

LAND USE COMMISSION

STATE OF HAWAII

November 28, 2018

Commencing at 9:30 a.m.

Natural Energy Laboratory Hawai'i Authority

73-987 Makako Bay Drive

Kailua-Kona, Hawaii 96740

AGENDA

I. Call to Order

II. Adoption of Minutes

III. Tentative Meeting Schedule

IV. Action-A06-767 Waikoloa Mauka LLC, (Hawai'i)
Hearing on Motion for Issuance of a Subpoena to
an Authorized Representative of the State of
Hawai'i Office of Planning, in the Matter of
the Petition of Waikoloa Mauka LLC

V. Continued Hearing and Action
A06-767 Waikoloa Mauka LLC (Hawai'i)

VI. Recess to reconvene meeting in Kihei, Maui on
November 29, 2018

BEFORE: Jean Marie McManus, CSR #156

APPEARANCES

COMMISSIONERS:

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

PATRICIA T. OHARA, ESQ.
Deputy Attorney General

STAFF:

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

STEVEN LIM, ESQ.
VALERY GRIGORYANTS
NATALIA BATICHTCHEVA
JOEL LaPINTA
IRINA McGRIFF - Russian interpreter
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

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1 CHAIRPERSON SCHEUER: Good morning.

2 This is the November 28th, 2018 Land Use
3 Commission meeting.

4 Our first order of business is adoption of
5 November 14, 2018 minutes. Are there any corrections
6 or comments on the minutes?

7 Mr. Aczon.

8 COMMISSIONER ACZON: I move to adopt the
9 November 14th minutes.

10 VICE CHAIR MAHI: I'll second.

11 CHAIRPERSON SCHEUER: Commissioner Aczon
12 has moved to adopt the minutes and Commissioner Mahi
13 seconded the motion.

14 Any discussion? All in favor say "aye".
15 Any opposed? Minutes are unanimously adopted.

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

18 EXECUTIVE OFFICER: Thank you, Mr. Chair.

19 Tomorrow we will be on Maui for Emmanuel
20 Lutheran various motions, and Hale Mua, Adoption of
21 Order.

22 The 12th of December has been postponed.
23 That date is now open, and we will not be holding a
24 hearing on that day.

25 Thursday the 13th we will be on Oahu

1 Kapolei Harbor Side at Honolulu International
2 Airport.

3 On January 9th and 10th, we will be doing
4 site visits for DR18-63 and DR18-64 on Oahu. We will
5 be meeting at the airport and traveling out from
6 there.

7 On January 23rd we will be hearing DR18-63
8 and DR18-64 at the Honolulu Airport. We also have
9 Thursday the 24th, January 24th for that as well.

10 I would note for the Commissioners that the
11 February meetings which were originally scheduled for
12 13 and 14th and 27 and 28 are being moved to
13 February 6th and 7th, and February 20th and 21st. The
14 6th and 7th will be on Kaua'i, Kealia Property, and
15 20th and 21st is being held open right now.

16 March 13th and 14 we will be on Oahu for
17 Hawai'i Memorial Park at Honolulu International
18 Airport.

19 CHAIRPERSON SCHEUER: Thank you, Mr.
20 Orodenker. Any of the Commissioners have any
21 questions for the Executive Officer? Hearing none.

22 Before I proceed with moving on, I will
23 just share for those members of the public who,
24 perhaps have not appeared in front of us before, a
25 very brief of who we are.

1 The nine of us who serve on the Land Use
2 Commission, eight members currently, are all
3 volunteers. We are appointed by the Governor of
4 Hawai'i and confirmed by the State Senate. If you
5 don't like what we do, you have an opportunity to
6 object at our next confirmation hearing. However,
7 I'm done, so you won't have a chance to object to me.

8 For those of us who are self-employed or
9 have their own companies, that means we are not
10 getting paid volunteering this time to the State of
11 Hawai'i; and in addition, we take an oath of office.
12 We swear to uphold the laws and Constitution of the
13 United States and do our very best.

14 Our next agenda item is a continued hearing
15 and action meeting A06-767 Waikoloa LLC to hear
16 evidence, deliberate and take action on the Order to
17 Show Cause as to why approximately 731.581 acres of
18 land in South Kohala District, Island of Hawai'i, Tax
19 Map Key No. (3)6-8-02:016 (portion), should not
20 revert to its former land use designation or be
21 changed to a more appropriate classification issued
22 June 4, 2018.

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

25 MR. LIM: Good morning, Steven Lim. With

1 me today to my back is Petitioner's representatives
2 Valery Grigoryants, Natalia Batichtcheva, and Joel
3 LaPinta, and the Russian to English and English to
4 Russian interpreter Irina McGriff, who was here the
5 last hearing.

6 CHAIRPERSON SCHEUER: Thank you.

7 MR. KIM: Good morning, Chair and
8 Commissioners, Ron Kim appearing on behalf of the
9 County. With me is Jeffery Darrow from the Planning
10 Department. And also present from the County seated
11 alongside the door side wall are members of the
12 Office of Housing and Community Development. We have
13 Administrator Mr. Neil Gyotoku. We have Visiting
14 Chief Anne Bailey. And we have Deputy Duane Hosaka.

15 MS. APUNA: Good morning, Chair and members
16 of the Commission, Dawn Apuna, Deputy Attorney
17 General, on behalf of State Office of Planning. Here
18 with me today is Rodney Funakoshi.

19 CHAIRPERSON SCHEUER: Thank you. Let me
20 now update the record.

21 On October 24th and 25th, 2018, the
22 Commission held a meeting on the Order to Show Cause
23 for Docket No. A06-767, and later set today for the
24 hearing date for these proceedings.

25 During our October 24-25 proceedings, the

1 Commission received written and oral testimony of
2 Julia Alos, and the Curriculum Vitae of Russian
3 Language Interpreter Irina Francis McGriff.

4 On November 2, 2018, the Commission mailed
5 LUC Chair's correspondence regarding the filing of
6 witness and exhibit lists for the November 28, 2018
7 meeting.

8 On November 7, 2018, the Commission
9 received Petitioner's Motion for Issuance of a
10 Subpoena for Representative of County of Hawaii
11 Office of Housing and Community and Subpoenas Duces
12 Tecum -- I'll also note I'm not an attorney so if I
13 stumble over some of these words, forgive me -- for
14 various listed documents for the Office of Housing
15 and Community Services and the County of Hawaii
16 Mayor's Office; Memorandum in Support of Motion,
17 Exhibits 38 through 41.

18 On November 8th, 2018, the Commission
19 received Petitioner's Errata Statement regarding
20 Exhibit Numbering and Re-numbered Exhibit copies 39 -
21 42 for WHI's Motion for Issuance of a Subpoena and
22 Subpoenas Duces Tecum; Exhibit A.

23 On November 9, 201, the Commission returned
24 signed copies of Petitioner's Subpoena and Subpoena
25 Duces Tecum to Petitioner to be issued.

1 On November 13, 2018, the Commission
2 received County of Hawaii Planning Department's
3 Memorandum in Opposition to Waikoloa Highlands,
4 Inc.'s Motion for Issuance of a Subpoena and Subpoena
5 Duces Tecum and/or Motion to Quash Subpoena and
6 Subpoena Duces Tecum.

7 On November 14, 2018, the Commission
8 received OP's Response to WHI's Motion for Issuance
9 of Subpoena and Subpoena Duces Tecum.

10 On November 15, 2018, the Commission
11 received signed copies of service of Petitioner's
12 Subpoena Duces Tecum; and WHI's Motion for Issuance
13 of Subpoena to an Authorized Representative of the
14 State of Hawaii Office of Planning, and Petitioner's
15 Exhibits 43 - 44.

16 On November 19, 2018, an LUC meeting agenda
17 notice for the November 28-29, 2018 LUC meeting was
18 sent to the Parties and the Statewide, Maui and
19 Hawai'i mailing lists; and the Commission received:

20 County of Hawaii - Mayor Kim's
21 correspondence re: Non-fulfillment of Condition 9 -
22 Affordable Housing.

23 County of Hawaii Briefs submitted in
24 response to LUC Chair's direction at October 24-25,
25 2018 meeting.

1 OP's Supplemental Statement of Position on
2 the Land Use Commission's Order to Show Cause.

3 WHI's Second Supplemental Statement of
4 Position; Exhibits 45 through 64.

5 On November 21, 2018, the Commission
6 received a signed copy of service of Petitioner's
7 Subpoena of County of Hawaii's Office of Housing and
8 Community Development, also on this date the Chair
9 considered the County of Hawaii's Motion to Quash
10 Petitioner's Subpoena and Subpoena Duces Tecum and
11 issued an order that denied in part and granted in
12 part the Motion.

13 Also on this date, the LUC sent Notice of
14 Hearing WHI's Motion for Issuance of Subpoena to an
15 Authorized Representative of the State of Hawaii
16 Office of Planning on November 28, 2018.

17 On November 26, 2018, the Commission
18 received Notice of a new email address for Ms.
19 Batichtcheva.

20 Let me briefly run over our procedure.

21 First I will call those desiring to provide
22 public testimony for the Order to Show Cause to
23 identify themselves. All such individuals will be
24 called in turn to our witness box where they will be
25 sworn in prior to their testimony.

1 Next, the Commission will consider
2 Petitioner's Motion for Issuance of Subpoena to an
3 Authorized Representative of the State of Hawaii
4 Office of Planning. The Chair will remind the
5 Parties that per the LUC correspondence dated
6 November 21, 2018, each Party will have 10 minutes to
7 state their argument and the hearing on this Motion
8 will be limited to 45 minutes.

9 Next the Commission will resume proceedings
10 on the Order to Show Cause Docket No. A06-767.

11 Finally, the Petitioner may reserve a
12 portion of their time to respond to comments made by
13 the County and the State Office of Planning.

14 It is the Chair's intent to close the
15 evidence in this docket and deliberate on this matter
16 during the remainder of today.

17 The Chair would also note for the Parties
18 and the public that from time to time, I will be
19 calling for sort breaks.

20 Are there any questions on the procedures?

21 MR. LIM: None from the Petitioner.

22 MR. KIM: None from the County.

23 MS. APUNA: No questions.

24 CHAIRPERSON SCHEUER: Are there any
25 individuals desiring to provide public testimony on

1 the Order to Show Cause?

2 CHAIRPERSON SCHEUER: Mr. Orodenger.

3 EXECUTIVE OFFICER: Mr. Chair, we have
4 Delene Osorio, followed by Ms. Alos.

5 THE WITNESS: How much time do I have?

6 CHAIRPERSON SCHEUER: I'm going to ask you
7 to try to keep it to three minutes if at all
8 possible, given the tremendous amount of work that we
9 have to cover.

10 I'm going to first swear you in.

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

13 THE WITNESS: Yes, I do.

14 CHAIRPERSON SCHEUER: So please speak close
15 to the mic. State your name and address for the
16 record, then proceed.

17 DELENE OSORIO

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

20 DIRECT EXAMINATION

21 THE WITNESS: Delene Osorio, address 348
22 Haili Street, Hilo, Hawai'i.

23 Aloha, I am the local representatives on
24 the Big Island for Ikaika Ohana, a non-profit
25 developer of affordable housing in Hawaii and

1 California. I am testifying at this hearing today to
2 encourage the support of the Land Use Commission to
3 retain the present land use rural designation for
4 Waikoloa Highlands and to assure this commission that
5 we are an active and viable affordable housing
6 developer that can satisfy the County requirement to
7 build affordable housing.

8 Ikaika Ohana has been offered an estimated
9 five-plus acre parcel across from the Waikoloa Post
10 Office that will enable us to build more affordable
11 housing in the area that is badly needed. It is our
12 intent to build at least 60 multifamily units with a
13 3,500 square foot community center.

14 A bit of history about Ikaika Ohana. It
15 was created in 2009 by Lowell Kalapa, the former head
16 of the Tax Foundation of Hawaii in Honolulu. Those
17 of us with the same color hair might remember who he
18 is.

19 Lowell's group built a 200 unit project
20 adjacent to Aala Park and an elderly project on Pua
21 Lane in Liliha. Following his death a few years ago,
22 the remaining directors were not going to continue
23 with developing affordable housing and subsequently
24 Doug Bigley and his brothers took over this
25 non-profit entity in 2015 to continue their goal of

1 building affordable housing for the residents of our
2 state.

3 Urban Housing Community - UHC, a for-profit
4 affordable housing development company was formed in
5 2003. I met Doug Bigley, the President of UHC in
6 2007. They were looking for properties to acquire in
7 Hawaii that had project-based vouchers attached to
8 it, and the opportunity to sell them an affordable
9 housing apartment building that needed much
10 renovation to meet HUD's requirements and maintain
11 the subsidies for the tenants was a win for both UHC
12 and the tenants.

13 Every report and study about the need for
14 affordable housing in Hawaii comes to the same
15 conclusion, more housing is needed, yet the developer
16 who puts together the proposals to provide that
17 housing has to go through regulations and application
18 processes and financing hoops to get a project off
19 the ground and that all takes time and a great deal
20 of money.

21 Here are some examples of what we have gone
22 through to build in Hawaii.

23 2007 Riverside Apartments in Hilo, four
24 applications submitted for funding from HHFDC, seven
25 years to complete.

1 2007 E Komo Mai, four years to completion.

2 2013 Kamana Elderly, three years to
3 complete, and these projects were renovations.

4 On Oahu and in 2014 Ikaika Ohana completed
5 a 48 unit project in Nanakuli on DHHL land that
6 started in 2009. That was a five year endeavor.

7 This is what is in our active inventory of
8 upcoming projects.

9 October 2018, last month, they broke ground
10 in Kihei, Maui, to build 120 units multifamily, \$55
11 million in funding was obtained.

12 CHAIRPERSON SCHEUER: Ms. Osorio, three
13 minutes. Can I ask you to summarize your testimony,
14 and then the Petitioner and Parties and Commissioners
15 will have a chance to ask you questions.

16 THE WITNESS: Okay. I'm just trying to
17 lead up to -- we are an organization that's done work
18 in Hawai'i already. We're not somebody out there
19 that's nebulous. If we are able to build the housing
20 in Waikoloa that would be from donated lands, and
21 that's what I'm here for.

22 Are there any questions?

23 CHAIRPERSON SCHEUER: I will handle that
24 part of it. Thank you.

25 Are there any questions from Petitioner?

1 MR. LIM: Yes.

2 CROSS-EXAMINATION

3 BY MR. LIM:

4 Q Good morning. You're familiar to some
5 degree about the 11-acre parcel that was donated by
6 the Waikoloa Highlands project in satisfaction of the
7 affordable housing requirement?

8 A Yes.

9 Q Are you currently working on development of
10 an affordable housing project for that parcel?

11 A We have had some conversations with the
12 owner, but there's nothing concrete that's been
13 developed yet.

14 Q So if the project does go forward, my
15 understanding is that the developer wouldn't develop
16 the affordable housing, it would be Ikaika Ohana, the
17 nonprofit that would develop the affordable housing;
18 correct?

19 A Yep.

20 Q Why is the Waikoloa Highlands project site
21 a very appropriate kind of an unique site in Waikoloa
22 to develop affordable housing?

23 A Well, we already have a
24 four-and-a-half-acre parcel that was bought in 2015.
25 We got \$24 million in funding for it, and we got

1 approval in January of 2017 to build, and the day
2 after we got the award letter we were notified by
3 heads to stop everything because of the unexploded
4 ordinances. So we have been working on it for two
5 years. We've worked with the Army Corps of
6 Engineers. We worked with the Department of Health.

7 So we are getting to a point of being able
8 to finalize, obtain a letter of no significant
9 impact, or a final letter that will allow us to build
10 the 60 units down the street from where the Waikoloa
11 Highlands parcel is located.

12 Q Is it your understanding that the Waikoloa
13 Highlands parcel is similarly situated, that it
14 doesn't have unexploded ordinance according to the
15 U.S. Army Corps of Engineers?

16 A From the maps that I've seen that were put
17 out by the Army Corps, those parcels are not
18 affected.

19 On our parcel, a half an acre out of the
20 four-and-a-half acres had no splatterings on it, so
21 because of that we have had a two-year delay.

22 Q No further questions.

23 CHAIRPERSON SCHEUER: County.

24 MR. KIM: County has no questions for the
25 testifier.

1 The County would just echo the comments
2 that affordable housing is a need within the County
3 and thank the testifier and her organization for all
4 the good work.

5 CHAIRPERSON SCHEUER: Office of Planning?

6 MS. APUNA: No questions.

7 CHAIRPERSON SCHEUER: Commissioners?
8 Commissioner Wong.

9 COMMISSIONER WONG: Just a couple
10 questions.

11 First thing is, when did you start
12 discussions with the Petitioner for the affordable
13 housing?

14 THE WITNESS: For Waikoloa Highlands?

15 COMMISSIONER WONG: Yes.

16 THE WITNESS: A few weeks ago.

17 COMMISSIONER WONG: No other questions.
18 Thank you.

19 CHAIRPERSON SCHEUER: Are there further
20 questions for the testifier? Thank you very much.
21 We thank for your work.

22 MR. LIM: I'm sorry, it was mostly just a
23 qualification of exhibits. This is something that
24 Ms. Osorio is probably the best --

25 CHAIRPERSON SCHEUER: We're not at that

1 point of the agenda. Ms. Osorio is not listed.

2 Commissioner Ohigashi.

3 COMMISSIONER OHIGASHI: I apologize. We
4 received this UHC community -- is that from you?

5 THE WITNESS: Yes.

6 COMMISSIONER OHIGASHI: Tell me what this
7 is.

8 THE WITNESS: UHC is Urban Housing
9 Community. They are the for-profit arm of the
10 housing developer. Ikaika Ohana is the nonprofit
11 entity.

12 I wanted to share those brochures with you
13 so that you're assured that the products that are
14 built by Urban Housing is not junk. I don't know how
15 to explain it. They're very nice. I would live in
16 one of those renovated units, they're built that
17 well.

18 COMMISSIONER OHIGASHI: I just wanted to
19 clarify.

20 CHAIRPERSON SCHEUER: Thank you.

21 Ms. Alos. I'll hold you to three minutes.
22 Do you swear or affirm that the testimony you're
23 about to give is the truth?

24 THE WITNESS: Yes.

25 CHAIRPERSON SCHEUER: Please state your

1 name and address for the record.

2 JULIA ALOS

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

5 DIRECT EXAMINATION

6 THE WITNESS: Aloha, good morning. I'm
7 Julia Alos. I live 68-1888 Pau Nani Street in
8 Waikoloa, Hawai'i.

9 I'd appeared before the Commission, and I
10 would like to just bring a couple things to mind.

11 The Petitioner, Waikoloa Mauka, had
12 submitted an annual report written by Sidney Fuke on
13 February 29, 2016, stating apologies for not being
14 able to submit one the previous year, and attempted
15 to submit one the next year in as much as very little
16 progress had been made.

17 In his general background he listed on this
18 page to the County, he had stated that Ordinance 90
19 160, amendments to Ordinance 95 51 required final
20 subdivision approval of no less than 175 lots be
21 secured within a five-year period.

22 It further requires the construction of
23 channelized improvement at the intersection of
24 Waikoloa Road, Pua Melia Street and Paniolo Avenue
25 before June 30th of 1996, as well as the construction

1 of traffic signalization improvements.

2 Paragraph 6 stated that Petitioner
3 requested further amendments to Ordinance 05 157
4 relating to the nature of the traffic improvements at
5 the intersection of Waikoloa Road. The Petitioner
6 requested the improvements be changed from a traffic
7 signal to a roundabout system.

8 Paragraph 9 stated the tentative
9 subdivision approval was issued on April 5th of 2007.
10 The on-site infrastructure construction plans have
11 been prepared. The construction plans for the
12 roundabout improvements at Waikoloa Road/Paniolo have
13 been completed. I'm concerned about that.

14 Efforts to dedicate 10-plus acres of land
15 situated approximate to the subject of the site to
16 the County of Hawaii for a community center and a
17 park there ongoing. This is to address the County
18 rezoning park and recreation fair share requirement
19 as proposed in the 398-lot subdivision.

20 There was Exhibit C, also Exhibit No. 12 in
21 a letter of transmittal dated March 17th of 2008 from
22 RM Towill stating that the Waikoloa Highlands
23 subdivision roundabout was included in this paperwork
24 that they had submitted. And it was sent to Robyn
25 Matsumoto of the Engineering Department of the

1 Hawai'i Public Works, and they submitted their
2 off-site inspection improvements for review and
3 approval on Ordinance No. 07 127.

4 In closing, I just want to say that the
5 Waikoloa residents are very concerned and worried.
6 We have been delayed for a number of years due to
7 delay in this project, the development of Waikoloa
8 Highlands and Waikoloa Mauka.

9 There's a lot more things that are coming
10 up. I just went to a meeting, there was 250 acres
11 proposed solar farm. There's a lot of things that
12 are going on, and we need to get this intersection,
13 as per their conditions, done as soon as possible.

14 And I just have been here three times to bring
15 this to your attention.

16 CHAIRPERSON SCHEUER: Please wait to see if
17 anybody has questions. Petitioner?

18 CROSS-EXAMINATION

19 BY MR. LIM:

20 Q Good morning.

21 The traffic improvement that you're talking
22 is, I guess, primarily the roundabout as required by
23 the County Rezoning Ordinance?

24 A That's correct.

25 Q Do you understand that if the Waikoloa

1 Highlands Petition Area is reverted from Rural to
2 Agricultural by the Land Use Commission, that the
3 project will be delayed by at least another four
4 years?

5 A Unfortunately, I do.

6 Q What would you be in favor of, retaining
7 the current Rural or having it taken away?

8 A Based on all the information that I've read
9 on all the filings, I would like for it to be
10 retained, but I would like for this to be at the top
11 of the list and included in on a bond or something if
12 needed.

13 We just want to move forward with this.
14 And this development will add about one, you know,
15 another thousand or 1200 people to the 7,000 we have,
16 so that's going to be a big deal for us.

17 So, yes, we would like to get this done, if
18 you can get it approved.

19 CHAIRPERSON SCHEUER: County?

20 MR. KIM: The County had no questions for
21 the testifier.

22 MS. APUNA: No questions.

23 CHAIRPERSON SCHEUER: Commissioners?
24 Commissioner Cabral.

25 VICE CHAIR CABRAL: I would like to

1 personally thank you. You have attended all of these
2 hearings, and I can appreciate it's so important both
3 for the intersection and for the entire community.
4 And I'm glad that someone up there is paying
5 attention to the huge impact this could have on the
6 community, so thank you for your attendance and
7 input.

8 THE WITNESS: Thank you, Vice Chair.

9 CHAIRPERSON SCHEUER: Commissioners?
10 Commissioner Chang.

11 COMMISSIONER CHANG: Good morning, Ms.
12 Alos. Thank you for being here.

13 I want to confirm. I believe your
14 testimony at the last hearing was you are familiar
15 with the Waikoloa Highlands property?

16 THE WITNESS: Yes, I am.

17 COMMISSIONER CHANG: How long have you
18 lived there?

19 THE WITNESS: 18 years.

20 COMMISSIONER CHANG: During that period of
21 time, have you noticed any improvements on the
22 Waikoloa Highlands property?

23 THE WITNESS: Nothing.

24 COMMISSIONER CHANG: Thank you.

25 CHAIRPERSON SCHEUER: Anything further?

1 Commissioner Mahi.

2 VICE CHAIR MAHI: You just -- aloha. You
3 just shared with us that you lived there 18 years.
4 And responding to the Petitioner's attorney, you say
5 that you would be for this project if it, of course,
6 makes it primary that this roundabout is built, is
7 placed.

8 How assured are you that this will happen
9 in the four, five or even ten more years? We're
10 talking almost 20 years right now.

11 THE WITNESS: That's correct.

12 Based on the exhibits that were sent and
13 are on the website right now, about 80 percent of the
14 engineering costs were already paid for by the
15 Petitioner. And so if we can get that fast tracked,
16 because I believe they spent about 80-some-thousand
17 dollars for this intersection with diagrams, et
18 cetera, et cetera.

19 I know that there are traffic safety
20 analysis from 2005, but we have a more current one.
21 I would be interested in making sure that this is a
22 top priority. Moving forward it should be something
23 that should happen maybe in the meantime while
24 they're working on doing their lots.

