Applicant -- I mean, it's gone on

1 since 1990. There's been attempts to be able to
2 subdivide this property, but through the subdivision
3 process, it's costly. You have to put in all the
4 backbone infrastructure that is required, not only
5 under our requirements, but also the requirements of
6 the D&O.

7 When somebody has not complied with their
8 conditions, we will take them back to Commission and
9 Council.

10 The Applicant has consistently -- what
11 normally happens is it's a time issue, right? Even
12 in the D&O on this particular case, it's unique to
13 see a timing issue in the D&O. There's a 10-year
14 time frame for this particular D&O for this project.

15 Normally, I've observed over the years, the
16 timing has been through the County ordinance. And so
17 the Applicant on a consistent basis will come back --
18 if they haven't built the project, will come back to
19 the Council, the Commission and the Council.

20 And we look at it and find out what's going
21 on with compliance with these conditions? Why isn't
22 this project moving forward? And granted, there's a
23 number of reasons.

24 A majority of the reasons I've heard have
25 been economic in nature as far as global economics.

1 But it could just be the fact that, like what's
2 happening here, there's -- you come in with this
3 plan, and the plan is bird's-eye view. You have this
4 nice little map. And then all of a sudden you
5 realize there's more to it? There's drainage issues,
6 there's -- in this particular area, there's the
7 formerly used defense site issue where they have to
8 come in and do clearing. And you can't do anything
9 until they do that. And it takes a long time for you
10 to be able to get a clearance from them.

11 But, again, it's over a number of issues
12 that can arise.

13 If an Applicant continues to come to the
14 Commission and Council, they are definitely
15 challenged to be able to prove to the Commission and
16 Council, similar to this process, of how are you
17 going to reassure the Commission and the Council that
18 this project is going to go forward.

19 And I've seen, even in this one, when you
20 look at the history, there's adjustments in the
21 conditions to either make it more -- you know, to
22 hold the Applicant at their word, we're going to do
23 this in this time, and if you don't you come back.

24 Or if the Applicant says, look, I've tried,
25 I can't do it. I'm going to try to downsize my

1 project.

2 So in the last amendment that came back,
3 Phase I was brought down to 50 lots, and then the
4 remainder in Phase II.

5 So you see these adjustments that happen.
6 But, again, we do on a regular basis look at
7 compliance.

8 We also have a requirement for our annual
9 progress reports on these larger projects.

10 COMMISSIONER OKUDA: Thank you very much.

11 CHAIRPERSON SCHEUER: Commissioner Chang
12 and then we will take a break.

13 Let's take a ten-minute break now. 9:47.

14 (Recess taken.)

15 CHAIRPERSON SCHEUER: We're back on the
16 record.

17 We were having Commissioner questions of
18 the witness. Commissioner Chang.

19 COMMISSIONER CHANG: Thank you, Chair.

20 Good morning, Mr. Darrow. Thank you so
21 much for your testimony for being here this morning.
22 I just want to follow up on a couple of questions
23 from Commissioner Okuda.

24 Quite frankly, we are here today -- let me
25 kind of backtrack.

1 Has the Petitioner or any representative of
2 the Petitioner come to the County prior to this Order
3 to Show Cause to ask for any -- to provide the County
4 status updates to ask for any changes to any of the
5 conditions?

6 Because you were just talking about the
7 normal process is a developer would come in, and they
8 would try to seek a -- has the Petitioner or a
9 representative of the Petitioner come to the County
10 prior to the Order to Show Cause to ask the County
11 for any adjustments in some of these conditions?

12 THE WITNESS: A number, the D&O, was
13 approved in 2008. So at that time there was an
14 ordinance in place currently, an ordinance that was
15 approved to 2007.

16 The next -- normally there's a five-year
17 timeframe for our conditions. They adjust
18 accordingly. But in this case the Petitioner came to
19 the County in 2013 to refresh that ordinance. And so
20 that ordinance again was adjusted accordingly.

21 When you look at the history, you see the
22 different adjustments that have occurred, and it
23 appears that the Petitioner was working towards
24 trying to adjust the conditions to go forward mainly
25 with phasing.

1 In the beginning there was -- Phase I
2 consisted of quite a number more lots than there
3 currently are in the most recent ordinance. As
4 mentioned, Phase I consists of up to 50 lots at this
5 time.

6 So as far as the Petitioner representatives
7 coming to the County, you have several divisions in
8 the County. The Planning Division is one. We also
9 have Administrative Permits Division that covers all
10 of the administrative activities within the
11 department, one of them being the subdivision
12 actions.

13 In looking at the subdivision actions of
14 the Applicant or of the Petitioner, there's been
15 continual updates and communications between the
16 Petitioner and the subdivision section.

17 Again, as far as the Petitioner and the
18 Planning Division, we have received a number of
19 annual progress reports updating us. And with the
20 current condition of timing coming to a close, the
21 Petitioner has been coming to the County or the
22 representatives and getting ready to be able to go
23 back to the Commission and Council to request
24 additional timing.

25 And again, a lot of this, we have met with

1 them on a number of occasions. They've informed us
2 of this matter of fraud. And we're very open to
3 trying to resolve how they're going to be able to go
4 forward.

5 Because, again, it appears that this has
6 been quite a blow to the Petitioner, and how they're
7 going to be able to work through that and be able to
8 continue on with their project.

9 COMMISSIONER CHANG: Who were the
10 representatives from the Petitioner that met with the
11 County officials that you're aware of?

12 THE WITNESS: There's been two
13 representatives. One was Sidney Fuke, and more
14 recently Steve Lim.

15 COMMISSIONER CHANG: Your testimony, it
16 appears as if there's been consistent updates to the
17 County. Is that correct? Am I understanding your
18 testimony correctly?

19 THE WITNESS: It's not -- normally we
20 require an annual progress per year. There has been
21 some lapses in that. But, again, I believe we had
22 one in 2014, 20016 and then more recently.

23 So as far as the Planning Division, there
24 has been that communications.

25 In the subdivision action, as stated in the

1 annual progress reports, there's been -- they're a
2 little bit more flexible as far as conditions and
3 time extension requests, but everything funnels down
4 to the timing of the ordinance. You cannot -- the
5 administrative sections cannot grant more time than
6 what the ordinance allows. So that always brings
7 them back to having to refresh their ordinance
8 conditions.

9 COMMISSIONER CHANG: Our records indicate
10 that LUC did not receive any annual reports between
11 the years 2009 to 2013.

12 Do you recall whether the County received
13 annual reports during that period of time?

14 THE WITNESS: I do not think we did.

15 COMMISSIONER CHANG: So you did receive --
16 the County was receiving representation by Mr. Fuke
17 2013. Prior to that and up until what period of
18 time?

19 THE WITNESS: The most recent was
20 August 14th, 2018. This was a combined 2017 and 2018
21 Annual Progress Report.

22 COMMISSIONER CHANG: And what did you
23 receive prior to that?

24 THE WITNESS: We have an annual progress
25 report dated February 29th, 2016 from Sidney Fuke.

1 And I believe there was one in 2014. Let me just
2 check.

3 COMMISSIONER CHANG: Are those reports
4 addressed to both Land Use Commission and County of
5 Hawaii?

6 THE WITNESS: The one that I have that I'm
7 looking at, that I hope is in the record, is
8 February 29, 2016 addressed to Daniel Orodener,
9 Executive Officer of the Land Use Commission.

10 COMMISSIONER CHANG: And who was it
11 submitted by?

12 THE WITNESS: Mr. Fuke.

13 COMMISSIONER CHANG: So Mr. Fuke was
14 submitting reports up to 2016?

15 THE WITNESS: I believe there were two, and
16 one was in 2014, and one was in 2016.

17 COMMISSIONER CHANG: You never received any
18 reports from Mr. Stefan --

19 THE WITNESS: Not that I recall.

20 COMMISSIONER CHANG: Did you ever meet him?

21 THE WITNESS: I may have, but it's not
22 memorable.

23 COMMISSIONER CHANG: You say there were
24 allegations where there was fraud. Are you aware of
25 any specific fraud that you're aware of?

1 THE WITNESS: Just what I was reading in
2 the record and what was presented at the meetings
3 with the Petitioner.

4 COMMISSIONER CHANG: Do you pass by the
5 site, the Waikoloa -- have you seen any use of the
6 land?

7 THE WITNESS: Well, I mean, there is a very
8 nice wall that goes along the perimeter, and there's
9 a nice entryway. And I believe it says, I think it
10 says Waikoloa Highlands or Waikoloa Estate or
11 something. It's quite a nice wall and nice entry
12 area, but other than that, I don't recall.

