

LAND USE COMMISSION

STATE OF HAWAII

Hearing held on January 23, 2019

Commencing at 12:30 p.m.

Hilo State Office Building

Meeting Room A, B, C

725 Aupuni Street

Hilo, Hawaii 96720

AGENDA

I. Call to Order

II. Adoption of Minutes

III. Tentative Meeting Schedule

IV. ACTION

No. A18-806 Barry Trust (Hawaii'i)

Consider Petitioner's Motion Requesting the
Land Use Commission to be the Approving Agency
for an Environmental Assessment

V. ACTION

A18-805 Church (Hawaii'i)

Consider Amended Motion that the Land Use
Commission Accept an Existing EA/FONSI as
Sufficient to Support the Petition

VI. RECESS

BEFORE: Jean Marie McManus, CSR #156

APPEARANCES:

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

STAFF:

RANDALL S. NISHIYAMA, ESQ.
Deputy Attorney General

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

DAWN APUNA, ESQ.
Deputy Attorney General
AARON SETOGAWA, Planner
(Present via telephone)
For State Office of Planning

RON KIM, ESQ.
Deputy Corporation Counsel
JEFF DARROW,
For County of Hawaii

DEREK SIMON, ESQ.
Carlsmith Ball, LLC
For A18-806 Barry Trust

KENNETH CHURCH
JOAN EVELYN HILDAL
Pro Se
For A18-805 Church

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1 CHAIRPERSON SCHEUER: Aloha kakou. Good
2 afternoon.

3 This is the January 23rd, 2019 Land Use
4 Commission meeting.

5 Our first order of business is the adoption
6 of the December 13, 2018 minutes.

7 Are there any corrections or comments on
8 the minutes? Hearing none, is there a motion to
9 adopt them?

10 COMMISSIONER ACZON: I move.

11 CHAIRPERSON SCHEUER: A motion has been
12 made by Commissioner Aczon to adopt the minutes. Is
13 there a second?

14 COMMISSIONER WONG: Second.

15 CHAIRPERSON SCHEUER: Seconded by
16 Commissioner Wong. Any discussion? All in favor say
17 "aye". Anybody opposed? The minutes are unanimously
18 adopted.

19 Our next agenda item is our tentative
20 meeting schedule. Mr. Orodener.

21 EXECUTIVE OFFICER: Thank you, Mr. Chair.

22 Tomorrow we will be at the Honolulu
23 International Airport for Robinson Kunia, Petition
24 for Declaratory Order.

25 On February 6th we will be at the Courtyard

1 Marriott on North Shore for Malaekahana, and Hawaiian
2 Agricultural Land Petition.

3 February 7th we will be in Kona at NELHA
4 for the Lanihau and HHFDC and Shopoff status update.

5 On February 20 to 21st, we will be on Maui
6 for the Ka'ono'ulu Intervenor Motion for Order to
7 Show Cause and to hear the Kihei High School Status
8 Report.

9 March 13th and 14 is currently open.

10 March 27th is currently open.

11 March 28th we will be at NELHA for the
12 Waikoloa Mauka Adoption of Order.

13 On April 10th, we will be in Honolulu for
14 the Waiawa matter.

15 And on April 23rd to 24th we will be at
16 Hawai'i Memorial FEIS hearing at Kaneohe Bayview Golf
17 Course.

18 On May 8th and 9th, we are currently open.

19 May 22nd to 23rd we will be overnight on
20 Kaua'i for the Kealia and Hokua Place matters.

21 And that takes us to June.

22 CHAIRPERSON SCHEUER: Thank you.

23 Commissioners, are there any questions for
24 Dan? Hearing none, I'll just deviate from the script
25 for one moment, since we have some folks who have not

1 appeared before us before.

2 State Land Use Commission, there's nine
3 possible members. We have eight right now. One of
4 us is physically not able to attend the meeting
5 today.

6 We're all volunteers. We're not getting
7 paid to do this job. We do it by being appointed by
8 the governor and confirmed by the senate. And so we
9 try to be as respectful of peoples' time because we
10 know many of you are taking your own time to be in
11 front of us. Thank you.

12 The next agenda item is an action meeting,
13 Docket A18-806, Petition of Kevin M. Barry and Monica
14 S. Barry, Trustees of the Barry Family Trust's Motion
15 Requesting the Land Use Commission to be the
16 approving agency for the Environmental Assessment in
17 the matter of the Barry's Petition to Amend the Land
18 Use District Boundary of Certain Lands Situated at
19 Keaau, Puna, County and State of Hawaii, Consisting
20 of .51 acres from the Conservation District to the
21 Agricultural District, Tax Map Key No.
22 (3)1-5-059:059.

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

25 MR. SIMON: Derek Simon for Petitioners

1 Kevin and Monica Barry as Trustees of the Barry
2 Family Trust. Today with me in the audience is Kevin
3 Barry.

4 CHAIRPERSON SCHEUER: Thank you, Mr. Simon.
5 Hawaii County?

6 MR. KIM: Deputy Corporation Counsel Ron
7 Kim representing the County of Hawaii's Planning
8 Department. Also appearing with me to represent the
9 Planning Department is Jeff Darrow, Long-Term
10 Planning Program Manager.

11 CHAIRPERSON SCHEUER: And I understand we
12 have by phone from Honolulu representatives of the
13 Office of Planning.

14 MS. APUNA: Good afternoon. Dawn Apuna on
15 behalf of the State Office of Planning. Here with me
16 today is Aaron Setogawa.

17 CHAIRPERSON SCHEUER: Thank you very much.
18 Now, let me next update the record.

19 On February 1st, 2012, the Commission
20 received a letter of inquiry from All Aina Services.

21 On December 19, 2018, the Commission
22 received the Petitioner's Petition for Land Use
23 District Boundary Amendment and Petitioner's Exhibits
24 1 through 9, with cashier's check for the \$5000
25 filing fee, CD containing docket computer files and

1 the original and a hard copy of the Petition and
2 Motion Requesting the Land Use Commission to be the
3 approving agency for an Environmental Assessment.

4 On December 20, the Commission received an
5 additional copy of the Petitioner's Motion Requesting
6 the Land Use Commission to be the approving agency
7 for the Environmental Assessment.

8 On December 21st, 2018, the Commission
9 received an Amended Certificate of Service for the
10 Petition for Land Use District Boundary Amendment and
11 the Motion Requesting the Land Use Commission to be
12 the approving agency to an Environmental Assessment,
13 and an additional affidavit attesting to service of
14 the Petition.

15 On December 29th, the Commission received
16 OP's Response to Petitioner's Motion Requesting the
17 Land Use Commission to be the approving agency to the
18 Environmental Assessment.

19 On January 10th of this year, the
20 Commission mailed Petitioner an acknowledgment of the
21 receipt of documents and comments on the Petition for
22 District Boundary Amendment.

23 On January 14th, the Commission received
24 County of Hawaii Planning Department's Response to
25 Petitioner's Motion and an Land Use Commission

1 meeting agenda notice for the January 23-24, 2019
2 meeting was sent to the Parties and the Statewide,
3 Oahu and Hawai'i mailing lists.

4 Mr. Simon, has our staff informed you about
5 the Commission's policy regarding reimbursement of
6 hearing expenses, and if so, can you please state
7 your clients' position on the matter?

8 MR. SIMON: We have not discussed that
9 policy to date, but I'm roughly aware of the policy.

10 CHAIRPERSON SCHEUER: Can you first of all
11 turn your mike up and speak right into the
12 microphone?

13 (Mr. Simon complies.)

14 That's a little bit better. Most of the
15 time I'm checking whether OP can hear us. Can OP
16 hear us?

17 MS. APUNA: Yes. The second time was a lot
18 better.

19 CHAIRPERSON SCHEUER: Has the staff
20 informed you of the policy?

21 MR. SIMON: I have not directly discussed
22 the policy with staff in regards to this matter, and
23 would need to consult with my client on the policy.

24 CHAIRPERSON SCHEUER: Would you like to
25 take a couple minutes to consult with your client so

1 we can proceed?

2 MR. SIMON: I don't have a copy of the
3 policy in front of me, but I'm happy to do so.

4 CHAIRPERSON SCHEUER: It's a standard
5 practice in front of the Commission.

6 I'm going to take a two-minute recess.

7 (Recess was taken.)

8 CHAIRPERSON SCHEUER: We're back on the
9 record.

10 Mr. Simon?

11 MR. SIMON: My apologies, Chair Scheuer,
12 Commissioners, I have confirmed with my client and
13 he's okay to abide by the policy.

14 CHAIRPERSON SCHEUER: I'm going to remind
15 you to really speak close to the mike

16 MR. SIMON: My apologies.

17 CHAIRPERSON SCHEUER: Now, let me briefly
18 run over our procedure today.

19 First, I will call for anybody desiring to
20 provide public testimony on this motion to identify
21 themselves. I'm not seeing anybody in the room who I
22 believe is likely to be providing public testimony on
23 this matter who is not already the Petitioner. There
24 is no indication of anybody that is going to provide
25 public testimony.

1 After that, we will then -- unless somebody
2 comes forward to provide public testimony.

3 We will then begin proceedings on the
4 motion, beginning with the Petitioner presenting
5 their case, followed by the County Planning
6 Department, and then by the State Office of Planning.

7 The Petitioner may reserve a portion of
8 their time to respond to comments made by the County
9 and Office of Planning.

10 Are there any questions on our procedures
11 today, Mr. Simon?

12 MR. SIMON: None for Petitioner.

13 CHAIRPERSON SCHEUER: County?

14 MR. KIM: No, thank you.

15 CHAIRPERSON SCHEUER: Office of Planning?

16 MS. APUNA: No questions.

17 CHAIRPERSON SCHEUER: I'll note for the
18 record that from time to time I'll call for short
19 breaks, including a chance to give our court reporter
20 a rest.

21 Are there any other questions about our
22 procedures? Seeing none, thank you.

23 Final check, anybody desiring to provide
24 public testimony today? Hearing none, let's proceed
25 with our case with the Petitioner.

1 MR. SIMON: Good afternoon, Chair Scheuer,
2 Commissioners.

3 First and foremost, I'd like to thank you
4 all for taking the time and efforts to get this
5 motion before you today.

6 As I mentioned, we represent the Barry
7 Family Trust, Monica and Kevin, husband and wife, are
8 the trustees of that trust.

9 They purchased the Petition Area about ten
10 years ago in preparations of retiring. Their goal
11 has since been to develop a single-family dwelling,
12 and related agricultural uses on the property.

13 They're now at the point where they feel
14 they're able to do so, and coming before you is the
15 first step in that process.

16 In the motion there's really two questions,
17 I think, one of which is whether Chapter 343
18 compliance is required. I think that's quite clear.
19 Under HRS 343-5 and the regulations that, you know,
20 set District Boundary Amendment out of the
21 Conservation District is a trigger, and there's no
22 exemptions or anything of that nature.