25 VICE CHAIR MAHI: You feel confident about

1 this?

2 THE WITNESS: Just as hopeful as I could
3 be. I can't feel confident. I think the County
4 would need to levy some pressure on them for misdeeds
5 for not having this done.

6 VICE CHAIR MAHI: Maybe we will hear some
7 comments from the County, something I'm looking
8 forward to. Thank you.

9 CHAIRPERSON SCHEUER: Anything further,
10 Commissioners? Thank you very much.

11 That's the end of public testimony.
12 Commission will now consider any further exhibits
13 that the parties wish to offer.

14 Mr. Lim, describe the exhibits that you
15 wish to have entered into the record.

16 MR. LIM: We have submitted copies to the
17 Commission and to the Parties of what's been marked
18 as Petitioner's Exhibit 65, which is a June 19, 2017
19 email from former Project Planner Sidney Fuke to Alan
20 Rudo, the Office of Housing and Community
21 Development.

22 In addition to June 19th, 2017 letter from
23 Mr. Fuke to Mr. Neil Gyotoku, the Housing
24 Administrator for OHCD, purporting to transmit the
25 Waikoloa Highlands executed warranty deed for

1 11.7 acres of TMK parcel (3)6-8-002:057. And that
2 exhibit is less the metes and bounds that were
3 attached to the original document.

4 I'll represent to you that that may or may
5 not be a correct copy of what is in the Office of
6 Housing and Community Development's files. This was
7 just what was in our file. Mr. Kim has made me aware
8 that he has, I think, a better copy that's different
9 than what we submitted.

10 The purpose of submitting is to show
11 whatever we had in our file, and that was provided to
12 me by my client as of about 12 noon yesterday, that's
13 why we had to submit late.

14 CHAIRPERSON SCHEUER: Mr. Lim, I think
15 you've only spoken to the things that were submitted
16 today and not submitted between the last two
17 hearings. Did I understand you correctly?

18 MR. LIM: You're just talking about the new
19 ones. We request that --

20 CHAIRPERSON SCHEUER: So everything
21 submitted since the last hearing has not been
22 actually put into the record.

23 MR. LIM: So we request that at this time,
24 Mr. Chairman, everything submitted with the Second
25 Supplemental Filing by the Petitioner.

1 CHAIRPERSON SCHEUER: Any there any
2 objections from the County?

3 MR. KIM: With understanding that the
4 document attached to the letter differs from the
5 document which is in the Office of Housing files, the
6 County doesn't object to this exhibit coming from
7 Petitioner's own file.

8 CHAIRPERSON SCHEUER: You're referring to
9 what exhibit number?

10 MR. KIM: Exhibit 65. There is a warranty
11 deed attached to the email in the letter.

12 CHAIRPERSON SCHEUER: Does the County have
13 a position on any of the other exhibits submitted by
14 Mr. Lim?

15 MR. KIM: County does not object to the
16 entering of exhibits by Petitioner.

17 CHAIRPERSON SCHEUER: Is it a procedural
18 question, Mr. Ohigashi?

19 COMMISSIONER OHIGASHI: Yes.

20 CHAIRPERSON SCHEUER: Please proceed.

21 COMMISSIONER OHIGASHI: The original or the
22 none -- the document that you refer to, is that part
23 of the record so far, the one that you have in your
24 files?

25 MR. KIM: It is not part of the record.

1 COMMISSIONER OHIGASHI: Do you intend to
2 make it part of the record?

3 MR. KIM: I was not intending to. I don't
4 have hard copies presently. I would have to
5 logistically work out -- I wasn't intending to. I
6 just got the document earlier this week.

7 CHAIRPERSON SCHEUER: There will be a
8 chance for the Commissioners to ask questions or
9 object.

10 Office of Planning?

11 MS. APUNA: OP does object, and I would
12 like to provide my reasons for objecting to certain
13 exhibits.

14 CHAIRPERSON SCHEUER: Please.

15 MS. APUNA: OP objects to those portions,
16 including exhibits of Petitioner's Second
17 Supplemental Statement on Order to Show Cause that go
18 beyond the scope of the six specific questions the
19 Commission requested legal briefing on.

20 In particular, OP objects to the admittance
21 of Petitioner's arguments in Part II of its
22 Memorandum in Support, from pages 5 through 23, and
23 the entering into evidence of Petitioner's Exhibits
24 46 through 54, because:

25 1. Petitioner has failed to comply with

1 the Commission's specific request.

2 2. The evidentiary record should be
3 closed, and;

4 3. Petitioner's additional argument and
5 evidence is ultimately irrelevant to these
6 proceedings.

7 First, Petitioner is attempting to squeeze
8 in evidence that was not specifically requested by
9 the Commission. Petitioner has not complied with the
10 Commission's request by including arguments and
11 exhibits clearly outside of and irrelevant to the six
12 specific questions made by the Commission at the last
13 hearing.

14 Secondly, consistent with HAR Section
15 15-15-59, at this point in the hearing the
16 evidentiary record should be closed.

17 The course of the hearing, which Chair
18 Scheuer explained from the outset, without objection
19 by the Petitioner, was to proceed in the following
20 order: The Petitioner presents their case, including
21 argument and evidence, then the County, and then OP.
22 Pursuant to HAR Section 15-15-55 and 55.1, prior to
23 the hearing, the parties were required to timely
24 submit their position statements as well as exhibits
25 for filing, which allows for review and potential

1 response or objection from the other parties.

2 At this late stage in the game, after
3 Petitioner has filed its position statement as
4 amended, filed its exhibits, and completed its case
5 in chief, and the County and OP, having done the
6 same, Petitioner now attempts to inject new arguments
7 of due process and equal protection and voluminous
8 exhibits, after the evidentiary portion of the
9 hearing and Petitioner's case has essentially been
10 closed.

11 Once the evidentiary portion of the hearing
12 is closed, there are only two ways in which
13 additional evidence may be admitted into the record.
14 The first is under HAR Section 15-15-63(1), whereby
15 the Commission may require the production of further
16 evidence through testimony or exhibits upon any
17 issue. This is how the Commission was able to ask
18 for documentation of the County disaffirming
19 Petitioner's fulfillment of the affordable housing
20 agreement and evidence of Petitioner's corporate
21 structure.

22 Here, the Commission has not asked for
23 additional evidence or even argument on Petitioner's
24 due process/equal protection argument on past
25 Decision and Orders.

1 The only other way additional evidence may
2 be admitted following close of the evidentiary record
3 would be pursuant to HAR Section 15-15-70(1), which
4 requires, after the hearing on the evidence is
5 closed, but before the Commission votes on a
6 decision, a party for good cause shown may move to
7 re-open the hearing to take newly discovered
8 evidence. Petitioner's additional argument and
9 exhibits are not newly discovered evidence. The
10 exhibits are past Commission D&Os and hearing minutes
11 that existed prior to the hearing when exhibits were
12 due for filing. Therefore, even under HAR Section
13 15-15-70(1), Petitioner is unable to introduce its
14 additional exhibits.

15 Moreover, the County, OP and this
16 Commission will be prejudiced by the improper and
17 untimely filing by Petitioner of these voluminous
18 exhibits and argument, given that we are not provided
19 appropriate time to review and respond.

20 Lastly, this Commission needn't worry that
21 the record will be incomplete or lacking without
22 Petitioner's additional exhibits because they are
23 irrelevant to these proceedings.

24 Petitioner's reason for the additional
25 exhibits is to support its argument that reversion of

1 the property would violate Petitioner's right to due
2 process and equal protection, by comparing past
3 dockets that allegedly are similarly situated to this
4 matter but were treated more favorably.

5 Pursuant to HRS Section 205-4(g), this
6 Commission's duty in an order to show cause is to
7 determine whether Petitioner has complied with its
8 D&O conditions, whether Petitioner has substantially
9 commenced use of the land in accordance with
10 representations, and/or whether Petitioner has shown
11 good cause not to revert the property to its prior
12 classification.

13 There is no duty or requirement or reason
14 for the Commission to look to prior dockets and
15 actions to influence or guide its decision.

16 For these foregoing reasons, the Commission
17 should strike Petitioner's additional arguments and
18 Exhibits 46 through 54.

19 CHAIRPERSON SCHEUER: Just to be very
20 clear, counsel, the Petitioner has submitted Exhibits
21 45 through 65 counting through today.

22 MS. APUNA: I believe 45 was -- I didn't
23 bring mine because they were so large. I think 45
24 was with regard to something that was relevant to --

25 CHAIRPERSON SCHEUER: It's the transcript.

1 MS. APUNA: Right. So I don't think that
2 is irrelevant to what was asked of the Petitioner.

3 CHAIRPERSON SCHEUER: So you would possibly
4 agree that the transcript is already a matter of the
5 record of this hearing?

6 MS. APUNA: Yes, that's true. I agree.

7 CHAIRPERSON SCHEUER: Commissioners, are
8 there any objections?

9 COMMISSIONER OKUDA: Chair, may I ask the
10 counsel for OP a question?

11 CHAIRPERSON SCHEUER: Please.

12 COMMISSIONER OKUDA: To clarify, what
13 actual prejudice has the Office of Planning suffered
14 or claims to suffer because of this submission?

15 MS. APUNA: Thank you, Chair.

16 So this stack, that is mostly, I think,
17 90 percent of it are the exhibits that we object to.
18 We received this last week, and I can't say that we
19 have been able to review these things, that I'm to
20 prepared, and to understand everything that they're
21 trying to argue are based upon these exhibits.

22 COMMISSIONER OKUDA: Well, do you agree
23 that even though there were intervening holidays and
24 things like that, if you have about a week, that
25 really should be ample time to review the documents

1 even though, unfortunately, us as lawyers sometimes
2 we have to work into the weekends and over the
3 holidays?

4 Let me be more specific.

5 Was there something, some medical issue or
6 physical issue would which have prevented reviewing
7 these documents and gaining an understanding during
8 the intervening time?

9 MS. APUNA: No, not a medical -- no, no,
10 issue, just that the vast -- it's a lot to get
11 through, and there's a lot of other things going on
12 with this docket that we're preparing for as well as
13 other work.

14 I think it's -- I think it would have been
15 appropriate if they were timely at least. I think
16 they're irrelevant, but this argument that they're
17 bringing up, they could have brought it up in --

18 COMMISSIONER OKUDA: I'm only focused on
19 actual prejudice. Would you agree with me that as
20 far as looking at time or time available to review
21 it, there really wasn't any actual prejudice?

22 MS. APUNA: I would disagree. I think
23 there's a lot to take in and to prepare for, at
24 least --

25 COMMISSIONER OKUDA: Thank you, Chair. I

1 have no further questions.

2 CHAIRPERSON SCHEUER: Commissioners?
3 Commissioners, normally it is -- Commissioner
4 Ohigashi.

5 COMMISSIONER OHIGASHI: Are we going to ask
6 questions about the actual exhibits, or are we going
7 to -- I'm trying to clarify. Are we limited to
8 asking OP their position or are you going to --

9 CHAIRPERSON SCHEUER: At this point you
10 should be asking questions of OP about their
11 position.

12 COMMISSIONER OHIGASHI: My actual question
13 is -- the question is, is that they bring up the
14 relevance issue, so I wanted to hear from Petitioner,
15 their response to the relevance issue since we don't
16 have anything in writing.

17 CHAIRPERSON SCHEUER: Let me say something
18 about the procedure that we're in now. This is what
19 I was about to say before you spoke.

20 Ultimately, under the Administrative Rules
21 it could be my sole decision as Chair whether or not
22 to sustain the objections and not let things into the
23 record.

24 I am interested in the thoughts of my
25 fellow Commissioners as to that. However, I don't

1 believe procedurally we are at a point of needing to
2 question the Petitioner as to their opinions why they
3 believe it's relevant. They have submitted it as
4 proposed, and I gave the Petitioner an opportunity to
5 explain what has been introduced into -- that they
6 tried to introduce into the record, and they had that
7 opportunity at that time to discuss any relevance.

8 So I would be happy to hear your thoughts
9 about it, but not wanting to go into the full
10 discussion with the Petitioner, County and Office of
11 Planning at this time.

12 COMMISSIONER OHIGASHI: Thank you.

13 CHAIRPERSON SCHEUER: Commissioner Okuda.

14 COMMISSIONER OKUDA: Chair, if that's your
15 inclination, I would ask the Chair to allow admission
16 of the exhibits, additional exhibits proposed by the
17 Petitioner, and this is the reason why.

18 I don't believe that admissibility should
19 be determined strictly on a narrow view of relevance,
20 because we haven't heard the argument or the
21 testimony or any other discussion with respect to
22 relevance, either on these new issues raised, equal
23 protection, or the equal protection or -- I'm sorry,
24 the other issue that was raised by the Petitioner.

25 And so I think, in the interest of having a

1 complete record, and frankly reducing potential
2 issues on appeal, I would ask that the exhibits be
3 allowed and considered.

4 CHAIRPERSON SCHEUER: And you're referring
5 to all the exhibits?

6 COMMISSIONER OKUDA: Yes, all the exhibits
7 that are proposed by the Petitioner.

8 CHAIRPERSON SCHEUER: Mr. Okuda, would you
9 have -- if you had the opportunity to question the
10 Petitioner as to their relevance, would you change
11 your position?

12 COMMISSIONER OKUDA: I might.

13 CHAIRPERSON SCHEUER: So I will first ask
14 the other Commissioners whether they have questions,
15 and then I will open up some discussion with the
16 Petitioner as to relevance.

17 Commissioners other questions? Commission
18 Aczon.

19 COMMISSIONER ACZON: Just trying to confirm
20 if we are done with the evidentiary hearing. And I
21 guess the reason why I'm asking, if we accept this,
22 how many more they going to submit. There has got to
23 be an end. We've been talking about this. I just
24 want to make sure there is an end game on this.

25 CHAIRPERSON SCHEUER: Mr. Aczon, I will say

1 this. I very explicitly, at the end of the last
2 hearing, did not close the evidentiary portion, but I
3 did so for two specific reasons.

4 One, there was a late request to
5 cross-examine a staff member from the Office of
6 Planning. And I wanted to afford the opportunity for
7 us to hear evidence and arguments on that which we
8 are actually going to after this.

9 The second reason was that I, and a number
10 of my fellow Commissioners, actually asked for some
11 specific briefings on particular points.

12 That was the intention. It was not the
13 intention to keep the record open to a number of new
14 claims regarding procedural due process. It was
15 certainly not an opportunity to have previously
16 called witnesses to correct what they said on the
17 record in written testimony.

18 COMMISSIONER ACZON: Thank you for the
19 clarification, Mr. Chair.

20 CHAIRPERSON SCHEUER: Commissioners?
21 Commissioner Okuda.

22 COMMISSIONER OKUDA: Mr. Chair, it's in
23 your discretion how to proceed, but if you would
24 allow me to ask some questions of the Petitioner
25 about relevance.

1 CHAIRPERSON SCHEUER: Please proceed.

2 COMMISSIONER OKUDA: Thank you.

3 Mr. Lim, your claim regarding equal --
4 first of all, these additional exhibits, are they
5 being presented for additional argument or in support
6 of additional argument?

7 MR. LIM: What do you mean by additional
8 argument?

9 COMMISSIONER OKUDA: Arguments that
10 supplement the presentations that you made earlier.

11 MR. LIM: That's correct. And we did
12 mention at the last hearing, October 26th hearing, at
13 transcript page 109 that was the reason why we wanted
14 to talk to the Office of Planning witnesses because
15 of potential claims for violation of due process and
16 equal protection at line 16.

17 COMMISSIONER OKUDA: With respect to the
18 equal protection claim, did you look at any Hawaii
19 Supreme Court cases to evaluate what the elements are
20 of equal protection claim?

21 MR. LIM: Correct, I did.

22 COMMISSIONER OKUDA: Did you, for example,
23 look at Mahiai, M-A-H-I-A-I, versus Suwa, S-u-w-a, 69
24 Hawai'i 349, a 1987 Hawai'i Supreme Court case?

25 MR. LIM: I don't recall.

1 COMMISSIONER OKUDA: This is the statement
2 from Mahiai as far as -- let me ask you this.

3 Your equal protection claim is it really
4 summed up in saying, hey, there are a bunch of other
5 people whose violations have been allowed to go
6 forward without any real sanction, so therefore, the
7 Commission, if it attempts to enforce now certain
8 conditions, it violates your client's equal
9 protection rights under the constitution?

10 MR. LIM: Essentially. It also is what we
11 think is an example of the Commission's reasonable
12 exercise of discretion in this matter.

13 We see the disparate treatment of the
14 various Petitioners, and there may or may not be
15 reasons for that, but we just don't know that.
16 That's why we wanted to question the Office of
17 Planning on these issues, and that's why we put those
18 other dockets into the record.

19 COMMISSIONER OKUDA: But relevance --
20 whether or not evidence is relevant depends on what
21 the legal standards are, correct?

22 MR. LIM: Correct.

23 COMMISSIONER OKUDA: Tell me whether or not
24 you disagree that this is what the Hawai'i Supreme
25 Court stated as the applicable rule in Mahiai versus

1 Suwa, specifically at pages 360 to -61 of -69 Hawai'i
2 reports, and 368 of 742 Pacific 3d.

3 And I quote: It is insufficient to show
4 merely that other offenders have not been prosecuted,
5 or that there has been laxity of enforcement, or that
6 there has been some conscious selectivity and
7 prosecution. Recognition of the defense will not
8 permit the guilty to go free simply by showing that
9 other violators exist.

10 And that's the Hawaii Supreme Court citing
11 a criminal case, State versus Kailua Auto Wreckers,
12 62 Hawaii 222, a 1980 Hawai'i Supreme Court case, but
13 that's cited in that Mahiai.

14 If that's the rule being cited by the
15 Hawaii Supreme Court, wouldn't that suggest that
16 these exhibits are really not relevant?

17 MR. LIM: We have to disagree. We think
18 they are relevant. Like I said, there's also the
19 ancillary reason of showing what is the reasonable
20 exercise of discretion by the Commission on an Order
21 to Show Cause.

22 COMMISSIONER OKUDA: Yeah, but going on
23 what the Supreme Court in Mahiai said, this is what
24 you have to demonstrate -- not you, but this is what
25 someone who claims selective enforcement in a civil

1 or criminal case has to demonstrate, and I quote:

2 To substantiate a claim of discriminatory
3 enforcement, ranchers -- because in that case, the
4 Mahiai case is enforcement against ranchers --
5 ranchers must satisfy a two-part test.

6 First, they must demonstrate that the
7 Department generally has not enforced Section 142-6
8 against others similarly situated.

9 And there is a citation to 9th Circuit
10 Court: Ranchers must establish that their selection
11 was, quote, deliberately based upon an unjustifiable
12 standard such as race, religion or other arbitrary
13 classification, close quotes.

14 And, again, the Hawai'i Supreme Court cites
15 Auto Wreckers case which, in parenthesis quotes
16 Oyler, O-y-l-e-r, versus Boles, B-o-l-e-s, the United
17 States Supreme Court case, 368 U.S. at 456.

18 So not to get too technical here, but I
19 think the technicality is important because, again,
20 as I mentioned at our earlier hearing, I'm very
21 conscious for many reasons of claims of
22 discrimination, because I think we must be vigilant
23 about claims of discrimination, because all people
24 should be treated equal under the law.

25 But the standard that the supreme Court

1 here says is that you not only have to show, number
2 one, that the standard or enforcement has not been
3 enforced against other people; but number two, the
4 party who claims discrimination also has to show that
5 the selection was, quote, deliberately based upon an
6 unjustifiable standard such as race, religion or
7 other arbitrary classification.

8 So is it the Petitioner's contention that
9 the OSC here was based, deliberately based, upon an
10 unjustifiable standard such as race, religion, or
11 other arbitrary classification? Is that the
12 Petitioner's claims.

13 MR. LIM: That is the one thing, the
14 elephant in the room that we have been arguing about
15 from the very beginning is that we think that the
16 Commission has taken aggressive action against this
17 project because they are from Russia. And we have
18 had some initial discussion on that.

19 And we also think that the Commission was
20 prejudiced from the very start of the proceedings due
21 to some, I don't know what you call it, periodical
22 reporting by Environment Hawai'i.

23 COMMISSIONER OKUDA: Well, let me ask you
24 this then, because what you raise is a very serious
25 concern and issue and allegation.

1 What evidence in the record shows that
2 there's any selection based on race, ethnicity,
3 national origin or the language anyone speaks?

4 MR. LIM: I guess the fact that we have the
5 OSC issued against this particular project.

6 COMMISSIONER OKUDA: So the only evidence
7 you have of an alleged selection based on race,
8 religion or what we all lawyers call a suspect
9 classification under the law, is the fact that an OSC
10 was issued and nothing else?

11 MR. LIM: Well, based upon the facts of the
12 particular Petitioner, yes.

13 COMMISSIONER OKUDA: That's the only thing?

14 MR. LIM: Yes.

15 COMMISSIONER OKUDA: Chair, I have no
16 further questions of this witness. And based on the
17 responses, I would actually modify my request. And I
18 think based on the responses, it does not satisfy
19 Mahiai versus Suwa, and I think based on that the
20 evidence is irrelevant.

21 CHAIRPERSON SCHEUER: Mr. Ohigashi, you had
22 a desire to ask questions of the Petitioner?

23 COMMISSIONER OHIGASHI: No.

24 CHAIRPERSON SCHEUER: Excuse me. I'm sorry
25 if I misunderstood you.

1 COMMISSIONER OHIGASHI: My question was
2 what OP presented their position, but it wasn't part
3 of their submittal in writing, so I thought maybe the
4 Petitioner would respond to those issues that OP
5 brought up.

6 CHAIRPERSON SCHEUER: You wanted to give
7 the Petitioner an opportunity to respond to OP?

8 COMMISSIONER OHIGASHI: Right.

9 CHAIRPERSON SCHEUER: Thank you for the
10 clarification. Commissioner Wong.

11 COMMISSIONER WONG: Mr. Lim, just being a
12 non-lawyer person, so this whole gist of it is -- I
13 mean, this whole motion was the Order to Show Cause,
14 right, not for the other issues or the new exhibit?
15 I'm just trying to figure out why you're putting this
16 in.

17 MR. LIM: The Order to Show Cause decision
18 by the Commission is an exercise of discretion. So
19 we're trying, as Commissioner Okuda said, we're
20 basically trying on behalf of the Petitioner to fight
21 a death penalty case.

22 So we are going to bring in all the
23 evidence that we feel is relevant to this case. And
24 part of it is what we feel to be unequal treatment on
25 the Order to Show Cause by other projects. That's

1 why we feel the other projects -- or at least the
2 ones we knew about, put into the record on exhibits.

3 Now, whether the Commission agrees or
4 disagrees with us on whether there has been unequal
5 treatment, or whether there has been a suspect
6 classification involved or not, that's the
7 Commission's business, but that's our offer of proof
8 and why we are putting it in.

9 COMMISSIONER WONG: So I guess I was
10 taught -- maybe I'm wrong -- that every hearing is a
11 specific hearing on only one issue, not other
12 hearings and motions from other past practice or
13 future practices.

14 We're just dealing with this one in
15 general, right? But you said -- you brought up about
16 other OSCs that may or may not have -- but I don't
17 think that's -- we are just dealing with the evidence
18 that's shown here today, right, or in the past few
19 days.

20 MR. LIM: Petitioner's point on that issue
21 is that the actions by the Commission and the
22 positions taken by Office of Planning on other
23 petitions are relevant in terms of the Commission's
24 own reasonable exercise of discretion, what have you
25 done in other similar cases. That's why those things

1 are relevant.

2 Like I said, the Commission may choose to
3 decide that that's not, but I think we have to make
4 our record on this.

5 CHAIRPERSON SCHEUER: Commissioner Mahi.

6 VICE CHAIR MAHI: Thank you.

7 So I guess to the Petitioner, you're saying
8 that there have been other cases where people have
9 been sort of taken off of the hook, so to speak, and
10 have exceeded 20 years of not meeting the
11 requirements to make the development? Do you have
12 examples of that you want to share with us?