13 I'm -- I think that there is also, I'm not
14 sure if it's still part of this property or not, but
15 there's also a cinder operation, a quarry operation
16 in this general area that's been active, but I can't
17 recall if it's actually on this particular property.

18 COMMISSIONER CHANG: Because this property
19 isn't permitted for quarry process, is it?

20 THE WITNESS: It can through a special
21 permit.

22 COMMISSIONER CHANG: Are you aware of a
23 special permit?

24 THE WITNESS: There is one, I believe it's
25 come before the Land Use Commission for timing. I'm

1 not sure if it's a portion of this property or just
2 outside. Maybe the Petitioner --

3 MR. LIM: I'll represent the special permit
4 for the cinder operation is off-site.

5 COMMISSIONER CHANG: Thank you for the
6 clarification.

7 As far as you're aware of, there's been no
8 activity towards developing the land for the purposes
9 that it was zoned in 2008?

10 THE WITNESS: At this time, I mean other
11 than as mentioned through the record, it's all the
12 reports, the planning, you know, the studies,
13 everything that's been done as far as not on the
14 ground, you know, behind the scenes kind of thing.
15 But on the ground I'm not aware of it.

16 COMMISSIONER CHANG: Just a question about
17 the zoning. And I'm clearly not as akamai as you are
18 or some of the others here. Help me understand FA 1,
19 you call it Family Ag.

20 Based upon the proposed development by the
21 Petitioner, the 398 lots, one acre, can they do that
22 on FA 1?

23 THE WITNESS: They could.

24 COMMISSIONER CHANG: They could?

25 THE WITNESS: Yeah, it would be a little

1 different being in the State Land Use Agricultural
2 District and being within Family Agricultural Zoning,
3 it would be instead of a single-family dwelling, we
4 would be looking at farm dwelling. So it has to be
5 related to farming activity. And I think in the
6 record it shows the actual agricultural significance
7 of this land is minimal.

8 COMMISSIONER CHANG: So if, again, the
9 issue before the Commission right now is whether to
10 revert the property, because they've not completed
11 the buildout by 2018.

12 If it was reverted back to the original
13 zoning being Ag, while it is inconsistent with your
14 current General Plan, the Petitioner could still
15 proceed with its proposed development to develop lots
16 for residential one acre, they would have to make
17 some adjustments to be more consistent with the Ag
18 Farming lot zones, but they could do residential
19 development on those lots?

20 THE WITNESS: The term "residential" --

21 COMMISSIONER CHANG: Farm dwellings, they
22 could do farm dwellings?

23 THE WITNESS: Yeah.

24 COMMISSIONER CHANG: There is still
25 potential use of this property, just they'd have to

1 be consistent with the zoning and the conditions
2 under those zonings?

3 THE WITNESS: And the General Plan.

4 COMMISSIONER CHANG: And the General Plan.

5 Okay, I think that's it. Thank you very
6 much.

7 CHAIRPERSON SCHEUER: Commissioner
8 Ohigashi.

9 COMMISSIONER OHIGASHI: Mr. Darrow, when I
10 hear the word "refresh", I'm not used to hearing that
11 word. You mean refreshing an ordinance? What does
12 that mean exactly?

13 THE WITNESS: Normally our ordinances come
14 with a timing condition. Our normal standard timing
15 is five years.

16 COMMISSIONER OHIGASHI: I'm more interested
17 in the procedure, what has to be done.

18 THE WITNESS: So if an Applicant or a
19 Petitioner needs to refresh their condition, they
20 will have to submit an amendment request, which goes
21 before the Planning Commission, and they in turn
22 submit either a favorable or unfavorable
23 recommendation to the County Council who will then
24 make the final decision.

25 COMMISSIONER OHIGASHI: It's an amendment

1 to an ordinance, another ordinance amended?

2 THE WITNESS: Yeah.

3 COMMISSIONER OHIGASHI: I just wanted to
4 know what that means.

5 The second thing that I wanted to ask you
6 about was that you mentioned an ordinance in 2005
7 requiring this developer to obtain Land Use
8 Commission approval or change of, I guess, to
9 reclassify it to Rural. Is that right?

10 THE WITNESS: Yes.

11 COMMISSIONER OHIGASHI: And that was
12 directed only at this developer?

13 THE WITNESS: Yes.

14 COMMISSIONER OHIGASHI: And the reason for
15 that, you indicated that prior to that they changed
16 the General Plan to recognize this as Rural?

17 THE WITNESS: If I could elaborate on the
18 question.

19 The Rural zoning was in place since 1990,
20 yet it was somewhat inconsistent with the State Land
21 Use Agricultural District zoning. And so in 2005,
22 and I believe it was in direct response to the County
23 aligning their General Plan to the zoning, then the
24 County Council request that the Applicant come before
25 the Land Use Commission to also make their State Land

1 Use designation consistent with both the General Plan
2 and the zoning.

3 COMMISSIONER OHIGASHI: Assuming that they
4 didn't do that, would they be permitted to go forward
5 with the present development?

6 THE WITNESS: No.

7 COMMISSIONER OHIGASHI: And assuming that
8 there was no ordinance, would they have been
9 directing them to do that? Would they have been able
10 to submit an application for rezoning, or submit a
11 subdivision?

12 THE WITNESS: I believe they would. It
13 would be what we would probably refer to as
14 nonconforming or grandfather-type situation.

15 It's very similar to Aina Le'a, which has
16 that same inconsistency. This all occurred in the
17 early 1990s.

18 COMMISSIONER OHIGASHI: So would it be fair
19 to say then the County directed them to file this
20 Land Use Commission Petition in order to satisfy the
21 County's requirements, and not necessarily meant to
22 bar the Petitioner from filing a subdivision
23 ordinance?

24 THE WITNESS: I believe that's accurate.

25 COMMISSIONER OHIGASHI: And apparently they

1 did, they complied with --

2 THE WITNESS: Sure.

3 COMMISSIONER OHIGASHI: Now, I was just
4 curious about testimony relating to -- that you gave
5 relating to your position on the affordable housing.

6 Was that a directed issue to you by the
7 Housing Director that they are no longer going to
8 take this agreement? The County is no longer
9 planning to honor this agreement?

10 THE WITNESS: That was what I was trying to
11 express in my testimony, that I'm really not the
12 right person to answer that.

13 COMMISSIONER OHIGASHI: But the County took
14 that position for this hearing. So I'm asking you
15 was that authorized? Were you authorized to take
16 that position by the Housing Director?

17 THE WITNESS: No.

18 COMMISSIONER OHIGASHI: Who authorized you
19 to take that position -- scratch that. I'm not going
20 to ask that question. No, I'm not going to ask that
21 question, because from what I understand is that
22 signatures to the agreement seems to be the
23 Administration as well as the Housing Director and
24 approved by the Corporation Counsel, Deputy
25 Corporation Counsel as to formal legality. Somewhere

1 in all these people's knowledge, wouldn't they know
2 whether the terms and conditions of all the
3 ordinances dealing with the County?

4 THE WITNESS: I believe they would.

5 COMMISSIONER OHIGASHI: Okay, so -- and I'm
6 taking this -- I'm asking. So there's no official
7 position taken by any of the signatures to that
8 agreement, that being the Managing Director's Office
9 and the Housing Director -- I keep calling it Housing
10 Director.

11 THE WITNESS: Administrator.

12 COMMISSIONER OHIGASHI: None of them have
13 directed you to take this position?

14 THE WITNESS: No.

15 CHAIRPERSON SCHEUER: Commissioners?
16 Commissioner Cabral.

17 VICE CHAIR CABRAL: Thank you, Jeff, for
18 trying to help us understand things.

19 I drive by that location quite often, and I
20 think the sign says "Highland Golf Estates". It's
21 hard to read through the weeds.

22 But since it references the golf, and I
23 know in my reading that it previously talked quite a
24 bit about a golf course being involved. But it's so
25 hard to figure out where we're at now.

1 Are there plans, from your understanding,
2 is there still a plan that in addition to the housing
3 lots of 398 or 86 lots that there would be a golf
4 course still to be built?

5 THE WITNESS: My understanding is that the
6 golf course is no longer being pursued, but those
7 areas, open areas would be more for recreational
8 passage and park use.

9 But if the Petitioner could confirm that,
10 that would be good.

11 VICE CHAIR CABRAL: Thank you.

12 CHAIRPERSON SCHEUER: Further questions? I
13 have a few. I'll try to be brief.

14 I know a number of us have asked these
15 questions, but I'm still trying to wrap my head
16 around it.

17 The first question that is before the
18 Commission is whether or not substantial commencement
19 has occurred?

20 Can you orally respond? I see you nodding
21 yes.

22 THE WITNESS: That is the question.

23 And so are you asking me to answer that?

24 CHAIRPERSON SCHEUER: I'm just asking you,
25 you understand that that's the first thing in front

1 of us, has there been substantial commencement?

