

LAND USE COMMISSION

STATE OF HAWAII

November 14, 2018

Commencing at 9:34 a.m.

VIDEO CONFERENCE

Oahu - Kalanimoku Building, 1151 Punchbowl, Rm 132

Maui - Department of Transportation

Hawai'i - Hilo State Office Building

AGENDA:

I Call to Order

II Adoption of Minutes

III Tentative Meeting Schedule

IV Rule Amendment Status and Authorization to  
proceed with Amendments

V Action - Consider Motion to Correct Transcript

IV Adjournment

1 APPEARANCES:

2 COMMISSIONERS

3 JONATHAN SCHEUER, Chair  
4 NANCY CABRAL, Vice Chair (Hawai'i)  
5 LEE OHIGASHI (Maui)  
6 EDMUND ACZON  
7 AARON MAHI

8 RANDALL S. NISHIYAMA, ESQ.  
9 Deputy Attorney General

10 STAFF:

11 DANIEL ORODENKER, Executive Officer  
12 RILEY K. HAKODA, Chief Clerk/Planner  
13 SCOTT A.K. DERRICKSON, AICP  
14 ARIANA MASUOKA, Planner  
15 RASMI AGRAHARI, Planner

16 RODNEY FUNAKOSHI  
17 State Office of Planning

18 RON KIM, ESQ.  
19 Deputy Corporation Counsel  
20 JEFF DARROW, Planner  
21 County of Hawai'i  
22  
23  
24  
25

## INDEX

WITNESS:

PAGE

DAVID ARAKAWA

7

Direct Examination/Public

1           CHAIRPERSON SCHEUER: Good morning. This  
2 is November 14th, 2018, Land Use Commission meeting  
3 being conducted via video conference from network  
4 meeting centers on Maui, Hawaii and Oahu.

5           Our first order of business is the adoption  
6 of the October 24th-25th, 2018 minutes.

7           Can you hear me, Hawai'i Island?

8           VICE CHAIR CABRAL: Yes.

9           CHAIRPERSON SCHEUER: I would note that I  
10 did send in some non-substantive corrections to what  
11 was electronically sent out correcting spelling on  
12 certain names.

13           What we are approving is slightly different  
14 than what you received, but not substantially.

15           COMMISSIONER ACZON: Move for approval.

16           CHAIRPERSON SCHEUER: Commissioner Aczon  
17 has moved to approve the minutes. Is there a second?

18           VICE CHAIR CABRAL: I'll second it.

19           CHAIRPERSON SCHEUER: Commissioner Cabral  
20 has seconded. Any discussion? All in favor say  
21 "aye". Any opposed? The minutes are adopted  
22 unanimously.

23           Our next agenda item is the tentative  
24 meeting schedule. Mr. Orodener.

25           EXECUTIVE OFFICER: Thank you, Mr. Chair.

1           On November 28th, we will be in Kona for  
2 status report on HHFDC, Lanihau matter, and for  
3 continuation of the Waikoloa Mauka matter.

4           On the 29th, we will be on Maui for matters  
5 associated with -- several motions associated with  
6 Emmanuel Lutheran, and for adoption of the Hale Mua  
7 order.

8           On December 12th, we will be on Maui again  
9 for status report on Ka'ono'ulu Ranch.

10           On December 13th, we will be at Oahu  
11 Airport, Honolulu, HNL, for Kapolei Harbor, Motion to  
12 Amend.

13           We have no further meetings in December.

14           In January, January 9th, we will be having  
15 site visits on Oahu for a couple Waiehu motions.

16           January 23rd and 24th we will also be in  
17 Honolulu for DR18-64 which is Important Land  
18 Designation and another Oahu IAL Designation, if need  
19 be, we'll hold hearings on Oahu, Honolulu Airport on  
20 January 24th.

21           February 6th, we will be holding a meeting  
22 on Kaua'i for Kealia Properties. That meeting is  
23 also scheduled for February 7th.