13 MR. LIM: Yeah. Part of the Halekua case
14 that we cited in our briefing at -- Second
15 Supplemental briefing at page 14, some of the
16 exhibits in there relate to that also.

17 CHAIRPERSON SCHEUER: Commissioner Mahi, if
18 I can provide a little suggestion. We're focused on
19 whether or not this evidence should be entered into
20 the record or not at this time.

21 I don't necessarily want to go down the
22 road of the Petitioner arguing the case that he
23 wishes to argue before us.

24 MR. LIM: Mr. Chairman, can I give my
25 presentation as to the Office of Planning's position,

1 and then at least we will have that on the record?

2 CHAIRPERSON SCHEUER: I'm going to allow
3 Commissioner Chang.

4 COMMISSIONER CHANG: Good morning, Mr. Lim.

5 Based upon the questions that Commissioner
6 Okuda asked, is your assertion that the Petitioner
7 has been unfairly treated because of his ethnicity?
8 Are you alleging that the exhibits that you're
9 proposing to enter are similarly situated cases
10 involving a Petitioner who is, in your case, you're
11 saying we discriminated against him or treated
12 unfairly because he's Russian?

13 So the exhibits that you're proposing to
14 enter, are they also based upon someone's ethnicity?

15 MR. LIM: No. Those are entered to show
16 that other Petitioners, who may not be Russian or
17 whoever, have not been treated the same.

18 It's been our -- because we don't know what
19 the Commission does in their deliberations, but it's
20 been our position that had the Petitioner possibly
21 not been Russian, and had Petitioner shown up at the
22 original status hearing earlier this year, we might
23 not be sitting here. But because of those things, we
24 believe that the Commission had whatever it had
25 before it at the time, decided to issue the Order to

1 Show Cause, so we have been kind of on the downhill
2 slope ever since then.

3 COMMISSIONER CHANG: I just remind you that
4 the Land Use Commission is probably one of the only
5 commissions that our total deliberation is in public.
6 So I think you have access to all of our
7 deliberations. I have no further questions.

8 CHAIRPERSON SCHEUER: Just for myself,
9 before you proceed with responding to OP, I want to
10 clarify something for the record.

11 I believe I understood the testimony of Mr.
12 Grigoryants actually not indicated that he's Russian,
13 but rather he's Armenian. And that was actually a
14 distinction being made by your Applicant that they're
15 Armenian and not Russian; is that correct?

16 MR. LIM: I think he was Armenian but he's
17 a Russian citizen.

18 CHAIRPERSON SCHEUER: So your claim is on
19 the basis of citizenship?

20 MR. LIM: Or citizenship, however you want
21 to say it.

22 CHAIRPERSON SCHEUER: Well, those are two
23 different things, correct? Citizenship and ethnicity
24 both in the United States and in Russia are
25 different.

1 MR. LIM: Whether you call it Russian or
2 Armenian, I think the idea is the same.

3 CHAIRPERSON SCHEUER: Why don't we proceed
4 with your response to the Office of Planning's
5 objections.

6 MR. LIM: I think the Commission touched on
7 the first point, which is that the Commission's
8 evidentiary portion of the hearing is still open, and
9 that was made clear in the October 25th hearing
10 transcript at page 110, line 14, where the
11 Chairperson said, quote:

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

15 So the second point is that this is an
16 administrative agency hearing, and my understanding
17 of the evidentiary rules is that the evidentiary
18 rules of admissibility and relevance are
19 significantly relaxed.

20 I have not been in too many agency hearings
21 where exhibits were excluded from the record. The
22 agency typically accepts them for what they're worth.
23 If it's not worth anything, then you disregard them.

24 So I would say I agree with Commissioner
25 Okuda's initial intent to allow all the Petitioner's

1 exhibits and you can do what you want with them.

2 Also the Commission itself ordered that the
3 briefing be filed by November 20 -- excuse me,
4 November 19th, and that is what we did.

5 I think part of the confusion, and part of
6 what Commissioner Scheuer referred to the kapulu
7 nature is caused by the lack of rules on an Order to
8 Show Cause proceeding.

9 This is something that we have briefed in
10 our pleadings, but we feel we have complied with the
11 Commission's orders to submit the written filings by
12 a certain date. And so we feel that the Commission
13 should accept all of the exhibits as presented. And
14 if the Commission is intending to exclude certain
15 exhibits, we would like you to identify which ones.

16 CHAIRPERSON SCHEUER: You're done?
17 Commissioners, further -- Commissioner Chang.

18 COMMISSIONER CHANG: One question.

19 Mr. Lim, is there a reason you did not or
20 could not enter these exhibits in a timely fashion at
21 the original hearing?

22 MR. LIM: In part because we haven't had
23 time to have discovery with the Office of Planning.
24 We could have maybe gotten some information from
25 them, but we didn't know until very late in the game

1 that they weren't going to provide us any exhibits or
2 to have Mr. Funakoshi testify.

3 COMMISSIONER CHANG: Did you attempt to
4 request this information from them earlier during the
5 original hearing?

6 MR. LIM: We had -- it started when, at the
7 October 24th-25th hearing when I asked to
8 cross-examine Mr. Funakoshi, because I didn't think
9 they were going to put him on as a witness, so at
10 that time we knew we needed to have a witness to
11 prove some elements of our case.

12 COMMISSIONER CHANG: Was the equal
13 protection argument part of your original position
14 statement?

15 MR. LIM: There was no original position
16 statement.

17 COMMISSIONER CHANG: Well, your position
18 statement on the Order to Show Cause hearing filed I
19 believe for the October hearing, did you raise that
20 as an issue?

21 MR. LIM: I don't recall.

22 COMMISSIONER CHANG: Thank you.

23 CHAIRPERSON SCHEUER: Commissioner Wong.

24 COMMISSIONER WONG: Chair, I would like to
25 move to go into executive session to consult with the

1 board's attorney on questions and issues pertaining
2 to the board's powers, duties, privileges, immunities
3 and liabilities on these issues.

4 VICE CHAIR CABRAL: I will second that.

5 COMMISSIONER ACZON: Can we hear from OP?

6 CHAIRPERSON SCHEUER: I'm sorry, did I miss
7 your --

8 MS. APUNA: Chair, I just want to respond
9 to what Mr. Lim said as far as getting these exhibits
10 from OP.

11 All of these exhibits that we're objecting
12 to, these are not in our record. These are Land Use
13 Commission records that are accessible on the
14 internet. This is not something we withheld in any
15 way.

16 So this was obviously available to the
17 Petitioner well before they had submitted it. We had
18 nothing to do with releasing these records.

19 CHAIRPERSON SCHEUER: Thank you.

20 There is a motion on the floor to move into
21 executive session made by Commissioner Wong. Is
22 there a second?

23 COMMISSIONER ACZON: Second.

24 CHAIRPERSON SCHEUER: Seconded by
25 Commissioner Aczon. All in favor say "aye", any

1 opposed, say "nay". We're in executive session.

2 (Executive session.)

3 CHAIRPERSON SCHEUER: We're back in
4 session. Thank you.

5 I had a question for the Office of
6 Planning. Just to clarify from my notes and my
7 understanding which exhibits you were objecting to,
8 the Petitioner has, if I understand correctly,
9 submitted, since the last hearing, proposed Exhibits
10 45 through 65. Is that correct, Mr. Lim?

11 MR. LIM: That's correct.

12 CHAIRPERSON SCHEUER: I would like to be
13 clear which ones the Office of Planning is going on
14 record as objecting to.

15 MS. APUNA: Exhibits 46 through 54.

16 CHAIRPERSON SCHEUER: So 55 through 65, you
17 have no objection?

18 MS. APUNA: I don't believe so. I think
19 that the remaining exhibits were irrelevant to the
20 questions that were asked by the Commission. I
21 believe so. I think the remaining ones were okay.

22 CHAIRPERSON SCHEUER: From the Office of
23 Planning's perspective?

24 MS. APUNA: Yes.

25 CHAIRPERSON SCHEUER: Commissioners, were

1 there any other further points you wanted to raise at
2 this time? 46 through 54.

3 MS. APUNA: Those are the decisions and
4 orders and minutes from prior LUC matters.

5 MR. LIM: Excuse me, Mr. Chairman. OP is
6 including Exhibits 46 and 47 in that list, and those
7 are the Commission's proposed rule amendments that
8 you've been working on concurrently with this
9 proceeding.

10 We would argue that those rule amendments
11 are relevant to the Petitioner's argument relating to
12 due process.

13 CHAIRPERSON SCHEUER: Ms. Apuna.

14 MS. APUNA: I think we are still objecting
15 to any evidence or exhibits relating to that
16 argument, the due process, and equal protection
17 argument. Anything beyond that would be okay.

18 CHAIRPERSON SCHEUER: So let me
19 procedurally refer to Hawaii Administrative Rules
20 which govern admission of evidence, specifically
21 Section 15-15-63 (c) regarding how this is done.

22 The presiding officer -- which in this case
23 is me -- shall rule on the admissibility of all
24 evidence. The rulings shall be reviewed by the
25 commission in determining the matter on its merits.

1 In extraordinary circumstances, where prompt
2 decisions by the commission is necessary to promote
3 justice, the presiding officer may refer the matter
4 to the commission for determination.

5 My first question. Would you prefer that I
6 refer them to you and we take a motion, or would you
7 prefer that I simply rule on the admission of
8 exhibits?

9 Commissioner Mahi.

10 VICE CHAIR MAHI: I move we leave it in
11 your hands.

12 COMMISSIONER CHANG: Mr. Chair, I would
13 agree with Commissioner Mahi that for purposes of the
14 continued hearing on the Order to Show Cause, that we
15 would defer this motion on the exhibits to the Chair.

16 That was my second.

17 CHAIRPERSON SCHEUER: I don't think it has
18 to be a motion.

19 COMMISSIONER WONG: Chair, for expediency,
20 I also defer to you.

21 CHAIRPERSON SCHEUER: Thank you.

22 I'm going to go over the numbers. Mr. Lim
23 you asked that we be specific in our rulings. I'm
24 going to give these exhibits in categories. Please
25 be prepared to correct me if I have miscategorized

1 the exhibits.

2 I believe Exhibit 48A, 48B, 49A, 49B, 50A,
3 50B, 50C, 51A, 51B, 51C, 51D, 51E, 51F, 52A, 52B,
4 52C, 52D, 52E, 52F, 52G, 53A, 53B, 53C, 54A, 54B,
5 54C, are all evidence about other Order to Show Cause
6 or other petitions.

7 MR. LIM: Did you mention 54D?

8 CHAIRPERSON SCHEUER: I did.

9 MR. LIM: That's correct.

10 CHAIRPERSON SCHEUER: No, I did not mention
11 54D, but it should be noted.

12 Regarding those, the ruling of those are
13 actually not relevant or material to this matter, so
14 they're going to be excluded under 15-15-63.

15 Exhibits 53D and 54D -- sorry, excuse me.
16 I'm trying to identify the portions of the record
17 that are LUC minutes.

18 So exhibits -- Mr. Lim, 54D you asked me
19 about before. I'm going to clarify my ruling on 54D,
20 so 53D and 54D are LUC minutes. A portion of those
21 minutes contain discussion of Waikoloa, and those
22 portions are admitted, but the rest are excluded,
23 irrelevant under 15-15-63.

24 The proposed Land Use Commission rule
25 amendments are Exhibits 46 and 47; is that correct?

1 MR. LIM: That's correct.

2 CHAIRPERSON SCHEUER: I'm going to exclude
3 those under 15-15-63 as irrelevant and not material
4 to this matter.

5 Exhibit 56 is the written direct testimony
6 of Mr. LaPinta. Exhibit 61 is the written direct
7 testimony of Mr. Grigoryants, Valery Grigoryants, and
8 Exhibit 64 is written direct testimony of Natalia
9 Batichtcheva; is that correct?

10 MR. LIM: That's correct.

11 CHAIRPERSON SCHEUER: So on those, I'm
12 going to actually read to you a section of the LUC
13 transcripts from the second day, October 25th
14 hearing. And this is I think specifically relevant
15 in regards to any testimony from these three
16 witnesses on page 9 of the October 25th transcript.

17 I started to go over the procedures at the
18 top of the page. Then starting at line 6 it says:

19 "Mr. Lim: Thank you, Mr. Chairman. Steven
20 Lim with my client, Waikoloa Highlands. Today I was
21 going to recall Mr. Grigoryants just to address one
22 issue and then we will be closing."

23 So on that basis, because we have concluded
24 examination and cross-examination on those three
25 witnesses, I'm excluding those three direct written

1 testimony.

2 Exhibits 59A, 59B, and 60 are letters that
3 were written regarding affordable housing, however,
4 after the Order to Show Cause was submitted. Is that
5 correct?

6 MR. LIM: 59A, 59B, and 60; that's correct.

7 CHAIRPERSON SCHEUER: And because the issue
8 at hand is whether or not, prior to the Order to Show
9 Cause, the conditions were violated, or substantial
10 commencement was made, those three letters are being
11 excluded.

12 Finally, I want to ask you about Exhibits
13 57, 62, 63A and 63B, which are collectively letters
14 of confirmation, certification and authorization. I
15 believe, if I understand it correctly, you actually
16 submitted these letters in response to the
17 Commission's specific request to understand the
18 ownership structure of the entities that ultimately
19 control Waikoloa Highlands's Inc.; is that correct?

20 MR. LIM: That's correct, 57 --

21 CHAIRPERSON SCHEUER: 62, 63A, and 63B.

22 MR. LIM: That's correct.

23 CHAIRPERSON SCHEUER: None of those
24 documents are notarized, correct?

25 MR. LIM: No, but we have Mr. Grigoryants

1 here to testify to their authenticity.

2 CHAIRPERSON SCHEUER: Let me clarify for
3 the record. Which Mr. Grigoryants do you have here?

4 MR. LIM: We have Mr. Valery.

5 CHAIRPERSON SCHEUER: But the document 57
6 is actually signed by Vitaly Grigoryants.

7 MR. LIM: That's correct.

8 CHAIRPERSON SCHEUER: So we don't have
9 opportunity to cross-examination Vitaly?

10 MR. LIM: No, but Mr. Valery Grigoryants
11 can testify that he obtained those from his brother.

12 CHAIRPERSON SCHEUER: But there's no
13 notarization or other authentication of those
14 documents?

15 MR. LIM: No. I don't think that's
16 required by the Commission rules.

17 CHAIRPERSON SCHEUER: I'm prepared to allow
18 those into the record, but I'm noting for the record
19 that those were submitted to us without normal
20 reviews or certification. They are unsworn
21 documents.

22 That I believe includes the entirety of all
23 the exhibits that you've proposed to us except for
24 65. This is the one that was admitted today --
25 excuse me, not admitted, submitted today.

1 MR. LIM: Yes. Our understanding -- is my
2 understanding correct that with the exceptions of
3 exhibits that you've excluded over the past couple of
4 minutes, that everything else is included?

5 CHAIRPERSON SCHEUER: Please correct me if
6 I'm wrong if I have not mentioned one of the
7 exhibits.

8 MR. LIM: No, that's why I was asking the
9 question, because you're excluding certain ones, but
10 you are not mentioning which ones are received.

11 CHAIRPERSON SCHEUER: I believe I've gone
12 over every -- except with 65 still to be addressed,
13 which actually there is a timing issue with
14 introducing new evidence today as well.

15 MR. LIM: Right.

16 CHAIRPERSON SCHEUER: But even with the
17 timing issue aside, it has to do with an attempt to
18 substantiate claims that you've met the affordable
19 housing requirement of the County with documents that
20 post date the Order to Show Cause, is that correct?

21 MR. LIM: These predate.

22 CHAIRPERSON SCHEUER: They predate the
23 Order to Show Cause, so if they predate the Order to
24 Show Cause, and there was no objection to 65 due to
25 timeliness, I'm prepared to let that one into the

1 record.

2 I'm happy if we want to take the time to go
3 over each one of those, but I believe the list is
4 complete and there is nothing that I have not
5 mentioned, so there is nothing that I've either said
6 is admitted or is excluded.

7 MR. LIM: I think you're correct.

8 CHAIRPERSON SCHEUER: We're done with the
9 first ten minutes of the hearing.

10 COMMISSIONER OHIGASHI: Mr. Chair, you're
11 admitting 65 subject to the clarification given by
12 the County that they have the original documents
13 within --

14 CHAIRPERSON SCHEUER: Thank you,
15 Commissioner. County.

16 MR. KIM: I believe that would be correct,
17 because the County's position would be that these
18 documents came from Petitioner's files. We will
19 accept that representation from Petitioner.

20 And, you know, the County would just argue
21 as to the authenticity of the document or weight.
22 Authenticity, we reserve that argument as to weight,
23 not as to admissibility.

24 CHAIRPERSON SCHEUER: Yeah, under those
25 conditions. That would be the legal term of art what

1 he said.

2 County, do you have any exhibits that you
3 want to enter into the record?

4 MR. KIM: The County has no further
5 exhibits to admit into the record.

6 CHAIRPERSON SCHEUER: Ms. Apuna, can you
7 describe the Office of Planning's exhibits?

8 MS. APUNA: We have no further exhibits to
9 admit.

10 CHAIRPERSON SCHEUER: Thank you. We are
11 now going to go into the 45-minute period where the
12 Commission will consider the Petitioner's Motion for
13 Issuance of a Subpoena to an Authorized
14 Representative of the State of Hawai'i Office of
15 Planning.

16 To my fellow Commissioners, I request that
17 you hold your questions of the parties until after
18 they have completed their presentation. Is that
19 understood?

20 Mr. Lim, do you want to reserve time for
21 rebuttal?

22 MR. LIM: Yes.

23 CHAIRPERSON SCHEUER: How much?

24 MR. LIM: Five minutes.

25 CHAIRPERSON SCHEUER: You have five minutes

1 now and five minutes reserved for rebuttal. Please
2 proceed.

3 MR. LIM: In part, the reason for the
4 request for the witness to testify and produce
5 records by the Petitioner was to determine additional
6 information as to the unequal -- we believe to be
7 unequal treatment of this Petitioner as opposed to
8 others similarly situated.

9 Based upon the Commission's evidentiary
10 rulings on the exhibits, relating to some of those
11 petitions, these are the only ones that we know
12 about, there may be others.

13 Then we're going to go ahead and rest on
14 our briefings. We think we have sufficiently
15 presented the issue for appeal.

16 CHAIRPERSON SCHEUER: Mr. Kim.

17 MR. KIM: County's position is that given
18 the Commission's ruling on exhibits and relevance,
19 and not wanting to get into evidence of selective
20 prosecution at this juncture, the County would say
21 that subpoenaing the Office of Planning would not be
22 relevant at this juncture.

23 CHAIRPERSON SCHEUER: Ms. Apuna.

24 MS. APUNA: Thank you, Chair.

25 OP opposes Petitioner's Motion for Subpoena

1 of an OP Representative for the following reasons:

2 First, Petitioner wants OP to testify as to
3 why the Commission has issued OSCs and how the
4 Commission arrived at its decisions on OSCs and
5 status reports in support of its due process/equal
6 protection argument.

7 However, OP is not a representative of the
8 Commission and would have no basis to testify as to
9 the Commission's various rulings. OP does not
10 initiate OSCs, but evaluates and responds to what is
11 put before it, and OP is not the decisionmaker in
12 these proceedings.

13 Under HAR Section 15-15-93(a), any party or
14 interested person may file a motion with the
15 Commission requesting the issuance of an OSC.
16 However, OP did not file a motion requesting the
17 issuance of the OSC in this matter. Under HAR
18 Section 15-15-93(b), whenever the Commission shall
19 have reason to believe that there has been a failure
20 to perform according to the conditions imposed, or
21 the representations or commitments made by the
22 Petitioner, the Commission shall issue and serve upon
23 the party or person bound by the conditions,
24 representations, or commitments, an order to show
25 cause.

1 It is clearly the Commission that issues
2 OSCs, and it is the Commission that issued this OSC,
3 not OP.

4 Petitioner's request for OP to testify as
5 to why the Commission made certain decisions in other
6 OSC proceedings and status reports is also misplaced.
7 OP is required by statute to appear as a party and
8 make recommendations relative to proposed state land
9 use boundary amendments, pursuant to HRS Section
10 205-4(e)(1). OP was required and limited under the
11 Commission's OSC, filed July 3, 2018, to present
12 testimony and exhibits to the Commission as to
13 whether Petitioner has failed to perform according to
14 representations made.

15 The County is equally required to provide
16 its recommendations and testimony in boundary
17 amendments and OSCs.

18 The Commission also receives public
19 testimony during these proceedings. OP, the County,
20 and public testifiers, merely provide recommendations
21 and positions that are received and deliberated by
22 the Commission in rendering its decision on an OSC.
23 As it is the decision exclusively made by the
24 Commission, it is clearly not for OP to testify as to
25 why or how the Commission made its decisions on prior

1 OSCs and status reports.

2 Moreover, in introducing its due
3 process/equal protection argument to the Commission,
4 Petitioner admitted that it is the Commission's, not
5 OP's actions, that are the subject of Petitioner's
6 argument and evidence gathering.

7 At the last hearing, Commissioner Okuda
8 asked Petitioner: Can counsel state what entity is
9 violating the Petitioner's right to due process? Is
10 it the Office of Planning? Or is the representation
11 or claim that some other entity is violating due
12 process?

13 Petitioner's counsel responded: I think
14 the only actor in this proceeding is the Commission,
15 so it would be the Commission.

16 Petitioner thus understands that OP is not
17 the actor or entity allegedly violating Petitioner's
18 right to due process, and should therefore not
19 request that OP testify to violating Petitioner's
20 right to due process.

21 Secondly, OP's testimony is not the best
22 evidence of Petitioner's specific inquiries.

23 Rather than asking a witness about the
24 contents of a document, the actual document should be
25 entered into evidence. Here, Petitioner specifically

1 requested to question OP on each past and present OSC
2 and Status Report regarding the approval date of the
3 D&O, a short description of the proposed project, and
4 the OSC reversion action or other enforcement action
5 by the Commission.

6 All three of these items are written in
7 each D&O, and do not require OP to testify to their
8 contents. Any person capable of reading the
9 documents, not just OP, can provide the information
10 that Petitioner is requesting from the documents.

11 Petitioner also requests for each docket,
12 that OP testify to the current development status of
13 the project and the current status of any Status
14 Report. OP has no basis to testify to the current
15 status projects and status reports. The appropriate
16 source for current status would be the Petitioner for
17 each docket.

18 Thirdly, Petitioner request for all past,
19 present and pending OSCs and Status Reports is
20 overbroad.

21 Fourthly, the basis for Petitioner's
22 request for OP's testimony is irrelevant to the
23 proceedings, which I spoke to while we were covering
24 the evidence to be admitted.

25 Finally, if Petitioner wishes to

1 demonstrate that the Commission has violated its
2 right to due process or equal protection, it should
3 simply argue so rather than pull testimony from OP.
4 Petitioner should say how the Commission is unfairly
5 treating Petitioner relative to previous Commission
6 dockets, with specific references made to those
7 dockets.

8 For the foregoing reasons, it's simply
9 unnecessary and inefficient to require an OP witness
10 for Petitioner's claim. The Commission should deny
11 the Petitioner's Motion to subpoena an OP
12 representative. Thank you.

13 CHAIRPERSON SCHEUER: Thank you. Rebuttal.

14 MR. LIM: In part, our motion was also to
15 get OP's position on these matters, but I think, like
16 I said, we made the record on this, and the only
17 thing I have left on this subject is that it relates
18 to all of the other Decisions & Orders that we have
19 mentioned in our pleading is a request that the LUC
20 take administrative notice of the other Decision &
21 Orders noted in Petitioner's Second Supplementary
22 Submittal and Petitioner's proposed Exhibits 48
23 through 54 inclusive.

24 CHAIRPERSON SCHEUER: You're asking for
25 them to be included in the record that I covered

1 earlier?

2 MR. LIM: I'm asking the Commission rule on
3 my request to take administrative notice of the
4 matters in its files.

5 CHAIRPERSON SCHEUER: Please correct me if
6 I'm misunderstanding you. You're a very smart and
7 articulate attorney. It sounds like you're asking me
8 to admit all the evidence which I previously
9 specifically ruled on.