2 THE WITNESS: My understanding there has
3 not.

4 CHAIRPERSON SCHEUER: And then we get to
5 the issue of if there has been no substantial
6 commencement, what do we do with the property. And a
7 number of fellow Commissioners asked questions about
8 that.

9 If, what I'm trying to make really clear in
10 my mind, is if the Commission reverted the property,
11 what would the next process be for the developer if
12 they still wish to build out a substantially similar
13 development?

14 THE WITNESS: They would petition at this
15 time, because of the General Plan Amendment, they
16 would petition the Planning Department staff that's
17 working through that amendment, and request that
18 through that comprehensive update, that they consider
19 the property being reverted back to Extensive
20 Agriculture.

21 When you look at the area map of the
22 General Plan, the areas more to the north and east of
23 this area are still in Extensive Agriculture as far
24 as the General Plan.

25 From that point, if that occurs, then they

1 would come in. They would submit a change of zone
2 application. I'm not sure how it would work. We'd
3 have to kind of work it out.

4 I don't think they possibly could amend the
5 current ordinance to go from RA to FA or they would
6 request that that be revoked and come in for a new
7 ordinance. I'm not sure what the process would be at
8 that point.

9 But they would want to change the zoning
10 from Residential Agricultural one acre to Family
11 Agriculture one acre.

12 CHAIRPERSON SCHEUER: And with appropriate
13 actions by the Planning Commission and the County
14 Council they could do so without further coming to
15 this body?

16 THE WITNESS: Correct. At that point there
17 would be no conditions or D&O with the State Land Use
18 Commission.

19 CHAIRPERSON SCHEUER: Would the Planning
20 Commission or the Council have the opportunity to
21 place further conditions or different conditions on
22 the project?

23 THE WITNESS: They would.

24 CHAIRPERSON SCHEUER: Would those
25 conditions include the ability to place conditions on

1 the project regarding the development of affordable
2 housing?

3 THE WITNESS: Yes.

4 CHAIRPERSON SCHEUER: So there was some
5 questioning yesterday that seemed to imply that the
6 affordable housing requirement would -- no affordable
7 housing would be produced by this project, but that
8 is not necessarily true. It very well might be that
9 the Planning Commission and the County Council could
10 require substantially similar affordable housing
11 requirements for them to go forward with this project
12 under County?

13 THE WITNESS: It would be exactly -- it
14 would be, in my understanding, it would be -- you're
15 asking for one-acre zoning regardless if it's
16 Residential Agriculture or Family Agriculture. The
17 requirements would be the same depending on the
18 amount of lots. 20 percent of the lots would need to
19 meet the affordable housing requirement.

20 CHAIRPERSON SCHEUER: So while on paper
21 there would be an inconsistency between the County
22 zoning and the State Land Use district, essentially
23 that could be rectified on the County level and the
24 project could go forward?

25 THE WITNESS: It could. But there are

1 processes, and those processes, for example, if the
2 General Plan does not change and remains the same,
3 then it would be difficult to go forward with that
4 inconsistency.

5 CHAIRPERSON SCHEUER: But if the General
6 Plan was amended, it could do so?

7 THE WITNESS: Yes.

8 CHAIRPERSON SCHEUER: And that could be
9 done by ordinance?

10 THE WITNESS: Correct.

11 CHAIRPERSON SCHEUER: I don't have anything
12 further.

13 COMMISSIONER OHIGASHI: Mr. Chairman, I
14 have one followup.

15 CHAIRPERSON SCHEUER: Commissioner
16 Ohigashi.

17 COMMISSIONER OHIGASHI: Following that same
18 scenario, what would happen to that ordinance
19 requiring them to seek petition for land use boundary
20 amendment? Does that no longer exist at this point?

21 THE WITNESS: That ordinance was in 2005.
22 The most recent ordinance -- because the Petitioner
23 had met that condition, that's no longer a
24 requirement.

25 I would have to look at -- I believe that

1 condition was taken out in the most recent ordinance.
2 I think it was taken out because they had complied
3 with it. And when that ordinance was again
4 refreshed, they ended up removing that condition
5 because it was --

6 COMMISSIONER OHIGASHI: So it was a
7 condition to the existing ordinance, not a separate
8 ordinance?

9 THE WITNESS: Correct.

10 COMMISSIONER OHIGASHI: And the other
11 question, the followup to that particular question.

12 Then would it be correct to say that to use
13 your word "refreshment" or "amendment" to the
14 existing ordinance, would that be available to the
15 Applicant for the purposes of attaching additional
16 conditions whether we revert or not?

17 THE WITNESS: At this time the Applicant --
18 in 2013 the ordinance that was amended had a
19 five-year timeline. So it's now 2018. The Applicant
20 is currently in a position to have to go back to
21 Planning Commission and County Council to request
22 additional time for the current ordinance.

23 COMMISSIONER OHIGASHI: And would that
24 ordinance depend on whether or not we revert?

25 THE WITNESS: If the Petitioner comes

1 before the Planning Commission with that request, and
2 during that time we look at -- it's like --

3 COMMISSIONER OHIGASHI: This is what I'm
4 trying to ask, really trying to ask you this.

5 We have this ordinance that is in effect
6 right now. If we reverted to Rural, can the
7 Petitioner, in its refreshment process, add
8 conditions to keep that ordinance in effect for the
9 purposes of -- or can they amend that ordinance to
10 change the Rural designation under the General Plan.
11 In other words, piggyback on the existing ordinance
12 or amendment to say that this parcel will be exempt?

13 THE WITNESS: If I can just clarify. I
14 need to expound a little.

15 The General Plan update ordinance is
16 separate from this particular ordinance of this
17 subject property. So as they go through this General
18 Plan Amendment and change that General Plan Ordinance
19 with the hope that that would reflect, if this was
20 reverted to Agriculture, from the property being now
21 Extensive Agriculture, then the Applicant could come
22 back in and fresh their current.

23 If they were to go forward now, if this was
24 reverted, we would say they don't meet the criteria
25 for approval because it's no longer consistent with

1 the General Plan.

2 COMMISSIONER OHIGASHI: And my last set of
3 question following up.

4 How much time are we talking about?

5 THE WITNESS: It could take years.

6 COMMISSIONER OHIGASHI: And assuming that
7 they were able to reach an understanding with your
8 Housing Department regarding development of low cost
9 housing, would that be -- could that be done prior to
10 the change in General Plan?

11 THE WITNESS: It could, but the Applicant
12 would be doing that on good faith thinking and hoping
13 that these other activities were going to happen, but
14 the reality is they may not all happen.

15 COMMISSIONER OHIGASHI: Thank you.

16 CHAIRPERSON SCHEUER: Commissioner Chang.

17 COMMISSIONER CHANG: Sort of following this
18 line of questioning, thinking about what the options
19 are.

20 So we have explored if the Land Use
21 Commission revert, a Petitioner could go back through
22 this General Plan Amendment to make it consistent.

23 Could the Petitioner also come back and
24 file a new application with the Land Use Commission
25 to change this back to Rural?

1 THE WITNESS: They could.

2 COMMISSIONER CHANG: They'd have to update
3 all of their environmental, all the other documents,
4 but they could essentially start the boundary
5 amendment process?

6 THE WITNESS: Yeah.

7 COMMISSIONER CHANG: So there is more
8 options then just -- okay, thank you.

9 CHAIRPERSON SCHEUER: Sorry, along with
10 this line of questioning.

11 Should this Commission revert property, the
12 Petitioner comes before you to seek the appropriate
13 General Plan changes and other changes to have this
14 project go forward solely under County authority.

15 Do you also have the ability, in addition
16 to requiring conditions, do you have the ability to
17 require that certain studies be updated for
18 decision-making?

19 THE WITNESS: Yes.

20 CHAIRPERSON SCHEUER: Would that include
21 water and archaeological studies?

22 THE WITNESS: It may include hydrology
23 studies, but normally not. But if they're doing an
24 environmental assessment or impact statement, it will
25 be included in that.

1 Normally in our amendment process we have
2 conditions that have been added to the zoning code
3 relating to concurrency. So normally you'll be
4 seeing a traffic study come in.

5 We are always -- as far as archeology,
6 cultural, historical studies, those are always
7 priorities for us. We make sure that they're all
8 updated and approved through the State Historic
9 Preservation Division process.

10 But I would have to say as far as
11 hydrology, I'm not -- I'm thinking that might not be,
12 but we could always ask, if we have the ability, if
13 we're aware of something similar to what was brought
14 up in the hearing, that we could request that.

