

LAND USE COMMISSION

STATE OF HAWAII

Hearing held on February 20, 2019

Commencing at 1:09 p.m.

Maui Arts & Cultural Center, Higashi Meeting Room

One Cameron Way, Kahului, Maui, Hawaii 96732

and

Malcolm Center

1305 North Holocono Street, Suite 5

Research & Technology Park

Kihei, Maui, Hawaii

Commencing at 6:14 p.m.

AGENDA

I. Call to Order

II. Adoption of Minutes

III. Tentative Meeting Schedule

IV. ACTION

194-706 Ka'ono'ulu Ranch (Maui).

* Consider Pi'ilani South, LLC, and P'ilani North, LLC, and Honua'ula Partners, LLC's Motion to Dismiss the Order to Show Cause Proceeding

* Consider Intervenors' Motion to Conduct Phase II of Contested Case Pending since 2012, and for Final Decision

* Consider Intervenors' Motion to Strike Portions of the Petitioner's Responses Attempting to Improperly Submit Evidence

V. Recess

VI. Call to Reconvene

VII. Status Report All-794 Department of Education-Kihei High School

VIII. Recess

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BEFORE: Jean Marie McManus, CSR #156

APPEARANCES:

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

STAFF:

PATRICIA OHARA, ESQ.
Deputy Attorney General

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

DAWN APUNA, ESQ.
Deputy Attorney General
RODNEY FUNAKOSHI, Planning Programing Administrator
For State Office of Planning

MICHAEL HOPPER, ESQ., Deputy Corporation Counsel
MICHELE McLEAN, Planning Director
ANN CUA, Planner VI
THOMAS KOLBE, ESQ. (DOE Kihei only)
For Maui County Department of Planning

RANDALL F. SAKUMOTO, ESQ.
CATHERINE TASCHNER, ESQ.
LISA CALTADO, ESQ.
Attorneys for Pi'ilani South and Pi'ilani North

CURTIS TABATA, ESQ.
Attorney for Honua'ula Partners, LLC

TOM PIERCE, ESQ.
Attorney for Intervenors

GAYLYN NAKATSUKA (DOE Kihei only)
Planning Coordinator
Department of Education

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1 CHAIRPERSON WONG: Good afternoon, aloha.
2 This is the February 20th, 2019 Land Use
3 Commission meeting.

4 Our first order of business is the adoption
5 of our February 6, 2019 minutes. Are there any
6 corrections or comments on the minutes? Seeing none,
7 is there a motion to adopt the minutes?

8 VICE CHAIR MAHI: I move.

9 VICE CHAIR CABRAL: Second.

10 CHAIRPERSON SCHEUER: Moved by Commissioner
11 Mahi and seconded by Commissioner Cabral. Any
12 discussion?

13 Next agenda item is the tentative meeting
14 schedule. Mr. Orodénker.

15 EXECUTIVE OFFICER: Thank you, Mr. Chair.

16 March 13th and 14 is currently open, but we
17 hesitate to fill those dates just yet.

18 March 27 and 28th we will be in Kona for
19 HHFDC, Lanihau; and March 28th at NELHA for the
20 Waikoloa Mauka Adoption Order and N Bencorp
21 Substitution of Petitioner and reversion, status
22 conference.

23 April 10th we will be back here on Maui for
24 any matters that need to be handled. We are also
25 reserving that date for a Motion for Declaratory

1 Ruling in the Kihei High School matter that was filed
2 just last night.

3 April 23rd and 24th, we will be on Oahu at
4 Bayview Golf Club for the Memorial Park matter.

5 On the 23rd and on the 24th, we will be at
6 the airport for the remainder of that hearing,
7 Honolulu International Airport.

8 May 8th and 9th -- May 7th, this we will be
9 at NELHA for AO2-737 and AO6-770.

10 May 22nd and 23rd Maui overnight Kaua'i,
11 Kealia matter and the Hokua Place matter.

12 June 12th and 13 is open.

13 June 26th we have a potential IAL, and that
14 takes us through the fiscal year.

15 CHAIRPERSON SCHEUER: Thank you, Dan.

16 Are there any questions from the
17 Commissioners?

18 Our next agenda item is an action meeting
19 to consider the following Docket A94-706 motions.

20 First, Petitioner's Pi'ilani Promenade
21 South, LLC, and Pi'ilani North, LLC; and Honua'ula
22 Partners, LLC's Motion to Dismiss the Order to Show
23 Cause proceedings.

24 Intervenors Maui Tomorrow Foundation,
25 Incorporation, South Maui Citizens for Responsible

1 Growth, and Daniel Kanahele's Motion to Conduct Phase
2 II of the Contested Case Pending since 2012, and for
3 Final Decision.

4 And Intervenors' Motion to Strike Portions
5 of the Petitioner's Response attempting to Improperly
6 Admit Evidence.

7 And here I guess is where we have to pause
8 because not all of the parties are here yet.

9 I will update the record and then ask for
10 the parties to identify themselves when we are graced
11 with the presence of Office of Planning.

12 On December 6, 2018, the Commission
13 received the Intervenors' Motion to conduct Phase II
14 of the Contested Case Pending since 2012.

15 On December 7, 2018, the Commission
16 received Intervenors' Memorandum in Opposition to
17 Petitioner's Motion to Dismiss the Order to Show
18 Cause Proceeding and the LUC mailed a letter to
19 Piilani Promenade North, LLC., and Piilani Promenade
20 South, LLC re: Continuance of the deadline to
21 respond to Intervenor's Motion to Conduct Phase II of
22 Contested Case Pending since 2012 and for Final
23 Decision.

24 On January 9, 2019, the Commission received
25 County's Position Statement re: Intervenors' Motion

1 to Conduct Phase II of Contested Case.

2 On January 10, 2019, the Commission
3 received:

4 Petitioner Pi'ilani Promenade's Memorandum
5 in Opposition to Intervenor's Motion to Conduct Phase
6 II of Contested Case Pending since 2012, and for
7 Final Decision, Filed December 3, 2018;

8 Office of Planning's Response to
9 Intervenor's Motion to Conduct Phase II of Contested
10 Case Pending since 2012, and for Final Decision;

11 Petitioner Honua'ula Partners, LLC's
12 Memorandum in Opposition to Intervenor's Motion to
13 Conduct Phase II of Contested Case Pending since
14 2012, and for Final Decision.

15 On January 17, 2019, the Commission
16 received Intervenor's Correspondence and support
17 documents requesting additional time to respond to
18 Parties opposition paper.

19 It's 1:14 p.m. and we have been joined by
20 representatives of Office of Planning.

21 On January 18, 2019, the Commission granted
22 Intervenor an extension, and the County of Maui
23 provided an email stating no objection to the
24 extension; and received the Declarations of Robert
25 Poynor, Kenneth Gift, and Darren Unemori from

1 Petition.

2 On January 31, 2019, the Commission
3 received Intervenor's Reply to the Parties Responses
4 to Intervenor's Motion to Conduct Phase II of
5 Contested Case and Intervenor's Motion to Strike
6 Portions of Petitioner's Responses Attempting to
7 Improperly Submit Evidence.