23 And the second issue would be whether the
24 Commission is the appropriate agency to process an
25 Environmental Assessment. And we also think that's

1 quite clear under both the Chapter 343, the
2 regulations, and also the Commission's rules as well.

3 I have nothing further to speak on that.

4 CHAIRPERSON SCHEUER: Okay. Are there any
5 questions for Mr. Simon, Commissioners? Seeing none.

6 Are you going to reserve time to respond to
7 anything that might arise?

8 MR. SIMON: Only if there is any
9 substantive comments.

10 CHAIRPERSON SCHEUER: Hawaii County, please
11 proceed.

12 MR. KIM: The County, as stated in its
13 Position Statement, has no objection. The County has
14 no objection to the Land Use Commission being the
15 accepting agency for an Environmental Assessment or
16 EIS.

17 CHAIRPERSON SCHEUER: That's it?

18 MR. KIM: Yes.

19 CHAIRPERSON SCHEUER: I thought so, but I
20 wanted to confirm.

21 Commissioners, are there any questions for
22 Hawaii County?

23 We are just whipping through this. Office
24 of Planning.

25 MS. APUNA: Office of Planning has no

1 objections to the motion. Thank you.

2 CHAIRPERSON SCHEUER: Okay. We're going to
3 set a record here on this.

4 Commissioners?

5 Nothing else was raised, Mr. Simon, so
6 there's nothing to rebut.

7 MR. SIMON: Nothing to rebut.

8 Just for the record, the motion is
9 requesting the Commission be the approving agency not
10 the accepting authority.

11 CHAIRPERSON SCHEUER: The approving agency.
12 Thank you.

13 Are there any other questions for the
14 Parties, Commissioners?

15 Commissioner Chang.

16 COMMISSIONER CHANG: Good afternoon. I'm
17 not expecting an answer at this point in time, but I
18 would ask that the Petitioner, because you've
19 mentioned at this hearing, as well as in your papers,
20 I would like to see some discussion on the related
21 agricultural uses that you are proposing.

22 MR. SIMON: As we noted in the Petition
23 filed, the Amended Petition will discuss that in
24 detail.

25 COMMISSIONER CHANG: Thank you.

1 CHAIRPERSON SCHEUER: Are there any other
2 questions from the Commissioners? Seeing none,
3 Commissioners, what is your pleasure?

4 Commissioner Cabral, who we also have to
5 thank you for our lunch today.

6 VICE CHAIR CABRAL: Welcome to Hilo. And I
7 must state that the rumors of us having a lot of rain
8 are greatly exaggerated as seen by the sun of today.

9 So I did want to comment before I make my
10 motion, and I'm -- this probably is something I
11 should go to our staff first, but of course I'm a
12 volunteer, but all this, it seems like we're becoming
13 the receiving agency for all kinds of data and
14 procedures and for different decisions, and I'm not
15 really sure if --

16 CHAIRPERSON SCHEUER: Commissioner Cabral,
17 perhaps you could make the motion and then perhaps
18 raise anything related to the motion.

19 VICE CHAIR CABRAL: Thank you for setting
20 me straight.

21 I would like to move that the project
22 proposes that the use of and reclassification of
23 State Conservation District land, which triggers a
24 requirement to prepare an Environmental Assessment
25 pursuant to HRS Section 343-5(a)(7), and HAR Section

1 11-200-6(b)(1)(F) and HAR Section 15-15-50(b).

2 Secondly, that the Land Use Commission
3 agrees to be the approving agency to process and
4 review Applicant's proposed actions pursuant to
5 Chapter 343 HRS, as the Petition to Amend Land Use
6 District Boundaries represents the earliest practical
7 time to determine whether an EIS shall be required.

8 And, three, that to direct the Petitioner
9 to prepare and submit an Environmental Assessment for
10 the Commission for review pursuant to HAR Section
11 11-200-9(b)(3)(b) and 11-200-12, so that they can
12 determine whether the action warrants an anticipated
13 finding of no significant impact or an EIS
14 preparation notice. Thank you.

15 CHAIRPERSON SCHEUER: Thank you,
16 Commissioner Cabral.

17 Just to clarify, based on the statement
18 from the Petitioner, the "accepting authority"?

19 VICE CHAIR CABRAL: Yes.

20 CHAIRPERSON SCHEUER: Is there a second to
21 Commissioner Cabral's motion?

22 COMMISSIONER OHIGASHI: Second.

23 CHAIRPERSON SCHEUER: Motion seconded by
24 Commissioner Ohigashi.

25 Ms. Cabral, I think you want to speak to

1 the motion?

2 VICE CHAIR CABRAL: I probably need a
3 question from our counsel or from our staff as to
4 exactly how it is that the Land Use Commission
5 becomes the accepting authority for this.

6 There are other things that have been
7 coming up, but it just seems like there's a lot of
8 things that -- no one knows what to do with
9 something, so we'll give it to the Land Use
10 Commission.

11 Is that sort of what seems to be happening,
12 or is that my imagination?

13 CHAIRPERSON SCHEUER: I'm going ask the
14 attorney general to respond.

15 MR. NISHIYAMA: I think it's the function
16 of the statute. Legislature drafted it in such a
17 manner that the Land Use Commission does become the
18 receiving body.

19 VICE CHAIR CABRAL: Okay, that's Chapter
20 343?

21 MR. NISHIYAMA: Yes.

22 VICE CHAIR CABRAL: Thank you for your
23 legal interpretation.

24 CHAIRPERSON SCHEUER: Does anybody else
25 wish to speak to the motion?

1 Seeing none, there is a motion on the
2 table. Mr. Orodenker, will you please poll the
3 Commission?

4 EXECUTIVE OFFICER: Thank you, Mr. Chair.

5 The motion is to move that the Commission
6 be the accepting authority, and that to direct the
7 Petitioner to prepare the necessary documents.

8 Commissioner Cabral?

9 VICE CHAIR CABRAL: Yes.

10 EXECUTIVE OFFICER: Commissioner Ohigashi?

11 COMMISSIONER OHIGASHI: Yes.

12 EXECUTIVE OFFICER: Commissioner Chang?

13 COMMISSIONER CHANG: Yes.

14 EXECUTIVE OFFICER: Commissioner Wong?

15 COMMISSIONER WONG: Yes.

16 EXECUTIVE OFFICER: Commissioner Aczon?

17 COMMISSIONER ACZON: Yes.

18 EXECUTIVE OFFICER: Commissioner Okuda?

19 COMMISSIONER OKUDA: Yes.

20 EXECUTIVE OFFICER: Commissioner Mahi is
21 absent.

22 Chair Scheuer?

23 CHAIRPERSON SCHEUER: Yes.

24 EXECUTIVE OFFICER: Thank you, Mr. Chair.
25 The motion passes unanimously.

1 CHAIRPERSON SCHEUER: Thank you.

2 Congrats to you and your client, and we
3 will see you again before too long.

4 We will now take a couple minute break for
5 the next party to come forward.

6 MR. SIMON: Thank you.

7 (Recess taken.)

8 CHAIRPERSON SCHEUER: We are back in
9 session. Our next agenda item action meeting Docket
10 A18-806, the Petition of Kenneth Stanley Church and
11 Joan Evelyn Hildal to amend the Conservation Land Use
12 District Boundary into the Agricultural Land Use
13 District for Approximately 3.4 Acres of Land at
14 Wailea, Island of Hawaii, Tax Map Keys: (3) 2-9-003
15 parcel 029 and parcel 60 to consider an Amended
16 Motion that the Land Use Commission Accept an
17 Existing Environmental Assessment and Finding of No
18 Significant Impact or EA/FONSI as Sufficient to
19 Support the Petition.

20 Will the parties please identify themselves
21 for the record?

22 MR. CHURCH: My name is Ken Church, and I'm
23 here with my wife Joan Hildal.

24 MR. KIM: Good afternoon, Chairman and
25 Commissioners, this is Deputy Corporation Counsel Ron

1 Kim for the County of Hawaii's Planning Department.
2 And with me is Jeff Darrow, also from the Planning
3 Department.

4 CHAIRPERSON SCHEUER: Office of Planning.

5 MS. APUNA: Good afternoon. Deputy
6 Attorney General Dawn Apuna on behalf of State Office
7 of Planning. Here with me is Aaron Setogawa.

8 CHAIRPERSON SCHEUER: Let me update the
9 record.

10 On July 20, 2018, the Commission received
11 Mr. Church's Petition with personal check for \$5000.
12 After review of the submitted materials, the
13 Petitioner was advised that his Petition format was
14 unconventional and was referred to the Land Use
15 Commission website to the research how petitions
16 submitted to the Land Use Commission should be
17 formatted.

18 Petitioner was also advised that a
19 cashier's check was necessary and his personal check
20 was returned to his PO box.

21 Petitioner was advised that cashier's check
22 could be submitted when his Petition was acceptably
23 constructed.

24 On July 31st, 2018, the Commission received
25 Petitioner's correspondence re: Cross references for

1 the initial submittal and a cashier's check for
2 \$5000.

3 On August 1, 2018, the Land Use Commission
4 sent Petitioner correspondence advising that the
5 submitted materials for its Petition was an
6 incomplete filing, and what corrective measures and
7 procedures needed to be addressed.

8 On August 6, 2018, the Land Use Commission
9 mailed Petitioner a receipt for \$5000 filing fee.

10 On August 10, 2018, the Commission received
11 an incomplete filing of Petitioner's Motion that the
12 Land Use Commission Accept an Existing EA/FONSI as
13 Sufficient to Support the Petition.

14 On August 13, 2018, the Commission sent
15 Petitioner correspondence requesting compliance with
16 the LUC's August 1, 2018 correspondence regarding
17 proper filing of documents and notice that both the
18 Petition and Motion were not completed filings.

19 On August 15, 2018, the Commission received
20 Incomplete Petitioner's Amended Motion that the Land
21 Use Commission accept an Existing EA/FONSI as
22 Sufficient to Support the Petition, and Exhibits 1-3,
23 and a compact disk of electronic files.

24 On September 5, 2018, the Commission
25 received a copy of Petitioner's Motion that the Land

1 Use Commission Accept an Existing EA/FONSI as
2 Sufficient to Support the Petition.

3 On September 29, 2018, the Commission
4 received Petitioner's Amended Motion that the Land
5 Use Commission Accept an Existing EA/FONSI as
6 Sufficient to Support the Petition.

7 On October 31, 2018, the Commission
8 received OP's Response to Petitioner's Amended Motion
9 that the Land Use Commission Accept the Existing
10 EA/FONSI as Sufficient to Support the Petition.