15 CHAIRPERSON SCHEUER: Thank you.

16 Anything further, Commissioners? Okay
17 redirect.

18 MR. KIM: Thank you.

19 REDIRECT EXAMINATION

20 BY MR. KIM:

21 Q I'm going to start asking you to stay on
22 the line of the land use type questions.

23 First question is: Are you aware of the
24 first change of zoning ordinance for this property in
25 1990?

1 A Yes.

2 Q And is that the time that the property was
3 zoned as RA-1A?

4 A Correct.

5 Q In 1990 did the RA-1A zoning conflict with
6 the General Plan?

7 A I would think it would. But, again, I'm
8 not sure as the decision makers, how they did that.
9 But it appears inconsistent, not only with the
10 General Plan, but also with the State Land Use
11 designation.

12 Q Do you know whether the FA designation was
13 available in 1990?

14 A My understanding is it came about in the
15 Comprehensive Zoning Code update in 1996.

16 Q And you testified that there presently is
17 rezoning ordinance as to the subject property, is
18 that right?

19 A Yes.

20 Q Do you know if there's any restrictions,
21 conditions on Petitioner now as far as the rezoning
22 ordinance goes?

23 A There are a number of conditions for the
24 Petitioner in Ordinance 1329. It's conditions A
25 through O.

1 Q Thank you.

2 Do you know whether any of those conditions
3 require Petitioner to satisfy the County's affordable
4 housing requirements?

5 A That would be Condition E.

6 Q Thank you.

7 Do you know whether Petitioner is either
8 noncompliant or in violation of any of the conditions
9 of the present rezoning ordinance?

10 A The only condition that currently is out of
11 compliance is Condition B, which is the timing
12 condition. And so again, it's just a matter of
13 needing more time.

14 Q What was the deadline set out in condition
15 B?

16 A If I could just read it? It's not long.

17 Final subdivision approval for not less
18 than 50 lots shall be secured within five years of
19 this new amendment, provided, however, that final
20 subdivision approval for the entire project shall be
21 secured within ten years of the effective date of
22 this new amendment.

23 So because the first part of the condition
24 was not met, then they could not move on to the
25 second part. The effective date of the ordinance was

1 March 13, 2013, so that would leave us March of 2018.

2 Q Thank you.

3 Now, I'm going to shift to questions about
4 the affordable housing. Just to clarify a few
5 matters.

6 Do you know whether anyone in the County
7 saw the deed where Waikoloa Highlands, Incorporated
8 transferred the 11.7 acres to Plumeria at Waikoloa
9 LLC before signing the release?

10 A I'm not aware.

11 Q Do you know whether the administrator of
12 the Office and Housing and Community Development
13 believes that Petitioner has presently satisfied the
14 affordable housing condition?

15 A My understanding, again, this is by
16 hearsay, is that he currently does not.

17 Q So he does not believe that they have
18 fulfilled the condition for affordable housing
19 presently, correct?

20 A That's my understanding, but again, that's
21 through hearsay.

22 Q A few more questions.

23 Do you know whether the Affordable Housing
24 Agreement stated that the 11.7 acres was going to be
25 conveyed to a nonprofit entity?

1 A I'm not personally aware of that, but
2 that's what has been on the record.

3 Q And do you know whether or not the entity
4 Plumeria at Waikoloa LLC, which the property was
5 conveyed to, was a nonprofit entity?

6 A It appears that it was not.

7 Q Do you know whether Plumeria at Waikoloa
8 LLC is still the owner of this property?

9 A My understanding is it is not.

10 Q Do you know -- do you have any
11 understanding as to the transaction -- oh, please
12 strike that.

13 Do you know who the present owner is of the
14 property?

15 A Just through the record. My understanding
16 it's Pua Melia.

17 Q Do you know whether Pua Melia paid for the
18 property?

19 A My understanding is they did.

20 Q How much do you understand that they paid?

21 A 1.5 million.

22 Q That's it for my redirect.

23 CHAIRPERSON SCHEUER: Mr. Lim, do you have
24 questions of this witness?

25 MR. LIM: Yes, based on the redirect.

RE CROSS-EXAMINATION

BY MR. LIM:

Q I'll start from backwards forward for the affordable housing issue.

You said that you believe that the Housing Administrator of OHCD believes that the Affordable Housing Agreement entered into for this project was not fully satisfied?

A Again, that's just what I've heard through hearsay.

Q Who did you hear that from?

A Our counsel.

Q Who is your counsel?

A Ron Kim.

Q Was he at the meeting last week with the Office of Housing and Community Development?

A I'm not sure.

MR. KIM: If I may represent, I was not at the meeting, but I have corresponded with Mr. Gyotoku and his deputy, and both of them are in agreement that Petitioner has not satisfied his affordable housing requirement.

CHAIRPERSON SCHEUER: I'll just say at this point that it's not particularly helpful to the Commission, or at least to me, to have one person

1 come up and say I heard this at a meeting and the
2 other person say I heard this, different thing
3 happening, without any documentation as to what
4 actually might be the situation.

5 So I'm going allow you to proceed with the
6 question, but I'm going to say, in general, the last
7 latter set of questioning and this line of
8 questioning to me doesn't shed any particularly great
9 light on what has gone on.

10 COMMISSIONER CHANG: Excuse me, Chair.
11 This is based upon Mr. Kim's statement.

12 Is the County going to be submitting
13 something for the record that confirms that position?

14 MR. KIM: We can, yes. We can, because I
15 have emails right now with the director and deputies,
16 but there is some other information that I consider
17 privileged presently, so I really don't want to share
18 those emails.

19 CHAIRPERSON SCHEUER: Commissioner Okuda.

20 COMMISSIONER OKUDA: Can I state for the
21 record I join in the concerns of the Chair, and if I
22 could just add this. I don't believe that the
23 attorney/client privilege can be asserted in part and
24 not asserted in part.

25 If there's disclosure of certain statements

1 which are normally considered attorney/client
2 privilege, I believe the case law in Hawai'i doesn't
3 allow the privilege to be asserted in part and not in
4 part.

5 So I join in the Chair's observation about
6 helpfulness of certain information and
7 representations being presented.

8 MR. KIM: The information email which is
9 privileged is not privileged attorney/client
10 privilege. It's more of a personnel type privilege.

11 CHAIRPERSON SCHEUER: Commissioner
12 Ohigashi, and I will just say that I'm getting close
13 to being very open to the idea of executive session.

14 COMMISSIONER OHIGASHI: I was going to move
15 for executive session.

16 CHAIRPERSON SCHEUER: This is why I'm so
17 fond of you, Commissioner Ohigashi.

18 There has been a motion to move into
19 executive session by Commissioner Ohigashi. Is there
20 a second?

21 VICE CHAIR CABRAL: I'll second that.

22 CHAIRPERSON SCHEUER: It has been seconded
23 by Commissioner Cabral. Is there any discussion of
24 the motion? Hearing none, all if favor say "aye",
25 any opposed?

1 Commission is going to go into executive
2 session to consult with its attorney.

3 (Executive session.)

4 CHAIRPERSON SCHEUER: We're back on the
5 record.

6 When we went into executive session, the
7 Petitioner's counsel was questioning the County's
8 witness. I'm requesting, as the Chair, that the
9 County provide us written documentation of what the
10 actual position is currently on the satisfaction of
11 the affordable housing requirement from the Decision
12 and Order in this case. And I don't want to
13 entertain any further questioning or discussions of
14 that matter.

15 Let me say, and I want that position before
16 we close this hearing. So let me say a little bit
17 more about procedurally where I think we are, where I
18 intend for this hearing to go.

19 I will allow Mr. Lim to ask any further
20 questions that are not related to the County's
21 position on the affordable housing requirement.

22 That will conclude the County's portion. I
23 will allow the Office of Planning if at this time
24 they want to present their case. I'm then going to
25 open it up to discussion by the Commission, not fully

1 closing the evidentiary portion of this hearing,
2 reserving that and allowing the Commission to have a
3 discussion about what additional information we might
4 want briefing on from the parties.

5 Is that clear?

6 MR. KIM: Yes. I just have one question
7 for clarification.

8 The County's Position Statement, should
9 that come from the Office of the Mayor or the Office
10 of housing and --

11 CHAIRPERSON SCHEUER: I will leave it up to
12 you to determine who is best able to represent the
13 County's position on that.

14 MR. KIM: Okay, thank you.

15 CHAIRPERSON SCHEUER: Mr. Lim.

16 MR. LIM: Thank you, Mr. Chairman.

17 Q Mr. Darrow, just in general for
18 subdivisions, can a subdivider of land obtain final
19 subdivision approval and sell lots without any
20 groundwork? And this assumes that they get their
21 construction plans approved and post a bond covering
22 the cost of the improvements.