10 MR. LIM: That's correct, through
11 administrative notice.

12 CHAIRPERSON SCHEUER: So I will stand on my
13 previous ruling.

14 Commissioners, on this particular hearing
15 matter regarding the Petition for Motion for Issuance
16 of Subpoena. Commissioner Okuda.

17 COMMISSIONER OKUDA: Thank you, Mr. Chair.

18 May I ask Petitioner's attorney, Mr. Lim, a
19 question?

20 Using the language from the Hawai'i Supreme
21 Court case, again Mahiai versus Suwa and State versus
22 Kailua Auto Wreckers, Incorporated, can you tell me
23 what offer of proof you can make to show that any
24 designated witness from the Office of Planning would
25 have personal knowledge about whether -- excuse me --

1 would have personal knowledge to establish whether or
2 not there was, and I quote, a deliberately -- a
3 decision deliberately based upon an unjustifiable
4 standard such as race, religion, or other arbitrary
5 classification with respect to the OSCs or other
6 matters you seek testimony of from the Office of
7 Planning? What is your offer of proof?

8 MR. LIM: Our offer of proof would be that
9 the other similarly situated matters did not involve
10 foreign investors, such as the Petitioner in this
11 case.

12 COMMISSIONER OKUDA: And is that the only
13 offer of proof, the absence of foreign investors?

14 MR. LIM: Investors specifically from
15 Russia, whether they're citizens or born in Armenia,
16 Russia and Armenia the same, yes.

17 COMMISSIONER OKUDA: That would be the sole
18 offer of proof that you can provide in response to my
19 question?

20 MR. LIM: That's correct.

21 COMMISSIONER OKUDA: No further questions,
22 Mr. Chair.

23 CHAIRPERSON SCHEUER: Thank you.

24 Commissioners, other questions for the
25 Parties? Commissioner Chang.

1 COMMISSIONER CHANG: Mr. Lim, I guess I
2 just want to confirm. OP's argument is that the
3 decisionmaker with respect to Order to Show Cause is
4 the Land Use Commission and not the Office of
5 Planning. Would you concur with that?

6 MR. LIM: I understand that. We also ask
7 for OP's position on those various documents.

8 COMMISSIONER CHANG: What is the relevancy
9 of OP's position on those dockets if the LUC, the
10 Commission, makes those decisions?

11 MR. LIM: Well, the Office of Planning is
12 taking a position on this Petition, which we believe
13 is materially different than they have taken in prior
14 cases.

15 COMMISSIONER CHANG: So I understand, your
16 position is that Land Use Commission makes the
17 decisions on the Order to Show Cause, notwithstanding
18 any position, whether it's Office of Planning or the
19 Counties may have?

20 MR. LIM: I understand.

21 COMMISSIONER CHANG: Thank you very much.

22 CHAIRPERSON SCHEUER: Commissioners,
23 further questions?

24 Commissioners, what is your -- hearing no
25 further discussions on this matter or questions for

1 Parties, what is your pleasure on this particular
2 matter on Petitioner's Motion for Issuance of a
3 Subpoena to an Authorized Representative of the State
4 of Hawaii, Office of Planning?

5 Commissioner Okuda.

6 COMMISSIONER OKUDA: Mr. Chair, like the
7 prior rulings, I would defer to the Chair making a
8 decision whether or not to allow Mr. Funakoshi or
9 anyone else who is subpoenaed from the Office of
10 Planning to testify.

11 However, even though that would be my
12 statement for the record, I would ask the Chair to
13 consider the fact that the testimony sought is not
14 relevant to the current proceeding. I believe we are
15 bound by the standard set forth by the Hawai'i
16 Supreme Court in Mahiai versus Suwa, 69 Hawai'i 349,
17 citing State versus Kailua Auto Wreckers,
18 Incorporated, 62 Hawai'i 222, and for those reasons
19 and the reasons stated by the Office of Planning, I
20 would urge the Chair to rule that the subpoena should
21 be quashed and any request for testimony not be
22 allowed.

23 CHAIRPERSON SCHEUER: If I may, before
24 other Commissioners speak on this matter, I read from
25 Section 15-15-63, which specifically gives to the

1 presiding officer the power to determine the
2 admission of evidence.

3 I don't know that I have that power in
4 relationship to ruling on this because one of the
5 parties specifically requested a hearing on this
6 matter. And I turn affectionately to our attorney
7 general to see whether she might indicate whether
8 that is correct.

9 MS. OHARA: I believe that's correct.

10 COMMISSIONER OKUDA: Then out of an
11 abundance of caution, I would move for the reasons I
12 stated on the record, and incorporating by reference
13 the statements of the Office of Planning as
14 additional reasons that the testimony not be allowed,
15 and any request for subpoena issued or not issued be
16 stricken and not allowed.

17 CHAIRPERSON SCHEUER: So, Commissioner
18 Okuda, the Motion would be to deny Petitioner's
19 Motion for Issuance of Subpoena?

20 COMMISSIONER OKUDA: That is correct.

21 COMMISSIONER WONG: Second.

22 CHAIRPERSON SCHEUER: There is a second on
23 the motion from Commissioner Wong.

24 Commissioners, there's an active motion on
25 the floor. Is there any further deliberation on this

1 motion? Hearing none.

2 Mr. Orodenker, will you do a roll call of
3 the Commission.

4 EXECUTIVE OFFICER: The motion on the floor
5 is to deny the Motion for Subpoena to Issue for the
6 Office of State Planning or for a representative to
7 testify.

8 Commissioner Okuda?

9 COMMISSIONER OKUDA: Yes.

10 EXECUTIVE OFFICER: Commissioner Wong?

11 COMMISSIONER WONG: Yes.

12 EXECUTIVE OFFICER: Commissioner Cabral?

13 VICE CHAIR CABRAL: Yes.

14 EXECUTIVE OFFICER: Commissioner Lee?

15 COMMISSIONER OHIGASHI: Yes.

16 EXECUTIVE OFFICER: Commissioner Aczon?

17 COMMISSIONER ACZON: Yes.

18 EXECUTIVE OFFICER: Commissioner Chang?

19 COMMISSIONER CHANG: Yes.

20 EXECUTIVE OFFICER: Commissioner Mahi?

21 VICE CHAIR MAHI: Aye.

22 EXECUTIVE OFFICER: Chair Scheuer?

23 CHAIRPERSON SCHEUER: Aye.

24 EXECUTIVE OFFICER: Chair, the motion
25 passes unanimously.

1 CHAIRPERSON SCHEUER: So that portion of
2 the hearing is now done.

3 We are now going to go back to the main
4 body. I'm going to call -- well, I'm going to ask
5 two important questions.

6 Mr. Hakoda, what is the status for the
7 lunches for the Commissioners?

8 CHIEF CLERK: It's here.

9 If you want to keep running us like this,
10 you have to allow us to eat. Its now 11:43 a.m. I'm
11 going to propose that we take a 45-minute lunchtime
12 break. 45-minute break for lunch. We will resume at
13 12:30 p.m.

14 (Noon recess taken.)

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

17 If the parties recall when I went over and
18 updated the record at the first part of this
19 proceeding, I noted that we denied in part, and --
20 the subpoena to the County of Hawaii, so we did
21 issue, and it remains a standing subpoena to the
22 County of Hawaii to produce somebody who could be
23 questioned by the Petitioner.

24 We will proceed with that portion of the
25 hearing at this time.

1 Mr. Lim, who are you calling?

2 MR. LIM: We're calling Mr. Neil Gyotoku.

3 CHAIRPERSON SCHEUER: How long do you
4 expect this is to take for purpose of understanding
5 the schedule for the afternoon?

6 MR. LIM: Probably at the most a half hour.

7 CHAIRPERSON SCHEUER: I'm going to swear
8 you in. And then you will state your name and
9 address for the record, then Mr. Lim examine.

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

12 THE WITNESS: I do.

13 NEIL GYOTOKU

14 Was called as a witness by and on behalf of the
15 Petitioner, was sworn to tell the truth, was examined
16 and testified as follows:

17 THE WITNESS: Thank you. My name is Neil
18 Gyotoku, the Housing Administrator for the County of
19 Hawai'i.

20 CHAIRPERSON SCHEUER: Mr. Lim.

21 Excuse me, Mr. Lim.

22 VICE CHAIR CABRAL: I would like to
23 disclose that I worked with his agency, not
24 necessarily with the witness directly, but I do work
25 with his agency, and my company receives rental funds

1 through that agency as a source of income to my
2 company and my clients.

3 CHAIRPERSON SCHEUER: Do the parties have
4 any objections to Ms. Cabral's continued
5 participation in these proceedings?

6 MR. LIM: Petitioner has no objection.

7 MR. KIM: No objection.

8 MS. APUNA: No objection.

9 CHAIRPERSON SCHEUER: Please proceed, Mr.
10 Lim.

11 DIRECT EXAMINATION

12 BY MR. LIM:

13 Q Mr. Gyotoku, are you the representative
14 from the County's Office of Housing and Community
15 Development that can speak to the issues relating to
16 the 11.7 acres conveyed by Waikoloa Highlands?

17 A In part I am. I took office December 5th,
18 2016. I have some knowledge of that date, but prior
19 to that was the previous administration.

20 Q I've handed you Petitioner's Exhibit 10,
21 which is the warranty deed from Waikoloa Highlands
22 Incorporated to Plumeria at Waikoloa LLC recorded at
23 the State Bureau of Conveyances on January 29, 2018.

24 Do you have that before you?

25 A Yes, I do.

1 Q I've also handed you a copy of the
2 Petitioner's Exhibit 65, which is a series of
3 documents essentially, what we believe at least for
4 the Petitioner's file, show to be a transmission by
5 Sidney Fuke, the former planning consultant for the
6 project to yourself regarding the Affordable Housing
7 Release Agreement and the Deed from Waikoloa
8 Highlands, Inc. to Plumeria at Waikoloa LLC.

9 A Yes.

10 Q On the Exhibit 10, I'll just ask you to
11 confirm that the Grantee under the Warranty Deed,
12 both on the page one and page two of Exhibit 10 are
13 to Plumeria at Waikoloa LLC, a Hawai'i limited
14 liability company; is that correct?

15 A As far as I can -- yes.

16 Q With respect to Petitioner's Exhibit
17 No. 65, ask you to look at page number 2 of the
18 Warranty Deed, that I'll represent to you was signed
19 by my client's representative Natalia Batichtcheva,
20 at Page 2 with a Warranty Deed. Starts: Know all
21 men by these -- states that the grantee is Plumeria
22 at Waikoloa LLC, a Hawai'i nonprofit corporation.

23 A Right.

24 Q Do you know why the discrepancy in the
25 corporate status of the grantee?

1 A I do not know specifically why it changed.
2 When I saw the document, I assumed according to
3 Chapter 11.

4 CHAIRPERSON SCHEUER: Sorry, Mr. Hakoda, we
5 can't hear the testimony. Please proceed.

6 THE WITNESS: I saw the document, and as
7 far as I understand under Chapter 11 of the County
8 Code, specifically 11-55, it says: The developer may
9 satisfy the affordable housing requirement by
10 conveying to the County or at the County's direction
11 to a nonprofit organization.

12 So Plumeria was a nonprofit organization.
13 I do not know how that document, when it was recorded
14 and was changed.

15 Q Do you know whether the County is the one
16 that picked the grantee entity Plumeria at Waikoloa?

17 A I do not know that.

18 Q But you do know that the County had to
19 approve the conveyance document and the affordable
20 housing release agreement?

21 A Like I said, the affordable housing
22 agreement was signed December 1st, 2016, which was
23 four days before I assumed office and was processed
24 accordingly.

25 Q Is the County's position that the

1 Petitioner's failure to fully satisfy the
2 Commission's Condition 9 relating to affordable
3 housing affected by the fact that the property is
4 encumbered by easements or odd lot configurations for
5 drainage issues that prevent building the number of
6 affordable housing homes a developer would have to
7 provide?

8 A Could you repeat?

9 Q Is it true that the County, whether through
10 your office or through the corporation counsel's
11 office, is claiming that the property in question,
12 the 11.7 acres, is encumbered by easements, odd lot
13 configuration and drainage issues that prevent
14 building the number of affordable homes the developer
15 would have had to provide?

16 A We do as far as acknowledge that the lot
17 has some challenges as far as especially drainage.

18 In meeting with the new developer, they
19 were making plans to as far as address those issues,
20 as far as the drainage and the easement.

21 Q So those issues are not a problem for the
22 current developer?

23 A I wouldn't say it's not a problem. It's a
24 concern that we were looking at. I met with the new
25 developer. The first thing we noted, because I work

1 with civil defense and my assistant we work with
2 civil defense. There was some major flooding issues
3 on this parcel I believe in the 2000 rain months.

4 Q Do you know whether the Office of Housing
5 and Community Development researched the property
6 before accepting the conveyance of the land?

7 A Like I say, I do not know what the previous
8 administration -- I believe there was done some
9 research as far as the property was concerned. It
10 was right next to Waikoloa Road, which is into the
11 Village, which would make it kind of easier to have
12 infrastructure like sewer and water.

13 Q Who is the current developer of the 11.7
14 acres?

15 A I believe it's Mr. Dan Julkowski. He's
16 with True Value Company.

17 Q Is he the principal behind Pua Melia LLC?

18 A Yes, I believe he owns the property.

19 Q What is a general description of his
20 proposed project with you?

21 A He was talking about building on the upper
22 half a True Value store, and on the bottom half to
23 build housing units as well as some higher end
24 condominium units.

25 Q Does Mr. Julkowski's arrangement, proposed

1 arrangement with the County contemplate that the
2 affordable housing component of his 201H application
3 would be built by Ikaika Ohana?

4 A I believe that Ikaika came in at the later
5 discussions as far as trying to satisfy the
6 affordable housing required, Mr. Julkowski was trying
7 to satisfy the affordable housing.

8 I was talking to my office, I believe the
9 Highlands agreement had to provide 70 affordable
10 housing units to comply with the affordable housing
11 agreement, and his plan was to try to put in at least
12 that amount.

13 Q I'll represent to you that the Petitioner's
14 prior pleadings for the proposed 398 lots at 20
15 percent would be approximately 80 affordable credits.

16 A I stand corrected.

17 Q So Mr. Julkowski's property, Pua Melia
18 property, is going to develop both the affordable
19 housing units necessary to satisfy the Waikoloa
20 Highlands Condition 9 with the Land Use Commission
21 and his True Value Hardware store?

22 A That was the intent.

23 Q So would you agree that if Mr. Julkowski
24 did build his True Value Hardware store, that he
25 would have sufficient land to develop enough

1 affordable housing units to satisfy the Waikoloa
2 Highlands' project?

3 A He would have to go vertical, which is
4 higher like three, four stories in order to
5 accomplish getting that number of units. It wouldn't
6 fit as far as being spread out like one or two-story
7 type building.

8 Q Our understanding of Mr. Julkowski's need
9 to go vertical to accommodate the 38-unit or
10 40 units, whatever he's proposing, is because he
11 doesn't -- because his True Value Hardware store is
12 taking up the rest of the property; is that correct?

13 A I think that was correct.

14 Q Is it your understanding that the deed that
15 was signed by my client for 11.7 acres was altered at
16 some point in time at the County's level?

17 A I believe so.

18 Q That was without the consent of my client?

19 A Yes.

20 Q I have no further questions.

21 CHAIRPERSON SCHEUER: County of Hawai'i.

22 MR. KIM: I just have a few questions.

23 CROSS-EXAMINATION

24 BY MR. KIM:

25 Q Just initially I want to backtrack to Pua

1 Melia, or Julkowski's project.

2 Just to be clear, were you saying that his
3 proposal now would satisfy the affordable housing
4 requirement for Waikoloa Highlands?

5 A I am not going to say that because we just
6 had some initial discussions as far as conceptual
7 design. There was really -- the plans that we looked
8 at really didn't supply the number of required units
9 that they would need to satisfy the affordable
10 housing requirement for the Highlands.

11 Q Thank you.

12 My other question is the last question Mr.
13 Lim asked you, where my understanding was you said
14 that the deed that Waikoloa Highlands signed was
15 altered at the County level.

16 Do you mean that the County altered the
17 deed after it was signed?

18 A I do not know if it was at the County level
19 or if after it left my office. By the time it was
20 recorded at the Bureau of Conveyances it shows
21 Plumeria LLC, and it doesn't state that it was a
22 nonprofit LLC, Hawai'i nonprofit.

23 My understanding, when it was in my office,
24 Plumeria was a nonprofit LLC.

25 Q Thank you. Those are the questions that I

1 have.

2 CHAIRPERSON SCHEUER: Office of Planning.

3 MS. APUNA: No questions.

4 CHAIRPERSON SCHEUER: Commissioners?
5 Commissioner Wong.

6 COMMISSIONER WONG: Just one question, sir.
7 When were the discussions started with your
8 department?

9 THE WITNESS: With Mr. Julkowski?

10 COMMISSIONER WONG: The Petitioner.

11 THE WITNESS: I believe it was started in
12 2015 that they entered into some discussion as far as
13 affordable housing.

14 COMMISSIONER WONG: Thank you.

15 CHAIRPERSON SCHEUER: Commissioner Okuda.

16 COMMISSIONER OKUDA: Thank you, Mr. Chair.
17 You testified that there were discussions.
18 And these were, as you described them, conceptual
19 designs or conceptual discussion.

20 When you use the word "conceptual design",
21 what do you mean?

22 THE WITNESS: We were just looking at the
23 type of houses, buildings to accommodate as far as
24 rental units that he intended to put on that parcel,
25 and the design layout of how he's going to position

1 the buildings.

2 COMMISSIONER OKUDA: So these things that
3 you looked at, the paperwork, I mean were they like
4 engineering plans?

5 THE WITNESS: No, no, just drawings.

6 COMMISSIONER OKUDA: And the drawings were
7 on how many pages of paper?

8 THE WITNESS: About three or four pages
9 just showing type of like buildings that he intended
10 to put on to the property.

11 COMMISSIONER OKUDA: These would be like
12 eight-and-a-half by 11 size piece of paper?

13 THE WITNESS: I think bigger than that,
14 like maybe 17 by 11.

15 COMMISSIONER OKUDA: But these papers or
16 drawings that were shown, were they stamped by any
17 architect or engineer?

18 THE WITNESS: I believe it wasn't.

19 COMMISSIONER OKUDA: So they weren't really
20 in any form to be submitted for permitting processes
21 or anything like that?

22 THE WITNESS: No, only for us to discuss,
23 open discussion of his plans on what he was going to
24 do on the affordable housing parcel.

25 COMMISSIONER OKUDA: And these discussions

1 took place during what period of time, what month and
2 year?

3 THE WITNESS: I would have to go back, but
4 I would say sometime in 2017 we started the
5 discussions.

6 COMMISSIONER OKUDA: On how many occasions
7 did you have these discussions?

8 THE WITNESS: I specifically remember at
9 least two.

10 COMMISSIONER OKUDA: And this would be in
11 2017?

12 THE WITNESS: One was 2017, and one in
13 2018, but I can go back --

14 COMMISSIONER OKUDA: Yeah, can you give an
15 estimate of what month in 2018? Best estimate would
16 be fine. Early part, late part?

17 THE WITNESS: I would think early part,
18 maybe about April or so.

19 COMMISSIONER OKUDA: And since then have
20 there been any other discussions, conceptual or
21 otherwise, regarding affordable housing?

22 THE WITNESS: Let me backtrack. The last
23 meeting we had with Mr. Julkowski he had invited Ms.
24 Osorio to attend because he wanted them to do the
25 affordable housing part of the development like that

1 to help him. So that I believe was in about May or
2 June of this year, April, May or June.

3 COMMISSIONER OKUDA: That would have been
4 the last meeting that took place regarding affordable
5 housing, correct?

6 THE WITNESS: For us, yes.

7 COMMISSIONER OKUDA: Would you describe it
8 as meetings in the conceptual stages only?

9 THE WITNESS: Yes.

10 CHAIRPERSON SCHEUER: Commissioner Chang.

11 COMMISSIONER CHANG: Thank you.

12 Are you familiar with -- your counsel
13 submitted a letter of November 9, 2018, from Mayor
14 Kim, Harry Kim.

15 THE WITNESS: Yes. I believe Mr. Kim can
16 answer that.

17 COMMISSIONER CHANG: Are you familiar with
18 this letter?

19 THE WITNESS: Yes.

20 COMMISSIONER CHANG: It is to: Dear Chair
21 Scheuer and Land Use Commissioners. The official
22 position of the County of Hawaii is that Waikoloa
23 Mauka LLC has not yet fulfilled Condition 9
24 affordable housing of the State Land Use Commission's
25 Findings of Fact, Conclusions of Law, Decision &

1 Order, et cetera. Dated June 10th, 2018.

2 And it does say the Petitioner is engaging
3 in negotiation with the County towards fulfilling
4 this condition.

5 Is it your -- do you disagree with Mayor
6 Kim's letter?

7 THE WITNESS: Oh, never.

8 COMMISSIONER CHANG: So it is your position
9 that the mayor, that his most recent letter, that
10 your preliminary discussions predated this letter of
11 November 9th, 2018?

12 THE WITNESS: Yes.

13 COMMISSIONER CHANG: That this is the
14 official position of the County?

15 THE WITNESS: Yes.

16 COMMISSIONER CHANG: And you read this
17 letter?

18 THE WITNESS: Not specifically, but we have
19 been in discussion. We had discussion.

20 COMMISSIONER CHANG: Thank you very much.

21 CHAIRPERSON SCHEUER: Commissioner
22 Ohigashi.

23 COMMISSIONER OHIGASHI: I was just
24 reviewing the deed, Exhibit 65, that was sent over,
25 and it was dated, according to this, June -- looks

1 like June 1st was signed by the representative of
2 Waikoloa Highlands, Inc.

3 Did you receive this letter, this deed,
4 along with the letter?

5 THE WITNESS: There was a letter from Mr.
6 Fuke.

7 COMMISSIONER OHIGASHI: Right. Did you
8 receive that?

9 THE WITNESS: Yes, I believe we did.

10 COMMISSIONER OHIGASHI: And did the County
11 record the deed?

12 THE WITNESS: I believe the County recorded
13 the deed in January.

14 COMMISSIONER OHIGASHI: Did the County
15 record the deed?

16 MR. KIM: The deed does speak for itself as
17 to who it was supposed to be recorded.

18 COMMISSIONER OHIGASHI: I'm just asking,
19 did the County send it in for recordation?

20 THE WITNESS: I'm not sure. I'm not sure.
21 I believe it did.

22 COMMISSIONER OHIGASHI: You believe it did.
23 Whether or not it stated who the deed should be
24 returned to doesn't necessarily indicate who
25 submitted it for recordation, correct?

1 THE WITNESS: Yes.

2 COMMISSIONER OHIGASHI: That would be -- so
3 between the time you looked at the deed in 2017, and
4 this letter, and sometime when it was recorded by the
5 County, you guys decided there was some change in the
6 deed itself; is that right?

7 THE WITNESS: Correct.

8 COMMISSIONER OHIGASHI: Now, in addition, I
9 was looking at Exhibit 11, and I'm not sure if you
10 have it with you or the Petitioner can provide it to
11 you.

12 CHAIRPERSON SCHEUER: Why don't we give the
13 Petitioner a moment to get it to him.

14 MR. LIM: I'll represent for the record
15 that Petitioner Exhibit 11 is the Release Agreement
16 for the Waikoloa Highlands's project.

17 COMMISSIONER OHIGASHI: That's dated
18 July 20th, 2017; is that right?

19 THE WITNESS: Correct.

20 COMMISSIONER OHIGASHI: And you signed it?

21 THE WITNESS: Correct.

22 COMMISSIONER OHIGASHI: And that was seven
23 months after you took office?

24 THE WITNESS: Yes.

25 COMMISSIONER OHIGASHI: And the other one

1 was the managing director, Mr. Wil Okabe?