8 On February 1, 2019, the Commission
9 received the Original copy of Petitioner's Motion to
10 Dismiss Order to Show Cause Proceeding.

11 On February 4, 2019, the Commission
12 received Honua'ula Partners, LLC's Joinder to
13 Petitioner's Motion to Dismiss Order to Show Cause
14 Proceeding.

15 On February 5, 2019, the Commission
16 received Pi'ilani Promenade South, LLC, and Piilani
17 Promenade North, LLC's Memorandum in Opposition to
18 Intervenor's Motion to Strike Portions of the
19 Petitioner's Responses Attempting to Improperly
20 Submit Evidence, Filed January 31, 2019.

21 On February 6, 2019, the Commission
22 received Honua'ula Partners, LLC's Memorandum in
23 Opposition to Intervenor's Motion to Strike Portions
24 of the Petitioner's Responses Attempting to
25 Improperly Submit Evidence.

1 On February 7, 2019, the Commission
2 received Intervenors' Memorandum in Opposition to
3 Petitioner's Motion to Dismiss the Order to Show
4 Cause Proceeding.

5 On February 12, 2019, the Commission mailed
6 the agenda for February 20-21, 2019, meeting to
7 Parties and Statewide and Maui mailing lists.

8 On February 12, 2019, the Commission
9 received OP's Response to Petitioner's Motion to
10 Dismiss the Order to Show Cause.

11 On February 13, 2019, the Commission
12 received Petitioner's Reply Memorandum in Support of
13 their Motion to Dismiss the Order to Show Cause
14 Proceeding.

15 On February 14, 2019, the Commission
16 received County of Maui, Department of Planning's
17 Response to Petitioner's Motion to Dismiss the Order
18 to Show Cause Proceeding and OP's Withdrawal of
19 Response to Petitioner's Motion to Dismiss the Order
20 to Show Cause Proceeding and Amended Response to
21 Petitioner's Motion to Dismiss the Order to Show
22 Cause Proceeding.

23 I'll now go back slightly and ask the
24 parties to please identify themselves for the record.

25 MR. SAKUMOTO: Thank you, Mr. Chair.

1 Randall Sakumoto and Catherine Taschner here on
2 behalf of Piilani North and Pi'ilani South.

3 MR. TABATA: Curtis Tabata for Honua'ula
4 Partners.

5 MR. HOPPER: Michael Hopper, Deputy
6 Corporation Counsel, representing Maui County
7 Department of Planning. With me is Acting Planning
8 Director Michele McLean and Planner VI Ann Cua.

9 MS. APUNA: Good afternoon, Chair. I
10 apologize for our tardiness.

11 Deputy Attorney General Dawn Apuna on
12 behalf of the Office of Planning. With me is Rodney
13 Funakoshi.

14 MR. PIERCE: Good afternoon, Mr. Chair and
15 Commissioners. This is Tom Pierce on behalf of
16 Intervenors Maui Tomorrow, South Maui Citizens for
17 Responsible Growth, and Daniel Kanahele. And at some
18 point Mark Hyde from South Maui Citizens for
19 Responsible Growth may join me up here.

20 CHAIRPERSON SCHEUER: Thank you very much.

21 The Chair would like the parties and public
22 to be aware that due to the Land Use Commission's
23 meeting obligations scheduled in Kihei this evening,
24 the Commission will be taking a recess, if necessary,
25 around 3:30 to 4:00 p.m., depending on the state of

1 this meetings proceeding to reposition ourselves for
2 the evening meeting.

3 The Commission will resume the hearing of
4 any remainder of this matter here at the Maui Arts
5 and Cultural Center tomorrow morning at 9:00 a.m.

6 Let me briefly further describe our
7 procedures.

8 First I will call for any individuals
9 desiring to provide public testimony to identify
10 themselves. Any such individuals will be called in
11 turn to our witness box where they will be sworn in
12 prior to testimony.

13 After public testimony, the Commission will
14 hear evidence and argument on Petitioner Pi'ilani
15 Promenade South, LLC and Pi'ilani North, LLC and
16 Honua'ula Partners, LLC's Motion to Dismiss the Order
17 to Show Cause Proceedings.

18 At the conclusion of the arguments on this
19 Motion, and after questions from the Commissioners,
20 and the answers thereto, the Commission will conduct
21 its deliberations.

22 If this Motion is denied, the Commission
23 will then concurrently hear arguments for the two
24 remaining Motions, Intervenor Maui Tomorrow
25 Foundation, Inc., South Maui Citizen for Responsible

1 Growth, and Daniel Kanahele's Motion to Conduct Phase
2 II of the Contested Case Pending Since 2012, and for
3 Intervenor's Motion to Strike Portions of the
4 Petitioner's Responses Attempting to Improperly Admit
5 Evidence.

6 Are there any questions on our procedures
7 today?

8 MR. SAKUMOTO: No.

9 MR. TABATA: No.

10 MR. HOPPER: No, Mr. Chair.

11 MS. APUNA: No.

12 MR. PIERCE: No.

13 CHAIRPERSON SCHEUER: Mr. Okuda.

14 COMMISSIONER OKUDA: Thank you, Mr. Chair.

15 If this is a proper point, I would like to
16 make a disclosure.

17 CHAIRPERSON SCHEUER: Please proceed.

18 COMMISSIONER OKUDA: In my practice of law
19 I have two pending cases where partners of the
20 McCorriston Mukai Law Firm represent adverse parties.
21 I don't believe the fact that I am involved in
22 litigation where partners from the McCorriston firm
23 are involved will affect my decision-making here, but
24 I would like to make that disclosure.

25 CHAIRPERSON SCHEUER: Thank you. Are there

1 any objections from the parties to this proceeding to
2 Mr. Okuda's continued participation?

3 MR. SAKUMOTO: No objection, Mr. Chair.

4 MR. TABATA: No.

5 MS. APUNA: No.

6 MR. HOPPER: No.

7 MR. PIERCE: No.

8 CHAIRPERSON SCHEUER: Any other disclosures
9 from my fellow Commissioners?

10 Are there people who -- show of hands --
11 are planning to testify today? So for those that are
12 testifying, we're going to ask, due to the complexity
13 of these proceedings, to try to limit your testimony
14 to three minutes.

15 So now is the time for public testimony.
16 Mr. Orodenger.

17 EXECUTIVE OFFICER: Thank you. The first
18 testifier is Mike Moran, followed by Harry Lake.

19 CHAIRPERSON SCHEUER: Good afternoon, Mr.
20 Moran. Do you swear or affirm that the testimony
21 you're about to give is the truth?

22 THE WITNESS: I do.

23 CHAIRPERSON SCHEUER: Please state your
24 name and address for the record and proceed with your
25 testimony.

1 THE WITNESS: My name is Mike Moran. I'm
2 testifying for the Kihei Community Association. My
3 address is 167 Ahaaina Way in Kihei, Hawai'i.