23 A Can I ask further clarification?

24 Does it -- does that include final
25 subdivision approval?

1 Q Yes. I was asking it so that there was --
2 I understand your concerns about the position of the
3 Petitioner on selling of lots prior to final
4 subdivision approval. So that's why I --

5 CHAIRPERSON SCHEUER: Mr. Lim, you asked
6 whether they can sell lots. Are you asking whether
7 the County can enjoin the selling of lots?

8 MR. LIM: I'll ask the question another
9 way.

10 Q Assuming the subdivider obtains final
11 County approval of its construction drawings and
12 posts subdivision bond in agreement with the County,
13 can he then get final subdivision approval and sell
14 the lots without touching the ground at all?

15 A My understanding is yes.

16 Q Going to the processing time required.

17 If the Commission were to revert the
18 Petition Area from the Rural to the Agricultural
19 District, you noted that the timeframe would include
20 two main actions. The first being a General Plan
21 Amendment from Rural to Agricultural, is that
22 correct?

23 A Correct.

24 Q And the second being an amendment or a new
25 zoning ordinance to the Family Agricultural FA-1A

1 zoning?

2 A Correct.

3 Q For the first action you noted that the
4 Petitioner could not file its independent application
5 for a General Plan Amendment because the County's
6 already in the process of its ten-year review; is
7 that correct?

8 A Correct.

9 Q And when was the last General Plan?

10 A 2005.

11 Q And you're supposed to do it every ten
12 years by charter?

13 A Correct. And they requested before the
14 Council additional time to begin and finish that
15 process.

16 Q So at least as of today, it's now 13 years
17 past?

18 A Correct.

19 Q Before the 2005 plan, what was the General
20 Plan before that?

21 A My understanding is 1989.

22 Q So between 1989 and 2005 there was a long
23 period of time, decades before the General Plan was
24 amended?

25 A For clarification purposes, I'm not sure if

1 in the original General Plan there was a ten-year
2 time frame for updates as there is currently. So
3 that's -- I'm just not sure about that.

4 Q So if the Commission were, let's say, this
5 month to revert the property back to the Agricultural
6 District and the County would be processing its
7 General Plan Amendment, how many years do you think
8 it would take from today to complete the General Plan
9 Amendment?

10 A It would just be a guess, but I would say
11 several years.

12 Q In excess of three years?

13 A It very well could.

14 Q Then the second step, the rezoning. How
15 long would that typically take?

16 A Normally -- it normally takes between six
17 months to one year.

18 Q So a total of processing time for redo of
19 the project, assuming a reversion here, would be
20 let's say a minimum of four years?

21 A It very well could be.

22 Q If the Commission were to decide to defer
23 the Order to Show Cause hearing until the Applicant
24 could process its County Zoning Amendments, would the
25 County be in favor of that process?

1 A I mean, just given the history regarding
2 this project, I believe they would be.

3 Q Excuse me while I look through my notes.
4 I have no further questions.

5 COMMISSIONER OHIGASHI: Mr. Chair.

6 CHAIRPERSON SCHEUER: Commissioner
7 Ohigashi.

8 COMMISSIONER OHIGASHI: Can I ask the
9 question before I forget?

10 CHAIRPERSON SCHEUER: Only you could answer
11 that.

12 COMMISSIONER OHIGASHI: Mr. Darrow, how
13 long would it take to complete the proposed
14 amendments for this project that is presently sought?

15 THE WITNESS: Between six months and one
16 year.

17 COMMISSIONER OHIGASHI: Okay.

18 THE WITNESS: If I could just clarify.

19 CHAIRPERSON SCHEUER: You may continue
20 answering.

21 THE WITNESS: Thank you.

22 That's in regards to the current ordinance,
23 and going back to refresh the time and condition,
24 correct, between six months to one year.

25 CHAIRPERSON SCHEUER: Are you ready, Mr.

1 Lim?

2 MR. LIM: No further questions.

3 CHAIRPERSON SCHEUER: Last one for me.

4 Is it possible for the County to
5 simultaneously process a General Plan Amendment and a
6 zoning change? Has that been done?

7 THE WITNESS: Many times. Unfortunately in
8 this particular situation, as Mr. Lim was referring
9 to is when the County is going through a General Plan
10 Amendment, then it does not allow for interim
11 amendments from parties and petitioners to come in.

12 CHAIRPERSON SCHEUER: That is at the
13 discretion of the Council or is that a charter?

14 THE WITNESS: I believe it is -- I would
15 have to -- it could be in the General Plan actually,
16 but I would have to check. But it's been -- I'm not
17 sure exactly.

18 CHAIRPERSON SCHEUER: You're not sure,
19 that's okay.

20 THE WITNESS: Thank you.

21 CHAIRPERSON SCHEUER: Thank you. Are you
22 done with your witness, counsel?

23 MR. KIM: Yes, thank you.

24 CHAIRPERSON SCHEUER: You're excused.

25 THE WITNESS: Thank you.

1 CHAIRPERSON SCHEUER: Office of Planning.

2 MS. APUNA: Thank you, Chair. I will now
3 present OP's Statement of Position.

4 CHAIRPERSON SCHEUER: Please proceed.

5 MS. APUNA: Thank you.

6 Petitioner has failed to comply with and/or
7 has not the D&O.

8 Condition 2 requires that the Petitioner
9 develop the Petition Area and complete buildout of
10 the Project no later than ten years from the date of
11 the D&O. Petitioner has acknowledged that they have
12 failed to complete the Project by the June 10th, 2018
13 deadline.

14 Condition 6 required Petitioner to reach an
15 agreement with State DOT for construction of certain
16 highway improvements. DOT advised that there has not
17 been full agreement with Petitioner on these
18 improvements, and Petitioner stated the same.

19 Condition 9 required that Petitioner
20 provide affordable housing opportunities for
21 residents of Hawaii. While Petitioner has
22 transferred 11.8 acres to a corporation for
23 development of affordable housing, this Condition
24 remains unfulfilled.

25 Condition 11 required Petitioner to consult

1 with State Historic Preservation Division on
2 archaeological Site 22. Petitioner has not consulted
3 with SHPD regarding Site 22.

4 Condition 15 required Petitioner, on a
5 fair-share basis, the funding and construction of
6 adequate solar-powered civil defense measures serving
7 the Petition Area. The State Department of Defense
8 has no record of Petitioner contacting them regarding
9 defense measures.

10 Condition 20 required Petitioner to give
11 notice to the Commission of any change in ownership
12 interest in the Petition Area. By transferring the
13 Petition Area to successor Waikoloa Highlands without
14 notice of intent to transfer, Petitioner failed to
15 comply with Condition 20.

16 Petitioner failed to comply to Condition 21
17 annual reports for years 2009 to 2013.

18 Petitioner has not substantially commenced
19 use of the land in accordance with its
20 representations made to the Commission. By plain
21 language of the statute, Petitioner is required to
22 demonstrate the commencement of the project is
23 "substantial" and "of use of the land."

24 The Supreme Court in Bridge Aina Le'a noted
25 that "substantial" is "considerable in amount or

1 value; large in volume or number."

2 Here Petitioner has not commenced backbone
3 infrastructure or any construction on the land, has
4 not provided any evidence of construction of water
5 source, storage and transmission facilities and
6 improvements. Petitioner has not commenced highway
7 improvements, consultation with SHPD on
8 archaeological Site No. 22, and has not made any
9 progress toward providing civil defense measures.

10 In sum, as the Petition Area remains
11 vacant, Petitioner's commencement of the project can
12 only be characterized as minimal rather than
13 substantial.

14 Notably, for consistency with the
15 legislative intent of HRS 205-4(g), this Commission
16 need not find that the Petition Area was used for
17 speculative or land-banking purposes. It is enough
18 that the land was left vacant for the past ten years
19 and the development was untimely.

20 Petitioner has failed to show good cause
21 why the Petition Area should not revert to its former
22 classification. Petitioner attributes the delay in
23 the Project to the gross mismanagement and bad acts
24 of Martirosian. However, there is no corporate or
25 other document to draw a connection between his bad

1 acts to the mismanagement and extensive delay of the
2 Project. And it is not evident that the bad acts of
3 Martirosian can be separated out from the overall
4 responsibility of the Waikoloa Highlands Corporation
5 or parent Vitroil Corporation.

6 It is also unclear why the Project has not
7 substantially commenced since Mr. Martirosian was
8 removed or resigned from the corporation more than
9 two years ago.