2 THE WITNESS: Yes.

3 COMMISSIONER OHIGASHI: And that was
4 notarized?

5 THE WITNESS: Yes.

6 COMMISSIONER OHIGASHI: Does Mr. Okabe have
7 the power to bind the County of Hawaii on these
8 agreements?

9 THE WITNESS: Yes, on behalf of Mayor Kim.

10 COMMISSIONER OHIGASHI: So essentially
11 acting on behalf of Mayor Kim?

12 THE WITNESS: Yes.

13 COMMISSIONER OHIGASHI: What happened?

14 THE WITNESS: The process -- when we
15 processed this release, we assumed the housing,
16 affordable housing agreements we review, my office
17 reviews it and prepares it and submits it to the
18 Corporation Counsel for review, and it goes to the
19 Mayor after they sign it, and recommend approval, and
20 it goes to the Mayor's office for his final
21 signature.

22 COMMISSIONER OHIGASHI: My question was --
23 maybe you misunderstood -- what happened between this
24 time and November 9th?

25 THE WITNESS: There was some bad procedures

1 on my office as far as reviewing those documents and
2 processing those documents. We started taking some
3 actions to correct it and install new procedures to
4 correct those types of mistakes. That won't happen
5 in the future, we hope.

6 COMMISSIONER OHIGASHI: So the November 9th
7 letter does not rescind this letter that was signed
8 by yourself and the managing -- and approved as to
9 form by the Deputy Corporation Counsel, the
10 November 9th Mayor's letter?

11 THE WITNESS: Trying to find the
12 November 9th --

13 COMMISSIONER OHIGASHI: The November 9th
14 letter that you testified to that Mr. Kim stated he's
15 in the position --

16 THE WITNESS: Oh, I have to --

17 COMMISSIONER OHIGASHI: By the way, Mr.
18 Chairman, is it proper to place that letter into
19 evidence at this time? Or is it -- because we're
20 discussing it.

21 CHAIRPERSON SCHEUER: Commissioner
22 Ohigashi, thank you for that. It occurred to me that
23 the County did not -- when I asked the County if they
24 had any further exhibits for the record, they did not
25 include that, however, that was submitted to us at my

1 specific request and direction that they submit that
2 to us.

3 COMMISSIONER OHIGASHI: So if it's not part
4 of the record, wouldn't it be -- could this
5 Commission consider it as part of the position of the
6 County? That's what I'm trying to get at before he
7 answers the question.

8 CHAIRPERSON SCHEUER: You're requesting
9 that it be admitted?

10 COMMISSIONER OHIGASHI: If the County
11 doesn't want to admit it, if I can even ask this
12 question.

13 MR. KIM: I didn't say we didn't want it
14 admitted. I said we had no exhibits to proffer
15 because the County had directly submitted it to the
16 LUC, per request by LUC. I wasn't looking at it as
17 an exhibit which needed to be admitted, because it
18 was something that the Mayor's office sent to LUC. I
19 never said I didn't want to admit it.

20 CHAIRPERSON SCHEUER: We are going to take
21 a short recess.

22 (Recess taken.)

23 CHAIRPERSON SCHEUER: We're back on the
24 record.

25 Mr. Ohigashi has correctly pointed out that

1 we have not formally included the County's letter
2 which was provided as a direct response to a request
3 by me for written position of the County's
4 relationship to their position on their compliance
5 with that condition.

6 Is there any objections from the Parties
7 that we admit that letter into the records?

8 MR. LIM: None from the Petitioner.

9 MR. KIM: None from the County.

10 MS. APUNA: No.

11 CHAIRPERSON SCHEUER: It will be admitted
12 into the record as exhibit --

13 MR. KIM: I think we had some exhibits with
14 our Opposition to the Motion for Subpoena, but I
15 don't know if those would be considered exhibits just
16 for that motion.

17 CHAIRPERSON SCHEUER: It is going to be
18 admitted into the record and will be appropriately
19 numbered. And I'm hearing no objection from any of
20 the Parties about its submission into the record.

21 For the record of the transcript, all of
22 the Parties' attorneys are nodding at me, though not
23 verbally saying "yes".

24 Please continue, Mr. Ohigashi.

25 COMMISSIONER OHIGASHI: So now that I know

1 it's in the record, what happened between the time of
2 this Exhibit 11 and the November 9th, 2018 letter?

3 THE WITNESS: It's our basic contention
4 that the affordable housing agreement with Waikoloa
5 Highlands was never satisfied, because they did not
6 convey the affordable housing property to a nonprofit
7 as directed in Chapter 11.

8 And Mayor Kim's letter is just -- it
9 doesn't change our position as far as the affordable
10 housing agreement was not met, requirement was not
11 met.

12 COMMISSIONER OHIGASHI: So is it your
13 position then that this release agreement is void
14 because you've decided that it's wrong?

15 THE WITNESS: It's void because the
16 agreement was not satisfied. So our release on
17 something that wasn't valid, doesn't affect -- we had
18 assumed that everything was valid up to very
19 recently. And we discovered that parcel was
20 transferred to a non -- to a limited liability
21 entity, and not a nonprofit as stated in Chapter 11.

22 COMMISSIONER OHIGASHI: And that occurrence
23 appears to have taken place correctly under 65 when
24 you got Exhibit 65, when you got this, right?

25 THE WITNESS: 65, yes.

1 COMMISSIONER OHIGASHI: Did you prepare any
2 type of due diligence in determining whether or not
3 Plumeria LLC, at the time that you signed the
4 release, Exhibit No. 11, was a nonprofit or -- was a
5 nonprofit or not?

6 THE WITNESS: We did not.

7 CHAIRPERSON SCHEUER: Are there other
8 further questions for the witness? Commissioner
9 Aczon.

10 COMMISSIONER ACZON: Just a brief
11 clarification. I don't like when, if I heard you
12 correctly, when you say Ms. Osorio's involved on this
13 was when?

14 THE WITNESS: I believe this year. April
15 or May that we had met with Mr. Julkowski. He had
16 ordered in to help him build the affordable housing
17 unit, which he had very little experience, I believe.
18 So he felt she would bring to the table some
19 experience.

20 COMMISSIONER ACZON: Maybe I heard it
21 incorrectly this morning.

22 During Commissioner Wong's questioning to
23 Ms. Osorio and Ms. Osorio, if I heard correctly, she
24 testified that the Petitioner just approached her two
25 weeks ago. So which one is correct?

1 THE WITNESS: I have not heard of the
2 latest transfer, or giving of the land by the
3 Petitioner. My involvement with Ms. Osorio was only
4 regarding that 11-acre parcel that was given
5 supposedly to the County for Plumeria for affordable
6 housing.

7 COMMISSIONER ACZON: Just wondering about
8 the inconsistency of dates.

9 MR. LIM: I'll make representation on
10 behalf of Petitioner we are now talking about two
11 separate issues. One is what we do with the
12 11.7 acres, which we point out had some problems; and
13 as the Petitioner we don't want to wait for that to
14 resolve itself, because that's going to be hard to
15 resolve.

16 We're independently pursuing, as soon as we
17 knew the County's position, then we independently
18 started to pursue developing affordable housing with
19 Ms. Osorio on our own. That's why you're hearing two
20 different stories.

21 COMMISSIONER ACZON: Thank you for the
22 clarification.

23 VICE CHAIR CABRAL: I'm just -- since I'm
24 involved in real estate, and public records are what
25 they are, during my time here I've looked up some

1 information, and on this 11-acre parcel to clarify
2 which one is which per Exhibit 65. I'm finding that
3 Plumeria at Waikoloa LLC changed it's name --

4 CHAIRPERSON SCHEUER: Commissioner Cabral,
5 can you phrase it as a question?

6 VICE CHAIR CABRAL: Yes, I'm wondering
7 exactly what really could have taken place, because
8 Plumeria LLC is showing articles of incorporation
9 filed in November of 2016.

10 I withdraw anything that's not in the
11 record.

12 I'm concerned, I guess, about how something
13 could be -- have appeared to be nonprofit that is in
14 fact a for-profit corporation.

15 And the fact that then it could, as a
16 for-profit corporation, handle the property outside
17 of what the County apparently understood it to be.

18 So you said that you signed it, you
19 understood it to be the paperwork nonprofit. Who did
20 you submit that to then? What happened to that paper
21 work?

22 THE WITNESS: You mean the release?

23 VICE CHAIR CABRAL: You would have signed
24 the deed. So in a normal transaction that would go
25 directly to an escrow company.

1 Did it go directly to an escrow company or
2 did it go back to the buyer, and they might have
3 inserted a different page? I don't know what your
4 document looked like versus what their -- what their
5 recorded document --

6 CHAIRPERSON SCHEUER: County of Hawaii.

7 MR. KIM: I don't believe the County signed
8 any deed in this case.

9 VICE CHAIR CABRAL: I don't have it, I'm
10 sorry. But you would have had to sign something to
11 buy it. You signed an agreement --

12 CHAIRPERSON SCHEUER: Commissioner Cabral,
13 if I may be of some assistance.

14 VICE CHAIR CABRAL: Your name is here --

15 CHAIRPERSON SCHEUER: I believe you're
16 looking at --

17 COURT REPORTER: Okay, stop. I can't take
18 both of you at the same time. Let's just start this
19 over again.

20 VICE CHAIR CABRAL: I apologize for the
21 confusion.

22 I see that your name is there to have
23 signed, not the deed, but the release of --
24 affordable housing release agreement.

25 Did you keep a copy of all the documents

1 that were attached to that?

2 THE WITNESS: Yes, we did.

3 VICE CHAIR CABRAL: So you would have the
4 documents that you would have signed at that time
5 somewhere in May or June of 2017?

6 THE WITNESS: Yes.

7 VICE CHAIR CABRAL: So if we needed to, you
8 could produce the one that would have led you to
9 believe it was a nonprofit corporation?

10 THE WITNESS: Yes, we can.

11 VICE CHAIR CABRAL: Thank you.

12 CHAIRPERSON SCHEUER: Commissioner Okuda.

13 COMMISSIONER OKUDA: Chair, if I could ask
14 a follow-up question to one of the earlier questions
15 regarding the release.

16 So is it the County's position that this
17 release of the affordable housing condition is a void
18 document?

19 THE WITNESS: That's our contention.

20 COMMISSIONER OKUDA: Okay, if that's -- you
21 can understand that people in general, including the
22 Land Use Commission, rely on the public record; you
23 agree with that, right?

24 THE WITNESS: Yes.

25 COMMISSIONER OKUDA: If the County's

1 position is that the release document, which is
2 playing a role in this proceeding, is a void
3 document, shouldn't the County have taken some type
4 of action to remove it from the public record, either
5 some type of agreement with the Petitioner, or if the
6 Petitioner wouldn't agree, some type of declaratory
7 action to remove it? Because, you know, just so that
8 the public record is clear. Because now we're
9 starting to get somewhat contradictory statements
10 from the County.

11 THE WITNESS: I have to admit that we just
12 recently discovered that the affordable housing
13 agreement was now invalid. And, yes, we did -- I did
14 do the release, and just recently we found out that
15 the agreement was voided, I mean not valid. So we
16 will take actions to rescind that release of
17 affordable housing.

18 But it's just the agreement was void, so
19 the release really is void too, as far as I
20 understand.

21 COMMISSIONER OKUDA: If I can ask this
22 question, because it was raised in the Petitioner's
23 briefing.

24 Does the County have any type of concern
25 that a reasonable objective party might be led to

1 believe that because this release was signed by the
2 County, the County in fact believed that the
3 affordable housing condition or requirements were
4 satisfied? Would that be a reasonable conclusion?

5 THE WITNESS: When we sign an agreement --
6 I signed the agreement, we had assumed that the
7 affordable housing agreement was valid and that they
8 had complied with it.

9 COMMISSIONER OKUDA: So the County takes
10 no -- not umbrage, but the County doesn't have any
11 argument against the Petitioner where the Petitioner
12 says that they were relying on the fact that the
13 County signed this release agreement, so they
14 believe, reasonably believed, that they had satisfied
15 the condition?

16 THE WITNESS: I think that's valid.

17 COMMISSIONER OKUDA: Thank you, Chair. I
18 have no further questions.

19 CHAIRPERSON SCHEUER: Commissioner Chang.

20 COMMISSIONER CHANG: I would like
21 clarification. Correct me if I am wrong, the County
22 relied upon the documentation provided by the
23 Petitioner to draw reasonable conclusion that Pua
24 Melia was a nonprofit?

25 THE WITNESS: Yes.

1 COMMISSIONER CHANG: On that basis you
2 signed the release?

3 THE WITNESS: Yes.

4 COMMISSIONER CHANG: So now that you are
5 aware that the documents upon which you relied upon
6 were not correct, you're now going to take
7 appropriate action?

8 THE WITNESS: Yes.

9 COMMISSIONER CHANG: That's why the Mayor's
10 letter is the most -- is the official position of the
11 County based upon all of the information now received
12 by the County?

13 THE WITNESS: Yes.

14 COMMISSIONER CHANG: Thank you very much.

15 CHAIRPERSON SCHEUER: Commissioners?

16 Commissioner Cabral.

17 VICE CHAIR CABRAL: My understanding is
18 that the County understood and was signing with the
19 understanding that Plumeria at Waikoloa LLC was the
20 buyer of the land, not Pua Melia's subsequent
21 transfer buyer of the land from Plumeria?

22 THE WITNESS: That is correct. Plumeria at
23 Waikoloa was a nonprofit that was receiving the land.

24 VICE CHAIR CABRAL: It's been brought in by
25 somebody else, so then that land's been sold, since

1 then another entity.

2 I think that was just confusing to who your
3 initial buyer was. Thank you.

4 CHAIRPERSON SCHEUER: If there is nothing
5 further --

6 COMMISSIONER ACZON: Just follow-up
7 Commissioner Chang's question.

8 So what triggers Mayor Kim's letter? Is
9 that because of the discovery of that?

10 THE WITNESS: Exactly.

11 COMMISSIONER ACZON: Thank you.

12 CHAIRPERSON SCHEUER: I'm looking at
13 Exhibit 65. Do you have a copy of that in front of
14 you?

15 THE WITNESS: Yes.

16 CHAIRPERSON SCHEUER: The first page of
17 Exhibit 65 is an email that appears to be from Mr.
18 Fuke to Alan Rudo.

19 THE WITNESS: Yes.

20 CHAIRPERSON SCHEUER: Let me know when you
21 have the document in front of you.

22 THE WITNESS: I have it. I don't have the
23 email. I'm sorry, I do.

24 CHAIRPERSON SCHEUER: Mr. Rudo is an
25 employee who you supervise?

1 THE WITNESS: Yes. He's under Community
2 Development Division of my office.

3 CHAIRPERSON SCHEUER: Are you otherwise
4 familiar with this email?

5 THE WITNESS: No.

6 CHAIRPERSON SCHEUER: Do you know who, on
7 the cc from Mr. Fuke, it's to Mr. Rudo, cc to Natalia
8 and Stefan dot M212. Do you know who that is?

9 THE WITNESS: No, I don't.

10 CHAIRPERSON SCHEUER: Is there a chance
11 that's Stefan Martirosian?

12 THE WITNESS: I don't know.

13 CHAIRPERSON SCHEUER: Have you had any
14 dealings with Mr. Martirosian?

15 THE WITNESS: No.

16 CHAIRPERSON SCHEUER: Has your --

17 THE WITNESS: I don't know.

18 CHAIRPERSON SCHEUER: You don't know
19 whether or not Mr. Martirosian was part of these
20 discussions of the release of the affordable housing
21 agreement as of June 19th, 2017?

22 THE WITNESS: Not with me.

23 CHAIRPERSON SCHEUER: Are you aware that in
24 the Petitioner's Exhibit 5 they indicated that by
25 that point they had already released Mr. Martirosian

1 from any role in Waikoloa Highlands Inc.?

2 THE WITNESS: I have not had any meetings
3 with Mr. Martirosian. I had I have not any meetings
4 or communications with him.

5 CHAIRPERSON SCHEUER: I have nothing
6 further. Commissioners, anything more? Redirect?

7 MR. LIM: Just a couple questions.

8 REDIRECT EXAMINATION

9 BY MR. LIM:

10 Q On the issue of the grantee affordable
11 housing entity, when you're talking about the project
12 with Mr. Julkowski, or the proposal that we've
13 discussed about Waikoloa Highlands, if the land, at
14 the end of the day, is conveyed to Ikaika Ohana,
15 which I'll represent to you is a 501(c)(3) nonprofit
16 organization, if the land is conveyed to Ikaika Ohana
17 to develop affordable housing units, does that
18 satisfy the County code requirement that the land be
19 conveyed to the --

20 A I don't think it's part of the original
21 affordable housing agreement. So they would have to
22 delete, do a new affordable housing agreement.

23 You're talking about a different parcel.
24 As far as I understand it, Mr. Julkowski owns the
25 parcel that you folks conveyed on the original

1 affordable housing agreement.

2 Q Taking Mr. Julkowski's proposed project as
3 an example. Is he under the obligation to develop
4 affordable housing or not?

5 A At this point, it's really unclear because
6 Waikoloa Highlands was supposed to have satisfied
7 that requirement. And this is supposed to have
8 transferred over to a nonprofit to develop that into
9 affordable housing, and this land was transferred and
10 sold to Mr. Julkowski. And we trying to work with
11 him in trying to develop affordable housing because
12 of the parcel was designated for affordable housing.

13 And as I said earlier that my office was
14 instrumental in clearing that parcel for unexploded
15 ordinances.

16 So I really don't want to lose that parcel,
17 because it will take me years or years of us to get
18 any type of clearance again. So that parcel is, I
19 would say, is semi-developable. And we want to work
20 with Mr. Julkowski, but I believe he doesn't have any
21 specific requirement to develop into an affordable
22 housing project.

23 Q You do admit that in the warranty deed
24 signed by my client conveying it to Plumeria at
25 Waikoloa LLC, a Hawai'i nonprofit corporation, was

1 sent to your office?

2 A Yes, I do.

3 Q So is Mr. Julkowski -- Pua Melia LLC is his
4 company, right?

5 A I believe it is, yes.

6 Q So you're saying that he's not specifically
7 required to develop affordable housing?

8 A Because affordable housing agreement is
9 voided for, you know, not valid, I don't think he's
10 under any requirement to develop affordable housing
11 at this point.

12 As far as the County is concerned, we
13 really would like to have it, but that's really not
14 my decision.

15 Q Let's move now to the Waikoloa Highlands'
16 proposal that we have been discussing recently.

17 If they do their own stand-alone 201H
18 affordable housing project, if the land that the
19 affordable housing will be developed upon is conveyed
20 to Ikaika Ohana, does that satisfy the County's
21 Chapter 11 requirement that the affordable housing
22 land be conveyed to a nonprofit corporation?

23 A From Waikoloa Highlands?

24 Q Correct.

25 A Again, we would have to execute a new

1 affordable house agreement.

2 Q Assuming there was an agreement to do so,
3 would that satisfy --

4 A Sure, we are all for it, for the
5 development of affordable housing. There would be no
6 questions as far as us to trying to work with you
7 folks on that.

8 MR. LIM: I'll represent to the Commission,
9 with Mr. Gyotoku's consent, that we're going to be --
10 you can see this is a complicated issue for the
11 11.7 acres. How do we get the land back? It's sold
12 twice already. We are hoping to work out a
13 settlement with the County. We are going to meet
14 with them tomorrow in Hilo, just for your
15 information.

16 CHAIRPERSON SCHEUER: Commissioner Wong.

17 COMMISSIONER WONG: So I have one question.

18 CHAIRPERSON SCHEUER: You have a question
19 for whom?

20 COMMISSIONER WONG: The Pua Melia project,
21 its being -- isn't it the True Value Hardware store
22 being the one to make 201H, backed up by 201H?

23 THE WITNESS: I don't think he wanted to
24 include the True Value in the affordable housing
25 component. He wanted to build a separate rental

1 units, different from the True Value.

2 COMMISSIONER WONG: But it's not on the
3 same parcel then?

4 THE WITNESS: That was a question we had
5 with him. And I think the top portion of it was, he
6 was planning to do that to make mixed commercial as
7 well as residential, but we also told him that it had
8 to be for affordable housing. At that time we
9 understood it to be part of the affordable housing
10 requirement from Waikoloa Highlands.

11 COMMISSIONER WONG: Use it as 201H?

12 THE WITNESS: Yeah.

13 COMMISSIONER WONG: Thank you.

14 CHAIRPERSON SCHEUER: Nothing further, Mr.
15 Lim.

16 MR. LIM: No further questions.

17 CHAIRPERSON SCHEUER: It is 1:23 p.m., and
18 we've been going about 50 minutes. I'd like to give
19 a break to our court reporter. Here's what we're
20 going to do for the rest of the day.

21 We are going to, after ten minutes, come
22 back together. Each of the parties will have
23 15 minutes to brief the Commission on the matter that
24 we requested briefing on at the end of the last
25 meeting, with time for questioning by the

1 Commissioners. And then when that is done, we will
2 probably take about an hour, we will take a quick
3 break at that time, then go into closing arguments,
4 then deliberation.

5 Commissioner Chang.

6 COMMISSIONER CHANG: Chair, I just --
7 procedurally, is it my understanding that Mr. Gyotoku
8 was the last witness, and the proceedings have come
9 to a close, and you'll reconvene where the parties
10 will essentially give closing arguments?

11 CHAIRPERSON SCHEUER: Commissioner Chang,
12 Mr. Gyotoku was the last witness. There are no
13 further witnesses.

14 The parties, we asked the parties to brief
15 on certain questions. So they have submitted written
16 briefs to us on those questions. We want to give
17 them an opportunity to orally respond to some of
18 those questions including, I believe, questions you
19 had raised about standards in relationship to Bridge
20 Aina Le'a. And then we will finish that, and then go
21 into closing arguments.

22 COMMISSIONER CHANG: Thank you for that
23 clarification.

24 CHAIRPERSON SCHEUER: Any questions for the
25 proceedings from parties or Commissioners? It is now

1 1:25. We will take a ten-minute break.

2 (Recess taken.)

3 CHAIRPERSON SCHEUER: We are back on the
4 record.

5 We're going to go through giving the
6 parties a chance to orally present on what was
7 responsive to the Commission's request at the close
8 of the October 25th, starting with the Petitioner,
9 then County, then Office of Planning.

10 Mr. Lim, I've set the time for each party
11 at 15 minutes. Mr. Lim, are you ready to proceed?

12 MR. LIM: Yes. I'm going to hear a big
13 sigh of relief. I'm going to rest on my briefs with
14 the exception of one issue. So you're not off the
15 hook yet.

16 And that's the issue relating to the
17 question raised by Commissioner Chang, her questions
18 about whether Aina Le'a applies to this case, or
19 there is a condition that specifically sets out a
20 condition of the backbone infrastructure.

21 And I have to tell you that this has been
22 an evolving process for my office as well as I think
23 the other Parties and the Commission in this
24 proceeding.

25 Trying to make sense of, you know, what HRS

1 205-4(g) means. What does the Aina Le'a decision
2 mean? How that relates to the project in question.

3 The way that I think we've come down on
4 this is that we believe, that under HRS Section
5 205-4(g) the Commission can only order a reversion if
6 it meets the five-part test.

7 Number one, that the Commission imposes a
8 condition.

9 Number two, that that condition complies
10 with 205-4(g), and specifically provides that the
11 trigger is absent substantial commencement of the use
12 of the land.

13 Number three, the Commission issues an
14 Order to Show Cause.

15 Number four, the Commission finds that
16 there has not been substantial commencement.

17 And five, that the Commission finds that
18 good cause does not exist to maintain the
19 classification.

20 So based upon that test, we believe, from
21 the Petitioner's end, that the Commission cannot act
22 on an OSC to revert the property, and especially so
23 under Condition No. 3 in this case, which doesn't
24 contain the second element that I talked about, which
25 includes the language absent substantial commencement

1 of the use of the land.

2 I know that the Commission always operates
3 on the test of you're not complying with the
4 substantial representations made to the Commission.
5 And that's okay for an Order to Show Cause to bring
6 people back in to report to you, but I don't think
7 that's good enough for a reversion.

8 The Supreme Court in Aina Le'a held at
9 205-4(g) represents a very limited exception to the
10 general principle set forth in Chapter 205 for
11 district boundary amendments.

12 So only if the Commission follows these
13 five steps, is our position, that if you don't follow
14 the five steps, then the Commission has no
15 jurisdiction to revert the district boundary
16 amendment. I think you can hold an Order to Show
17 Cause, but you cannot revert the project.