4 MIKE MORAN

5 Was called as a witness by and on behalf of the
6 Public, was sworn to tell the truth, was examined and
7 testified as follows:

8 DIRECT EXAMINATION

9 THE WITNESS: Back on August 24th of 2012
10 we traveled from Kihei up to Ka'anapali to testify on
11 this matter concerning a motion regarding a land use
12 change of the Ka'ono'ulu lands to show cause why the
13 land classification should not revert back to
14 Agriculture from Urban.

15 Under the chairmanship of Kyle Chock, the
16 Commissioners voted unanimously to approve the Motion
17 for Show Cause Order after listening to and reading
18 testimony submitted by interested parties on the
19 situation, including ours.

20 That day we had two testifiers. One
21 offering our then current position, and the other
22 reading testimony from the now deceased past KCA
23 president, Carla Flood, reflecting back on the
24 original use change.

25 So our nonprofit has extensive lengthy

1 participation on this land in our district.

2 Now, some six-and-a-half years later after
3 decades since the original use change, the land
4 remains basically the same. Is it not now time for
5 the land to revert back to agriculture? Is there not
6 some reasonable time limit when the volunteer
7 Commissioners decide they and scores of previous
8 Commissioners and staff have devoted more than enough
9 time and resources when no change has occurred and to
10 close this matter, revert the change and move on?

11 We certainly believe that it is. Mahalo.

12 CHAIRPERSON SCHEUER: Are there questions
13 for the witness?

14 MR. SAKUMOTO: No questions, Mr. Chair.

15 MR. TABATA: No.

16 MR. HOPPER: No.

17 MS. APUNA: No.

18 MR. PIERCE: No questions.

19 CHAIRPERSON SCHEUER: Commissioners? Thank
20 you, Mr. Moran.

21 THE WITNESS: Thank you, sir.

22 EXECUTIVE OFFICER: Next testifier is Harry
23 Lake followed by Mark Hyde.

24 THE WITNESS: My name is Harry Lake. I'm
25 with Koa Partner --

1 CHAIRPERSON SCHEUER: Do you swear or
2 affirm that the testimony you're about to give is the
3 truth?

4 THE WITNESS: I do.

5 CHAIRPERSON SCHEUER: Identify yourself by
6 name and address.

7 THE WITNESS: Harry Lake, Koa Partners.
8 Home address 4554 Westwood Avenue, Dallas, Texas.

9 HARRY LAKE

10 Was called as a witness by and on behalf of the
11 Public, was sworn to tell the truth, was examined and
12 testified as follows:

13 DIRECT EXAMINATION

14 CHAIRPERSON SCHEUER: Please proceed. It
15 appears you have a PowerPoint presentation.

16 THE WITNESS: Yes, real quick.

17 First of all, I was participating with the
18 current ownership to help outreach to the community.
19 I think I testified last time to that effect.

20 We just wanted to take some time to let you
21 know that we have actually done significant outreach
22 to the community, including meeting with the
23 Intervenor, basically seeking to understand their
24 thoughts of what should be at the property.

25 So we went in with no agenda last January,

1 February. We took their feedback and we went back to
2 Intervenors and then presented some ideas. We took
3 that additional feedback and then presented again to
4 Intervenors the plans and the resulting plans.

5 Went through multiple iterations of exactly
6 what we thought we were hearing. Understandably we
7 were not in sync completely. So we iterated yet
8 again. Then we presented to islandwide community
9 meeting in Kihei.

10 So we had that meeting. Then we took back,
11 again, and we hired a cultural consultant to help us
12 better articulate the things that we were hearing.
13 Then we came up with yet another plan.

14 And it's about that time we got really
15 excited, particularly responding to things that we
16 heard from Mr. Kanahale, things that we heard from
17 Keamoku Kapu (phonetic). Things we heard from Vernon
18 Kalanikau (phonetic) and even things we hear from the
19 Hewahewa family, and we tried to incorporate that.

20 We reached out to Intervenors again. At
21 that point they disengaged. And there really, really
22 wasn't a great reason that we understood. They just
23 said, we're tired at looking at more plans. So it
24 was disappointing. But we said, hey, we still want
25 to do the right thing.

1 And so when we got to the position where we
2 had to go back to the original D&O, we said okay, we
3 can do that. But we could not be responsive yet to
4 the things that we're hearing.

5 So the plan in front of you has us
6 preserving over seven acres of the creek, which is
7 one of the key points both cultural and environmental
8 that we thought we were hearing was important to the
9 community. Even though we really didn't get the
10 engagement of the community to do that, but personal
11 sacrifice of the owners, we said this is the right
12 thing to do.

13 So we believe it's substantially compliant,
14 the original plan. We think it speaks to a lot of
15 things that we heard in the community, and we still
16 want to be responsive to those things, and we want to
17 be good stewards of the land.

18 So we just wanted to at least provide some
19 context around the out reach that we've done. The
20 sensitivity that we have taken into consideration,
21 and the personal sacrifices we made.

22 Sorry we weren't be able to really go to
23 the slides.

24 CHAIRPERSON SCHEUER: Thank you, Mr. Lake.
25 Are there questions for the witness, Petitioner?

1 MR. SAKUMOTO: No questions, Mr. Chair.

2 MR. TABATA: No questions.

3 MR. HOPPER: No questions.

4 MS. APUNA: No questions.

5 MR. PIERCE: No.

6 CHAIRPERSON SCHEUER: Commissioner Okuda.

7 COMMISSIONER OKUDA: Thank you, Mr. Chair.

8 Mr. Lake, because of this outreach that you
9 have been engaged in, you're familiar with the
10 current use of the land; is that correct?

11 THE WITNESS: Yes.

12 COMMISSIONER OKUDA: Is the land being used
13 in any way currently or right now?

14 THE WITNESS: When you say "currently", are
15 you talking about the substation, MECO's under
16 construction with the substation?

17 COMMISSIONER OKUDA: It's a general
18 question. Right now, is the land -- when I say "the
19 land", I mean the property which is subject to this
20 proceeding.

21 Is there any use of that land right now?

22 THE WITNESS: No, no. We're not using the
23 land right now. We would like to, but we are not.

24 COMMISSIONER OKUDA: That answers my
25 question. Thank you very much.

1 CHAIRPERSON SCHEUER: Commissioner Chang.

2 COMMISSIONER CHANG: Good afternoon, Mr.
3 Lake. Thank you so much for your testimony.

4 Two questions. It sounds like you had a
5 lot of community outreach and you engaged a lot of
6 people. On an average, how many people attended your
7 meetings?

8 THE WITNESS: Well, we coordinated a lot of
9 meetings through Intervenors, so they coordinated
10 individual meetings there.