10 Petitioner has also failed to demonstrate
11 its ability to move forward with the Project by
12 providing the Commission with a project timeline, a
13 financial statement with a current certified balance
14 sheet and income statement to demonstrate financial
15 capability similar to that required under HAR Section
16 15-15-50(c)(9) for district boundary amendments, a
17 development plan or motions to amend the current
18 conditions.

19 In its Supplemental Position Statement,
20 Petitioner has provided to the Commission:

21 A commitment letter from Armbusinessbank
22 CJSC for a \$45 million loan to Waikoloa Highlands to
23 develop the property; as well as the Project
24 expenditures in the amount of \$1.27 million.

25 However, this new information does not

1 significantly alter or augment Petitioner's showing
2 of compliance with conditions, substantial
3 commencement of use of the land, or good cause.

4 The commitment letter is a step forward,
5 but Petitioner offers no other assurances that the
6 project will be completed in a timely manner.

7 The 1.278 million dollars in project
8 expenditures demonstrates investment in the project,
9 however, upon closer inspection, all but one of these
10 expenditures were invoiced in 2006, 2007 or 2008
11 prior to the adoption of the Decision and Order on
12 June 10th, 2008. Because these expenditures were
13 made prior to the D&O, they were not made in
14 compliance with representations made in the D&O or
15 subsequent to that reclassification.

16 Petitioner also argued that the current
17 County plans and zoning for the Petition Area that
18 are consistent with the State Rural classification
19 should not be "frustrated" or disturbed. However,
20 this Commission is within its authority to revert the
21 land to its prior classification regardless of
22 current County plans and zoning. And the County is
23 not restricted from amending its County plans and
24 Zoning to be consistent with the State Land Use
25 classification.

1 Upon further review of Petitioner's
2 compliance with the affordable housing Condition 9,
3 while Petitioner relies on the County's release, it
4 is questionable that Petitioner has satisfied
5 Condition 9.

6 Condition 9 states that Petitioner shall
7 provide affordable housing opportunities for Hawai'i
8 residents, quote, "in accordance with applicable
9 affordable housing requirements of the County",
10 specifically Hawaii County Code, Chapter 11, Article
11 1.

12 Chapter 11, Article 1 requires Petitioner
13 to earn affordable housing credits equal to 20
14 percent of the number of units or lot. This is
15 consistent with Finding of Fact 47 of the Decision
16 and Order, as well as Ordinance 13-29.

17 For a 398 residential lot project,
18 Petitioner is therefore required to fulfill 80 credit
19 or units to meet its affordable housing requirement.
20 Based on HHFDC's letter to OP Pua Melia is proposing
21 under its 201H application to develop 32 affordable
22 units on 11.8 acre lot, which is 48 credits or units
23 short of fulfilling the affordable housing
24 requirement.

25 Moreover, Petitioner's witness denied that

1 the Pua Melia project has anything to do with the
2 Waikoloa Project. Petitioner believes that the
3 transfer of 11.8 acre lot, which is merely
4 1.6 percent of the total 731.58 acre Petition Area,
5 which remains undeveloped and vacant, fulfills
6 affordable housing Condition 9.

7 Additionally, Chapter 11, Article 1 of the
8 Hawaii County Code requires that the transfer land be
9 made to a nonprofit corporation. Neither Plumeria at
10 Waikoloa LLC nor Pua Melia is a nonprofit corporation
11 according to DCCA record. The County has since
12 raised the issue that the land is not without unusual
13 site conditions that make it difficult to build a
14 home on the lot as required by Hawaii County Code
15 Chapter 11.

16 In conclusion, over the past ten years,
17 Petitioner simply has not developed the Project as
18 Petitioner had represented it would, and haven't even
19 substantially commenced use of the land. Petitioner
20 has failed to comply with the D&O conditions and
21 cannot sufficiently justify delay or assure this
22 Commission timely development of the project in the
23 future. Therefore, this Commission, pursuant to HRS
24 Section 205-4(g) is authorized to revert the Petition
25 Area to its prior classification. OP would not

1 object to such reversion. Thank you.

2 CHAIRPERSON SCHEUER: Questions for Office
3 of Planning?

4 MR. LIM: From Petitioner, I would like to
5 call Rodney Kawamura who's seated at the table.

6 CHAIRPERSON SCHEUER: I don't think he's
7 been provided listed as a planned witness for the
8 Office of Planning. He his sitting at the table.

9 MR. LIM: We have some questions for the
10 Office of Planning.

11 CHAIRPERSON SCHEUER: We will take a
12 five-minute break.

13 (Recess taken.)

14 CHAIRPERSON SCHEUER: We are back on the
15 record.

16 Mr. Lim, you didn't list wanting to
17 question Rodney Funakoshi as an adverse witness. You
18 didn't request that he be produced as a witness
19 earlier, did you?

20 MR. LIM: No, I did not, but in an Order to
21 Show Cause proceeding, there is no rule for listing
22 witnesses, and that's how we've been proceeding.

23 Mr. Darrow was not listed as a witness
24 either. For the record, I'll indicate that I
25 understood that the County wasn't going to call Mr.

1 Darrow, then the Commission took a break and Mr.
2 Darrow was asked to testify. So I'm asking the same
3 thing for Mr. Kawamura.

4 CHAIRPERSON SCHEUER: But Mr. Darrow was
5 called by the County as a witness, not by you.

6 MR. LIM: Yes, that's correct. I think I
7 have the right --

8 CHAIRPERSON SCHEUER: I'm not doubting that
9 you have the right to call your own witnesses who you
10 might not have -- who are not adverse witnesses, but
11 you're trying to call the Office of Planning as an
12 adverse witness.

13 MR. LIM: Well, if the Office of Planning
14 is going to rely strictly on his written testimony,
15 then I think we have the right to question the
16 witnesses that support it.

17 COMMISSIONER OKUDA: Chair.

18 CHAIRPERSON SCHEUER: Commissioner Okuda.

19 COMMISSIONER OKUDA: Chair, can counsel be
20 asked what the specific offer of proof is going to be
21 by calling the witness?

22 MR. LIM: We are in an Order to Show Cause
23 proceeding. And one of the things that Petitioner
24 wishes to prove is the similarity or dissimilarity of
25 this proceeding with other ongoing and concurrent

1 Order to Show Cause proceedings before the
2 Commission.

3 COMMISSIONER OKUDA: Mr. Chair, can the
4 counsel be asked what is the relevance between that
5 question and the current proceeding?

6 MR. LIM: The reason for the request is
7 that we believe that the Petition Area, both in terms
8 of the history of its long time 28-year zoning, and
9 the fact that the Commission, over the years has, at
10 least to my knowledge, only reverted involuntarily
11 two properties. I believe one was the Aina Le'a
12 project, which was subsequently reversed by the
13 Supreme Court, and I think the Commission just acted
14 on the Hale Mua project to revert that just last
15 month, I believe it was.

16 But as I understood for that proceeding,
17 although the developer wanted to develop the project,
18 the project landowner and lender did not.

19 So those are the reasons for trying to
20 distinguish the current proceeding from what has
21 happened before, both what happened before and also
22 the circumstances of the other pending OSC matters.

23 CHAIRPERSON SCHEUER: Thank you for your
24 responses, Mr. Lim.

25 I'm not -- first, I'm not seeing how these

1 are questions necessarily directed toward the Office
2 of Planning so much as statements of argument.

3 I want to clarify again where we are going
4 to go procedurally. I'm not closing the evidentiary
5 portion of this proceeding. I want to ask the
6 Commissioners to have a discussion about additional
7 areas in which we would like to be briefed. The
8 matters which you're raising could be among the areas
9 on which we would ask for additional briefings from
10 the parties that we would have in writing prior to
11 reconvening this proceeding on November 28th.

12 MR. LIM: I would like, at this point, make
13 a formal request that Commission take administrative
14 notice of all pending proceedings before you on
15 status reports and/or Order to Show Cause.

16 CHAIRPERSON SCHEUER: We'll take a
17 five-minute break.

18 (Recess taken.)

19 CHAIRPERSON SCHEUER: We're back on.

20 Mr. Lim, I heard your request. I'm not
21 going to act on it. Again, I'm repeating myself.

22 You have the opportunity to raise issues in
23 arguments about your case in front of you in the
24 closing arguments which are still to come in this
25 matter.

1 Commissioners, I would like to have a
2 discussion about the additional areas of briefing on
3 which we might want to --

4 The question was, is the Office of Planning
5 done?

6 MS. APUNA: Yes. We reserve the right to
7 provide closing statements.

8 CHAIRPERSON SCHEUER: We have not yet
9 gotten to that point in our proceeding, thank you.

10 Commissioner Okuda.

11 COMMISSIONER OKUDA: Mr. Chair, I would ask
12 that the Chair and the Commission request additional
13 briefing on the following issues. Hopefully this
14 will also cover some of the concerns raised by Mr.
15 Lim.