18 So that being said, I'm making an oral
19 motion to discuss the Order to Show Cause as it
20 relates to the reversion of the project.

21 CHAIRPERSON SCHEUER: We're going to take a
22 brief recess. Please don't run off far.

23 (Recess taken.)

24 CHAIRPERSON SCHEUER: Back on.

25 Mr. Lim, in response to your statements and

1 your, what you styled as a motion, which was supposed
2 to be in response to our questions that we asked at
3 the end of the last hearing.

4 What you styled as a motion seeks relief of
5 the same manner that would actually be what this
6 hearing is supposed to do, to consider this. So we
7 are holding that in abeyance right now, because among
8 other things, the County and Office of Planning
9 haven't had a chance to respond to the very questions
10 that are raised in response to your motion.

11 MR. LIM: For the record, we're just trying
12 to, like I said, get to an answer on how this is
13 supposed to work. And this is similar to what the
14 Commission did in the Halekua Order to Show Cause,
15 which is cited in our brief at page 16 of the Second
16 Proposed Memo.

17 During the hearing, Halekua moved to
18 dismiss the Halekua Order to Show Cause, and the
19 Commission then found good cause and approved the
20 oral motion to dismiss.

21 CHAIRPERSON SCHEUER: Thank you.
22 County of Hawaii.

23 MR. KIM: Similarly to the Petitioner, the
24 County will also stand on its brief -- I'm sorry,
25 Petitioner not Commissioner -- to the Petitioner,

1 County will stand on its brief. I was onto my next
2 thought already, I apologize.

3 And the one comment the County would make
4 that pulled out of its brief too, is that the County
5 reads 205-4(g) as setting the authority or mechanism
6 for this Commission to act and to revert properties,
7 land use classification, and the County believes that
8 the Commission could look at its prior Decision &
9 Order, which it's acting on to see what would
10 constitute use of land and/or substantial
11 commencement depending on what the Decision & Order
12 says, and the circumstances of the particular case.

13 And that was the one point I had to make.

14 CHAIRPERSON SCHEUER: Commissioners,
15 questions for the County?

16 Office of Planning. Commissioner Okuda.

17 COMMISSIONER OKUDA: Chair, if you were
18 asking for questions of the County, would we have an
19 opportunity to raise questions of the Petitioner?

20 CHAIRPERSON SCHEUER: Yes.

21 COMMISSIONER OKUDA: Is this an appropriate
22 time or some other time?

23 CHAIRPERSON SCHEUER: This is the
24 appropriate time.

25 COMMISSIONER OKUDA: Mr. Lim, just

1 addressing the point that you raise about what the
2 Commission can or cannot do with respect to an Order
3 to Show Cause, can you tell me whether you agree or
4 disagree with what I'm going to quote right here is
5 an accurate statement of the law coming out of the DW
6 Aina Le'a Development LLC versus Bridge Aina Le'a LLC
7 case, that's 134 Hawaii 187 found at page 209.

8 To the extent DW and Bridge argue that the
9 LUC must comply with the general requirements of HRS
10 Section 205-4 any time it seeks to revert property,
11 they are mistaken. The express language of HRS
12 Section 205-4(g) and its legislative history
13 establish that the LUC may revert property without
14 following those procedures provided that the
15 Petitioner has not substantially commenced use of the
16 property in accordance with its representations.

17 In such a situation, the original
18 reclassification is simply void.

19 Is that an accurate statement of the law?

20 MR. LIM: Generally, but I think that the
21 distinction is that Petitioner believes that 205-4(g)
22 is a limited exception to the general principles, and
23 therefore, must be strictly construed, and especially
24 so when you have such a serious result as a death
25 penalty in this project.

1 COMMISSIONER OKUDA: My only question is
2 whether or not that's an accurate statement of the
3 law. That was my only question. Is what I read an
4 accurate statement of the law?

5 MR. LIM: I would say whatever you read was
6 a quote from the case, I'll agree to that. I think
7 you and I probably disagree on what the statement of
8 law means.

9 COMMISSIONER OKUDA: Maybe the application
10 of the law we might disagree, but as far as an
11 agreement that that's an accurate statement of law,
12 you don't disagree with that, right?

13 MR. LIM: I agree you read the right words.

14 COMMISSIONER OKUDA: Thank you.

15 CHAIRPERSON SCHEUER: Are there other
16 questions for Mr. Lim? Commissioner Chang.

17 COMMISSIONER CHANG: Mr. Lim, I'm trying to
18 understand what appears to be a different argument
19 that you are orally making from what you originally
20 included in your response to our questions.

21 MR. LIM: Correct, that's why I talked
22 about an evolutionary -- we're trying to figure this
23 out as we go. And the more we thought about the
24 controlling statute 205-4(g), the more we thought
25 that the Commission doesn't have any authority to

1 order reversion other than in strict compliance with
2 205-4(g).

3 And that statute requires those five tests,
4 at least in our position, and the big difference
5 being, I think, is our second test which is that the
6 condition that you're trying to enforce on a
7 reversion has to have the words "absent substantial
8 commencement of the use of the land" or something
9 similar to that.

10 In this case Condition 3, which is the
11 operative condition, doesn't contain those words.

12 COMMISSIONER CHANG: And so it's your
13 opinion that because Condition 3 doesn't have those,
14 that the only remedy available to the Commission for
15 failure to meet Condition 2 or 3 -- well, let me ask
16 you. What is LUC's remedy for failure to meet
17 Condition 2 and 3?

18 MR. LIM: We believe the LUC has inherent
19 authority to call back Petitioners if they believe
20 they aren't fulfilling the conditions of the project
21 to ask for status report; and being dissatisfied with
22 the responses, you could initiate a district boundary
23 amendment with the full procedures of Chapter 205.

24 COMMISSIONER CHANG: So when you say, we
25 could proceed with a district boundary amendment --

1 I'm trying to reconcile your argument that we could
2 not revert. So how would we do -- change a district
3 boundary amendment versus reversion?

4 MR. LIM: It's that bifurcated process that
5 the Supreme Court was talking about in the Aina Le'a
6 case, where if the Petitioner has already
7 accomplished substantial commencement of use of the
8 land, the only way you can take him down is district
9 boundary amendment.

10 What we are saying here if the Commission's
11 condition doesn't have the required language under
12 205-4(g), substantial commencement language, then the
13 Commission cannot revert the property under that
14 condition.

15 COMMISSIONER CHANG: So your position is
16 that the only way the Commission could revert is to
17 interpret Bridge Aina Le'a saying, apply -- well,
18 one, you're saying the Bridge Aina Le'a case doesn't
19 apply to your particular case because there's no --
20 that we wouldn't reach the substantial compliance
21 issue?

22 MR. LIM: That's our alternate argument is
23 that even if you reach that, the argument that we
24 still have substantial commencement based upon the
25 specifics of this particular case where no ground

1 disturbance or vertical construction is required to
2 get final subdivision approval.

3 COMMISSIONER CHANG: And you don't
4 interpret the Bridge Aina Le'a case to say, the only
5 time that the boundary amendment criteria would apply
6 is if there's been substantial compliance? You would
7 say --

8 MR. LIM: I would also say that if the
9 condition that you're trying to enforce doesn't have
10 the 205-4(g) language of substantial commencement,
11 that you also can't revert on that condition.

12 COMMISSIONER CHANG: So your argument is
13 that we would have to first do essentially like an
14 Order to Show Cause, address the conditions that the
15 Petitioner has not met, and then it would be the
16 Commission who would have to initiate a boundary
17 amendment?

18 MR. LIM: Yes. Essentially follow the
19 regular procedures of 205, or the Commission, as the
20 Supreme Court said, is the Commission would just ask
21 the County to enforce.

22 COMMISSIONER CHANG: And as you started off
23 your argument, you said those five steps, that's your
24 interpretation of what the jurisdiction of LUC is?

25 MR. LIM: Of the statute, yes, 205-4(g).

1 COMMISSIONER CHANG: And it is different
2 from what you put in your position statement, your
3 response?

4 MR. LIM: I think it's our evolved
5 position, but we're still not giving up on the
6 alternate position.

7 CHAIRPERSON SCHEUER: Commissioner Okuda.

8 COMMISSIONER OKUDA: Thank you.

9 Mr. Lim, even if our positions might be
10 evolving, we still have to follow the plain language
11 of the opinion of the Hawaii Supreme Court, correct?

12 MR. LIM: The plain language, yes. I don't
13 think that the plain language of the Supreme Court
14 decision in Aina Le'a can overrule Condition No. 3 as
15 Office of Planning is arguing.

16 COMMISSIONER OKUDA: Well, let me read the
17 one line from the Bridge Aina Le'a case at 134 Hawaii
18 209. And this is what the Supreme Court said, and I
19 think this is plain English:

20 The express language of HRS Section
21 205-4(g) and its legislative history establish that
22 the LUC may revert property without following those
23 procedures -- meaning 205-4(g) procedures -- provided
24 that the Petitioner has not substantially commenced
25 use of the property in accordance with its

1 representations.

2 So the Supreme Court is not saying the
3 condition has to have some special language in there.
4 Supreme Court is saying, hey, if there isn't
5 substantial commencement of the use of the property
6 in accordance with the representations, you can
7 revert without following the 205-4(g) provisions, and
8 the plain language or plain English of the Supreme
9 Court opinion continues on with the explanation,
10 quote:

11 In such a situation, the original
12 reclassification is simply voided.

13 I mean, you know, aren't we duty bound as a
14 Commission to follow what the Supreme Court has said
15 in this opinion?

16 MR. LIM: I'll agree that you were reading
17 the correct language from the statute. And I agree
18 that the Commission is duty bound to follow the law,
19 but I disagree with your interpretation.

20 COMMISSIONER OKUDA: Thank you.

21 CHAIRPERSON SCHEUER: Commissioner Chang.

22 COMMISSIONER CHANG: So, Mr. Lim, if we go
23 back and we look specifically at the Decision & Order
24 of this that was decided in 2008, and we look at
25 Condition No. 2, completion of the project.

1 The Petitioner shall develop the Petition
2 Area and complete buildout of the project no later
3 than ten years from the date of the Commission's
4 Decision & Order for purposes of the Decision &
5 Order, buildout means completion of the backbone
6 infrastructure to allow for sale of the individual
7 lots.

8 So would you agree that that would apply to
9 this project?

10 MR. LIM: It is a condition for the
11 project. I would agree that the County can enforce
12 that condition for failure to comply with that
13 condition, but I disagree that the Commission can
14 revert based on that condition or Condition 3.

15 COMMISSIONER CHANG: But you would agree
16 that that is the condition of this project, and it
17 defines buildout? Means the completion of the
18 backbone infrastructure to allow. So I'm not talking
19 about jurisdiction, who has power to enforce, just
20 what is the condition.

21 Would you agree that the Petitioner has not
22 completed the backbone infrastructure?

23 MR. LIM: That's correct.

24 COMMISSIONER CHANG: I'm going to read
25 provision three, this is the third condition.

1 Reversion on failure to complete the
2 project. We have already defined what completion of
3 the project means.

4 Petitioner fails to complete the buildout
5 ten years from the date, the Commission may -- not
6 the County -- the Commission may, upon its own motion
7 at the request of any party or interested person file
8 an Order to Show Cause and require Petitioner to
9 appear before the Commission to explain why the
10 Petitioner should not revert to its previous
11 agricultural division.

12 How do you give meaning to the third
13 condition when it says: Should not revert to its
14 previous agricultural? What's the -- and it says the
15 Commission, doesn't say the County -- the Commission
16 may, and we did, we filed the Order to Show Cause.
17 So how do you give meaning -- and this is a very
18 plain meaning -- it says revert. Should not revert.
19 We have defined buildout.

20 So how do you give meaning to this
21 provision, this condition, if the Commission does not
22 have that power?

23 MR. LIM: I think there's two problems with
24 Condition 3. One is that it's missing the
25 substantial commencement of use of the land language

1 from 205-4(g); and the second, which was briefed in
2 our pleadings, was that the -- as it was described by
3 the County's witness and our project manager -- the
4 buildout of the spine infrastructure is effectively
5 completion of the project. So we had objections with
6 that.

7 So I think that both reasons are sufficient
8 for the Commission to not be able to revert the
9 project.

10 COMMISSIONER CHANG: And I know, Mr. Lim,
11 you were not the counsel at the time the condition
12 were agreed upon.

13 MR. LIM: That's correct.

14 COMMISSIONER CHANG: So this is your
15 interpretation of what the conditions are. But at
16 the time the conditions were determined, there was no
17 objection. And this is -- nor in any of the annual
18 reports is it my recollection that there was any
19 objection to these conditions nor different
20 interpretations of these conditions.

21 Would you agree that none of the annual
22 reports that have been filed raised the question that
23 you've raised that these two conditions or Condition
24 3 three is not valid?

25 MR. LIM: I agree that there are no prior

1 objections as far as I'm aware to the condition. And
2 that I think that the Aina Le'a case from the Supreme
3 Court I think changed the game a lot. And so we
4 think our arguments are valid.

5 COMMISSIONER CHANG: I guess that's why I
6 get a little confused. One, Aina Le'a applies or it
7 doesn't apply. Your first argument was that it
8 doesn't apply, notwithstanding what Commissioner
9 Okuda was reading.

10 But if I just read the plain language of
11 this condition, it does appear as if the parties
12 understood that this would be an available remedy for
13 the Commission to revert if the project had not been
14 completed as defined.

15 MR. LIM: At this point our position is
16 that the condition is an erroneous condition.

17 COMMISSIONER CHANG: Thank you very much.

18 CHAIRPERSON SCHEUER: Commissioners? We
19 are -- just to clarify where we are. I should have
20 stopped before asking the County to present for
21 questions for Mr. Lim.

22 Are there any further questions for Mr. Lim
23 or for the County? Office of Planning.

24 MS. APUNA: Office of Planning also rests
25 on our written brief. I would just like to address

1 some of the issues that Mr. Lim had brought up.

2 The Office of Planning believes that the
3 condition, as written, is not void. And if anything,
4 by Bridge Aina Le'a it interprets that 205-4(g), and
5 the conditions mean more narrowly that you must
6 have -- must show no substantial commencement rather
7 than full backbone infrastructure to have an Order to
8 Show Cause and to revert the land.

9 I believe that under HAR Section 15-15-79
10 this Commission is empowered. Plainly it says,
11 quote, Petitioner's granted district boundary
12 amendment shall make substantial progress within a
13 reasonable period as specified by the Commission from
14 the date of approval of the boundary amendment in
15 developing a property receiving the boundary
16 amendment.

17 The Commission may act to amend, nullify,
18 change or reverse its Decision & Order if the
19 Petitioner fails to perform as represented to the
20 Commission within the specified period.

21 So I believe that this Commission does have
22 the authority with Condition 3, and under 205-4(g),
23 and HAR 15-15-79 to revert the land based on the
24 finding of no substantial commencement.

25 CHAIRPERSON SCHEUER: Commissioners, are

1 there questions for Office of Planning?

2 Commissioner Ohigashi.

3 COMMISSIONER OHIGASHI: Maybe it's not -- I
4 like to get -- assuming that substantial commencement
5 is found not to have occurred, what role or vision
6 could cause that?

7 MS. APUNA: So basically for Order to Show
8 Cause, that you, the Commission, should find whether
9 there were --

10 COMMISSIONER OHIGASHI: In terms of
11 reversion. To me there's two standards. One is
12 substantial commencement; second one there is an
13 argument that everybody is making in their briefs on
14 the issue of good cause.

15 So my question to you is: Assuming that
16 you find commencement has not commenced, what does
17 good cause?

18 MS. APUNA: So if there is no substantial
19 commencement, and they haven't done anything in the
20 ten years as they represented, if they're able to
21 show good cause for moving forward, such as I think
22 Office of Planning had put in their position, you
23 know, provide us your plans to move forward, your
24 financial capability, a timeline.

25 These are things that OP has asked other

1 similarly situated petitioners when they haven't met
2 the ten-year deadline. And things that will make the
3 Commission feel confident that the project will be
4 completed in a certain amount of time. That may
5 serve as good cause.

6 Or good cause where there is a delay based
7 on, you know, not enough finance, something happened,
8 stock market, they were no longer able to finance the
9 project, so that good cause could be enough, even
10 though not substantial commencement. Good cause to
11 move forward.

12 COMMISSIONER OHIGASHI: My next set of
13 questions is that, when I read your brief, it
14 indicated to me that you acknowledge that the issue
15 of a bad actor or bad actor Petitioner has had is
16 relevant to that issue of good cause, if I read your
17 brief correctly.

18 The other thing, so is good cause basically
19 a request, the basis that you would consider
20 supporting a continuance rather than a reversion? Is
21 that what good cause means to you?

22 MS. APUNA: I think so. It means that the
23 Commission had confidence, based on what the
24 Petitioner put forth, that it had the ability, or it
25 should be given if it has an excusable situation

1 where they should be able to move forward with the
2 project even though substantial commencement hasn't
3 happened.

4 And in this case, we don't think that
5 they've shown that. They haven't provided us more of
6 a road map that, well, you know, are they going to
7 get this done in this amount of time? Do they have
8 the capability?

9 And I think when he talks about equal
10 protection, I mean this is what we do. We have seen
11 other petitioners provide more of a road map, and the
12 Commission has felt more comfortable moving forward,
13 that things will be completed timely.

14 COMMISSIONER OHIGASHI: So assuming that a
15 long time ago, that there was -- the OSC was not
16 filed, and prior to the filing of OSC any Petitioner
17 would come in and ask for a continuance to stretch
18 out the timeline, et cetera, like that. That would
19 be something that Office of Planning would review and
20 go over to determine whether or not it is entitled to
21 have that additional time frame?

22 MS. APUNA: Yes, that's our process.

23 COMMISSIONER HIGASHI: So my questioning
24 is, basically about this, is that what happened in
25 this case? Where was the person who's supposed to

1 come in and ask for the continuance? Why are we here
2 at this point in time?

3 Normally the projects that I've seen so far
4 going through this, long period of time, this one
5 happened right at the ten-year cutoff period where
6 normally people would start to come in for extensions
7 and request for time, and try to work with OP.

8 So what is -- what do you believe that
9 occurred in this? Because it was a displaced
10 landowner or what?

11 MS. APUNA: I'm not sure, but it is the
12 burden of the Petitioner to come forward and realize
13 they are behind schedule or not going to make
14 deadline to make a motion. And in our position
15 statement, we have said they should make a motion to
16 extend. They should provide all these things moving
17 forward, and we haven't seen that.

18 Generally that's the process. OP will look
19 at a project that wants an extension of time, then we
20 try to work with them, say this is what we like to
21 see. And I think this is what the Commission would
22 like to see in order for them to be completed,
23 because for ten years you haven't done anything.
24 Show how you're going to complete this project.

25 COMMISSIONER OHIGASHI: I see the County

1 nodding its attorney's head. It doesn't show on the
2 record. Is that your position too?

3 MR. KIM: To be totally forthcoming with
4 this Commission, the County has struggled with this
5 issue of what is good cause. Because when looking at
6 the legislative history, when they added in sort of
7 teeth to 205-4(g), the only discussion of good cause
8 came up in the context of lengthy, drawn out county
9 zoning or land use entitlement process that might
10 delay development. But I don't know if that would
11 necessarily limit that to the only grounds for good
12 cause.

13 I'm most familiar with the standard of good
14 cause from court case in Order to Show Cause, where
15 someone has violated a court order, and then you
16 bring them before the court on an Order to Show
17 Cause. In that case it's very open and very variable
18 as to what can constitute good cause.

19 But to me the bottom line would be if there
20 is a reasonable assurance that development can
21 proceed in a timely fashion, that would be a good
22 cause I think.

23 But, for example, in a court case if
24 someone doesn't appear in court when they're supposed
25 to, and you know if the court issues an Order to Show

1 Cause, and the person shows up and says I was
2 intending to come in but the car broke down, I've
3 seen the court show good because it was circumstances
4 beyond his control.

5 So it's very broad. And I even question
6 whether or not this Commission can apply the court
7 standards for good cause to its decision because, you
8 know, our courts are courts in equity, and I'm not
9 sure what the extent of the Commission's equity and
10 powers are.

11 COMMISSIONER OHIGASHI: You seem to argue
12 it in your brief, that's why --

13 MR. KIM: That was the only thing I could
14 find. In the legislative history there was a
15 standard for good cause. And OP's concept where good
16 cause should be basically a reasonable assurance you
17 can proceed with the development in a timely fashion.

18 CHAIRPERSON SCHEUER: We're going back to
19 the County, sliding back. And I can't prevent the
20 County from nodding his head. I wish I could.

21 COMMISSIONER OHIGASHI: I was just throwing
22 that out, because I was recalling her brief.

23 CHAIRPERSON SCHEUER: Are you done with
24 your questions?

25 COMMISSIONER OHIGASHI: Unless the

1 Petitioner wants to answer too.

2 CHAIRPERSON SCHEUER: You have your answers
3 to the questions for the Office of Planning. Are
4 there other questions for the Office of Planning from
5 the Commissioners? Seeing none.

6 It's 2:20. As I described earlier, we will
7 now take a ten-minute break. We will then go into
8 closing arguments.

9 (Recess taken.)

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

12 We will now give the parties opportunity to
13 provide closing arguments, although I realize that
14 some of your statements, positions were overlapping
15 with that. But I will still allow up to 15 minutes
16 for each party for their closing, beginning with
17 Petitioner.

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

19 Before I begin my closing statement, and it
20 won't be too long, could I have a ruling on my oral
21 Motion to Dismiss Order to Show Cause?

22 CHAIRPERSON SCHEUER: Yes, your, what was
23 styled as an oral motion, was essentially asking us
24 to make a decision that we're prepared to make today,
25 so whether or not this proceeding will result in a

1 motion to action to revert or not will be decided by
2 the end of this hearing today.

3 You gave to us your reason, your arguments
4 essentially why you believe that we should not act on
5 that.

6 MR. LIM: So we will consider that the
7 motion is denied? Should I consider the motion
8 denied or just not being acted on?

9 CHAIRPERSON SCHEUER: You may choose to
10 consider it how you wish. I said my statement on
11 this matter. Please proceed.

12 MR. LIM: Thank you very much to the
13 Commission members and staff. This has been a long
14 and complicated and arduous process, as Commissioner
15 Okuda said. This is a death penalty case and I have
16 the obligation to defend my clients zealously within
17 the bounds of the law. I've tried to do that. I
18 hope I haven't hurt any feelings in the meantime.

19 Basically we're asking the Commission again
20 to take a step back from the immediacy of the OSC and
21 look at the big picture of what this project
22 represents.

23 We have got a project that's ready to go,
24 731-and-a-half acres of land free and clear of any
25 debt with \$45 million project funding commitment from

1 a bank on land that was zoned by the County as Rural
2 Agriculture one acre lots since 1990, 28 years ago.

3 That's why we believe that the project is
4 different in time than the other projects you're
5 looking at. Usually you see projects that have come
6 in and the Land Use Commission is the very first
7 approval they get.

8 This was almost the very last approval,
9 this discretionary approval that this project is
10 getting. So we believe the project at Waikoloa
11 Highlands is different in time from other projects
12 that the Commission has been looking at.

13 As was stated earlier, the enforcement
14 action is coming barely ten years after the Decision
15 & Order, which at least in our mind, was unfairly
16 prejudicial to us.

17 We think that the Petitioner's initial --
18 if you remember going back to the first hearing on
19 this matter where I appeared, we recommended that the
20 Commission's best exercise of discretion in this
21 Order to Show Cause was to defer taking action.
22 Essentially take a time out. Let the developer, who
23 had just I think at that time we had been on the case
24 for something like 60 days at the most. Let the
25 developer and his new team take it through County

1 level and then come back to LUC on the Motion to
2 Amend.

3 The Office of State Planning has indicated
4 that that might have been something that they would
5 have wanted Petitioner to do, but as you know, we
6 have been busy defending ourselves on the OSC.

7 That's why we're requesting that we be
8 given some time to defer on the OSC, to go back to
9 the County. If the Petitioner doesn't perform, then
10 of course you still have the OSC to call us back on.