11 On November 15, 2018, the Commission
12 received various requested documents from Petitioner
13 which are on file.

14 On November 16, 2018, Commission staff
15 corresponded with Petitioner regarding its November
16 15, 2018 filing. Since the filing appeared to be
17 different from initial filing, staff requested
18 Petitioner clarify whether it was an exact copy of
19 its first filing. Also, staff attempted to answer
20 several questions Petitioner had raised in its cover
21 letter in the November 15, 2018 filing.

22 On November 26, 2018, the Commission
23 received County of Hawaii Planning Department's
24 Response to Petitioner's Amended Motion. Also on the
25 same day, the Commission received Petitioner's paper

1 and electronic files of: Petition, updated
2 information for Petition exhibits, Petitioner's
3 Motion and Amended Motion; and affidavits.
4 Additionally, the filing also contained two copies of
5 a previously unfiled September 3, 2018 letter to the
6 Commission with proof of service for the Petition,
7 Motion, and Amended Motion, and electronic files for
8 each.

9 On December 5, 2018, Petitioner requested
10 verification of its filing on or after November 20,
11 2018 and asked several questions about filing
12 requirements.

13 On December 11, 2018, the Commission sent a
14 letter verifying receipt of Petitioner's filing on
15 November 26, 2018, and responses to Petitioner's
16 questions on filing requirements. Petitioner was
17 informed that their filing still fails to meet all
18 procedural requirements and remains incomplete.

19 On January 14, 2019, the Commission mailed
20 an Land Use Commission meeting agenda notice for the
21 January 23-24, 2019 meeting to the Parties and the
22 Statewide, Oahu and Hawai'i mailing lists.

23 We have updated the record.

24 Mr. Church, as was done in the previous
25 docket, has the staff informed you of the

1 Commission's policy regarding reimbursement of
2 hearing expenses?

3 MR. CHURCH: Yes.

4 CHAIRPERSON SCHEUER: And what is your --
5 are you understanding and in agreement with that?

6 MR. CHURCH: We agree.

7 CHAIRPERSON SCHEUER: Thank you very much.
8 Let me briefly review our procedure for
9 today.

10 First, I will call those desiring to
11 provide public testimony for this Motion to identify
12 themselves. All such individuals will be called in
13 turn to our witness box where they will be sworn in
14 prior to their testimony.

15 Please be aware that public testimony at
16 this juncture will be limited to testimony on the
17 Motion Requesting the Land Use Commission to be
18 approving agency to an Environmental Assessment.

19 Two, the Commission will then begin
20 proceedings on the Motion starting with Petitioner
21 presenting its case, followed by County Planning
22 Department and the State Office of Planning.

23 The Petitioner may reserve a portion of
24 their time to respond to comments made by the County
25 and the State Office of Planning.

1 Are there any questions for our procedure
2 today? Mr. Church, do you have any questions on the
3 procedure?

4 MR. CHURCH: I do have a short dissertation
5 that might introduce the Commissioners to what we're
6 doing.

7 CHAIRPERSON SCHEUER: You can do that in
8 just a moment when we start the proceedings. I just
9 want to make sure you understand how the process
10 works.

11 MR. CHURCH: I understand.

12 MR. KIM: No questions from the County.

13 CHAIRPERSON SCHEUER: Office of Planning?

14 MS. APUNA: No questions.

15 CHAIRPERSON SCHEUER: As with the previous
16 matter, I will note that from time to time I might
17 declare a recess. Seeing that there is no public
18 testimony, we can proceed directly to what you wanted
19 to begin talking about, Mr. Church. You can start
20 with your case.

21 MR. CHURCH: Thank you. As you've
22 identified, this is an amended motion --

23 CHAIRPERSON SCHEUER: Mr. Church, please
24 excuse me. I'm going to actually have to swear you
25 in. Let me explain.

1 Normally, as you're probably aware, people
2 are represented by counsel. I don't swear counsel
3 in, but I do swear in everybody else.

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

6 MR. CHURCH: I do.

7 CHAIRPERSON SCHEUER: Thank you very much,
8 please proceed.

9 KENNETH CHURCH

10 Was called as a Pro Se witness, was sworn to tell the
11 truth, was examined and testified as follows:

12 MR. CHURCH: As you've introduced, this is
13 our Amended Motion that the Land Use Commission be
14 the approving agency according to HRS Chapter 343 and
15 subsection 15-15-50(b) of HAR, that they accept an
16 existing FONSI in support of the Petition, which
17 FONSI is attached to the Amended Motion here as
18 Exhibit 1.

19 I would like to thank you for placing this
20 Motion on the agenda today. I apologize, somehow I
21 left my written copy behind, so I'm reading it from
22 my computer screen.

23 I believe that it is useful today to
24 consider the history of this property as a background
25 to the Motion before you.

1 The property's agricultural use likely
2 dates back to the mid 1800s when it was first cleared
3 and sugarcane production began on it. The soils on
4 the property are classified as prime agricultural
5 land under the ALISH classification system. They are
6 deep and fertile.

7 When we purchased the property in 2004, it
8 was an open field of regularly mowed grasses. The
9 property does not have coastal frontage per se.
10 There exists a state-owned pali property makai, which
11 separates the property generally and variably by a
12 distance of 100 feet from the high wash of the waves.

13 Mauka the property shares a border with
14 intensely commercially agriculturally used property
15 which employs several people and is zoned
16 Agricultural. That property is bordered mauka
17 further by the coastal highway.

18 It also bears mentioning that there exists
19 no public views towards the ocean from the coastal
20 highway. The property is located in a seven lot
21 private and gated subdivision.

22 A Cultural Impact Analysis -- and if I can
23 be forgiven for not being able to pronounce it
24 correctly, which included a Ka Pa'akai o Ka'Ama
25 assessment, was included in that impact analysis and

1 was included in the Environmental Assessments and
2 FONSIIs which are on file with the Land Use Commission
3 for the property. We submit that these are relevant
4 to the applied for rezoning.

5 The findings described that there exist no
6 particular characteristics of the property that need
7 consideration for preservation. The property's
8 topography is not particularly steep. The property's
9 history of cultivation of its soil for ag use
10 included the area immediately adjacent to the coastal
11 pali.

12 We believe that the property's use for
13 agriculture is provided for in the DLNR rules under
14 HAR 13-5-7 as an allowed nonconforming use.

15 Attached to this Motion is a letter of
16 SMA's determination from the County that agriculture
17 is allowed by it on the property, and that the
18 property is zoned A-20a, an agricultural designation.

19 Also attached to this Motion as Exhibit 2
20 is a letter from the DLNR dated January 27th of 2017
21 stating that it had previously allowed that we may
22 use the property for agriculture.

23 While we -- and I want to emphasize that
24 the letter stated that, that they had previously
25 allowed it.

1 We pressed the DLNR over a period measured
2 in years for an official determination that the
3 nonconforming agricultural use was an allowed use of
4 the property without any permitting requirements.
5 The DLNR repeatedly did not issue the requested
6 determination, but rather a patchwork of letters were
7 received by us that lacked the requested succinct
8 determination.

9 During the property's previous owner's
10 similar Land Use Commission petition in the period
11 around 2005, the Land Use Commission expressed
12 concern that, due to the property's location, the
13 potential for erosion of its soils into the ocean
14 were a concern.

15 Our Petition describes that the potential
16 for erosion of soils is no longer a reasonable
17 characteristic of the property that would require the
18 DLNR's continuing administration of its use, as more
19 recently the DLNR has stated in the Exhibit No. 2
20 letter that agricultural use, and by extension,
21 cultivation of the soils for agricultural use has
22 been allowed as a use.

23 Also a residence and a structure accessory
24 to the agricultural use of the property have already
25 been approved for the property by the DLNR.

1 Sometime in the 1960's the State and County
2 were tasked to zone lands into various districts,
3 including the State Conservation District. It
4 appears to us an enormous task was placed on the
5 County to appropriately zone probably tens of
6 thousands of lots of records. The enormity of the
7 task seemingly resulted in a broad paint brush
8 approach to zoning without fully considering
9 individual lot characteristics in some cases, which
10 we believe include this property.

11 HAR 15-15-19 clearly describes lands with
12 the capacity -- with a high capacity for agriculture
13 shall be zoned agricultural. The word "shall" in the
14 rules carries a mandatory obligation -- the word
15 "shall" carries a mandatory obligation in the
16 administration rules.

17 The property soils are classified as prime
18 in the ALISH system. This is a designation, which by
19 definition, states that prime lands have a high
20 capacity for agricultural production.

21 The legislators of the laws that were
22 created around the zoning of lands did not seemingly
23 intend to cause cessation of the agricultural use of
24 this property by the administrative review authority
25 being applied by the newly created DLNR authority.

1 Otherwise eminent domain and taking considerations
2 would likely have resulted.

3 Today, however, it has been our experience
4 that the DLNR lacks a clear and evenly applied policy
5 regarding administratively recognized and allowing
6 rightful nonconforming agricultural use of property
7 like ours.

8 CHAIRPERSON SCHEUER: Mr. Church, I don't
9 want to throw you off. About how long do you have?

10 MR. CHURCH: I'm about halfway.

11 CHAIRPERSON SCHEUER: Okay. Please
12 proceed.

13 MR. CHURCH: Turning now to the Motion
14 before you today. Again, it is useful to first look
15 back to the relatively recent history of this
16 property. The previous property owners in a period
17 around 2005 submitted an Environmental Assessment and
18 Petition to the authorities through the Land Use
19 Commission administrative processes in order to
20 assess the affect, if significant, of rezoning the
21 property from the State's Conservation District to
22 the State's Agricultural District. This resulted in
23 a FONSI that there would be no significant impact of
24 such rezoning.

25 And, again, around 2008, the Land Use

1 Commission accepted this original FONSI again to be
2 sufficient to be relied upon again in another similar
3 petition before it.

4 We believe this existing FONSI remains
5 current today, particularly as we believe that a
6 FONSI does not appear to us to have an expiration
7 date.

8 Nonetheless, we recognize that the Land Use
9 Commission has broad discretion regarding the
10 relevance of a FONSI to the rezoning petition before
11 it, therefore, we respectfully request the LUC's
12 consideration of our Motion before it today, in light
13 of the described existing past FONSI, and a more
14 current one which we have exhibited as No. 1 to this
15 Amended Motion which was a FONSI for our planned
16 residence on the property.

17 I'm going to try to skip past something
18 here in the interest of brevity.

19 The previous property owners did not
20 identify to the Commission during the 2005 and -7 or
21 -8 petitions before it that they believe that the
22 property qualified for nonconforming agricultural use
23 without permitting.

24 The Environmental Assessment was also
25 repackaged by the former property owners, as I said,

1 in 2007, and submitted for a permit for a farm
2 dwelling with the DLNR. That dwelling was never
3 built. That was the second FONSI for this property.