24           On March 13th and 14th, we will be on Oahu  
25 at the airport for Hawai'i Memorial Park FEIS.

1           That takes us far enough.

2           CHAIRPERSON SCHEUER: Thank you, Dan.

3           Commissioners, are there any questions for  
4 the Executive Officer, Maui, Hawai'i, Oahu?

5           Our next agenda item is to consider the  
6 Land Use Commission rules amendment status and  
7 authorization to proceed with the amendments.

8           Mr. Orodenker, can you please provide the  
9 Commission with a status update on the progress of  
10 the amendments to the administrative rules and what  
11 remains to be done?

12          EXECUTIVE OFFICER: Thank you, Mr. Chair.

13          We have held hearings on all islands with  
14 regard to the proposed rule amendments. We have also  
15 received written testimony.

16          We received written testimony that  
17 indicated that -- I actually have to take  
18 responsibility for this error -- 15-15-93 was  
19 supposed to be amended to track the language from the  
20 Supreme Court decision in the Bridge Aina Le'a case  
21 with regard to "substantial commencement".

22          The language that is in the current draft  
23 of the rules says "substantial commencement of  
24 construction". The actual Supreme Court decision  
25 says "substantial commencement of use of the land."

1 Therefore, we are proposing to make that change to  
2 the proposed amendments, and that will also require  
3 us to hold hearings on all the other islands since  
4 our attorney general has advised us that it's a  
5 substantial change.

6 CHAIRPERSON SCHEUER: Thank you. Any  
7 questions for Dan?

8 EXECUTIVE OFFICER: We would need  
9 authorization to make that change and to hold  
10 additional hearings.

11 CHAIRPERSON SCHEUER: At this point I'm  
12 going to call for any individuals desiring to give  
13 public testimony. Mr. Arakawa. I'm going to swear  
14 you in first.

15 Do you swear or affirm that the testimony  
16 you're about to give is the truth?

17 THE WITNESS: The whole truth, nothing but  
18 the truth. Yes, I do.

19 CHAIRPERSON SCHEUER: Please state your  
20 name and address for the record and proceed.

21 DAVID ARAKAWA  
22 Was called as a public witness, was sworn to tell the  
23 truth, was examined and testified as follows:

24 DIRECT EXAMINATION

25 THE WITNESS: David Arakawa, Executive

1 Director of Land Use Research Foundation testifying  
2 on behalf of LURF, 1100 Alakea Street, Suite 408,  
3 Honolulu, Hawai'i 96813.

4 At the risk of bearing the lead, I have two  
5 preliminary matters. First is the notification of  
6 Land Use Commission meetings. It's great and, you  
7 know, we support and commend the LUC for having these  
8 teleconferences, so that's fantastic.

9 But in the agenda notice that went out, I  
10 wasn't sure where the meeting was, so I went to the  
11 State Office Tower, and I know another Commissioner  
12 went to another location. So I finally figured out  
13 that it would be at the Kalanimoku Building, but it's  
14 not stated in the notice. So maybe future notices up  
15 top you can say where the actual physical meeting  
16 will be so people will know, then keep the same  
17 information as to the video conferencing. That's a  
18 great idea that the LUC is going forward with.

19 The second comment, again, bearing the  
20 lead, is notice of public hearing. The notice of  
21 public hearing that's dated November 2, 2018, there's  
22 a sentence at the bottom of the first page that says,  
23 "comments or testimony will be restricted solely to  
24 the proposed amendment and not to the  
25 benefit/disadvantages of the underlying program".



1           So we're not really clear what that is.  
2   And sometimes Native Hawaiian practitioners want to  
3   give oli or give testimony, you know, through song or  
4   verse or whatever. So we're not sure whether that  
5   would restrict that kind of testimony at the hearing.  
6   We're not sure what that sentence means.

7           So perhaps -- I don't even know if it's  
8   necessary -- but perhaps some explanation of how your  
9   testimony could be restricted by the Commission would  
10   be good. We're not sure what that sentence means.  
11   So we'll probably, before the December hearings, be  
12   asking for clarification of exactly what that  
13   sentence means.