11 And at the meeting, like over 50 people
12 that showed up in response to an article in Maui
13 Times.

14 COMMISSIONER CHANG: Did you do public
15 notice of the meeting?

16 THE WITNESS: We did through Maui Times.

17 COMMISSIONER CHANG: Is it your testimony
18 that the plan that you just handed out to us, is this
19 consistent with the original D&O that was approved in
20 1995?

21 THE WITNESS: I believe it's substantially
22 compliant with the original. Yes.

23 COMMISSIONER CHANG: Had a cultural
24 preserve as well?

25 THE WITNESS: It did not. Though we

1 thought that that's -- we're happy to strike that, if
2 that would make sense. Although we thought that made
3 a lot of sense, given what we were hearing in
4 response to things that we thought was important.

5 COMMISSIONER CHANG: Thank you very much.

6 CHAIRPERSON SCHEUER: Mr. Hopper.

7 MR. HOPPER: I'm sorry, just a copy of what
8 was submitted. I don't think I have a copy.

9 CHAIRPERSON SCHEUER: Mr. Hakoda?

10 For the transcript, the printed sheet, one
11 page, was handed to the Commissioners, but not all of
12 the parties. That has now been shared with them.

13 THE WITNESS: If you could grace me just
14 30 seconds.

15 We were just talking about all the outreach
16 that we had with this part of community that we had.
17 Again, we went through multiple iterations to the
18 point where I think people got exhausted at how much
19 architect drafting and people responding, but still
20 thankful of the feedback that we got.

21 This was presented in Kihei at the
22 community meeting, live, like our architect live
23 sketched in response to things. And then we took a
24 great comment that was made by Keamoku Kapu who said,
25 hey, you know, you got to start with the aina, and

1 then build from there.

2 When we were hearing feedback from
3 Intervenors, it was more uses and things of that
4 nature.

5 So we started from scratch, and we started
6 off from the Hewahewa family, where they talked about
7 a celestial space where they could do those
8 practices.

9 So we started out there at the center of
10 the land that we're talking about, and we'd build
11 affordable housing and other uses.

12 So start we started migrating something and
13 respecting the creek. These are the things that we
14 were so excited about having discussions with the
15 Intervenors. But they disengaged. They didn't even
16 want to meet.

17 COMMISSIONER OHIGASHI: I think the
18 question was how many people were at --

19 THE WITNESS: I think I answered that.

20 COMMISSIONER OHIGASHI: Goes beyond the
21 question.

22 And the other question I have is, does the
23 PowerPoint in front us, do we have to take -- is that
24 part of the record? Do we have to include that part
25 for clarification?

1 CHAIRPERSON SCHEUER: So to take things in
2 order, the witness asked for 30 seconds more to
3 explain things. And I chose, as Chair, to grant
4 that.

5 As to the second question, I would turn
6 to -- if there is a question about whether this is
7 now admitted as evidence, the contents of a
8 PowerPoint, is that your question, Mr. Ohigashi?

9 I will turn to our deputy attorney.

10 MS. OHARA: You can accept the printout of
11 the PowerPoint.

12 CHAIRPERSON SCHEUER: And that can be made
13 available to us?

14 THE WITNESS: Absolutely. We have a copy
15 of that. We will get that to you.

16 CHAIRPERSON SCHEUER: Anything further,
17 Commissioners? Thank you, Mr. Lake.

18 Who's our next witness, Mr. Orodénker?

19 EXECUTIVE OFFICER: The next witness is
20 Mark Hyde followed by Albert Perez.

21 CHAIRPERSON SCHEUER: Good afternoon, Mr.
22 Hyde. I don't know if you were here when I advised
23 that we would be trying to limit testimony.

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

1 THE WITNESS: I do.

2 CHAIRPERSON SCHEUER: State your name and
3 address for the record.

4 THE WITNESS: Mark Hyde, 4320 East Waiola
5 Loop in Kihei, Hawai'i.

6 MARK HYDE

7 Was called as a witness by and on behalf of the
8 Public, was sworn to tell the truth, was examined and
9 testified as follows:

10 DIRECT EXAMINATION

11 THE WITNESS: This summer will mark a
12 quarter of a century since Ka'ono'ulu Ranch filed
13 this Petition in 1994 with this body to change the
14 use of the subject 88 acres of land from ag to urban
15 for development of a 123-lot light industrial park.

16 It gained conditional approval a year
17 later, but it never began the development. And sold
18 the land in 2005 to Maui Industrial Partners, which
19 then redirected the land for a retail shopping center
20 use.

21 17 years later the community learned from
22 the first page of the Maui News that the largest
23 shopping center in the county was to be developed on
24 the land.

25 A month after that, I met face-to-face with

1 the County Director of Planning and other county
2 officers to inform them of the Commission's
3 conditional order, and of the county's statutory duty
4 under HRS 205-12 to enforce it. They refused to act.

5 So the community had a choice. Let another
6 chapter of land in power in Hawai'i be written, or
7 stand up. We petitioned to intervene. And in the
8 fall of 2002, the Commission found the current owners
9 in violation of its 1995 order.

10 Since then, the owners have had six more
11 years to make this right, but their proposed EIS in
12 support of a different project was rejected by the
13 Commission a year-and-a-half ago.

14 It's now been 24 years and seven months
15 since the ranch filed to obtain the right to receive
16 a development of the light industrial park. That
17 project still has not begun, and there's no plan to
18 do it.

19 The longer any case takes, the greater cost
20 to all involved in time and energy and money. This
21 is particularly true for community members and groups
22 who step in when government refuses to act.

23 We've lacked the benefit of deep pockets
24 afforded by government and developers. We believe
25 it's time for closure in this matter, for justice to

1 be entered by entering the judgment, reverting the
2 land, clearing the Commission's docket, freeing the
3 Intervenor, and giving the developers a clean slate
4 from which to begin anew.

5 And I'll add in closing that I've never
6 seen the proposed map that was handed to you just now
7 by Mr. Lake. Thank you very much.

8 CHAIRPERSON SCHEUER: Are there questions
9 for the witness?

10 MR. SAKUMOTO: No questions, Mr. Chair.

11 MR. TABATA: No questions.

12 MR. HOPPER: No questions.

13 MS. APUNA: No questions.

14 MR. PIERCE: No questions.

15 CHAIRPERSON SCHEUER: Ms. Apuna, please
16 make sure you project. There is not a microphone in
17 front of you.

18 Commissioners? Thank you very much.

19 EXECUTIVE OFFICER: Next witness signed up
20 to testify is Albert Perez, and that's all the
21 witnesses that we have signed up.

22 CHAIRPERSON SCHEUER: Do you swear or
23 affirm that the testimony you're about to give is the
24 truth?

25 THE WITNESS: I do.

1 CHAIRPERSON SCHEUER: Please proceed.

2 ALBERT PEREZ

3 Was called as a witness by and on behalf of the
4 Public, was sworn to tell the truth, was examined and
5 testified as follows:

6 DIRECT EXAMINATION

7 THE WITNESS: Albert Perez, Executive
8 Director of Maui Tomorrow Foundation. My address is
9 55 North Church Street in Wailuku.