4 While the Motion before you today, on its
5 page four, describes another Environmental Assessment
6 and FONSI exist that supported the CDUA to combine
7 and resubdivide the property in 2015. I now believe
8 that to be incorrect. I can't find any evidence of
9 it.

10 However, beginning in 2014, after we
11 purchased the property, we applied to the DLNR for a
12 permit that we be allowed an agricultural use storage
13 and processing structure which was intended to
14 support our agricultural, then current and future
15 planned ag use of the property. The BLNR determined
16 that the earlier referred 2007 Environmental
17 Assessment and FONSI for residence for the previous
18 property owners were sufficiently relevant to our
19 planned accessory structure, so no new FONSI was
20 required. That structure of 720 square feet exists
21 today to the property.

22 Subsequently, we submitted a CDUA for a
23 planned residence on the property to DLNR, and the
24 Environmental Assessment and FONSI that you see
25 exhibited as 1 to this Motion before you, is that

1 Environmental Assessment or FONSI.

2 And I'm going to condense again.

3 In that Environmental Assessment we
4 described in some 40 places that the dwelling was
5 intended to be used as a primary and only residence,
6 and was needed to support our ongoing and expanding
7 nonconforming agricultural use of the property.

8 The Environmental Assessment was
9 substantially a repackaged version of the original
10 Environmental Assessment and FONSI that the Land Use
11 Commission accepted in the described periods of 2005
12 and -8.

13 During the most recent period of review of
14 the Environmental Assessment and CDUA for a planned
15 dwelling, we began to realize we had a problem with
16 the DLNR in that its staff consistently and
17 repeatedly would make no reference in any published
18 document which described our ongoing nonconforming
19 agricultural use of the property, which they were
20 fully aware of, particularly the staff submission to
21 the BLNR when it considered the CDUA for the
22 dwelling, which was supported by the FONSI in front
23 of you, omitted informing the BLNR that we had
24 extensive correspondence on file with the OCCL in
25 regards to such, and we had fully and clearly

1 described to it that the dwelling was intended by us
2 to support our extensive nonconforming agricultural
3 use of the property.

4 And I guess I'm going to leave most of the
5 rest of what I said, intended to say, by saying that
6 to some extent the seemed intransigence of the DLNR
7 to recognize in any way in writing that we were using
8 our property for nonconforming ag concerned us.

9 And, furthermore, the exhibited letter No.
10 2 to this Amended Motion is the letter we finally got
11 from them when we gave up after two years of writing
12 to them asking for the determination, they finally
13 said that they had previously approved the
14 continuance of nonconforming agricultural uses.

15 And when we went back through our entire
16 correspondence file, the only time there was ever a
17 determination issued was when they determined -- when
18 we asked that we could use the property for
19 agriculture, they responded that we could use -- they
20 determined that we could grow sugarcane on the
21 property, which was never discussed.

22 Furthermore, at the end of that same
23 letter, you will see that it was only copied to the
24 Chair of the DLNR. Oddly, every other correspondence
25 leading up to that point was copied to the State

1 Office of Planning and to the County Office of
2 Planning. So this further added to our concerns that
3 why was this being somehow avoided.

4 I guess that's what I want to give the
5 Commission today in support of why we're here.

6 CHAIRPERSON SCHEUER: Thank you very much,
7 Mr. Church.

8 MS. HILDAL: I have one correction.

9 CHAIRPERSON SCHEUER: Ms. Hildal, I will
10 have to swear you in then.

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

13 MS. HILDAL: I do.

14 JOAN HILDAL

15 Was called as Pro Se, was sworn to tell the truth,
16 was examined and testified as follows:

17 MS. HILDAL: I think he read incorrectly.
18 We bought the property in 2014, not 2004.

19 CHAIRPERSON SCHEUER: Thank you very much
20 for that correction.

21 Commissioners, are there questions for Mr.
22 Church? Commissioner Chang.

23 I will say this -- not directed at
24 Commission Chang, but the entire Commission -- to
25 remember at what point we are procedurally. This is

1 just over whether or not we can accept this
2 Environmental Assessment and FONSI.

3 COMMISSIONER CHANG: Thank you, Chair.

4 Thank you, Mr. Church, for your testimony
5 this morning.

6 CHAIRPERSON SCHEUER: Commissioner Chang,
7 go as close as possible to the mike.

8 COMMISSIONER CHANG: So your motion today
9 is, one, to have the Land Use Commission be the
10 accepting authority for the Environmental Assessment
11 that has been previously prepared for this property;
12 is that correct?

13 MR. CHURCH: Environmental Assessment and
14 resulting FONSI.

15 COMMISSIONER CHANG: Did you prepare that
16 Environmental Assessment?

17 MR. CHURCH: Yes.

18 COMMISSIONER CHANG: And there was a
19 determination of no impact in that?

20 MR. CHURCH: That is correct.

21 COMMISSIONER CHANG: So that is your motion
22 today is for Land Use Commission to be the accepting
23 authority for that previously accepted Environmental
24 Assessment?

25 MR. CHURCH: Correct.

1 COMMISSIONER CHANG: I guess now I have a
2 question, procedurally.

3 If we are accepting -- the Motion is for
4 the Land Use Commission to accept the FONSI.

5 CHAIRPERSON SCHEUER: Do you want to take a
6 moment and maybe go to another Commissioner if there
7 are any?

8 COMMISSIONER CHANG: Yes.

9 VICE CHAIR CABRAL: I have that same
10 question, I think I'm confused or concerned.

11 Are we voting to be the receiving body for
12 the Environmental Assessment and EIS? Or are we
13 actually saying that we accept the FONSI, or the work
14 that was previously done? That's my question,
15 because I haven't read that.

16 CHAIRPERSON SCHEUER: Procedurally in front
17 of us, the Motion requests first that we will be the
18 accepting authority for the Environmental Assessment
19 under HRS 343; and second, that the Petitioner's
20 June 22nd, 2016 FONSI is sufficiently applicable to
21 the Petition so that no new EIS or Environmental
22 Assessment would be required.

23 VICE CHAIR CABRAL: Thank you for that
24 clarification.

25 COMMISSIONER CHANG: So the question that I

1 have is two step.

2 One, that we're the accepting authority;
3 and second, that we accept the FONSI that has been --
4 we accept the Environmental Assessment that was
5 previously prepared and the finding of no significant
6 impact.

7 See, that's my concern, is that I can see
8 us being the accepting authority of a document, but
9 are we required to accept the finding of no
10 significant impact? Because the previous matter
11 required them -- required the petitioner to
12 prepare -- we directed them to prepare an
13 Environmental Assessment.

14 CHAIRPERSON SCHEUER: Commissioner Chang,
15 if I may.

16 I think right now procedurally we are in
17 Mr. Church's presentation, so it's a time to direct
18 questions towards Mr. Church.

19 We are certainly -- I am certainly open, as
20 Chair, if there is question about Land Use
21 Commission's powers, duties, and authorities related
22 to this matter that we could go into executive
23 session during the deliberation portion of this,
24 which my sense was your questions were going in that
25 direction.

1 COMMISSIONER CHANG: Very good, thank you.

2 CHAIRPERSON SCHEUER: Commissioner Cabral.

3 VICE CHAIR CABRAL: I do have some, I
4 think, some correctly directed questions.

5 If you purchased the property in 2014, at
6 that time it was already zoned to be in Conservation
7 District?

8 MR. CHURCH: Correct.

9 VICE CHAIR CABRAL: And it is zoned to be a
10 20-acre parcel, but yet when you bought it, it was
11 three acres or something, less than 20 acres

12 MR. CHURCH: When we bought it, there were
13 three TMKs consisting of six legal lots of record.
14 We first combined and resubdivided those into three
15 TMKs. We sold one of the TMKs, and we retained two.
16 Our structure accessory to the agricultural use of
17 the land is on one of those TMKs, and our residence
18 is under construction on the other.

19 And I want to add a little bit that I left
20 out of my speech, which might give some further
21 clarification.

22 There is no new use of the property
23 intended or likely. It's fully developed. Its
24 agricultural use is fully developed. It's hard for
25 me to understand how an Environmental Assessment of a

1 use that exists and is legal, is beneficial, but
2 perhaps I'm not as familiar with the rules as the
3 Commission or the AG is.

4 That is the point of this. The last FONSI
5 fully described all of our agricultural uses, and
6 that it's now fully developed, and it's not just
7 fully developed, but its development represents
8 long-term commitment to agricultural use.

9 VICE CHAIR CABRAL: And that question then,
10 because if you bought the property in 2014, that's
11 when the structures were built on the property or the
12 permits were obtained in 2014 to build the structures
13 that are currently on the property that we reference
14 in this county as agricultural accessory dwellings.

15 MR. CHURCH: The structure accessory to the
16 agricultural use of the property is the 720-square
17 foot storage and processing structure. And that
18 was -- construction was begun in 2015, and it was
19 substantially completed in 2015.

20 And the residence is currently under
21 construction, the foundation is being poured, the
22 site has been leveled, and it's all framed and ready
23 to be poured.

24 VICE CHAIR CABRAL: You know, a lot of this
25 information is public record.

1 So what is your agricultural product that
2 is being farmed or ranched on that property then
3 since they're such small parcels?

4 MR. CHURCH: We planted a number of orchard
5 species on the property, probably ranging in the area
6 of maybe 60 plants, something like that, in 2014 and
7 -15.

8 In 2016 we cultivated an area and planted
9 close to 100 pineapples, a large area of sweet
10 potatoes. And we have since decided we didn't like
11 growing sweet potatoes, and we have planted more
12 pineapples and dragon fruit, lilikoi and some other
13 various plants, bananas.

14 VICE CHAIR CABRAL: Because those are such
15 small parcels for any kind of economic agricultural
16 use. They were small parcels prior to your -- you
17 did not participate in breaking them down to that
18 small size?

19 MR. CHURCH: That's correct.

20 VICE CHAIR CABRAL: And you did not
21 participate in getting them into Conservation lands,
22 you're trying to get them out of Conservation?

23 MR. CHURCH: That's correct.

24 VICE CHAIR CABRAL: Thank you for the
25 clarification.

1 CHAIRPERSON SCHEUER: Commissioners, are
2 there other questions for Mr. Church at this time?

3 Seeing none, I have one question.

4 Do you sell some of those agricultural
5 products that you described?

6 MR. CHURCH: The orchard species have yet
7 to produce a meaningful crop. The pineapple, last
8 year we harvested quite a few, I don't recall how
9 many. We took them to the local market and sold them
10 to some people that had stalls there.