11 The Commission's discretion in this case I
12 don't think would serve any party. There is no land
13 banking and speculative land trading going on.
14 There's no evidence of that. There's no evidence of
15 any governmental agencies' plans being thwarted by
16 the nondevelopment of this project.

17 In fact, I think you heard from the public
18 that development of this project with the traffic
19 roundabout at the Waikoloa Road intersection with Pua
20 Melia Road is one of the community's big desires and
21 has been for many years.

22 This project has the specific condition to
23 do that within its project development timeframe.

24 Most importantly I think for the
25 Commission's considerations, and we have tried to

1 submit some of that evidence here, is that the
2 project going forward will also bring affordable
3 housing to Waikoloa Village.

4 Right now, as was being testified before,
5 much of Waikoloa Village, and even the County's
6 Kamakoa housing project nearby can't move forward
7 because of the unexploded ordnance restrictions on
8 the Ikaika Ohana project. It's across the street
9 from us. And this particular project area is one of
10 the few areas in Waikoloa that are free of unexploded
11 ordnance under Corps of Engineer's studies.

12 So we believe that the Commission's
13 exercise of discretion in deferring action on the OSC
14 would allow the project to move forward, allow the
15 chances for affordable housing project to move
16 forward. We might even have two affordable housing
17 projects, one through Pua Melia LLC through Mr.
18 Julkowski, and the second one through the Waikoloa
19 Highlands negotiations directly with Ikaika Ohana.

20 Other things that won't happen if the
21 project is reverted is the Department of Education
22 agreement that we already have with the State
23 Department of Education to pay approximately \$3,507
24 per lot for the 398 lots at closing.

25 The other thing is obviously the affordable

1 housing agreement that is in contention here.

2 We believe that the reversion of the
3 property is not in anyone's best interest. This is
4 not one of those projects that have continually
5 dragged on and dragged on for 15, 20 more years. We
6 believe that the first status hearing on this project
7 might have even been before the ten-year period ran.
8 So I think that it's our strong desire that the
9 Commission allow the Petitioner to move forward with
10 the County, with the Order to Show Cause hanging over
11 our head as an enforcement tool. And that this would
12 be the best exercise of your discretion in this
13 matter.

14 And I think that's about it. Thank you
15 very much.

16 CHAIRPERSON SCHEUER: Thank you. County.

17 MR. KIM: Good afternoon, Chairperson and
18 Commissioners. First of all I would like to thank
19 you all for your service to the public and throughout
20 these series of hearings. There's been a lot of time
21 and effort expended on your behalf here in looking at
22 these issues. These are tough issues to decide and
23 we appreciate the hard look that you've taken at the
24 history and the evidence.

25 The evidence presented by Petitioner, in

1 the County's opinion, you know, did show that the
2 Petitioner did not proceed in a timely manner with
3 its project. And the Petitioner alleged that was due
4 to the actions and mismanagement of a certain
5 individual. That individual, according to
6 Petitioner, is no longer in Petitioner's company. So
7 the fact for delay may have been removed, according
8 to Petitioner. That would go to the good cause
9 issue.

10 As far as substantial commencement goes,
11 the County's position would be that Petitioner has
12 not demonstrated evidence of substantial commencement
13 at this series of hearings. And so even if, just
14 solely for the purpose of argument, the affordable
15 housing release was valid, and the affordable housing
16 conditions had been fulfilled, there are still a
17 number of other conditions which have been
18 unfulfilled by Petitioner.

19 So the County believes the affordable
20 housing condition was relevant, but it's not
21 determinative by any means for this Order to Show
22 Cause.

23 Now, as far as going back to the good cause
24 goes, Petitioner has presented evidence that they got
25 out what I'll call a bad actor, and that they're now

1 able to proceed. This may or may not constitute good
2 cause. The County cannot speak to that with total
3 certainty. That's going to be the Commission's
4 decision, and it's a tough call to make in the
5 County's opinion.

6 The County does have a preference for this
7 project to go forward, the reasons being that, you
8 know, we will see some of the conditions fulfilled
9 hopefully if this project does go forward.

10 We have had the community come in
11 consistently testifying that they're very concerned
12 about the transportation condition, and that would be
13 great if that could be fulfilled and if the community
14 could get those improvements and the intersection.

15 Also the affordable housing issue, the
16 County is in dire need of affordable housing. So if
17 the Petitioner is able to convey this property to the
18 County for affordable housing, that would be
19 beneficial.

20 The County does have preference to have its
21 general plan, its zoning and land use designation be
22 consistent. So as a matter of policy, the County
23 does prefer for the land to be Rural. So the County
24 wouldn't object to either deferring, or if the
25 Commission were to order Petitioner to come in and

1 ask for an amended Decision & Order. And at that
2 time, you know, the Commission could maybe even put
3 shorter time lines on certain conditions that have
4 been spoken to as priorities. And also Petitioner
5 could update their studies and submittals.

6 But, again, this is the Commission's
7 decision. So the County respectfully defers to the
8 Commission on the decision. We respect your
9 authority and your jurisdiction over the matter. And
10 if you did decide to revert, then the County's
11 comment would be that it would need any development
12 going forward on the other projects to be consistent.

13 And when I say consistent, consistency with
14 the General Plan Zoning and Land Use Classification.
15 So probably the easiest grounds, if it were reverted,
16 would be Petitioner or successor for the property, if
17 they had development plans, would need to come back
18 into Land Use Commission and ask for the land to get
19 reclassified as Rural again if it got reverted to Ag.

20 So with that, the County will respectfully
21 defer to the Land Use Commission's decision.

22 CHAIRPERSON SCHEUER: Thank you. OP.

23 MS. APUNA: Thank you, Chair, and thank you
24 Commission for your service on this docket.

25 For an Order to Show Cause this Commission

1 must look at three things.

2 One, has Petitioner fulfilled the D&O
3 conditions?

4 Two, has the Petitioner substantially
5 commenced use of the land in accordance with
6 representations made to the Commission?

7 And three, has Petitioner shown good cause
8 to not revert the property.

9 The Petitioner has failed to comply with,
10 has not fulfilled conditions 2, 6, 9, 11, 15, 20 and
11 21 of the Decision & Order.

12 In the past ten years Petitioner has not
13 substantially commenced use of the land in accordance
14 with its representation to the Commission. I'll add
15 that OP does not believe that the Commission is
16 rulemaking by having asked for legal briefing on what
17 is "substantial commencement". The Commission was
18 simply asking the Parties' interpretation of the term
19 based on statute and applicable case law.

20 Also if rulemaking was absolutely necessary
21 to interpret or determine "substantial commencement",
22 the Hawai'i Supreme Court would not have been able to
23 find that the Petitioner had "substantially
24 commenced" in Bridge Aina Le'a.

25 Lastly, without fulfillment of the Decision

1 & Order conditions and no substantial commencement of
2 use of the land, Petitioner's remaining opportunity
3 to save the project from reversion is to show good
4 cause why the Commission should not revert to its
5 former classification. Good cause can be shown by
6 either allowable excuse for the delay in the project,
7 and/or good cause or confidence in the Commission for
8 the project to move forward.

9 It is questionable whether Mr.
10 Martirosian's bad acts were the sole reason for the
11 delay in the project. As for instilling confidence
12 in the Commission that this project can move forward
13 successfully, even though suggested by OP in its
14 Position Statement, Petitioner has not demonstrated
15 to the Commission its ability to move forward with
16 the project if given the opportunity.

17 Other than a short commitment letter of
18 \$45 million to develop the property, Petitioner has
19 not made any motion to amend conditions and/or extend
20 the time to complete the project, Petitioner has not
21 presented a development plan, timeline, or its
22 financial ability to move forward, and generally, has
23 not demonstrated to the Commission that the project
24 will be completed in a timely manner.

25 In sum, Petitioner has not fulfilled the

1 D&O conditions, has not substantially commenced use
2 of the property, and has not shown good cause not to
3 revert.

4 Therefore, this Commission, pursuant to HRS
5 205-4(g), is authorized to revert the Petition Area
6 to its prior classification. OP would not object to
7 such a reversion.

8 CHAIRPERSON SCHEUER: Thank you.

9 Now, given that the Parties have completed
10 their presentation before the LUC, I declare the
11 evidentiary portion of this hearing to now be
12 completed.

13 The Commission will now conduct formal
14 deliberations concerning whether to issue the Order
15 to Show Cause. I will note for the Parties and
16 public that during the Commission's deliberations, I
17 will not entertain additional input from the Parties
18 or the public unless those individuals or entities are
19 specifically requested to do so by the Chair. If
20 called upon, I would ask that any comments be limited
21 to the question at hand.

22 The Commission has held hearings on May
23 23rd and 24th, September 6th, October 24 to 25, and
24 the remainder of the presentation and closing
25 arguments were heard today.

1 Commissioners, I'm going to confirm that
2 each of you have reviewed the record and read the
3 transcript for any meeting that you may have missed
4 and are prepared to deliberate on the subject docket.
5 After I call your name, please signify with either
6 "aye" or "nay".

7 Commissioner Aczon?

8 COMMISSIONER ACZON: Aye.

9 CHAIRPERSON SCHEUER: Commissioner Cabral?

10 VICE CHAIR CABRAL: Aye.

11 CHAIRPERSON SCHEUER: Commissioner Chang?

12 COMMISSIONER CHANG: Aye.

13 CHAIRPERSON SCHEUER: Commissioner Mahi?

14 VICE CHAIR MAHI: Aye.

15 CHAIRPERSON SCHEUER: Commissioner Okuda?

16 COMMISSIONER OKUDA: Aye.

17 CHAIRPERSON SCHEUER: Commissioner

18 Ohigashi?

19 COMMISSIONER OHIGASHI: Aye.

20 CHAIRPERSON SCHEUER: I as Chair am also
21 prepared.

22 COMMISSIONER WONG: Aye.

23 CHAIRPERSON SCHEUER: Excuse me, you were
24 absent from my script.

25 Commissioner Wong, are you also prepared to

1 deliberate on this matter.

2 COMMISSIONER WONG: Yes.

3 CHAIRPERSON SCHEUER: I'm also prepared to
4 deliberate.

5 Commissioners, any discussion on this
6 matter? Who wishes to go first?

7 CHAIRPERSON SCHEUER: Commissioner Wong,
8 since I'm letting you deliberate.

9 COMMISSIONER WONG: Thank you. I'm going
10 to deliberate now.

11 This reading the transcript, because I
12 missed the prior meetings, and reading all the
13 evidence, it's very interesting what has happened
14 throughout the chronological order of this issue from
15 the 2008 to now, and how there's different players
16 that came up to us, or through the transcript, or
17 through the evidence, that it's unique that it's
18 almost like I had to have a little script to say
19 who's who, because I was getting little confused,
20 tell you the truth.

21 Looking at the original Decision & Order,
22 and the condition that was placed upon the
23 Petitioner, it appeared that there's some issues that
24 was not met because of maybe one person who was not
25 doing the right job, but still yet there is a company

1 or someone has to be the head to say, hey, if I'm not
2 doing my job, you know, we should do something. As
3 OP said, maybe we had to come back and say, you know
4 what, we need more time because of this.

5 So right now, Chair, I wanted to just say
6 that I did read the transcript, and it was very
7 difficult to hear everything. That's just a
8 statement.

9 CHAIRPERSON SCHEUER: Commissioner
10 Ohigashi.

11 COMMISSIONER OHIGASHI: First of all, I
12 agree with the state, OP, on the issue of numbers 2
13 and 3 on the D&O, that because Bridge Aina Le'a came
14 down that essentially developed the standard that you
15 have to take a look to the requirements or to
16 requirements in the D&O in light of Bridge Aina Le'a.

17 So I tend to think that number 3 with
18 regard to issue of reversion, that you still have to
19 take a look at Bridge Aina Le'a to make that
20 determination. You cannot, just because the
21 conditions were written before Bridge Aina Le'a, you
22 cannot take that in a vacuum. So I'm going to think
23 of it as that way.

24 The first problem that I see is whether
25 there is substantial compliance. And there is

1 clearly no compliance on several issues. The
2 compliance that we see is some money being spent on
3 engineering studies for the roundabout.

4 The other issue is whether or not they met
5 the requirement for housing. The requirement for
6 housing is interesting because they actually have an
7 agreement saying that they met housing. And they
8 transferred the property, which has a value in it.
9 So I cannot -- my analysis says that you have to take
10 into account what that value is in determining
11 whether there's substantial compliance.

12 Now, the County says agreement hasn't been
13 met. And that it's essentially void. But in
14 reliance upon the agreement, they transferred the
15 property. So that's a cost on their side, even if
16 you take the County's position to be correct. And if
17 you take the County's position to be correct, they
18 still have to meet that requirement.

19 Those are the two issues regarding
20 substantial compliance.

21 I haven't reached my definitive answer on
22 that, but assuming that happened, what I say is a
23 lot, like the Chair once said, a lot of kapulu in
24 this case.

25 You had a bad actor from the Petitioner's

1 side who seemed to have been very naughty and delay
2 things. And then you have the County who didn't do
3 due diligence in its review of the necessary
4 documents. And what bothers me is that they had
5 possession of that deed from the time it was given to
6 them, sent to them, until they recorded it. I think
7 that was the testimony Mr. Gyotoku said, he said he
8 recorded it.

9 So those issues take -- I'm taking into
10 account those issues with regard to the issues of
11 good cause. I mean there was some -- there must have
12 been some reliance by the Petitioner on those issues.
13 So -- and given that reliance, perhaps that was one
14 of the reasons why it was taking a little bit longer.
15 So that's one of the issues of good cause.

16 The last thing I think is this. I think
17 that there's a need for housing on this island, and
18 statewide anyway, and this is a project that is
19 subdividing lots where people can build houses on it.
20 It's not only the affordable housing component, but
21 it's adding inventory to existing housing.

22 The County tells me in their briefs that if
23 we revert, it might take four to six years, four
24 years in order to get back. And everybody -- I mean
25 the State doesn't have an opinion, but I know the

1 County and Petitioner seem to think that if we do
2 this, we can get there. They would have to reinstate
3 the zoning ordinance, is that right? And you don't
4 have to answer that, but I remember you have to, and
5 that might take about six months.

6 And if that's the case, four years to get
7 approvals, which doesn't mean construction within the
8 future, and six months to get the approval to do it,
9 those are the issues that I'm weighing in terms of my
10 mind.

11 And the last thing is that I cannot come to
12 terms with right now, but I will have to, is that I'm
13 really concerned about the County. I'm really
14 concerned about what went on in that. And I'm
15 really -- and although there is no evidence from bad
16 actors on the Petitioner's side with regard to that
17 transaction, I'm really concerned that the County do
18 something about this in trying to ferret out what
19 happened. I'm trying to make a determination what
20 happened.

21 Because it bothers me when people who are
22 in that position, they don't do the due diligence
23 necessary to protect the public. And that is my last
24 statement for right now. I'm just hopeful that that
25 would happen.

1 CHAIRPERSON SCHEUER: I want to clarify.
2 In the first part of your statement you used the
3 phrase "substantial compliance".

4 COMMISSIONER OHIGASHI: Commencement.

5 CHAIRPERSON SCHEUER: I just wanted to
6 offer you that opportunity. Commissioner Okuda.

7 COMMISSIONER OKUDA: Thank you, Mr. Chair.
8 First of all, I would like to thank everyone who
9 participated in this proceeding, thank the
10 Petitioner, Petitioner's representatives who have
11 come from very far to be part of this proceeding.

12 Not to signal out anyone, but I know Mr.
13 Lim and his firm always does good legal work, and
14 he's an advocate and he's got to make the points that
15 he makes to zealously represent his client. And he
16 can be assured that I don't take any umbrage at what
17 he argues, because this is what our system of justice
18 is based on the ability for people to freely and
19 professionally advocate and make statements for their
20 clients within the framework of the law.

21 Difficult decisions I think we look for a
22 lifeline, and the lifeline we look to is basically
23 guidance from the Hawaii Supreme Court, and it's
24 because, number one, the Hawaii Supreme Court gives
25 meaning to what the substance of the law is, but also

1 we are obligated to follow the framework of
2 decision-making that the Supreme Court lays out, and
3 also the rules that are enunciated by the Supreme
4 Court.

5 The framework of the decision-making in
6 this case I believe is governed by the Aina Le'a
7 case, that citation has been given before, and I
8 won't repeat it here. But what I will repeat is the
9 quotation from the case, that's 134 Hawai'i at Page
10 209, which says the procedure we are to follow,
11 quote, turns on whether the Petitioner has
12 substantially commenced use of the land in accordance
13 with its representations.

14 That's the standard and the rule we have to
15 follow. And, again, as I quoted before, the Hawaii
16 Supreme Court has stated in the case, and I quote,
17 the express language of HRS Section 205-4(g) and its
18 legislative history establish that the LUC may revert
19 property without following those procedures, provided
20 that the Petitioner has not substantially commenced
21 use of the property in accordance with its
22 representations. In such a situation, the original
23 reclassification is simply voided.

24 Now, I know that the application of that
25 rule may be harsh. We might wish that the

1 legislature had given the Land Use Commission some
2 other leeway, but that's the law that has been
3 enacted, and that's the law the Supreme Court has
4 said we have to follow.

5 Bridge Aina Le'a has given a definition of
6 what substantial commencement is, and that's found at
7 134 Hawai'i reports at page 213 to page 214, quote,
8 substantial, close quote is, according to Black's Law
9 Dictionary, quote, considerable in amount or value;
10 large in volume or number. And there is a citation
11 following that.

12 So the question is: What does the evidence
13 in the record show as far as whether or not there is
14 or is not substantial commencement. Because frankly,
15 that's how we make sure we don't discriminate against
16 people, we don't let our internal biases affect our
17 decision when we are forced and required to look at
18 the evidence in the record.

19 And this is what my view is of what the
20 evidence is in the record.

21 Number one, if you look at Petitioner's
22 most recent annual report filed August 16, 2018,
23 there are 24 listed conditions, but only four of
24 these conditions are stated as satisfied. Two of the
25 satisfied conditions, that's numbers 23 and 24, deal

1 with recordation of documents at the Bureau of
2 Conveyances.

3 So in other words, these conditions really
4 don't have anything to do with Petitioner's
5 commencement of the use of the land in accordance
6 with its representations.

7 Condition 6a, which requires reaching an
8 agreement with the Department of Transportation, is
9 marked as satisfied on the annual report. But the
10 testimony in this case indicated that, in fact, there
11 hasn't been -- I'm sorry.

12 If you look at the annual report, the
13 annual report states in its comments section, that
14 the Petitioner is, quote, reaching an agreement with
15 State DOT. And so, therefore, the condition is
16 basically moot.

17 I believe this was consistent with the oral
18 testimony that was given in this proceeding. So in
19 other words, the stated satisfaction of Condition 6a
20 really doesn't deal with Petitioner's commencement of
21 use of the land.

22 So really only one of the 24 conditions
23 listed as satisfied, which is Condition No. 9, which
24 is regarding the affordable housing condition,
25 provides really any positive evidence on whether the

1 Petitioner has, in fact, commenced use of the land in
2 accordance with its representations.

3 When you look at, or consider the oral
4 testimony given, the oral testimony is frankly absent
5 of real evidence of substantial commencement of use
6 of the land.

7 Mr. Grigoryants, when asked about -- by me
8 actually -- about whether or not the property is
9 being used, testified, and I quote:

10 As far as I know, as of today, it's not
11 being used. And that's on the transcript of October
12 24, 2018 page 50, lines 22 through 25.

13 In response to a similar question from the
14 Chairperson that question was:

15 Has there been physical improvements to the
16 property since the time that the Decision & Order was
17 passed ten years ago? Mr. Grigoryants's answer,
18 quote, I did not notice any changes.

19 But he also stated that it was his
20 responsibility with respect to those items. And
21 that's also the same transcript of October 24, 2018,
22 page 73 at lines 15 through 20.

23 And, again, if you -- and I don't want to
24 repeat some of the things that were stated earlier,
25 but reading, for example, Condition No. 3, the

1 infrastructure was not completed as required under
2 Condition No. 3. And Condition No. 3 also provided
3 for the fact that the Petitioner could either
4 complete the buildout of the project or secure a bond
5 for the completion thereof within ten years. And
6 that condition was not complied with.

7 With respect to Condition No. 9, the
8 affordable housing condition, you know, I join in
9 some of the concerns that my fellow Commissioners
10 have raised that -- I think there's an issue about
11 estoppel and possibly other remedies that the
12 Petitioner may have where the County, not only signs
13 off on a written document, but has it recorded.

14 If the argument now is that the County was
15 mislead into signing that document, well, then that
16 document or action should be taken to remove the
17 document from the public record, because otherwise
18 people examining the public record, whether it's
19 title companies or commissioners like us looking at
20 the record, may be led to believe things are a
21 certain way when it's really not. And so that's not
22 really an issue for us to deal with here.

23 But even assuming that that affordable
24 housing release, or release of the affordable housing
25 provision document was somehow effective as between

1 the County and the Petitioner, I do not believe, for
2 the following reasons, that that document is
3 sufficient evidence of substantial commencement of
4 use of the land on the record.

5 And it's for these reasons. First of all,
6 the housing requirement, according to the condition,
7 is required to be provided, quote, in accordance with
8 applicable affordable housing requirements of the
9 County. Nothing in Condition No. 9 prohibits the
10 Land Use Commission from itself determining whether
11 or not housing has been provided, quote, in
12 accordance with applicable affordable housing
13 requirements of the County.

14 And there's nothing in the condition which
15 gives either the County, the Petitioner, or any other
16 party besides the Land Use Commission the right to
17 determine whether or not that condition has been
18 satisfied or not satisfied and make that
19 determination binding on the County.

20 So in other words, the Land Use Commission
21 itself can determine whether or not that condition
22 has been met.

23 Now, if we look at Finding of Fact 152 in
24 the Decision & Order, Condition 152 basically states
25 that the number of affordable housing units or lots

1 would, and I quote here, which equate to the 80
2 planned units that will be provided for affordable
3 housing by the Petitioner.

4 So in other words, Finding of Fact 152
5 clearly states that the number of affordable housing
6 units should be 80 planned units. And there's no
7 evidence in the record that any construction of the
8 80 units has been commenced substantially or
9 insubstantially.

10 So I would find that the evidence shows
11 that the Condition No. 9, affordable housing
12 condition, has not been met and there's not
13 sufficient evidence in the record to demonstrate that
14 whatever was done between the County and the
15 Petitioner constitutes substantial commencement of
16 use of the land in accordance with the
17 representation.

18 The final point was basically this. I
19 would find that there is no due process violation
20 with the current proceeding. And for that I would
21 also refer back to the Aina Le'a, this time at page
22 191 of 134 Hawai'i Reports.

23 And the 339 Pacific 3d citation would be
24 found at page 689. In that case, the Hawaii Supreme
25 Court rejected the claim of a due process violation

1 in the context of an OSC proceeding. And the
2 rationale that the Supreme Court gave for rejecting a
3 due process claim was the fact that, and I quote
4 here:

5 With respect to procedural due process,
6 both Bridge and DW had notice of the OSC, and that
7 the LUC might revert the property. They also each
8 had a meaningful opportunity to be heard on the
9 proposed reversion.

10 And with regard to substantive due process,
11 the LUC's reversion was not clearly arbitrary and
12 unreasonable given the project's long history,
13 various representations made to the LUC, and the
14 Petitioner's failure to meet deadlines.

15 And so the record is clear, especially
16 given the number of hearings and the time spent on
17 this case, and the fact that the Chair has been very,
18 I think, open, to allowing submissions of all the
19 parties, that if we look at the standards set forth
20 by the Bridge Aina Le'a case, there is no due process
21 violation here, and I would so find.

22 As far as the claim that rule-making was
23 required, that's basically controlled by a number of
24 Hawaii Supreme Court cases. The last one is Pilaa,
25 P-i-l-a-a, 400 LLC versus Board of Land and Natural

1 Resources. That's 132 Hawai'i 247, which can be
2 found at page 266.

3 The Pacific 3d citation is 320, Pacific 3d
4 912, 931. In that case, and the other Hawai'i
5 Supreme Court cases, the Hawaii Supreme Court
6 recognized the fact that in administrative
7 proceedings there are basically two things that can
8 go on.