14           CHAIRPERSON SCHEUER: If you wanted to  
15   offer an oli, Mr. Arakawa, I would be certainly happy  
16   to allow it.

17           THE WITNESS: I've been present at many  
18   commissions and many meetings where people have given  
19   that and they haven't been stopped, so I'm wondering  
20   whether this Commission would stop that kind of  
21   presentation based on that sentence, right? So can  
22   you tell me what it means?

23           CHAIRPERSON SCHEUER: Why don't we just  
24   continue with your testimony.

25           THE WITNESS: I would have expected that

1 the Chair would be able to explain it, but anyway,  
2 our testimony is consistent with what the Executive  
3 Officer has talked about, the difference in language  
4 between the Supreme Court case and the HRS which uses  
5 "substantial commencement of the use of the land" in  
6 accordance with the representation to the Commission.

7 And substantial commencement with the use  
8 of the land is an important term, and we're very  
9 happy and glad that the Commission is going to go  
10 back and change that language. Substantial  
11 construction may not be the correct term, because if  
12 it is Ag to Conservation or Conservation to Ag, there  
13 will be no construction, right? So, that -- and that  
14 is not a term that is used in the HRS and that's not  
15 a term used by the Supreme Court.

16 The LUC's index of proposed changes refers  
17 to "substantial compliance", so that's yet another  
18 term. So perhaps in a future index of proposed  
19 changes the Land Use Commission AG's could clean that  
20 up to -- because it adds another term that is not  
21 defined or not addressed in the HRS or the Bridge  
22 Aina Le'a decision.

23 So that's in your index of proposed changes  
24 which is on the website and describes the changes.

25 And the third and probably final -- not

1 final thing, but the third issue is that the rules,  
2 the changes in the rules appear to be based on a mere  
3 footnote in the Aina Le'a decision, a footnote in the  
4 Aina Le'a decision, and that's okay.

5 But we would argue and will be submitting  
6 testimony urging the Commission to make further rules  
7 that actually addressed the important parts of the  
8 Bridge Aina Le'a decision, and the legislative intent  
9 of the HRS 205-4(g).

10 So instead of just taking that mere  
11 footnote, which is okay, you know, use the other  
12 parts of the LUC decision, the important parts of the  
13 LUC decisions to help direct not only the Commission  
14 but the public in how the Commission will address  
15 issues where, you know, they have to revoke or  
16 rescind a land use boundary amendment based on  
17 failure to substantially commence the use of the land  
18 in accordance with the Petitioner's representation to  
19 the Commission.

20 And the last point that we wanted to make  
21 is that perhaps the Commission could consider some  
22 way of working with stakeholders. Affected  
23 stakeholders in this case would be the landowners,  
24 counties and maybe other interested parties.

25 The OEQC does a very good job of that in

1 the rules, and we have been part of that process, so  
2 we would encourage the LUC to do the same.

3 In the past the LUC has gone out and done  
4 outreach to affected stakeholders. In this case we  
5 would urge them to do so, because if they did so, you  
6 folks probably wouldn't have to go out for a second  
7 round of hearings.

8 CHAIRPERSON SCHEUER: Thank you very much,  
9 Mr. Arakawa.

10 Commissioners, are there any questions for  
11 Mr. Arakawa? Starting with Maui.

12 COMMISSIONER OHIGASHI: No question.

13 CHAIRPERSON SCHEUER: Hawai'i Island?

14 VICE CHAIR CABRAL: No questions.

15 CHAIRPERSON SCHEUER: Oahu?

16 COMMISSIONER ACZON: No.

17 CHAIRPERSON SCHEUER: Thank you very much.

18 THE WITNESS: Just as a note, in working  
19 with the Mr. Orodener and LUC staff, they've been  
20 very cooperative. They return phone calls and talk  
21 to us. So we don't mean this to be any slight on  
22 them.

23 CHAIRPERSON SCHEUER: Understood. Thank  
24 you very much.

25 Are there any other individuals wishing to

1 provide public testimony on this agenda item? And  
2 none of the counties are here. Office of Planning?