11 CHAIRPERSON SCHEUER: And the plan is to do
12 similarly with the orchard products?

13 MR. CHURCH: Yes.

14 CHAIRPERSON SCHEUER: Thank you. I have
15 nothing further.

16 Mr. Church, you can be allowed to reserve
17 some of your time to respond to anything else that
18 comes up.

19 MR. CHURCH: Thank you.

20 CHAIRPERSON SCHEUER: Hawaii County, are
21 you ready?

22 MR. KIM: Yes, Mr. Chairman. The County
23 has no objection to the Motion before the Commission.

24 CHAIRPERSON SCHEUER: Mr. Kim, once again,
25 you're a man of few words.

1 MR. KIM: I try to be.

2 CHAIRPERSON SCHEUER: Office of Planning,
3 Ms. Apuna.

4 MS. APUNA: Thank you, Chair. Office of
5 Planning also has no objection to the Motion. Thank
6 you.

7 CHAIRPERSON SCHEUER: Mr. Church -- excuse
8 me. Commissioner Okuda.

9 COMMISSIONER OKUDA: Thank you, Mr. Chair.
10 Could I ask a question of both the County
11 and Office of Planning?

12 CHAIRPERSON SCHEUER: Please proceed.

13 COMMISSIONER OKUDA: This question is
14 directed to Office of Planning and the County of
15 Hawaii.

16 The Applicant Movant has stated that they
17 are not proposing any new use of the property, that
18 this is a historic use of the property.

19 Do either of you, your offices, either
20 County of Hawaii or the Office of Planning disagree
21 with, number one, that statement by the Applicant, or
22 anything else the Applicant has represented to this
23 Commission either orally or in their filings?

24 CHAIRPERSON SCHEUER: So, thank you,
25 Commissioner Okuda, and for the record, I will

1 note -- I should have paused after the County had
2 stated their case whether there were any questions
3 for the County.

4 So, County, if you will first respond to
5 Commissioner Okuda's question; and then Office of
6 Planning.

7 MR. KIM: Mr. Darrow will respond.

8 CHAIRPERSON SCHEUER: Do you swear or
9 affirm that the testimony you are about to give is
10 the truth?

11 MR. DARROW: I do.

12 JEFF DARROW

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

16 MR. DARROW: Good afternoon, Mr. Chair and
17 members of the Commission.

18 The statement that the Applicant made
19 concerning not introducing any new uses, that may be
20 accurate in his particular case, but it cannot be
21 considered accurate across-the-board because of the
22 fact that once -- if the State Land Use designation
23 is changed from Conservation to Agricultural, all
24 permitted uses within the State Land Use Agricultural
25 District will be allowed, whether it's by this

1 Applicant or a new owner in the future.

2 CHAIRPERSON SCHEUER: Mr. Okuda.

3 COMMISSIONER OKUDA: Thank you, Chair.

4 I'm sorry if I caused confusion with my
5 question. My question was just to determine the
6 historic background.

7 So we recognize, or at least I recognize
8 that a change in boundary designation may have, or
9 will have certain consequences, but I don't believe
10 that's the issue here today. It's a more narrow
11 question.

12 From a historic standpoint, has this
13 property basically always -- do your records show, or
14 does your knowledge indicate that this property has
15 already and historically been in agriculture, even
16 though we recognize the type of agriculture might
17 have changed?

18 MR. DARROW: In looking at the former
19 information that was within the previous boundary
20 amendment, which was back in 2009, it appears that
21 there has been an agricultural use of the property
22 historically with sugarcane. It looks like that was
23 up to 1992, that's the information that I can gather.

24 From 1992 to the present, that's the area
25 that we're unclear about, whether or not the previous

1 owners had been conducting ongoing agricultural
2 activity.

3 When we use the term "nonconforming" in a
4 county sense, that means a use that continues without
5 ceasing for a period of one year. If it ceases for a
6 period of one year, it's no longer nonconforming.

7 And so that's something that, you know, could be
8 questioned as far as that connection between 1992 to
9 the present, whether or not that agricultural use of
10 the property has continued.

11 There may be information in the file that I
12 haven't seen, but that would be the questions that we
13 would raise.

14 CHAIRPERSON SCHEUER: Commissioner Okuda.

15 COMMISSIONER OKUDA: A short followup to
16 your testimony, Mr. Darrow, which we really
17 appreciate.

18 Given your knowledge of the parcel, do you
19 believe that relying on a prior Environmental
20 Assessment and FONSI would be appropriate or
21 inappropriate in this case?

22 MR. DARROW: Well, as mentioned, our
23 position at this time is no objections to the request
24 to the Motion. It appears that even prior to this
25 Environmental Assessment and FONSI, there was a

1 previous Environmental Assessment and FONSI that were
2 granted for the actual activity that's occurring
3 today.

4 The one we're looking at for the Land Use
5 Commission to be the approving authority and accept
6 the FONSI was for Conservation District Use Permit to
7 allow for a single-family dwelling. But, again, it
8 looks like, as far as documents and information
9 provided to the Commission and in the past regarding
10 actual impacts regarding this activity, it appears to
11 be well documented, and I believe we can move forward
12 from there.

13 COMMISSIONER OKUDA: Last question, Mr.
14 Chair, if you can indulge me.

15 Maybe related to your answer, do you see
16 any evidence in the record, including what you looked
17 at, which would indicate to you, based on your
18 expertise, you know, in the planning area, that a new
19 Environmental Assessment would result in any
20 conclusion or information different than the prior
21 Environmental Assessments?

22 In other words, if we order the Applicant,
23 the Petitioner, to prepare another Environmental
24 Assessment, would you, based on your expertise,
25 expect something new? Or we're probably going to get

1 the same thing?

2 MR. DARROW: I would say that there's been
3 few changes since the previous Environmental
4 Assessments that were done as far as information that
5 would be presented. The only thing that I can --
6 that comes to light that has changed, and that was
7 more recently, was the adoption of the Hamakua
8 Community Development Plan, but I believe that will,
9 again, be addressed as we move on. I don't think
10 that that's something that would require the
11 Applicant to have to go back and redo an
12 Environmental Assessment.

13 COMMISSIONER OKUDA: Thank you very much,
14 Mr. Chair.

15 CHAIRPERSON SCHEUER: Thank you, Mr. Okuda
16 and Hawaii County.

17 So to correct where I should have gone in
18 procedure earlier, are there any further questions
19 for Hawaii County from the Commissioners?

20 Commissioner Cabral.

21 VICE CHAIR CABRAL: Yes, I don't know if
22 this is Hawaii County or a State question.

23 But when you have land that's in
24 Conservation District, and it's allowed to build a
25 house or residence with a swimming pool and that on

1 it, I had always, somehow naively, I guess, thought
2 Conservation land was to have no major improvements
3 on them.

4 Who allows -- I mean is that the County
5 that gives people building permits to build their
6 residence on conservation land? What is the
7 procedure for that? Because this is such a small
8 parcel, the ag is just really the fact that it's
9 really going into residential usage. Who approves
10 that?

11 MR. KIM: It would actually be the state,
12 that's my understanding, that they got a permit from
13 the Board of Land and Natural Resources, I believe.

14 CHAIRPERSON SCHEUER: Commissioner Cabral,
15 you can ask that again to the state when we get to
16 them.

17 VICE CHAIR CABRAL: Thank you.

18 CHAIRPERSON SCHEUER: Commissioners, any
19 further questions for Hawaii County? None. Thank
20 you.

21 Now we are questioning the Office of
22 Planning. There were two questions that are hanging.

23 The first was Commission Okuda's question.
24 Did you want to restate your question for Office of
25 Planning, or are you satisfied?

1 COMMISSIONER OKUDA: I'm satisfied with the
2 responses from the County.

3 CHAIRPERSON SCHEUER: Ms. Cabral, did you
4 want to restate your question about who approves
5 residence dwellings in the Conservation District to
6 the Office of Planning?

7 VICE CHAIR CABRAL: Yes. Is the state here
8 with us?

9 MS. APUNA: Yes, right here.

10 VICE CHAIR CABRAL: So my question is,
11 since this land is and has been for an extended
12 period of time in Conservation Zoning, but yet
13 apparently it has a house that's been built on it
14 fairly recently, a year or so ago got permit for the
15 house and swimming pool. That is an approved use
16 through state.

17 Can you give me more about how that changes
18 the use of the land somehow? But how that goes about
19 getting the house permit for conservation land. I'm
20 not aware of those.

21 MS. APUNA: I apologize, Commissioner. We
22 don't have the lot in front of us, and I'm not too
23 familiar with the Conservation District allowed uses.
24 But we think there might be some allowance for a
25 limited type of dwelling, but we would have to double

1 check. We thought actually the county had permitted
2 that, but we would have to look at the statute.

3 I don't have that information available at
4 this time.

5 CHAIRPERSON SCHEUER: If I can go ahead and
6 add, without being an attorney, Commissioner Cabral,
7 there are certain areas of the state that are used
8 for residential purposes that are in Conservation
9 District, such as the Tantalus area of Oahu. And to
10 get permits you have to get a Conservation Use Permit
11 from the Board of DLNR.

12 VICE CHAIR CABRAL: Thank you.

13 CHAIRPERSON SCHEUER: Commissioner Chang.

14 COMMISSIONER CHANG: I promise I'll keep it
15 short.

16 Commissioner Cabral's question raised
17 something in my mind, and this is to the County.

18 And I apologize. Can I go back and ask the
19 County?

20 CHAIRPERSON SCHEUER: Any objections?

21 MR. KIM: No objections.

22 CHAIRPERSON SCHEUER: Please proceed,
23 Commissioner Chang.

24 COMMISSIONER CHANG: I'm just a little slow
25 at times; I have to catch up.

1 Going back and looking at this property,
2 does -- it is zoned Conservation, but the area around
3 this land is Agricultural. And it appears there was
4 a history.

5 Do you have any knowledge about the
6 county's intention of this property being zoned
7 Agriculture or Conservation?

8 MR. KIM: Mr. Darrow was discussing this
9 with me before our hearing, so if he can respond.

10 MR. DARROW: Commissioner Chang, as far as
11 historically how this came to be in Conservation and
12 Agricultural, I don't think that there was any
13 interim changes. I think this was all zoned when the
14 State Land Use Commission originally zoned this area.

15 This particular area along the ocean is in
16 Conservation. It goes in a particular distance.
17 It's very close in distance as the Special Management
18 Area. And it is very reflective of our county's
19 General Plan designation of Open.

20 So you'll see that Open designation very
21 reflective of the State Land Use Conservation.

22 Just outside of that going mauka you have
23 the Agricultural State Land Use district. And as Mr.
24 Church had mentioned earlier, the actual County
25 zoning for the entire area is Agriculture 20 acres.

1 So it's a little conflicting there.
2 Normally you would have a County Open Zoning with the
3 State Land Use Conservation, but there are times
4 where you see this conflict where you have County
5 Agricultural and State Land Use Conservation.