10 I would like to reference the Declaration
11 that I filed in this matter on November 30th of 2018.

12 In that Declaration I noted that we were
13 contacted by Mr. Harry Lake of Koa Partners on
14 February 1st of 2018, which was over a year ago.

15 Although at that point we had been involved
16 in this case for six years, we agreed in good faith
17 to explore options that would benefit the community.

18 One of the first things that we told them
19 were that there were important cultural features on
20 the site that any new proposals would need to
21 recognize.

22 After more than seven months, the site
23 plans presented to us by Koa Partners still failed to
24 accommodate those important features. When they
25 finally did modify the plan, the cultural features

1 were treated as mere landscape features robbed of
2 their context.

3 At a public meeting on September 17th, the
4 members of the community were quite vocal in their
5 opposition to the plan. And based on that community
6 reaction, and based on the fact that lineal
7 descendants of the land had not been consulted, and
8 rejected the plan, we determined that further
9 negotiations would not be likely to lead to a project
10 that the community could support.

11 We have not changed our opinion on this.
12 And it is time for this matter to be closed. Thank
13 you.

14 CHAIRPERSON SCHEUER: Are there questions
15 for the witness?

16 MR. SAKUMOTO: No questions, Mr. Chair.

17 MR. TABATA: No questions.

18 MR. HOPPER: No, Mr. Chair.

19 MS. APUNA: No questions.

20 MR. PIERCE: No questions.

21 CHAIRPERSON SCHEUER: Commissioners? Thank
22 you, Mr. Perez.

23 Is there anybody else from the public
24 wishing to provide testimony on this matter?

25 So we're done with public testimony. One

1 thing I normally note at the beginning, from time to
2 time I will call for recesses in this matter.

3 Approximately I try to do it every 55 minutes or so.

4 Are you ready to proceed, Mr. Sakumoto?

5 MR. SAKUMOTO: Yes, we are, Mr. Chair.

6 CHAIRPERSON SCHEUER: Please proceed.

7 MR. SAKUMOTO: If you can indulge me for
8 one minute, we want to get a PowerPoint ready. We do
9 have hard copies of this. I had mentioned to your
10 Executive Officer before the meeting started that one
11 of the slides was changed slightly this afternoon, so
12 the hard copy unfortunately is not 100 percent
13 accurate.

14 I can provide the complete copy right after
15 the meeting once we are able to switch out that page,
16 which may be, I think, probably better for the
17 record, if the --

18 CHAIRPERSON SCHEUER: No concerns from any
19 of the parties with that small change?

20 MR. PIERCE: Mr. Chair, Tom Pierce with
21 Intervenor. I'm not familiar with this PowerPoint
22 or the documents, and to the extent that any portion
23 of this is an addition or augments the copious
24 filings that have been made by the Petitioners, we
25 would object to it.

1 CHAIRPERSON SCHEUER: To be clear, Mr.
2 Pierce, you're objecting to us receiving a corrected
3 printed copy from the PowerPoint that is going to be
4 used in their presentation?

5 MR. PIERCE: To be clear, we're objecting
6 to the PowerPoint in its entirety to the extent that
7 it has any documents or presentation of materials
8 that are different from what was in the pleadings
9 that have been filed already with respect to
10 Petitioner's Motion to Dismiss.

11 And so on that, I would just say that the
12 reason that I would say here is obviously you're an
13 administrative agency. You're permitted to take
14 things that a court might not have to take, but in
15 this instance we haven't had the opportunity to
16 respond to it, and won't have the opportunity to
17 respond to it on paper.

18 And we would think it would be prejudicial
19 at this point, in addition to the facts that
20 Petitioners have had a very good opportunity to make
21 a higher case.

22 CHAIRPERSON SCHEUER: This is going to
23 happen quicker than I thought. I'm going to take a
24 couple minutes to recess.

25 (Off the record.)

1 CHAIRPERSON SCHEUER: We're back on the
2 record.

3 Mr. Sakumoto, is there anything in your
4 PowerPoint that is new information, or is this
5 information that's already contained in its entirety
6 in the filings that you've made on this case?

7 MR. SAKUMOTO: Thank you, Mr. Chair.

8 The only information I think that I would
9 consider new, in other words, not in any of the
10 filings for this case or otherwise part of the case's
11 record, is the diagram which Mr. Lake handed out
12 during his testimony.

13 CHAIRPERSON SCHEUER: Can you proceed while
14 excluding that?

15 MR. SAKUMOTO: It would be difficult to do
16 that.

17 CHAIRPERSON SCHEUER: Because my
18 inclination is to sustain the objection to providing
19 new information at this point in the proceedings.

20 MR. SAKUMOTO: All I can offer right now is
21 we do have a Declaration of the owners, Pi'ilani
22 Promenade, that would attest to this map, this
23 diagram, and we're prepared to submit that today.

24 I didn't want to do that until we had this
25 chance to discuss this with the Commission, rather

1 than just submit it. So I have it ready. I can
2 offer that up.

3 I think that if the Commission would
4 indulge us and consider this, it is a proposal that
5 is very worthy of consideration. I'm hoping that it
6 provides a means for all parties to move forward.

7 MR. PIERCE: Mr. Chair, if I may interject
8 momentarily.

9 CHAIRPERSON SCHEUER: Mr. Pierce.

10 MR. PIERCE: As I understand it, the
11 Petitioners want to include a diagram of what
12 apparently is going to be a new proposal being made
13 at the last minute.

14 But I would just point out to Mr. Chair and
15 to the Commissioners that the Motion to Dismiss that
16 was filed by the Petitioners doesn't have anything to
17 do with a design issue, so we don't think there's any
18 problem in rejecting that coming into evidence.

19 The Motion to Dismiss is based upon the
20 law. That's how they presented it. So there's no
21 basis for them to exclude that except to -- which we
22 believe has been an on-going pattern and practice as
23 we present in our pleadings. There's been an
24 effort --

25 CHAIRPERSON SCHEUER: Let's just focus on

1 the diagram at this point.

2 MR. PIERCE: We believe the only reason for
3 the Petitioners to add this at this point in time is
4 to attempt to taint the record, frankly, Mr. Chair.

5 COMMISSIONER OKUDA: Mr. Chair.

6 CHAIRPERSON SCHEUER: Commissioner Okuda.

7 COMMISSIONER OKUDA: Mr. Chair, it's in
8 your discretion, but I would ask the Chair to ask
9 counsel for the Petitioner why this document was not
10 presented earlier to the parties and placed in the
11 record earlier?

12 CHAIRPERSON SCHEUER: Can you please
13 respond to Commissioner Okuda's question, Mr.
14 Sakumoto?

15 MR. SAKUMOTO: Thank you, Mr. Chair. Yes.

16 The specifics of this proposal that are
17 shown in this diagram really had been something that
18 was a work in progress over the last several days, I
19 would say, or the last week.