3 MR. FUNAKOSHI: No.

4 CHAIRPERSON SCHEUER: Commissioner Cabral?

5 VICE CHAIR CABRAL: We have with us county  
6 representatives both Ron and Darrow.

7 MR. KIM: Good morning. Present on Hawai'i  
8 Island, Deputy Corporation Counsel Ron Kim along with  
9 Jeff Darrow from the Planning Department.

10 VICE CHAIR CABRAL: We have a public member  
11 also.

12 MS. TUMMONS: Pat Tummons, Environment  
13 Hawai'i.

14 CHAIRPERSON SCHEUER: Thank you.

15 Can I just clarify. Is there anybody on  
16 Hawai'i Island wishing to testify on the agenda item  
17 relating to the rule amendments?

18 VICE CHAIR CABRAL: None present.

19 CHAIRPERSON SCHEUER: Thank you. So I will  
20 entertain a motion for LUC Executive Officer and  
21 staff to move forward on hearings and other  
22 preparations to have the rule amendments adopted.

23 COMMISSIONER ACZON: So moved.

24 COMMISSIONER MAHI: So seconded.

25 CHAIRPERSON SCHEUER: Commissioner Aczon

1 moved to authorize the LUC Executive Officer and  
2 staff to move forward on hearings and other  
3 preparations, and Commissioner Mahi has seconded the  
4 motion.

5 Is there any discussion on the motion?  
6 Maui or Hawai'i, I just want to make sure that I'm  
7 not missing you. Any discussion?

8 COMMISSIONER OHIGASHI: No discussion.

9 VICE CHAIR CABRAL: Chairman, yes. I would  
10 like to thank our last public testifier -- sorry for  
11 names -- because I appreciate that it's a really  
12 complex matter, and clearly we're trying to get  
13 better the use of words to describe our rights,  
14 that's really a complicated matter. And I  
15 appreciate -- we hopefully are getting -- change will  
16 clarify and make things better with the understanding  
17 that they may be able to be found better in the  
18 future, but for now at least this will be an  
19 improvement.

20 CHAIRPERSON SCHEUER: Thank you.

21 Commissioners, any other discussion?

22 Hearing none, all in favor say "aye". Any  
23 opposed? The motion carries.

24 Our next agenda item is to consider a  
25 motion to correct the September 6, 2018 meeting

1 transcript. Let me update the record.

2 It was brought to the attention of the  
3 Commission by public witness Cindy Kester via email  
4 on October 19th, 2018, that an error in the  
5 transcript for the September 6th, 2018 meeting in  
6 Kailua-Kona for Docket A06-767 Waikoloa Highlands had  
7 been discovered.

8 On the same date, Land Use Commission staff  
9 notified court reporter Jean McManus via email that  
10 there might be an error in the transcript of Ms.  
11 Kester's reading of Julia Aslo's testimony of that  
12 day on page 13, line 21.

13 The sentence which reads, "roundabout has  
14 now been constructed" needs to be corrected to  
15 "roundabout has not been constructed".

16 Also on October 19th, our court reporter  
17 Jean McManus reviewed her recording and confirmed via  
18 email that an error had been made and that the word  
19 quote, "not" end quote, was correct and the written  
20 testimony reads correctly, and the transcript needed  
21 to be corrected to match.

22 On November 5th, today's meeting agenda  
23 today was mailed to the Statewide, Oahu and Hawai'i  
24 mailing list designating agenda item V for the  
25 Commission to consider an action motion to correct

1 the transcript accordingly.

2 Is there anybody who wishes to provide  
3 public testimony on this agenda item? Not seeing  
4 anybody on Oahu, and there's no one other than  
5 Commissioner Ohigashi on Maui, does anyone on Hawai'i  
6 Island wish to provide testimony on this item?  
7 Seeing none.