6 If I could just expound a little bit on the
7 permitting process just so that there's
8 clarification.

9 As mentioned by the Chairman, there's --
10 the county does not have the authority in the State
11 Land Use Conservation District to allow any type of
12 use. They have to go before the Board of Land and
13 Natural Resources for the approval of that use.

14 There are times we get involved because the
15 property may be in the SMA, and so they will come to
16 us to get a determination or an SMA minor or major
17 permit prior to that determination.

18 But as far as a building permit, it would
19 go through the County. But they have to be able to
20 get that approval from the Board before we can move
21 forward.

22 COMMISSIONER CHANG: Thank you.

23 CHAIRPERSON SCHEUER: Are there further
24 questions for the Office of Planning? Seeing none,
25 Mr. Church, you may choose or decline to provide any

1 further comments in response to the issues that have
2 been raised.

3 MR. CHURCH: In no particular order, I have
4 a few comments.

5 The county in your Exhibit 3 to this Motion
6 describes in some detail their assessment of whether
7 we should be able to use this land for agriculture
8 not within the SMA.

9 If I come back to the -- some of the
10 questions that were asked, there exists a report by
11 the Auditor General of the State of Hawaii. I
12 believe it was to the Governor, yes, in January of
13 1991 when the HAR 13-2, which was the former rules of
14 the DLNR, were being reviewed due to problems around
15 nonconforming use of DLNR land.

16 Particularly it was looking at residential
17 use, but in effect, when you read this report, it
18 affects both R use, or residential use.

19 And to speak to one of your questions, the
20 auditor makes a statement in this report, and it's
21 not that long. It says:

22 Citizens concerned with preserving the
23 natural wonders of the state have turned to the Land
24 Use Law for help in protecting the Conservation
25 District. It is within these laws that scenic and

1 natural values find their expression that the laws
2 and the rules adopted under them bound to disappoint
3 many. They do not have, as some might wish, an
4 orientation that is purely preservationist -- which
5 is I believe what you said -- instead the laws
6 contain the dual public purpose of preservation and
7 conservation. Preservation seeks to protect land
8 areas from any kind of development and Conservation
9 seeks to manage the natural resources and fully use
10 them.

11 And it's a fairly long area. It says here
12 the dual public purpose of Preservation and
13 Conservation can also be found in the Constitution of
14 the State of Hawaii. And it quotes a section:

15 For the benefit of present and future
16 generations, the state and its political subdivision
17 shall conserve and protect -- et cetera, et cetera --
18 in a manner consistent with the Conservation and
19 furtherance of self-sufficiency of the state.

20 This 40-page report goes to the heart of
21 many of the things that we're talking about in our
22 Petition. It is our position that the DLNR is
23 administering the property, at least in our case, in
24 a way that would discourage its agricultural use.

25 It makes it totally -- not totally

1 impossible -- it makes it exceedingly difficult. For
2 example, we first went through the rules and tried
3 to, within the rules of the DLNR applied to plant ten
4 fruit trees in little plastic bags. And after
5 considerable delay -- and this is in an open field
6 area, grass -- after considerable delay, we were told
7 that the reason for the delay was we hadn't described
8 what we were doing with the ten shovelfuls of dirt
9 that we were going to remove from the hole.

10 CHAIRPERSON SCHEUER: Mr. Church, you may
11 proceed after I say this if you want to.

12 It's clear to me from this much of the
13 proceeding that there is just a long and complex
14 history and difficult history associated with your
15 attempts to utilize this property.

16 I would offer for your consideration to
17 focus your final comments to us on the specific
18 matter at hand, which is whether or not we should be
19 the accepting authority for the Environmental
20 Assessment and FONSI, and rely on those previous
21 documents. But it's entirely up to you.

22 MR. CHURCH: Coming towards one of the
23 other questions raised by the Commissioners -- well,
24 actually it was raised by Jeff. This concept that
25 the county has that if you cease a use for one year,

1 it ceases. And that's in your rules HAR 15-15 -- I
2 don't -- I have it there, but I skimmed past it.

3 However, in advance of that rule and your
4 rules, it says that the administration of all
5 Conservation Districted lands shall be by the DLNR.
6 And the DLNR's rules, in concert with this auditor's
7 report, clearly established that any previous use of
8 land, any -- and I emphasize the word "any" because
9 that's the auditor's words -- continues to be allowed
10 irrespective of how long the use ceased.

11 I would further say that there's a
12 considerable, about another 40 pages of testimony
13 during the 2005 A05-757, I believe, hearings for this
14 land, the same -- pretty much the same land, all
15 three lots. We're talking about two.

16 A representative of the county gave
17 testimony. He said he was there from the beginning,
18 when all of this happened.

19 He explained that what I have suggested
20 here, that a broad paint brush approach was taken.
21 The land immediately to the north of the Hakalau
22 Gulch, which is a half mile from our property, is
23 treated as agricultural to the top of the pali, all
24 the way up the coast after that, pretty much. I'm
25 sure there's variations of that in gulches. But

1 generally ag use land remained in the Agriculture
2 District.

3 From our address, south towards Hilo, it
4 would appear that there was -- the line was drawn
5 differently, and it didn't even follow property lines
6 initially, it just was a paint brush line across
7 properties.

8 And that's not just my opinion, that's what
9 this testimony in 2005 pointed to.

10 CHAIRPERSON SCHEUER: Thank you. Did you
11 have anything further?

12 MR. CHURCH: No.

13 CHAIRPERSON SCHEUER: Thank you, Mr.
14 Church.

15 Commissioner Wong? No. Commissioner
16 Chang? No. Commissioner Cabral.

17 VICE CHAIR CABRAL: You know how I like
18 maps. We have this map, but I want clarification.
19 It appears that there is one that is highlighted in
20 red. It appears that that's the 1.16 acre parcel
21 here.

22 CHAIRPERSON SCHEUER: What map are you
23 referring to?

24 VICE CHAIR CABRAL: It's on the county
25 website. But one of ours is in red with the staff

1 report. And the upper one is 2.252. This is
2 regarding both parcels?

3 MR. CHURCH: That's correct.

4 VICE CHAIR CABRAL: That you consolidated
5 1.16 and 2.25 parcels?

6 MR. CHURCH: No. We owned all three
7 parcels originally, and a railway went across them.
8 So there were six legal lots of record. So we
9 combined all six and reconfigured them into three,
10 which you see in that map. Then we sold the south
11 lot, which is in dark blue.

12 COMMISSIONER CABRAL: So this is 1, 2 and
13 3. Is this the one you sold (indicating)?

14 MR. CHURCH: Yes.

15 VICE CHAIR CABRAL: But your Petition is
16 regarding these two?

17 MR. CHURCH: Correct.

18 VICE CHAIR CABRAL: That's what I thought.
19 All right, thank you.

20 COMMISSIONER WONG: I think you're talking
21 about the Petition, it's in the Petition?

22 VICE CHAIR CABRAL: Yes, I guess. And it's
23 also from the county website too. I just wanted to
24 see which ones it is.

25 CHAIRPERSON SCHEUER: I was going to check

1 in with Commissioner Chang before we conclude any
2 final questions for the Petitioner, County or Office
3 of Planning.

4 You had indicated you might have a desire
5 to go into executive session.

6 COMMISSIONER CHANG: Thank you very much,
7 Chair. I would like to just ask before we -- I would
8 like to ask you two questions first, before I make
9 the motion to go into executive session.

10 When you bought the property, did you know
11 it was Conservation?

12 MR. CHURCH: Yes.

13 COMMISSIONER CHANG: And the second
14 question is, because I guess I'm trying to understand
15 why you're bringing -- why you're doing the boundary
16 amendment. Is it because fundamentally the question
17 is, are we the accepting agency? Because under the
18 rules it says if it involves Conservation land, it
19 requires an Environmental Assessment or Environmental
20 Review.

21 So it's fundamentally the question before.
22 But I'm trying to understand, because it appears that
23 a lot of the work that you're doing now, you can do
24 it under Conservation, it does appear to be with some
25 challenges before DLNR.

1 So is your Petition to change the boundary
2 so that you can -- you would prefer to fall under the
3 county regulations than DLNR Conservation zone
4 regulation?

5 MR. CHURCH: Complicated answer. Could you
6 say it again, please?

7 COMMISSIONER CHANG: Yes.

8 So I'm just trying to understand, the
9 Petition that you're filing for boundary amendment to
10 change your zoning from Conservation to Agriculture,
11 because it does appear, while you're having
12 challenges with DLNR, you can do some of the activity
13 that you're doing.

14 But is your intention, or is the reason
15 you're doing the boundary amendment so that the
16 management, or the regulations that apply to your
17 activity on this land fall under the county with
18 Agricultural Zoning so that you are not under the
19 regulation of Conservation, DLNR Conservation?

20 MR. CHURCH: This is a hard yes or no. I
21 would say our problem is there has been that the DLNR
22 does not have a policy that allows us to do what
23 we're doing. And we're making tremendous
24 investments, huge investments in our property, and
25 its agriculture uses, and its uses accessory and

1 incidental to such agriculture, and for reasons that
2 we don't understand, they will not issue the
3 determination that the land qualified, that was
4 correctly applied for, that the land qualifies for
5 nonconforming agricultural use.

6 When we finally forced the issue, and I
7 asked that the board consider it, the chair
8 intervened and wrote the letter that you -- the
9 department wrote the letter that you see here today
10 as Exhibit, I believe, 1 or 2.

11 COMMISSIONER CHANG: You've answered my
12 question. And you've raised for me a legal issue
13 that, Mr. Chair, I would like to make a motion that
14 we go into executive session to consult with the
15 attorney's board on our duties and responsibilities.

16 CHAIRPERSON SCHEUER: The board's attorney.
17 The statute is right next to you if want to
18 refer to it.

19 COMMISSIONER CHANG: To consult with the
20 board's attorney on questions and issues pertaining
21 to the board's powers, duties, privileges, immunities
22 and liabilities.

23 CHAIRPERSON SCHEUER: There is a motion to
24 go into executive session by Commissioner Chang. Is
25 there a second?

1 VICE CHAIR CABRAL: I'll second.

2 CHAIRPERSON SCHEUER: Motion has been
3 seconded by Commissioner Cabral. Is there discussion
4 on the motion? Seeing none, all in favor say "aye".
5 Anybody opposed? The Land Use Commission will go
6 into executive session.

7 (Executive session.)

8 CHAIRPERSON SCHEUER: We're back on the
9 record at 2:13 p.m.

10 Where we are in our proceedings right now
11 is that the Petitioner, the County and the Office of
12 Planning have presented -- questions have been asked
13 of all three parties. The Petitioner had an
14 opportunity and did rebut. We went into executive
15 session.

16 We now have the opportunity for any
17 questions of Petitioner -- for either the Petitioner,
18 the County or the Office of Planning. Are there any
19 further questions for any of those three entities,
20 Commissioners?