20 It took into account information which, you
21 know, we were able to gather, basically feedback
22 which Mr. Lake received, and it was essentially
23 information that came after the filing of all of the
24 other pleadings that you received in this case.

25 So we didn't prepare one and try to submit

1 one, you know, just on the eve of this hearing. We
2 are prepared to do that, I'm just trying to be open
3 about --

4 CHAIRPERSON SCHEUER: What are you prepared
5 to do? Can you repeat what you are prepared to do?

6 MR. SAKUMOTO: We are prepared to submit a
7 declaration that attests to this diagram as part of
8 the Motion to Dismiss. As we understand the rules of
9 the Land Use Commission, that information that is not
10 already part of the record can be submitted in a
11 motion practice only if supported with an affidavit
12 or a declaration.

13 We're prepared to do that today, but I
14 leave it to the Commission.

15 MS. TASCHNER: May I add something?

16 We would like to submit a declaration of
17 our client, and consistent with, as an offer of proof
18 for the record, consistent with the Commission's
19 rules.

20 CHAIRPERSON SCHEUER: What specific rule
21 are you citing to?

22 MS. TASCHNER: Section 15-15-63.

23 We understand that the Commission can
24 exclude evidence if it is irrelevant, immaterial or
25 unduly repetitious. But this diagram that we would

1 like to use goes to the merits of the case, and I
2 think does help us to show that we are in substantial
3 compliance.

4 MR. PIERCE: Mr. Chair, if I may.

5 CHAIRPERSON SCHEUER: No, you may not. One
6 second. Mr. Okuda.

7 COMMISSIONER OKUDA: Thank you, Mr. Chair.

8 Can the Chair ask the Petitioner when did
9 they come to the conclusion -- how many days ago did
10 they come to the conclusion that this information was
11 either relevant or necessary for this motion?

12 CHAIRPERSON SCHEUER: Would you please
13 respond to Commissioner Okuda's question?

14 MR. SAKUMOTO: I would estimate that
15 perhaps within the last five days, four or five days.

16 COMMISSIONER OKUDA: And final question, if
17 the Chair would entertain the question.

18 If the Chair could ask the counsel if they
19 had come to that conclusion five days ago, wouldn't
20 it have been a matter of not only professional
21 courtesy, but giving adequate notice to inform all
22 parties to this action that you might be
23 supplementing the record, so that perhaps something
24 could have been worked out without actually
25 potentially prejudicing people by not having this

1 advanced notice?

2 CHAIRPERSON SCHEUER: Would you please also
3 respond to that question, Mr. Sakumoto?

4 MR. SAKUMOTO: Yes. As a matter of
5 professional courtesy, perhaps at that time we should
6 have circulated a copy of this document.

7 CHAIRPERSON SCHEUER: Mr. Pierce, you had
8 wanted to say something.

9 MR. PIERCE: Thank you, Mr. Chair.

10 Just to keep it very brief. The Motion to
11 Dismiss is essentially, the context and the substance
12 of that motion is an argument being made by the
13 Petitioner that the Commission now lacks the
14 authority to continue the contested case hearing
15 that's been going on for six years.

16 If the Petitioner seeks to argue or present
17 evidence with respect to substantial compliance, that
18 is an issue for Phase II and always has been; and if
19 they are prepared to continue to Phase II, then we
20 can move on.

21 But if the issue of substantial compliance
22 should not be part of their Motion to Dismiss, which
23 is based on issues related to the law in this
24 Commission's authority. And I'll stop there.

25 CHAIRPERSON SCHEUER: Commissioner Chang.

1 COMMISSIONER CHANG: Thank you, Mr. Chair.
2 I have a more fundamental question.

3 My understanding on the Motion to Dismiss
4 is that essentially the Petitioner is planning to do
5 the same project that was proposed in 1995.

6 So are you now proposing something that is
7 different? I mean it's actually a foundational
8 question. What is your offer of proof that this is
9 -- is this the same project in 1995? Or a different
10 project from 1995? Because that is the basis of your
11 motion.

12 CHAIRPERSON SCHEUER: So please respond to
13 Commissioner Chang's question. I'm being extra
14 deliberate that right now it is -- there's an offer
15 and request to submit something into evidence, and
16 objection to that, and I'm, as Chair, trying to
17 control that discussion.

18 Would you please respond to Commissioner
19 Chang's question?

20 MR. SAKUMOTO: Yes, I appreciate the
21 question.

22 If you would allow me to show you a
23 comparison between the 1995 plan and the plan that is
24 in this diagram, I think that would probably help to
25 answer your question most succinctly.

1 CHAIRPERSON SCHEUER: However, in doing so,
2 would require us to allow you to admit that into the
3 record.

4 Commissioner Ohigashi.

5 COMMISSIONER OHIGASHI: Is the question to
6 the Chair what effect does the fact that the question
7 that I asked earlier as to whether or not the
8 documents presented by Mr. Lake would be admitted
9 into the record, and the Chair introduced it as part
10 of the record.

11 My understanding, this diagram was part of
12 that presentation. So I'm just asking what effect
13 does the fact that we have accepted it into the
14 record have in regards to our determination whether
15 this can be used in this motion?

16 CHAIRPERSON SCHEUER: Is there a motion?
17 Are you making a motion to go into executive session,
18 Mr. Ohigashi?

19 COMMISSIONER OHIGASHI: If we can, to
20 consult our attorneys, yes. I'm making a motion to
21 consult our attorney regarding practices and
22 procedures before this Commission.

23 CHAIRPERSON SCHEUER: Is there a second to
24 Mr. Ohigashi's motion?

25 COMMISSIONER WONG: Second.

1 CHAIRPERSON SCHEUER: Motion made by
2 Commissioner Ohigashi, and Commissioner Wong seconded
3 to go into executive session to consult with counsel
4 on this matter.

5 Any discussion on the motion? All in favor
6 say "aye". Is there anybody opposed? Commission
7 will go into executive session.

8 (Executive session.)

9 CHAIRPERSON SCHEUER: We are back on the
10 record.

11 Where we were in our proceedings, Mr.
12 Sakumoto was about to give a PowerPoint, and he noted
13 that this PowerPoint contained information that was
14 only already in his pleadings on this matter with the
15 exception of a diagram.

16 Earlier during the public witness portion
17 of our proceedings, this exact same diagram was
18 provided to us, and actually asked the parties
19 whether or not there was an objection, when there was
20 a question from one of the Commissioners about
21 whether this would be part of the record.

22 There were no objections from any of the
23 parties to that diagram, this diagram being part of
24 the record. So it is already in the record.

25 Because of that, I'm inclined to simply let

1 Mr. Sakumoto proceed with his presentation.

2 Please proceed.

3 MR. SAKUMOTO: Thank you, Mr. Chair. And
4 thank you for hearing our Motion to Dismiss.

5 I appreciate the fact you have a very long
6 day ahead of you, and I'll try to keep this as brief
7 as possible.

8 Just as a reminder, our clients own six of
9 the seven parcels that are encumbered by the Decision
10 and Order in this case. I'll refer to it as the D&O.
11 Here in this PowerPoint it's shown in orange.