16 The additional briefing I would ask be
17 limited to discussion of legal authority, meaning
18 statute, case law or administrative rules, and not
19 necessarily a regurgitation of the facts, because I
20 believe we are familiar with the facts as presented
21 here in these proceedings.

22 The areas of additional briefing that I
23 would request would be as follows:

24 Number 1, what constitutes, quote,
25 "substantial commencement of the use of the land",

1 close quote, as that phrase is used in the Bridge
2 Aina Le'a case, including specifically at 339 Pacific
3 3rd at 710.

4 And related to that, what is the definition
5 of the word, quote, "use", u-s-e, close quote, as
6 that word is used in the phrase that I just quoted.

7 Number two, I would ask for additional
8 briefing on the issue with respect to if the Land Use
9 Commission finds that the Petitioner has not
10 substantially commenced the use of the land in
11 accordance with its representations, what is the
12 legal standard the Land Use Commission must apply and
13 follow before it can order the land reverted to its
14 prior classification.

15 Number 3, I would ask further briefing on
16 legal authority, again, statute, rule or case law on
17 the issue of whether the documents executed by and
18 between the Petitioner and the County of Hawaii
19 relative to the affordable housing condition or
20 component is evidence of, quote, "substantial
21 commencement of the use of the land," close quote, as
22 that phrase is used in the Bridge Aina Le'a case,
23 including specifically at 339 Pacific 3rd at 710.

24 And finally, I would ask further briefing,
25 in other words, presentation of legal authority and

1 not regurgitation of facts, about whether or not
2 internal management issues of the Petitioner is
3 relevant to matters involving this proceeding.

4 And when, for definition purposes only,
5 because I'm not suggesting that the Hawai'i Rules of
6 Evidence apply to this proceeding, but for definition
7 purposes of the word "relevant" or "relevance", I'm
8 using that term as defined in Rule 401 of the Hawaii
9 Rules of Evidence, specifically, quote, "relevant
10 evidence" close quote, means evidence having any
11 tendency to make the existence of any fact that is of
12 consequence to the determination of the action more
13 probable or less probable than it would be without
14 the evidence.

15 And that would be my request.

16 CHAIRPERSON SCHEUER: Commissioner Aczon
17 and then Commissioner Ohigashi.

18 COMMISSIONER ACZON: Mr. Chair, I was just
19 going to ask if we have the opportunity to question
20 the Office of Planning after their presentation?

21 CHAIRPERSON SCHEUER: Office of Planning, I
22 haven't closed the evidentiary portion, plus they
23 will still have closing arguments.

24 Mr. Ohigashi.

25 COMMISSIONER OHIGASHI: I would -- my

1 preference in kind of briefing is some kind of
2 outline of the County planning process that was
3 referred to in testimony today.

4 It's tough for myself, I guess, to figure
5 out what steps was taken from the testimony, but if
6 Mr. Okuda would allow an addition to his statement
7 any kind of outline of the existing County ordinances
8 and laws applicable in any processing.

9 Are there any scenarios that the County or
10 the Petitioner, OP may desire?

11 CHAIRPERSON SCHEUER: Commissioner
12 Ohigashi, first of all, to clarify procedurally I
13 believe as the Chair I can direct the parties to
14 brief. I don't need a motion and an amendment. It's
15 not necessarily whether Commissioner Okuda is open to
16 it.

17 I would ask you to be a little more
18 specific in the information that you're asking,
19 because that is, as somebody who has sometimes taught
20 Hawai'i planning law, a very, very broad request for
21 information.

22 But I believe, if I can try and phrase what
23 I think you're getting to, is you would like to know
24 what statutes and ordinances guide -- at times will
25 guide the process going forward if reversion occurs;

1 and if reversion does not occur, all moving towards a
2 project going forward that would be substantially
3 similar to the one before us now. Is that correct?

4 COMMISSIONER OHIGASHI: Exactly.

5 CHAIRPERSON SCHEUER: Does the County
6 understand what I just said?

7 MR. KIM: I believe so, but if I may
8 paraphrase as well.

9 CHAIRPERSON SCHEUER: You may. And what we
10 will do at the end of this discussion when all the
11 Commissioners have had a chance, I will clarify how,
12 from the records of our transcript, you will have
13 directions for these matters.

14 MR. KIM: I can wait then.

15 CHAIRPERSON SCHEUER: Commissioner Chang.

16 COMMISSIONER CHANG: Thank you very much.

17 I guess in addition to Commissioner Okuda's
18 request for additional briefing I would like the
19 parties to brief, in looking at this Decision and
20 Order whether -- what is the standard of review in
21 light of Condition No. 2 and Condition No. 3.

22 Condition No. 2 is completion of the
23 project, specifically says, "Petitioner shall develop
24 the Petition Area and complete build-out of the
25 project no later than ten years from the date of the

1 Commission's Decision and Order for purposes of the
2 Commission's Decision and Order, build-out means
3 completion of the backbone infrastructure to allow
4 for the sale of individual lots.

5 Condition No. 3, reversion on failure to
6 complete the project.

7 I would like briefing on whether Bridge
8 Aina Lea even applies to this Decision and Order,
9 because a decision and order specifically defines
10 what is the specific requirement of a build-out, and
11 the build-out means the backbone infrastructure to
12 allow for the sale of individual lots.

13 Does Bridge Aina Lea apply in this case?
14 Because I think the condition in Bridge Aina Lea is
15 very different from this condition. The Bridge -- I
16 believe the condition in Bridge Aina Lea dealt more
17 with compliance of representation and failures to
18 develop.

19 So I would like briefing on whether Bridge
20 Aina Lea is even applicable in this case, given
21 Conditions 2 and 3, and whether -- and if it is
22 applicable, explain how it is applicable, and that
23 would be Commissioner Okuda's questions related to
24 defining substantial compliance.

25 If it is not applicable, then I would like

1 briefing on what is the standard that is applicable
2 for this particular Decision and Order and this Order
3 to Show Cause, because in my view it is different.

4 CHAIRPERSON SCHEUER: Thank you,
5 Commissioner Chang. I think the second portion of
6 your statement was a good restatement of what your
7 question is.

8 Commissioner Aczon.

9 COMMISSIONER ACZON: Mr. Chair, disregard
10 my comments earlier since I have the same questions
11 as Commissioner Chang about Condition No. 2 and No.
12 3.

13 CHAIRPERSON SCHEUER: Thank you,
14 Commissioner Aczon. Commissioners?

15 MR. LIM: Mr. Chairman, point of
16 clarification. We left off at the last executive
17 session with my request for testimony by State Office
18 of Planning representative Rodney Kawamura, and I
19 didn't get an answer to that request.

20 CHAIRPERSON SCHEUER: Mr. Funakoshi.

21 MR. LIM: Excuse me. I was thinking of a
22 traffic expert, engineering.

23 CHAIRPERSON SCHEUER: I responded to that,
24 Mr. Lim. And what I stated was that the nature --
25 when you were explaining the nature of your inquiry

1 in a response to questions from Commissioner Okuda, I
2 said that they went to argument more than to specific
3 questions required of a witness from the Office of
4 Planning.

5 And I clarified that we were going to be
6 providing an opportunity for all the parties to still
7 present closing argument, as well as to present
8 additional briefing on the matters that we've just
9 discussed among the Commission.

10 MR. LIM: Let me just make a statement for
11 the record that we believe that the testimony by Mr.
12 Funakoshi -- sorry, Rodney, I was getting you mixed
13 up with an engineer -- would assist the Petitioner's
14 argument that the present Order to Show Cause
15 proceeding is subject to potential claims for the
16 violation of due process and equal protection as
17 compared to other similarly situated properties; and
18 that the only way that I can prove that is through
19 the State Office of Planning's witness. So that's
20 why I was calling Mr. Funakoshi.

21 CHAIRPERSON SCHEUER: You've stated it on
22 the record.

23 Commissioners, do you have anything further
24 on the issue of briefings?

25 Commissioner Okuda.

1 COMMISSIONER OKUDA: Mr. Chair, may I ask a
2 question about this due process violation, if the
3 Chair allows.

4 Can counsel state what entity is violating
5 the Petitioner's right to due process? Is it the
6 Office of Planning? Or is the representation or
7 claim that some other entity is violating due
8 process?

9 MR. LIM: I think the only actor in this
10 proceeding is the Commission, so it would be the
11 Commission.

12 CHAIRPERSON SCHEUER: I will clarify for
13 the record, and then end with this subject for now.

14 I've also not closed the evidentiary
15 proceedings, so the possibility that Mr. Funakoshi
16 could be called has not been foreclosed yet.