21 So seeing none, we can move on to
22 deliberation. Commissioners, what is your pleasure?

23 CHAIRPERSON SCHEUER: Commissioner Wong.

24 COMMISSIONER WONG: I wanted like to make a
25 motion to approve the Petitioner's Motion that the

1 Commission is the appropriate accepting agency for
2 the Petitioner's compliance with HRS Chapter 343.

3 COMMISSIONER OHIGASHI: Second.

4 CHAIRPERSON SCHEUER: A motion has been
5 made by Commissioner Wong, and seconded by
6 Commissioner Ohigashi.

7 COMMISSIONER WONG: I would like to state
8 some things about this motion.

9 CHAIRPERSON SCHEUER: Please proceed.

10 COMMISSIONER WONG: So there was --
11 Petitioner had an Environmental Assessment done in
12 2016 with DLNR, but to myself, I feel that we didn't
13 have the opportunity to really vet the Environmental
14 Assessment, so I would like to just review the
15 Environmental Assessment again, and have a more open
16 review of this process and see that it meets the
17 criteria that is requested for the Petition. So
18 that's why I wanted to make that motion.

19 CHAIRPERSON SCHEUER: If I may ask a
20 procedurally clarifying question.

21 Your motion is in essence to grant the
22 Petitioner's request in part, but deny it in part to
23 be the accepting authority for the previously
24 prepared 2016 Environmental Assessment, but not to
25 accept the finding of "no significant impact" at this

1 time.

2 Commissioner Ohigashi.

3 COMMISSIONER OHIGASHI: The reason why I
4 seconded the motion was, it's my understanding
5 that -- I'm understand this -- my concept of this is
6 that there are two things that the Petitioner is
7 asking for.

8 One is that we become the accepting
9 authority. And the second issue is whether or not we
10 accept the finding of "no significant impact".

11 The reason why I seconded this motion, I
12 believe that the statute provides that we would be
13 the accepting authority.

14 The question is, the next question, or the
15 next issue is whether or not there would be
16 sufficient enough reason for a motion to grant the
17 second part of the request. And with granting only
18 the first part of the request of that motion, I feel
19 comfortable in doing that.

20 If the Chair would like clarification of
21 how I feel about the second part of the motion, I
22 would be glad to give --

23 CHAIRPERSON SCHEUER: The Chair would like
24 clarification from either the movant or the secondary
25 as to what exactly is being proposed.

1 COMMISSIONER OHIGASHI: The proposal would
2 be, my understanding is that the second part of the
3 issue of whether or not we accept the finding, I
4 would propose that I would be making a motion that we
5 defer acceptance of any kind of finding until such
6 time that we have an opportunity to review the legal
7 issues concerning the applicability, and review it
8 more closely.

9 I think that it would behoove the
10 Petitioner to obtain some kind of assistance, legal
11 assistance to frame his request to accept the
12 finding, to address some of the legal issues that I
13 believe is still outstanding with regard to that.

14 CHAIRPERSON SCHEUER: Commissioner Wong.

15 COMMISSIONER WONG: I agree on that. And
16 also wanted to state that to me the Environmental
17 Assessment done in 2016 was on Conservation, for
18 Conservation land; and this one is doing the boundary
19 amendment for Ag land. So there's a little
20 difference in terms of what is requested, I mean,
21 from this Environmental Assessment of Conservation to
22 Ag. So I think that the Environmental Assessment
23 doesn't itself need to be clearly defined, what it's
24 going to be doing is moving for this Petition of
25 changing the boundary amendment.

1 That's why I want to just say, I'm moving
2 to just being the accepting authority.

3 CHAIRPERSON SCHEUER: Commissioner Chang.

4 COMMISSIONER CHANG: If I may. I see this
5 application very similar to the application that was
6 right before us. It is changing from Conservation
7 land to a boundary amendment to Agricultural land.
8 And I guess I'm of the view that -- I think the
9 Commission is right -- is that we are the accepting
10 agency by provision of the statute.

11 How the Applicant chooses to prepare his
12 Environmental Assessment, I leave that up to the
13 Applicant.

14 I mean I think there are previous documents
15 that have been prepared. He's done a really good job
16 in 2016 in preparing a document under the
17 Conservation District Use Application Permit. And I
18 think Commissioner Wong's distinction between
19 Conservation and Ag is a good one. But I am
20 comfortable if we -- if the motion is that the Land
21 Use Commission will be the accepting agency to
22 process the Applicant's application for boundary
23 amendment.

24 And with that, reviewing the rules, it does
25 require the preparation of an environmental document.

1 How the applicant chooses to prepare that, who he
2 decides to consult with, because obviously he's done
3 this awhile and feels very passionate about it. I
4 leave that up to the Applicant, because I think he
5 appears to be very well schooled.

6 But I'm a little uncomfortable about going
7 beyond that, other than to say we agree to be the
8 accepting agency.

9 CHAIRPERSON SCHEUER: Commissioner Aczon.

10 COMMISSIONER ACZON: Mr. Chair, I will be
11 supporting the Motion to approve the Petitioner's
12 Motion that the Commission is the appropriate
13 accepting agency. But I'm hesitant to accept the
14 Petitioner's 2016 FONSI without sufficient vetting by
15 this body.

16 CHAIRPERSON SCHEUER: Commissioner Okuda.

17 COMMISSIONER OKUDA: I guess -- not guess.
18 I'll be the contrarian here. And this is the reason
19 why.

20 First of all, what we have here is really a
21 narrow issue which is whether we should be the
22 accepting authority, and I agree with that.

23 But whether or not the prior documents can
24 be relied on to find no significant impact, now,
25 that's the reason why I asked the two agencies, and

1 especially the County of Hawaii, about whether or
2 not, based on, for example, Mr. Darrow's expertise --
3 although I do recognize we didn't have testimony
4 about his foundation background, but I think we can
5 take judicial notice of his qualifications based on
6 our prior Commission hearings where he's testified
7 about the likelihood that even if the Applicant goes
8 and prepares another Environmental Assessment,
9 whether there's going to be anything different.

10 And so far in the record, I don't see any
11 evidence that requiring the Applicant to prepare an
12 additional or updated Environmental Assessment is
13 going to change or reveal any significant additional
14 information which will help us decide a petition for
15 a boundary amendment.

16 My comments shouldn't be taken as saying
17 that such a petition for boundary amendment, if a
18 proper petition is filed, then I would vote in favor
19 of it or not, it depends on the evidence that's
20 presented at the time. But just on this narrow issue
21 about whether or not we can rely, and we should rely
22 on prior filed assessments, the testimony in the
23 record is that there's no evidence that I see that a
24 new Environmental Assessment is going to result in
25 anything different.

1 And, you know, I base -- so in other words,
2 I would not only vote in favor of the Commission
3 being the accepting authority, but also I would,
4 based on the record, vote that -- or in favor of a
5 finding that there is no significant impact which
6 requires an EIS.

7 And just so that record is clear, I rely on
8 Kila Kila, K-i-l-a K-i-l-a, O Haleakala versus the
9 University of Hawai'i and David Lassner which is
10 found at 138 Hawai'i 364.

11 CHAIRPERSON SCHEUER: Are you making -- are
12 you proposing to amend the motion? If you're not
13 proposing to amend the motion, I would suggest that
14 we can take up strictly this motion, what is in front
15 of us right now; and if you want to make a subsequent
16 motion to deal with the second issue, you could do
17 so. And if there is a second, you can speak to it.

18 COMMISSIONER OKUDA: Yes, that's fine.

19 CHAIRPERSON SCHEUER: Commissioner Aczon.

20 COMMISSIONER ACZON: That's what I was
21 going to say.

22 CHAIRPERSON SCHEUER: I'm only channeling
23 my former Chair.

24 Commissioner Cabral.

25 VICE CHAIR CABRAL: I'm going to speak in

1 favor of the motion, and I like the separation of the
2 two acceptance. I have trouble with the word
3 "accepting" the Environmental Assessment, but I'm
4 willing to receive it. I feel like we're receiving,
5 and I understand that the legal term is "acceptance",
6 so we are receiving it, but are not approving it or
7 accepting it as the document for future action. But
8 I am in favor of receiving it. Thank you.

9 CHAIRPERSON SCHEUER: Are there further
10 comments by the Commission at this time?

11 Commissioner Chang.

12 COMMISSIONER CHANG: Just one additional
13 comment to the motion. That I believe it's just to
14 ensure that the public has an opportunity to comment
15 on the environmental document as well. But I think
16 it is important that the Commission have the
17 opportunity to have an independent assessment of the
18 environmental document, as well as it complies with
19 all of OEQC regulation. That's an additional concern
20 that I have, and why I can support separating --
21 accepting the FONSI.

22 CHAIRPERSON SCHEUER: Is there further
23 discussion of the motion by the Commission? I will
24 say, if I may, I will speak in favor. I will vote
25 for the motion, and I will speak in favor of it with

1 these thoughts.

2 Commissioner Chang recently alluded to
3 procedural issues. Normally -- so this is an unusual
4 request in front of us. This is not something that
5 I'm personally familiar with us having done before,
6 relied on a previously prepared Environmental
7 Assessment for decision-making. I'm not saying it
8 hasn't happened, it hasn't happened during my almost
9 four years with this Commission. So it raises some
10 interesting questions.

11 One of the questions it raises for me that
12 in a normal district boundary amendment proceeding we
13 would first agree to be the accepting authority for
14 an Environmental Assessment. Then the Environmental
15 Assessment would be prepared. There would be a
16 notice of preparation done. And an environmental
17 notice, published Environmental Notice. The
18 Environmental Assessment would be prepared as a
19 draft. People would have a chance to comment on it.
20 Then a final would be prepared, and then a finding of
21 no significant impact, if there was no significant
22 impact would be done.

23 That process allows for any interested
24 member of the public -- and I'm not saying there are
25 any and I'm not saying there is any significant

1 impact from what is happening there now, but
2 Environmental Assessment's are prepared in
3 relationship to specific proposed actions. The
4 Environmental Assessment that we are discussing, the
5 2016 Environmental Assessment was prepared for
6 allowing a single fam -- if I understand it
7 correctly, a single family home to be built on a
8 parcel in the Conservation District.

9 We are proposing to use this document to
10 rely on it for a district boundary amendment, not for
11 the construction of just a single-family home, but
12 essentially for any potential future use of the land
13 that would be allowable in the Agricultural District.

14 So it is different what the purposes of
15 this Environmental Assessment is being used for. I
16 believe that if this motion prevails, and we become
17 the accepting authority for the Environmental
18 Assessment, it will procedurally give the chance for
19 any member of the public -- and I'm not saying there
20 is anybody, but we don't know, in this room. If
21 there is somebody who wants to comment on it, because
22 this Environmental Assessment is now being relied on
23 for a different decision-making, they will have a
24 chance somehow to comment or try and intervene, or
25 try and take part in this decision-making.