8 Commissioners, is there anyone who desires  
9 to make a motion?

10 COMMISSIONER MAHI: I'll move.

11 CHAIRPERSON SCHEUER: Commissioner Mahi has  
12 moved to make the correction. Is there a second?

13 COMMISSIONER ACZON: Second.

14 CHAIRPERSON SCHEUER: Commissioner Aczon  
15 has seconded the motion. Is there any discussion on  
16 the motion? Hearing none, all in favor say "aye".

17 CHAIRPERSON SCHEUER: Commissioner Cabral?

18 VICE CHAIR CABRAL: I will abstain as I was  
19 not present at that meeting.

20 CHAIRPERSON SCHEUER: Commissioner Cabral,  
21 I believe we will actually need you to participate in  
22 this for the motion to carry.

23 VICE CHAIR CABRAL: Okay. I approve then  
24 based on all of my learned colleague's knowledge.

25 CHAIRPERSON SCHEUER: Commissioner Cabral,



1 have you understood the correction to be made?

2 VICE CHAIR CABRAL: Yes, I do understand  
3 the correction. And I have read those minutes and I  
4 understand that the missing word makes a significant  
5 difference, so it was just an honest mistake, so I  
6 will approve that change.

7 CHAIRPERSON SCHEUER: And you're  
8 comfortable with making a vote on this?

9 VICE CHAIR CABRAL: Yes, I am.

10 CHAIRPERSON SCHEUER: Thank you. It's been  
11 unanimously passed. Commissioner Aczon.

12 COMMISSIONER ACZON: I want to move for  
13 executive session.

14 COMMISSIONER MAHI: Second.

15 CHAIRPERSON SCHEUER: There's been a motion  
16 made by Commissioner Aczon to go into executive  
17 session, and there is a second by Commissioner Mahi.  
18 Is there any discussion on the motion?

19 MS. TUMMONS: There has to be a reason  
20 stated for the executive session.

21 COMMISSIONER ACZON: Sorry about that. I  
22 want to make a motion to go into executive session to  
23 discuss matters regarding Waikoloa.

24 CHAIRPERSON SCHEUER: The motion has been  
25 amended to state that Commissioner Aczon moves to go

1 into executive session to discuss matters related to  
2 the current Waikoloa Mauka docket in front of us.

3 MS. SUMMONS: I don't think that's  
4 sufficient. I think there has to be a reference to  
5 the statute.

6 CHAIRPERSON SCHEUER: I'm going to take a  
7 five-minute recess.

8 (Recess taken.)

9 We're back on the record. Commissioner  
10 Aczon, could you restate your motion, please?

11 COMMISSIONER ACZON: I would like to make  
12 the motion to go into executive session to discuss  
13 matters regarding Waikoloa with our counsel.

14 CHAIRPERSON SCHEUER: Our attorney general  
15 says that's good enough.

16 COMMISSIONER MAHI: Second.

17 CHAIRPERSON SCHEUER: Sorry to the folks in  
18 Hawai'i Island. I understand the frustration that  
19 you're experiencing, but I don't believe we  
20 procedurally have a chance at this point in the  
21 agenda for a member of the public to opine on the  
22 appropriateness of our motion.

23 So there has been a motion made and  
24 seconded to go into executive session to discuss the  
25 Commission's powers and duties specifically as

1 related to the Waikoloa Mauka docket and seconded.

2 All in favor say "aye". Any opposed? We  
3 are going into executive session.

4 (Executive session.)

5 CHAIRPERSON SCHEUER: The last item of  
6 business, since our November 28th and 29th meeting  
7 are going to be held in remote locations and appear  
8 to require a working lunch to complete the scheduled  
9 items for each day, I'm going to direct staff to  
10 arrange for meals to facilitate the meeting and  
11 accommodate the Commission's needs.

12 There being no further business, I'm going  
13 to adjourn this meeting. Thank you all.

14 (The proceedings adjourned at 10:12 a.m.)  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## CERTIFICATE

STATE OF HAWAII                    )  
  ) SS.  
COUNTY OF HONOLULU            )

I, JEAN MARIE McMANUS, do hereby certify:

That on November 14, 2018, at 9:34 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 14th day of November, 2018, in Honolulu, Hawaii.

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