12 Honua'ula Partners owned the 13 acre parcel
13 that's shown in yellow.

14 In July of last year I reported to the
15 Commission that the Petitioner had teamed up with Koa
16 Partners to lead the design efforts for the original
17 1995 development plan.

18 The first step in that process was for Koa
19 to reach out to the community to open new lines of
20 communication, to be transparent about the idea of
21 going back to the original 1995 plan, and to listen
22 to the thoughts and ideas of those who are willing to
23 engage in the dialogue.

24 Koa Partners arranged meetings with
25 representatives from various parts of the community,

1 including Intervenors, lineal descendants of the
2 Petition Area, and people who testified at the
3 July 17th hearing on the EIS.

4 Koa also arranged for a public meeting
5 where residents from Maui, not just Kihei, were
6 invited to attend. During the year-long outreach
7 process, there were more than two dozen meetings with
8 community groups as well as numerous one-on-one
9 meetings.

10 As I also mentioned in July, the goal of
11 this outreach effort was to arrive at a development
12 plan that all parties could stipulate to in terms of
13 compliance with representations made to the
14 Commission.

15 In other words, we were trying very hard to
16 identify that project which incorporated components
17 which the community desired, but would still
18 substantially comply with the representations made.

19 Many good ideas were shared during these
20 discussions, including suggestions to incorporate
21 affordable and senior housing options, preservation
22 of certain physical aspects of the Petition Area, the
23 establishment of a celestial viewing area, as well as
24 certain viewplanes.

25 With each community meeting more input was

1 received. The development plan evolved, and an
2 updated version of the site plan had to be prepared.

3 While most changes would have had a
4 negative impact in terms of the investment in the
5 property, the Petitioners were nonetheless encouraged
6 by the progress that was being made, and looked
7 forward to the day when a stipulation could finally
8 be signed by all parties and presented to this
9 Commission.

10 Then one day in November of last year the
11 Intervenors unexpectedly notified Pi'ilani that they
12 were discontinuing all further discussions. This was
13 disappointing. And in the span of just a few weeks,
14 we went from one year of community outreach and
15 meaningful progress to what a mutually acceptable
16 development plan, to no further dialogue and the
17 filing of the stack of motions and memos that are now
18 before you today.

19 Needless to say, the Petitioners were
20 extremely disheartened by this turn of events.

21 MS. TASCHNER: Even though the Intervenors
22 chose to discontinue all conversation with Koa
23 Partners, our client wanted to honor the community
24 input received during the year-long outreach process.

25 As mentioned earlier, Harry Lake of Koa

1 Partners conducted over 25 meetings with the
2 community. During these meetings the public
3 expressed that they wanted the development to
4 incorporate more open space, honor cultural and
5 historical practices, and to include other uses other
6 than light industrial.

7 Balancing these community interests and the
8 Petitioner's obligation to develop the property in
9 substantial compliance with the representations made
10 in 1995, the Petitioners and Koa Partners developed
11 what we are presenting today as the modified original
12 plan.

13 The original D&O states that the project
14 will be a, quote, 123-lot commercial and light
15 industrial subdivision, end quote.

16 As you can see in the slide, the modified
17 original plan almost completely adopts the original
18 site plan, and will be used exclusively for
19 commercial and light industrial uses.

20 The modified original plan differs from the
21 original plan to accommodate feedback received from
22 the community. During the outreach process, our
23 client received lots of feedback on the gully or
24 creek that transects a portion of the property.

25 According to certain community members, the

1 gully has cultural significance.

2 In addition, our client also received
3 feedback regarding seven other sites on the property
4 that may have archaeological significance.

5 To honor the community's input, our client
6 has developed a modified original plan and --

7 MR. PIERCE: Mr. Chair, I must enter an
8 objection that the attorney is acting as a witness
9 instead of as an attorney.

10 She is purporting to act as a witness
11 talking about all the community outreach and all
12 those types of things. They had an opportunity to
13 present affidavits and declarations when they filed
14 their Motion to dismiss. And to the extent that
15 they're not here, they should not now be presented to
16 augment the record.

17 CHAIRPERSON SCHEUER: Is there a specific
18 thing that you're noting that is in the oral
19 discussion from counsel for the Petitioner that is
20 not in their motions?

21 MR. PIERCE: I would say that all of the
22 discussion that is happening right now is all about
23 what he said, she said, and in terms of what someone
24 thought they were hearing, those types of things.
25 And the point I would make on all of that is, is that

1 there's no way for me to -- unless the attorney wants
2 to lose her role as an attorney -- there's no way for
3 the Intervenor or any of the other parties to
4 cross-examine that type of evidence.

5 CHAIRPERSON SCHEUER: No, but you will, Mr.
6 Pierce, have a full opportunity to present your case,
7 which I would assume could respond to any of the
8 Petitioner's arguments that are being made.

9 MR. PIERCE: It appears they're not being
10 presented as arguments, being presented as facts and
11 that is our objection.

12 CHAIRPERSON SCHEUER: Your objection is
13 noted for the record.

14 Please continue.

15 MS. TASCHNER: Thank you.

16 The modified original plan includes a
17 seven-and-a-half acre cultural preserve area which
18 preserves the gully in place.

19 Our client also committed to preserving
20 additional seven archaeological sites within the
21 property.

22 The cultural preserve area comprises almost
23 ten percent of the entire property covered by the D&O
24 and important component of the modified original
25 plan.

1 MR. SAKUMOTO: That brings us here today.
2 After the Intervenor disengaged from discussions,
3 they filed their motion seeking to restart the Order
4 to Show Cause proceeding. Thereafter, the Commission
5 was inundated with other motions, memorandum,
6 position statements and the like. All of which were
7 difficult to reconcile.

8 However, several days ago the Office of
9 Planning filed a Position Statement with the
10 Commission which was intended to serve as a road map
11 for these proceedings.

12 Pi'ilani agrees with the OP's procedural
13 road map except on the application of the 365-day
14 deadline. However, that disagreement does not affect
15 the main issue that is before the Commission today,
16 which is, if the Commission determines that the
17 violations which were found during Phase I of the OSC
18 proceeding back in 2013 no longer exist, then the OSC
19 must be dismissed. That is the only determination
20 which needs to be made today.

21 The other two issues that are before you as
22 part of our Motion to Dismiss, namely substantial
23 commencement of use of the land, and the 365-day rule
24 have been fully briefed by Pi'ilani, and I'll not
25 repeat them now other than to say that we stand by

1 the positions taken in the documents we filed, and
2 are prepared to answer questions the Commission may
3 have.

4 For purposes of today, however, it is very
5 simple. And today's proceedings should be
6 streamlined. If the Commission determines that
7 Pi'ilani is no longer in violation of Conditions 5,
8 15 and 17 of the D&O, then the Commission must
9 dismiss the OSC proceeding.