1 That's why I'm going to vote in favor of
2 it.

3 Any further questions or comments from --
4 again, the last thing I will say too, particularly
5 because this is an unusual proceeding, I would, with
6 respect for the tremendous amount of work that the
7 Petitioner has already done, both in front of the
8 DLNR and in front of this body, sometimes getting
9 outside help is, while expensive, a useful, helpful
10 endeavor for your final.

11 Any further comments or questions? If not,
12 Mr. Orodenker, please poll the Commission on the
13 motion?

14 EXECUTIVE OFFICER: Thank you, Mr. Chair.
15 The motion made by Commissioner Wong was to have the
16 Commission be the accepting authority for any
17 environmental document review under Chapter 343.

18 Commissioner Wong?

19 COMMISSIONER WONG: Yes.

20 EXECUTIVE OFFICER: Commissioner Ohigashi?

21 COMMISSIONER OHIGASHI: Yes.

22 EXECUTIVE OFFICER: Commissioner Cabral?

23 VICE CHAIR CABRAL: Yes.

24 EXECUTIVE OFFICER: Commissioner Okuda?

25 COMMISSIONER OKUDA: Yes.

1 EXECUTIVE OFFICER: Commissioner Aczon?

2 COMMISSIONER ACZON: Yes.

3 EXECUTIVE OFFICER: Commissioner Chang?

4 COMMISSIONER CHANG: Yes.

5 EXECUTIVE OFFICER: Chair Scheuer?

6 CHAIRPERSON SCHEUER: Yes.

7 EXECUTIVE OFFICER: Chair, the motion
8 passes unanimously.

9 CHAIRPERSON SCHEUER: Commissioner Okuda,
10 did you wish to make a second motion?

11 COMMISSIONER OKUDA: Actually, after
12 listening to the Chair, I'm not going to make a
13 motion and this is the reason why.

14 I think the record is left where the
15 Applicant can file an environmental assessment if the
16 Applicant chooses, just to resubmit prior documents,
17 that's the Applicant's choice.

18 The Applicant will have the choice whether
19 to take the risk, and I'm not saying there is a large
20 risk or small risk, but whatever the risk is, to
21 determine whether or not in fact that the prior
22 Environmental Assessment can in fact be relied on to
23 make a determination whether or not there's a finding
24 of any no significant impact, or the Applicant might
25 take into account some of the comments that have been

1 made in this hearing and maybe modify the submission
2 or possibly get assistance in preparing and
3 presenting that.

4 So at this point in time, I don't believe a
5 further motion is necessary by me.

6 CHAIRPERSON SCHEUER: I apologize. I want
7 to take -- sorry Commissioner Okuda.

8 COMMISSIONER OKUDA: And the reason why I'm
9 saying that, I'm taking to heart what the Chair said,
10 which I might not have given enough attention to, is
11 the fact that there is part of 343 an intention to
12 have public review. There may not be any review or
13 input, but if that ability of the public is truncated
14 or eliminated, that actually might create issues on
15 appeal. And I think the last thing any of us would
16 want is a decision made here, someone shows up and
17 appeals for maybe bad reasons, and the case is
18 delayed or maybe the decision is overturned three to
19 five years later, and it delays things.

20 So even though this does create a delay, I
21 think the Chair does have a point about the need to
22 acknowledge that the 343 HRS process does require
23 public review, or at least the public an opportunity
24 to review and have input.

25 CHAIRPERSON SCHEUER: Mr. Church, again,

1 I'm going to preface these next remarks by stating
2 again that this is a challenging case, both because
3 it's unprecedented, at least in my experience, as
4 well as the fact that normally in every other case
5 I've been a part of, the Petitioner is represented by
6 counsel who is familiar with the Land Use Commission
7 proceeding before it.

8 What I want to clarify with you on the
9 motion, we passed one motion which in essence granted
10 half of what you asked for. We're the accepting
11 authority, and it leaves open the door for us to
12 later take action to accept that 2016 document as the
13 basis for decision-making and making a finding on it.

14 Are you satisfied that we have addressed
15 the motion that is put before us?

16 MR. CHURCH: The text that was with the
17 motion, the four pages or five pages describes that
18 there does exist a 2005 FONSI for this property for
19 exactly the same thing. And we pointed to that in
20 the text supporting this motion. And then we
21 described it.

22 We described all this in our residence
23 application and FONSI, and I don't know that the 2005
24 FONSI has expired.

25 CHAIRPERSON SCHEUER: So essentially what

1 I'm saying, Mr. Church, I'm asking you is, what has
2 happened today is we granted in part your motion and
3 we deferred action on the subsequent part of your
4 motion. So whether or not that 2005 FONSI, or any
5 other FONSI can be accepted by this Commission, we're
6 not ruling on today. But we have -- again, I
7 apologize because this raises unusual -- procedurally
8 it's unusual.

9 What I think we have to do, I was trying to
10 make it as simple as possible, but I believe, my
11 fellow Commissioners, what we have to do actually
12 because a motion was made in front of us to do two
13 things, and we have addressed half of it, but we
14 haven't addressed the other half.

15 So what I believe we have to do is we
16 actually have to do a second motion which would
17 essentially be either -- an option before us would
18 be, as Commissioner Okuda initially argued for,
19 accept the FONSI or deny the FONSI or defer action.

20 COMMISSIONER WONG: Chair.

21 CHAIRPERSON SCHEUER: Commissioner Wong.

22 COMMISSIONER WONG: I'd like to make a
23 motion to defer action on the second part.

24 COMMISSIONER ACZON: Second.

25 CHAIRPERSON SCHEUER: There's been a motion

1 made by Commissioner Wong, and seconded by
2 Commissioner Aczon to defer action on the second
3 portion of the Petitioner's motion, and the purpose
4 for that, in my mind, is to make it very clear on the
5 administrative record that we have taken notice of
6 all parts of Petitioner's motion, and taken action on
7 all parts of Petitioner's motion.

8 Five-minute recess.

9 (Recess taken.)

10 CHAIRPERSON SCHEUER: We're back in
11 session.

12 And, again, we're dealing with both things
13 that are procedurally unusual, and we're trying to do
14 this in a way that is sound and thoughtful.

15 So I believe what we have to do, and really
16 this reflects what is already on the record as the
17 intention in the first motion, the Petitioner has
18 presented the motion to us that asked us to do two
19 things: One, to be the accepting authority; and
20 second, to rely on the 2016 document, including the
21 FONSI associated with it, as the basis for future
22 decision-making on a district boundary amendment.

23 What the Commission has done so far is
24 said, we will be the accepting authority. But I
25 think what we procedurally need to do is we actually

1 need to -- in order for you to submit either a new
2 Environmental Assessment or the existing
3 Environmental Assessment, and for us to independently
4 make our own finding of no significant impact, if
5 that is indeed what we choose to do. What we need to
6 do right now is actually to make a motion to deny the
7 second part of what you've asked us to do today.

8 And that will then leave the door open for
9 the Petitioner to come, working with the staff,
10 submit the 2016 document, associated documentation,
11 ask us to -- with a request to make a finding of no
12 significant impact in the future, including
13 compliance with any other parts of 343 that may be
14 applicable. Commissioner Wong.

15 COMMISSIONER WONG: Chair, I would like to
16 retract my motion that was on the floor to defer.

17 CHAIRPERSON SCHEUER: So, Commissioner
18 Wong, you had made a motion to defer, and that you're
19 retracting that. And the secondary was Commissioner
20 Aczon, and you agree?

21 COMMISSIONER ACZON: Yes.

22 CHAIRPERSON SCHEUER: So now the floor is
23 open to a new motion.

24 COMMISSIONER CHANG: I move that we deny
25 the Petitioner's request that the Land Use Commission

1 accept the previously submitted Environmental
2 Assessment and the FONSI, and deny the second half of
3 the Petitioner's request without prejudice.

4 CHAIRPERSON SCHEUER: The motion has been
5 made by Commissioner Chang.

6 COMMISSIONER OHIGASHI: I'll second.

7 CHAIRPERSON SCHEUER: And it's already been
8 seconded by Commissioner Ohigashi. I think we are
9 clear on the motion. Any discussion on the motion?
10 Commissioner Okuda.

11 COMMISSIONER OKUDA: Thank you, Mr. Chair.

12 Let me speak in favor of the motion. It's
13 without prejudice, meaning the Commission does not
14 make a determination one way or the other, there's no
15 negative implication that the prior Environmental
16 Assessments are not acceptable. But I speak in favor
17 of this motion because I think it's important so that
18 whatever decision the Commission makes is less likely
19 to be changed or overturned on the basis that we did
20 not allow public input or public review of the
21 decision-making, even if we might believe -- I'm not
22 saying no one cares -- but there wouldn't be any type
23 of public input aside from the people here today. So
24 for that reason, I speak in favor of the motion which
25 is a denial again without prejudice.

1 CHAIRPERSON SCHEUER: Are there any further
2 comments or discussion of the motion? Hearing none,
3 Mr. Orodenker, please poll the Commission.

4 EXECUTIVE OFFICER: Thank you, Mr. Chair.
5 The motion by Commissioner Chang is to deny
6 Petitioner's request that the Land Use Commission
7 accept the prior finding of no significant impact
8 without prejudice.

9 Commissioner Chang?

10 COMMISSIONER CHANG: Yes.

11 EXECUTIVE OFFICER: Commissioner Ohigashi?

12 COMMISSIONER OHIGASHI: Yes.

13 EXECUTIVE OFFICER: Commissioner Wong?

14 COMMISSIONER WONG: Yes.

15 EXECUTIVE OFFICER: Commissioner Aczon?

16 COMMISSIONER ACZON: Yes.

17 EXECUTIVE OFFICER: Commissioner Cabral?

18 VICE CHAIR CABRAL: Yes.

19 EXECUTIVE OFFICER: Commissioner Okuda?

20 COMMISSIONER OKUDA: Yes.

21 EXECUTIVE OFFICER: Chair Scheuer?

22 CHAIRPERSON SCHEUER: Yes.

23 EXECUTIVE OFFICER: Thank you. The motion
24 passes unanimously.

25 CHAIRPERSON SCHEUER: Thank you to the

1 Petitioner, the County and the Office of Planning.

2 That concludes these agenda items for today.

3 This Commission is going to go into recess
4 and reconvene tomorrow morning at the Honolulu
5 Airport conference meeting room at 9:30 a.m. Thank
6 you.

7 (The proceedings adjourned at 2:56 p.m.)

CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on January 23, 2019 at 12:30 p.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 23rd day of January, 2019, in Honolulu, Hawaii.

/s/ Jean Marie

JEAN MARIE McMANUS, CSR #156