17 I don't know how many of you are familiar
18 with the Hawaiian word "kapulu". It means sloppy,
19 and it's a very negative thing. Like if you're doing
20 something and auntie says: You know what, that's
21 kapulu. That is a shame thing to have.

22 This project has clearly, based on the
23 record, been kapulu from the start, and I have no
24 intention to have this hearing proceed in a sloppy
25 manner.

1 So we are scheduled to meet on
2 November 28th. By November 19th, I want this
3 briefing from the parties on the three questions
4 phrased in the transcript from Commissioner Okuda,
5 the question from Commissioner Ohigashi that I
6 rephrased.

7 (Phone ringing). Somebody will please
8 silence their cell phone.

9 And the second phrasing of the questions
10 regarding the applicability of Bridge Aina Lea in
11 this case in light of Conditions 2 and 3 from
12 Commissioner Chang.

13 I will go to each of the parties to ask you
14 if you have any clarification on them.

15 COMMISSIONER CHANG: I'm sorry, Chair. May
16 I just add, I think all of us are very protective of
17 our process, and we try very hard to ensure that the
18 process is open.

19 And I appreciate that the Chair has
20 indicated that all evidence is not foreclosed,
21 however, I think if counsel feels -- I would
22 appreciate an additional briefing from counsel about
23 the need for Mr. Funakoshi of the OP, why he's so
24 critical, when I think -- I want to understand the
25 basis why Mr. Funakoshi is the appropriate person to

1 address the issue of a distinction between Order to
2 Show Cause hearings and its relevancy to this
3 proceeding.

4 I'm very protective of our administrative
5 record, and wanting to ensure that we are providing
6 all the process that is due to parties.

7 But it would be helpful if, Mr. Lim, if you
8 provided that briefing, and it would give the
9 parties, and including Office of Planning, to address
10 that.

11 MR. LIM: Mr. Chair, I have one more
12 practical matter.

13 CHAIRPERSON SCHEUER: What do you mean by
14 "practical matter", Mr. Lim?

15 MR. LIM: In terms of the attendance by Mr.
16 Valery Grigoryants for the Commission hearings.

17 I'll represent Mr. Grigoryants has health
18 concerns which may prevent him from coming back to
19 the Commission for further hearings, so we would like
20 the Commission to ask whatever questions they have of
21 him now.

22 In fact, he told me that he had to get into
23 shape, physical shape just to make sure he could make
24 the long travel over and do the hearing. While he
25 may come, I cannot guarantee that his physical health

1 would allow.

2 CHAIRPERSON SCHEUER: Thank you for that
3 disclosure, and I'm sorry to hear about Mr.
4 Grigoryants' health. However, I cannot in any
5 meaningful way suggest that the Commission will be
6 able to ask all the potential questions that we would
7 have of this witness, particularly prior to seeing
8 the briefings on this matter.

9 In addition to the matter that Commissioner
10 Chang mentioned, I also will remind the County of
11 Hawai'i that we want written documentation of your
12 position, current position, regarding whether or not
13 you feel the affordable housing requirement has been
14 met, as was discussed earlier in the hearing.

15 Commission Ohigashi.

16 COMMISSIONER OHIGASHI: When is this due?
17 Is it closed today, or are you extending the time for
18 them to --

19 CHAIRPERSON SCHEUER: I said to the
20 close -- thank you for the question. I said to the
21 close of the proceedings. I'm asking for the
22 briefings on all of these matters by November 19th.

23 I'm going to ask all of the parties, are
24 there any questions or clarifications on the requests
25 regarding these five matters?

1 MR. LIM: Is keeping the hearing open
2 limited to the submittal of the written responses, or
3 are we also keeping it open for witness testimony?

4 CHAIRPERSON SCHEUER: Again, I have stated
5 I have not closed the evidentiary portion of this
6 hearing.

7 County, do you have any questions?

8 MR. LIM: Excuse me.

9 In that case then can we have an agreement
10 that by the November 19th deadline that all parties
11 would disclose any physical witnesses that they want
12 to present?

13 CHAIRPERSON SCHEUER: Yes.

14 MR. LIM: Thank you.

15 CHAIRPERSON SCHEUER: Anything else, Mr.
16 Lim?

17 MR. LIM: Not for the Petitioner.

18 CHAIRPERSON SCHEUER: County, are you clear
19 with the instructions?

20 MR. KIM: I am clear with the instructions.
21 I just need a little clarification with the set of
22 questions on zoning.

23 So do you want us to brief how the
24 Petitioner may proceed with County zoning process, A,
25 if the Commission chooses to revert; and B if the

1 Commission chooses not to revert?

2 CHAIRPERSON SCHEUER: Correct, with
3 specific reference to at least two matters. One is
4 what laws or ordinances would govern those
5 proceedings, as well as administrative rules that may
6 exist.

7 Secondly, what anticipated timelines would
8 be, which would include whether or not and under what
9 circumstances matters could be worked on
10 simultaneously.

11 MR. KIM: Thank you.

12 CHAIRPERSON SCHEUER: Office of Planning?

13 MS. APUNA: Did you say, Chair, that there
14 would be some written order or other written --

15 CHAIRPERSON SCHEUER: I'm directing the
16 parties to look at the transcript from today's
17 proceedings, and the specific references that I made
18 earlier to those portions of the transcript.

19 To state them one more time. The
20 statements from Commissioner Okuda on briefing; the
21 statement from Commissioner Chang as she restated in
22 the second half of her statement; the restatement of
23 Commissioner Ohigashi's concerns, which I restated
24 and then just restated on the record immediately
25 prior to this exchange, the direction on the need for

1 witnesses from Commissioner Chang; and finally, a
2 statement from the County showing the County's
3 official position on whether or not they believe the
4 Petitioner has complied with the condition on
5 affordable housing.

6 MS. APUNA: Thank you.

7 CHAIRPERSON SCHEUER: Commissioner Cabral.

8 VICE CHAIR CABRAL: In addition to all of
9 the other homework assignments, I would really like
10 to ask the Petitioner if we could get a
11 clarification, a written statement or statements or
12 clarification of the items that are different from
13 what was previously presented to us in writing.
14 There are a number of things we have received that I
15 read over this last several weeks in preparation for
16 today's hearing, but then when we've come today,
17 yesterday there's --

18 CHAIRPERSON SCHEUER: If I may assist or
19 try to assist Commissioner Cabral.

20 Notably, Mr. Lim, there were questions that
21 came up in the examination of Mr. Grigoryants about
22 the accuracy of Exhibit 5, as well as the accuracy of
23 the exhibit which showed the corporate structures.

24 Are those the two items to which you were
25 referring, Commissioner Cabral?

1 VICE CHAIR CABRAL: Those are the
2 highlights of it, yes.

3 CHAIRPERSON SCHEUER: Commissioners?
4 Commissioner Cabral.

5 VICE CHAIR CABRAL: I would like to have us
6 be able to go into executive session as the
7 Commission in order to clarify our future assignment.
8 Thank you.

9 Well, to confer with counsel, our counsel,
10 in order to help us understand where we're going.

11 CHAIRPERSON SCHEUER: Is there a second on
12 the motion to go into executive session?

13 COMMISSIONER OHIGASHI: I'll second.

14 CHAIRPERSON SCHEUER: There has been a
15 motion made by Commissioner Cabral and seconded by
16 Commissioner Ohigashi to go into executive session to
17 consult with our counsel on our powers and duties in
18 relationship to this proceeding.

19 COMMISSIONER CHANG: Mr. Chair, are we
20 going -- will the hearing be closed at this point in
21 time so that everybody can either leave, or are we
22 going continue to come back?

23 CHAIRPERSON SCHEUER: I will call for
24 discussion of the motion formally. What I think I
25 need to do is keep the hearing open, go into

1 executive session, come out of executive session, and
2 then close the hearing.

3 You have my personal commitment we will
4 conduct no further business on this matter without
5 the parties here, that we will simply go into
6 executive session and then immediately close the
7 hearing.

8 Is that acceptable to the parties?

9 MR. LIM: Acceptable to the Petitioner.

10 MR. KIM: No objection.

11 MS. APUNA: No objection.

12 CHAIRPERSON SCHEUER: So any further
13 discussion on the motion to move into executive
14 session? Hearing none, all in favor say "aye", any
15 opposed say "nay".

16 The Commission is going into executive
17 session.

18 (The proceedings adjourned at 12:01 p.m.)
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CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on October 25, 2018, at 8:00 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 25th day of October, 2018, in Honolulu, Hawaii.

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