9 One is rule-making, which applies to future
10 action or adjudication, which applies to violations
11 and what actions or remedies an administrative agency
12 should take regarding such violations.

13 And based on those cases, and also the
14 application of Hawaiian Electric Company case, which
15 is 81 Hawai'i 459, a 1996 Hawai'i Supreme Court case.
16 This type of enforcement action does not constitute
17 rule-making, and I would follow the precedent set
18 forth by the Hawaii Supreme Court in the two cases I
19 cited that this is really an enforcement action, and
20 the evidence is being taken for enforcement.

21 And the final point, which I had raised
22 earlier about equal protection. Equal protection
23 violation requires proving two elements, not only
24 some type of selective type of prosecution, but also
25 that, number two, the action is being brought by the

1 fact, or the use of a suspect classification like
2 race, national origin, and things like that.

3 As I stated in one of the earlier hearings,
4 I wanted to assure everyone that the Commission does
5 not take actions based on the fact that somebody
6 comes from a different country, speaks a different
7 language, is a citizen of this country, or not a
8 citizen of this country, or what church they belong
9 to.

10 Contrary to what some people in politics
11 might say, I truly believe the strength of this
12 country is not only resident alien immigrants, but
13 it's people who come here to United States, even if
14 it's for short stays, for business, or just to see
15 friends that they have here.

16 I mean, we have a large Armenian community
17 in Los Angeles and in the United States because,
18 frankly, when the Armenian genocide took place, the
19 United States was a country that welcomes everyone,
20 and I hope that we still continue that view that this
21 is a country that welcomes everyone.

22 So the decision here has nothing to do with
23 what language anyone speaks, what anyone has done or
24 anything like that. It's simply based on the fact
25 that, looking at the standards set forth in Bridge

1 Aina Le'a, there is no substantial commencement of
2 use of the land in consideration, or looking at the
3 representations that were made. And that's simply
4 what this is about.

5 Perhaps if the legislature gave us other
6 options, we could look at other options. But we can
7 only enforce the law with the tools that the
8 legislature has given us, and the standard that the
9 Supreme Court has laid out.

10 So for those reasons, and other good
11 reasons in the record, I would vote to revert the
12 land to its prior classification.

13 CHAIRPERSON SCHEUER: Thank you,
14 Commissioner Okuda. Commissioner Mahi.

15 I remind the Commissioners we don't yet
16 have a motion in front of us.

17 VICE CHAIR MAHI: My comments will be short
18 and brief.

19 First of all, this whole bringing up of
20 this Aina Le'a -- and it's not le'a, it's **Aina Le'a**.
21 What does that mean? Anybody know what that means
22 and around here.

23 CHAIRPERSON SCHEUER: Joy.

24 VICE CHAIR MAHI: Yes. Le'a has several
25 meanings. In Hawaiian we can think of the positive

1 meaning, which is to be joyous, have fun, relax.
2 Le'ale'a also has meaning, to be a little bit of
3 nothing. You know, when you hana'ike aloha, you
4 know, full, like we have in Hawaiian language. Nanea
5 ko maka i ka le'a le'a. You know what that means?
6 My eyes after you, and I'm going to get you. And
7 that's doesn't mean big aloha hug, it's more than
8 that.

9 So sometimes I think when we name, or have
10 these names come up, it's hewa already. It's wrong.
11 So maybe that's a good reason why it came up in this
12 situation.

13 My feeling is I look, what I'm trying to
14 weigh here is the fact that, yeah, there is a lot of
15 hewa hewa going on at the beginning. I don't want to
16 restate what all of my fellow Commissioners have
17 shared already, so that is already said.

18 What concerns me is the fact that Aina Le'a
19 is precious to us. Aina is so precious, it's like
20 aina kamaha'o is food to us. And if we just let that
21 land stay over there when it could have been doing
22 something, maybe some food with pipi on top, kalo,
23 plant something.

24 700 acres. In Hawaiian we got poho poho.
25 You know what that means? Waste. And that's why

1 this movement over here by OP saying, hey, this is
2 wasting of this land. We could have been feeding
3 people. We could have been doing something, even
4 though owned by somebody else. That's hewa.

5 So what I'm weighing, you know, the County,
6 you know with their issues, you know. You guys got
7 to figure out when brother said, oh, even if we
8 change it back to agriculture, they going to push
9 back to have housing. And, hey, we don't have
10 somebody going to use that land. Maybe that's what
11 it is, housing, I mean, yeah. You got to think about
12 that.

13 That's what I'm weighing right and left on
14 my 'ike papa lua, trying to make that discernment.
15 So I just want to say what's on my mind. And I think
16 it's wrong that we have come this far, and we have
17 treated the land so disfaithfully. Shame on us.
18 That's all I'm going say.

19 CHAIRPERSON SCHEUER: Thank you,
20 Commissioner Mahi.

21 Commissioner Chang.

22 COMMISSIONER CHANG: Thank you.

23 This has been very difficult. I
24 appreciated that, Mr. Valery, you have come before us
25 on two hearings, and I know your travel has been far.

1 I believe you are trying. You have stepped in at a
2 point in time where previous actors may not have
3 lived up to certain standards, or at least the
4 conditions.

5 And I understand that Mr. Lim has also
6 inherited this case from previous counsel.

7 But we at the Land Use Commission are faced
8 with the question as to the application of the
9 conditions, and applying those conditions with the
10 relevant case law.

11 Sitting through all of the hearings, and I
12 take this really seriously, because lands have been
13 rezoned, boundaries have been changed based upon
14 representations and very good reasons at that point
15 in time.

16 And it is with great reluctance to have to
17 change that, but we must evaluate each case on its
18 own.

19 So in applying the standards, I looked at
20 all the conditions. I do believe that the Condition
21 No. 2, it has not -- the infrastructure has not been
22 built within the two years, it's has not been
23 completed.

24 Based upon the evidence, Condition No. 6,
25 transportation. There has not been an agreement with

1 Department of Transportation, and that was by the
2 Petitioner's representative's own admission.

3 Condition No. 9, providing affordable
4 housing. There seems to be some dispute in that, but
5 it is clear, based upon the Mayor's latest
6 representation to us by the County's concern, that
7 condition has not been met.

8 The evidence as to Condition No. 11
9 regarding archaeological Site No. 22, the record
10 appears to confront the Petitioner's consultant with
11 SHPD, but there has been no agreement or concerns
12 from SHPD.

13 Condition No. 15, based upon the evidence
14 presented, the civil defense and funds to construct
15 adequate solar power defense measures, Petitioner's
16 own admission, that has not been satisfied.

17 Condition No. 20 relating to notice of
18 change of ownership, Petitioner also admits that
19 there's been some discrepancies, and we appreciate
20 that they have been submitting some additional
21 documentation. But there's been some discrepancies
22 relating to the change of ownership.

23 Condition No. 21 relating to annual report,
24 there has not been regularly submitted annual report,
25 although appears to be attempt to try to catch up

1 with that over the last several years.

2 So in my view, those specific conditions
3 have not been met.

4 With respect to whether there has been
5 substantial commencement of the use of the land,
6 again, listening to all the testimony of these last
7 couple of months, I think it is Petitioner's own
8 acknowledgement that the land has not been developed.

9 Petitioner's own consultant admitted no
10 improvement on the land. We have had public
11 testimony from, I believe, Ms. Alos, who's confirmed
12 no use of the land.

13 Petitioner admitted that approximately
14 \$1.5 million was spent on the project but almost --
15 but most of that was spent prior to this LUC order.

16 Petitioner's consultant also stated that
17 the estimated cost to build the project would be
18 \$45 million. To date they have only spent \$900,000
19 and those have been on engineering cost primarily.

20 And I think it was also Petitioner's own
21 testimony that there was insufficient oversight. And
22 that whether the previous agent for the Petitioner
23 had some misdeeds, I think as far as LUC, we look to
24 the Petitioner to assume responsibility, and I
25 believe he also said he assumed responsibility for

1 that.

2 So that's what I have found on the record,
3 that's what I found in the testimony over these last
4 several months that there has not been substantial
5 commencement of the use of the land.

6 So while there may be some dispute or
7 argument, legal argument as to whether Bridge Aina
8 Le'a applies, or just Conditions 2 and 3, what's our
9 jurisdiction.

10 For all the reasons that have been
11 previously stated, I believe Bridge Aina Le'a does
12 apply, and it does set forth a standard upon which we
13 are to evaluate whether the Petitioner has satisfied
14 the conditions as set forth in the order, and whether
15 there's been commencement use of the land.

16 Assuming arguendo, as counsel has argued,
17 that the Bridge Aina Le'a doesn't apply, I still find
18 the Conditions 2 and 3 have not been satisfied, and
19 that the Commission does have the authority to take
20 appropriate action, including reversion of the land.

21 And, again, the notion that this is a death
22 penalty, I think the Commission, at least I take this
23 very seriously, this is the last resort. This is not
24 an action that we take lightly, as we have had
25 numerous -- the County and both -- OP has argued that

1 affordable housing, and maybe we should give them a
2 chance, I think we have to be -- that's weighed very
3 heavily. I think the County has argued, and they
4 have come before us and said affordable housing is
5 really important.

6 So that is what I find the evidence to have
7 been over these last several months. I know that
8 there is no motion, but I didn't want to put that on
9 the record as far as what I heard the testimony to
10 be.

11 CHAIRPERSON SCHEUER: Thank you,
12 Commissioner Chang. Commissioner Cabral.

13 VICE CHAIR CABRAL: I am extremely
14 conflicted. I am -- it's very emotional. This is my
15 island. I have properties in the lava zone that -- I
16 have friends. I have tenants. I have lots of people
17 I know dearly that have lost their home. I rent --
18 I'm a rental company. I rent hundreds of homes out,
19 and I could rent a couple hundred more homes tomorrow
20 if I had them.

21 So I feel this immense pressure to do
22 everything possible to have more housing available,
23 and while, by no means do I think that these lots of
24 in Waikoloa that won't be ready, I wish they were
25 ready tomorrow, and we could drop a house on them,

1 I'd be even happier. And if they could be fairly
2 affordable, even happier.

3 So I'm not saying that that is the answer
4 to the current emergency that our island has, but I
5 am conflicted because I hear -- I see what the law
6 says. And I see what sort of -- I see what might be
7 my legal obligation here, might be to follow that
8 law, and yet I have this horrible desire to fix my
9 island.

10 And so I am definitely in conflict with
11 this situation, and I really hope that whatever comes
12 of this, that it not be a death sentence to anything,
13 but that we can continue to move forward as rapidly
14 as possible to have more lots available. Because at
15 any point in time, and in my capitalistic world, that
16 we have a greater supply of lots, greater supply of
17 houses for our people. So I am in conflict. Thank
18 you.

19 CHAIRPERSON SCHEUER: I referenced at the
20 beginning of the hearing that we take oaths of office
21 contained in the Hawai'i State Constitution, Article
22 XVI, Section 4, requirement that "all eligible public
23 officers, before entering upon the duties of their
24 respective offices, shall take or subscribe to the
25 following oath or affirmation:

1 I do solemnly swear that I will support and
2 defend the Constitution of the United States, and the
3 Constitution of the State of Hawaii, and that I will
4 faithfully discharge my duties as a Land Use
5 Commissioner to the best of my ability.

6 So why do we do that? I mean, ultimately
7 right? We want people to have good lives. We want
8 people to have places to live. We want to see areas
9 developed, and at the same time we want them done in
10 ways that protect what in Hawai'i we have identified
11 as critical public trust natural resources and
12 cultural resources that are required to be protected.

13 And we have a State Land Use Commission,
14 because it has been found by the State and by the
15 State Legislature that it is good to have two layers.
16 It's good to have a couple layers of decision-making.
17 And there are times, which I think that the confusion
18 over the affordable housing requirement has -- it's
19 probably good that there's two layers of people
20 looking at things. That sometimes one layer doesn't
21 do as well they could, and the other layer should be
22 there to make sure the public interests are served.

23 So that's like the context of our
24 decision-making, just trying to do the right thing in
25 the right ways. And we have what a number of my

1 fellow Commissioners have referred to as sort of this
2 three steps that we have to look to in this case.
3 Right?

4 Has there been substantial -- excuse me.

5 First of all, has the condition been
6 violated, one or more conditions been violated? If
7 that's the case, has there been substantial
8 commencement? And if the case is that there hasn't
9 been substantial commencement, was there some good
10 cause that should show us not to take action?

11 Now, the pidgin version of this, the
12 clearer version of this is like: You did what you
13 said you was going do? Did you even start? If you
14 didn't, how come? Right?

15 Everybody agrees you never even went start.
16 Most of the conditions have not been met. The vast
17 majority. The Petitioner has admitted to that on the
18 record in regards to numerous conditions.

19 So I think we are all like past that part.
20 Clearly under the law that we are sworn to uphold,
21 they didn't meet that.

22 So did you even start? No. Didn't even
23 start. The closest thing that maybe came close to
24 starting was the transfer of land that is under
25 dispute. And clearly there are some problems that

1 went on in that issue between the County and the
2 Developer.

3 But I will say two things. One is, for
4 your every day person who looks at -- who lives in
5 Hawai'i, who says, oh, you know, they're letting
6 people develop. We are getting some affordable
7 housing on it. Even transferring a parcel of land
8 doesn't pass the sniff test of somehow we have
9 actually provided affordable housing for people that
10 need it.

11 Beyond that, even if we found that the
12 Commission, you know, that we relied on the County's
13 first representation, and that the conditions had
14 been met to satisfy that, that's a very, very small
15 proportion of the value of the over all project. It
16 doesn't actually reach the threshold of substantial
17 commencement.

18 And so then we come to the third thing, for
19 me. So, well, how come? What happened? Right? And
20 what has come in front of us for the last few months
21 from the Petitioner is, well, you know what, all this
22 stuff happened. We had this guy who cheated us. We
23 are ready to do it now.

24 And so it becomes our responsibility to
25 decide whether that's credible or not. And I

1 personally find, and I find this part difficult to
2 talk about, but I find that quite a bit of what the
3 Petitioner presented was not credible.

4 We had things introduced into evidence by
5 the Petitioner at the very beginning that said, hey,
6 here's who the owners of the property are. And then
7 later we have people testifying on behalf of the
8 Petitioner saying no, no, that's actually not
9 correct.

10 We have had at least two versions of the
11 agreement showing that the affordable housing
12 condition has been introduced into the record. I
13 don't know which is the right one.

14 I think the real estate expert, who was
15 presented to us as a development expert, Mr.
16 LaPinta -- I have no doubt he's a very good real
17 estate broker. I think what is on the record,
18 however, is that he's not a real estate developer
19 who's necessarily capable of moving this project
20 forward.

21 I found the financing claims very
22 troubling, because I actually thought Mr. LaPinta was
23 articulate and correct when he said the most you
24 would ever need at any one time to finance this is a
25 \$15 million commitment. And yet we had a \$45 million

1 commitment, but it wasn't from a third-party Bank of
2 Hawaii, First Hawaiian Bank, someone who has done
3 their due diligence and said this is ready to go. It
4 was from a related company.

5 So there is also things that came up,
6 including the sort of lack of current AIS, right?
7 The EIS that contained the AIS for this project was
8 developed prior to the adoption of rules governing
9 AIS's by the State Historic Preservation Division.

10 So whether or not there are substantial
11 public trust cultural resources at play in this
12 property really is not fully known.

13 So for me to then get to -- you know, I
14 really appreciate the community members who have come
15 in faithfully on this. And like my fellow
16 Commissioners, I want to see more housing. I want to
17 see traffic improvements that are needed by the
18 community. But do I have faith at this time? Has
19 there been good cause shown that deferring action
20 will result in that? I don't have that faith. I
21 actually think that the quickest path to get things
22 on this property going would be to find that there
23 is -- that we should be reverting the property.

24 And I think -- and just in reference to the
25 phrase of the "death penalty", I realize in the

1 context of the Land Use Commission, this is the
2 harshest, and really the only tool that the
3 legislature has given us. We've actually asked that
4 the legislature give us other tools. And we do
5 things less than reverting the entire property. So
6 far they've just left us with, this is what you get
7 to do. This is the one tool you have available to
8 you. And you have an obligation to use it, by the
9 way.

10 What has been on the record is that the
11 vast majority of what the Petitioner wants to do can
12 be done under the County without our involvement at
13 all. So I do believe that if there was a case of --
14 if this was, say, high density urban development, and
15 really had to transfer this to the Urban District,
16 and that we were reverting it from Urban back to
17 Conservation or Ag, and clearly couldn't go forward
18 if we took this action, it would be a very different
19 story from this where it's actually on the record
20 from a witness, from the County, that it might take a
21 little while, might take a few years, but you could
22 do this under the County's jurisdiction.

23 And the point of which the Petitioner's own
24 actions has delayed things by a decade, I don't feel
25 particularly bad that a few years extra are going to

1 occur because we are fulfilling our constitutional
2 and statutory duties.

3 So, Commissioners, is there a motion?

4 VICE CHAIR MAHI: I move.

5 CHAIRPERSON SCHEUER: Can you style it in
6 the form that you would move that a violation of the
7 conditions either has or has not occurred; that the
8 Petitioner has not substantially commenced use of the
9 land, and that the Petition Area should either be
10 reverted to its former land use designation or
11 changed to a more appropriate designation.

12 VICE CHAIR MAHI: So said.

13 CHAIRPERSON SCHEUER: Which are you
14 moving --

15 VICE CHAIR MAHI: Moving to show that there
16 is evidence that we should revert. Support reversion
17 of the property back to Ag.

18 CHAIRPERSON SCHEUER: There's been a motion
19 from Commissioner Mahi. Correct me if I have
20 misunderstood this: That there has been a violation
21 of conditions that the Petitioner has not
22 substantially commenced use of the land, and that the
23 Petition Area should be reverted to its former land
24 use classification into Agricultural District.

25 VICE CHAIR MAHI: Yes.

1 CHAIRPERSON SCHEUER: Is there a second to
2 that motion?

3 COMMISSIONER WONG: Second.

4 CHAIRPERSON SCHEUER: Commissioner Wong has
5 seconded. You'd like to say something?

6 COMMISSIONER WONG: So I guess, after
7 reading and hearing all this argument, I'm seconding
8 it just because, to me, the conditions were not met.
9 They had ten years. And from what I gather,
10 Condition 2, 3, 6, 9, 11, 15, you know, it was not
11 met, and especially the affordable housing when the
12 Mayor said it didn't meet the requirements for
13 affordable housing, that really kind of hit me on the
14 head, to say the least, that affordable housing was
15 not met, even though it's needed, so that's why I
16 seconded the vote.

17 CHAIRPERSON SCHEUER: So a motion has been
18 made by Commissioner Mahi and seconded by
19 Commissioner Wong. Is there discussion on the
20 motion? Commissioner Aczon.

21 COMMISSIONER ACZON: Thank you, Mr. Chair.
22 I've been reserving my comments until after the
23 motion. Now that we have a motion, I just want to
24 say that I share my fellow Commissioners' difficulty.
25 It's a difficult decision. We are not taking it

1 lightly. We all in agreement that this County needs
2 affordable housing, and also those traffic
3 improvements that the community has been longing for,
4 the County has -- (indecipherable) -- coming from
5 this project.

6 But I'm sorry to say, but I have to vote in
7 favor of the motion. There are various, majority of
8 the conditions weren't met by the Petitioner, and I
9 just want to focus on one condition.

10 Petitioner admitted that they failed to
11 comply with the Decision & Order Condition No. 2 by
12 failing to complete the buildout of the project by
13 June 10th, 2018.

14 The condition defined buildout completion
15 of the backbone infrastructure to allow for the sale
16 of the individual lots.

17 Petitioner has made no indication that it
18 has commenced with that infrastructure development of
19 the project, or that there has been any physical
20 development of the land.

21 In my personal view, the Petitioner has not
22 provided compelling evidence of substantial
23 commencement of the use of the land and provided a
24 good cause to excuse lack of development or
25 satisfaction of conditions.

1 We cannot predict or depend on what will
2 happen in the next ten years, but what we have in
3 front of us today is the past ten years of
4 nonconformance of the Petitioner. I have to make my
5 decision based on the past ten years.

6 I can assure the Petitioner that my
7 decision is not based on any personality or rumors,
8 but rather based on facts and evidence presented to
9 us these past three hearings.

10 I hope the Petitioner and Hawaii County can
11 find a way to work together for a better outcome for
12 the betterment of the people of Hawaii County, and
13 the State of Hawaii as far as for the benefit of the
14 Petitioner. I wish both of them the very best.

15 Thank you, Mr. Chair.

16 CHAIRPERSON SCHEUER: Thank you,
17 Commissioner Aczon.

18 Further discussion on the motion?
19 Commissioner Ohigashi.

20 COMMISSIONER OHIGASHI: After listening to
21 Mr. Okuda's rendition, I would agree, and Chairman, I
22 would agree that I -- I would agree that there hasn't
23 been substantial commencement.

24 My only problem that's been facing me all
25 this time, is that if we revert, the question turns,

1 is what is next? And I cannot look at it in a vacuum
2 saying it's up to the County, and up to the
3 Petitioner. I think that I'm not comfortable
4 necessarily with not having commitment placed upon
5 the property that can be enforced or can be pushed.

6 To revert means that we lose everything.
7 So up until the last second when Mr. Orodenker calls
8 my name, I will be thinking about this.

9 So I'm going to ask you to bear with me.
10 But I'm just going to say on the record, I understand
11 everybody's position, and I understand everybody's
12 feelings, but I have to think about this up to the
13 last second.

14 CHAIRPERSON SCHEUER: Thank you,
15 Commissioner Ohigashi.

16 Any further discussion? Commissioner
17 Okuda.

18 COMMISSIONER OKUDA: Chair, just so that
19 the record is clear, I would like to incorporate by
20 reference the discussion I gave earlier, since now a
21 motion has been made.

22 CHAIRPERSON SCHEUER: Are there any further
23 discussions of the motion? Hearing none, Mr.
24 Orodenker, please poll the Commission.

25 EXECUTIVE OFFICER: Thank you, Mr. Chair.

1 The motion is that a violation of conditions has
2 occurred, that Petitioner has not substantially
3 commenced use of the land, and that the Petition Area
4 should therefore revert to its former land use
5 designation.

6 Commissioner Mahi?

7 VICE CHAIR MAHI: Aye.

8 EXECUTIVE OFFICER: Commissioner Wong?

9 COMMISSIONER WONG: Aye.

10 EXECUTIVE OFFICER: Commissioner Chang?

11 COMMISSIONER CHANG: Aye.

12 EXECUTIVE OFFICER: Commissioner Aczon?

13 COMMISSIONER ACZON: Aye.

14 EXECUTIVE OFFICER: Commissioner Ohigashi?

15 COMMISSIONER OHIGASHI: No.

16 EXECUTIVE OFFICER: Commissioner Okuda?

17 COMMISSIONER OKUDA: Yes.

18 EXECUTIVE OFFICER: Commissioner Cabral?

19 VICE CHAIR CABRAL: My apologies for my
20 breakdown earlier. I am still completely conflicted,
21 but I guess emotion isn't what is supposed to direct
22 us, but law and requirements, and so I will
23 regretfully vote in favor of the motion.

24 EXECUTIVE OFFICER: Chair Scheuer?

25 CHAIRPERSON SCHEUER: Aye.

1 EXECUTIVE OFFICER: Thank you, Mr. Chair.
2 The motion passes seven votes to one.

3 CHAIRPERSON SCHEUER: Thank you.

4 The staff is hereby instructed to prepare a
5 final Decision & Order reflecting the Commission's
6 decision on this matter for review and approval by
7 the Commission at a hearing that will be determined.

8 We are going to -- just one moment, please.
9 We are recessed for the day and will reconvene
10 proceedings tomorrow at the Malcolm Center in Kihei,
11 Maui at 9:30 a.m.

12 (The proceedings adjourned at 3:52 p.m.)
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CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on November 28, 2018, at 9:30 a.m., the proceedings contained herein was taken down by me in machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct copy of the proceedings had in the foregoing matter.

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

Dated this 28th day of November, 2018, in Honolulu, Hawaii.

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