10 We are confident that the information
11 before you makes it very easy for you to determine
12 that the violations of the D&O Conditions 5, 15 and
13 17 no longer exist today, and as such, the OSC
14 proceeding must be dismissed.

15 Now, we will look at each of these three
16 conditions separate.

17 MS. TASCHNER: Previously the Commission
18 orally found that Petitioner's development of the
19 Petition Area would violate Condition 5 of the D&O
20 because the Eclipse Development retail project did
21 not include the construction of a frontage road.

22 The modified original plan presented today
23 includes a frontage road. A frontage road is defined
24 in Webster's Dictionary as a local street that
25 parallels an expressway or a through street, and that

1 provides access to property near the expressway.

2 As shown on the slide, the modified
3 original plan will include a road that parallels
4 Pi'ilani Highway and that provides access to property
5 nearby the highway.

6 Our client is also prepared to create
7 roadway reserve lots at the end of the cul-de-sac to
8 ensure that if the adjoining property owners ever
9 want to connect to the frontage road, that can be
10 done.

11 Because the modified original plan includes
12 the frontage road, there is no existing violation of
13 Condition 5.

14 MR. SAKUMOTO: Turning to Condition 15,
15 Pi'ilani will develop Pi'ilani parcels in substantial
16 compliance with the original plan and in compliance
17 with a pro pro law. Pi'ilani therefore meets
18 requirements of Condition 15 of the D&O.

19 As stated in more detail in our brief,
20 Pi'ilani has reviewed the Findings of Fact set forth
21 in the D&O to determine what representations were
22 made to the Commission in 1995 by Ka'ono'ulu Ranch.
23 The representations summarized on this page -- I'm
24 sorry -- the representations summarized on this page
25 are just some of the representations made to the

Commission in 1995.

For example, Ka'ono'ulu Ranch stated that the lot sizes would range between approximately 14,000 square feet to 54,000 square feet. The lot sizes in the modified original plan comply with this representation.

Ka'ono'ulu Ranch also represented that the lots would be used for, quote, light industrial uses including warehousing, light assembly, and service and craft-type industrial operation.

The Petitioner has declared, and once again confirms that they will substantially comply with this representation and all other representations made by Ka'ono'ulu Ranch.

MS. TASCHNER: Finally, Condition 17 requires that the Petitioner timely file annual reports in connection with the status of the subject project, and Petitioner's progress in complying with the conditions imposed in the D&O.

Following the Commission's oral findings in Phase I, Petitioner corrected the violation and submitted the missing annual report. Pi'ilani is current with the filing of its annual reports, and accordingly there is no current violation of Condition 17.

1 MR. SAKUMOTO: In summary, in 2013 the
2 Commission made an oral finding that the proposed
3 uses of the Petition Area would violate Condition 5,
4 and 15 of the D&O, and that Condition 17 had also
5 been violated.

6 The record before this Commission shows
7 that as of today these violations no longer exist.
8 None of the parties has made any assertion to the
9 contrary, and there is no evidence in the record to
10 the contrary.

11 Accordingly, there is only one
12 determination that can and need be made by the
13 Commission today. Because there are no violations of
14 the D&O, the OSC proceeding must be dismissed.
15 Accordingly, we respectfully request that you grant
16 our motion. Thank you.

17 CHAIRPERSON SCHEUER: Commissioners, you
18 may ask questions of Mr. Sakumoto. Mr. Okuda.

19 COMMISSIONER OKUDA: Thank you, Mr. Chair.
20 Mr. Sakumoto, looking at your Motion to
21 Dismiss, where in your motion is there admissible
22 evidence about the modified original plan, as you and
23 your colleague have described it now during this
24 hearing?

25 MR. SAKUMOTO: It's not in our motion.

1 It's not attached as a declaration or otherwise in
2 the Motion to Dismiss.

3 COMMISSIONER OKUDA: The Commission has to
4 base its decisions on admissible evidence or evidence
5 admissible pursuant to its rules, correct?

6 MR. SAKUMOTO: Yes.

7 COMMISSIONER OKUDA: Is it proper for the
8 Commission to make a decision based simply on
9 representations of counsel as far as what counsel's
10 client intends or doesn't intend to do?

11 MR. SAKUMOTO: I think that the plan was
12 submitted by the owner's representative who actually
13 was engaged in the preparation of this firsthand.

14 And let me be very clear about what we
15 intend to do to respond to your question,
16 Commissioner Okuda, and also to a question that was
17 made earlier by Commissioner Chang.

18 Pi'ilani Promenade plan to move forward is
19 to comply with the original 1995 plan. In the
20 process of preparing for this hearing, we tried to
21 factor in other considerations that -- other input
22 that we received from the community during this
23 extensive outreach process.

24 We tried to be sensitive to some of the
25 statements being made. And you heard them as well as

1 I did during the EIS hearing. Representatives from
2 the Native Hawaiian community had come out to talk
3 about this gully on this property.

4 COMMISSIONER OKUDA: I don't mean to cut
5 you off, but I'm just trying to focus in on the
6 evidence that at least I think I have to look at.

7 And I very well could be wrong, because a
8 lot of times I am wrong. So trying to come back to
9 the evidence that I have to focus on.

10 Regarding this modified original plan, does
11 this modified original plan have the approval of the
12 people who you call the owners?

13 MR. SAKUMOTO: Yes, it does.

14 COMMISSIONER OKUDA: When you use the term
15 or name "owners", can you give me specific names of
16 who these owners are?

17 And my follow-up question is going to be,
18 after you give me these names, since we don't have
19 their declaration, we don't have them testifying here
20 in person, when did they tell you?

21 Did they actually look at this original
22 modified plan?

23 And when did they give approval of this
24 original modified plan, or modified original plan, or
25 however it's being described?

1 So when you use the term "owners", can you
2 tell us the names of the owners, and please spell
3 that for the record?

4 MR. SAKUMOTO: The owners of the property
5 technically are the Co-Petitioners Pi'ilani Promenade
6 North, LLC and Pi'ilani Promenade South, LLC. The
7 owner of the 13-acre parcel adjacent and part of the
8 Petition Area is Honua'ula Partners LLC.

9 Representing Pi'ilani Promenade North, LLC
10 and Pi'ilani Promenade South, LLC is Mr. Robert
11 Poynor, P-o-y-n-o-r, and he is here today. And it is
12 his declaration that we intend to submit in
13 connection with this diagram.

14 COMMISSIONER OKUDA: Let me ask you this.

15 Do you believe that his declaration is a
16 necessary material part of this proceeding?

17 MR. SAKUMOTO: I believe that what is in
18 front of you is all that you need to determine that
19 there's no violation today.

20 COMMISSIONER OKUDA: I'm sorry, that wasn't
21 my question.

22 My question was whether or not you believed
23 Mr. Poynor's Declaration is a material and necessary
24 part of this proceeding?

25 MR. SAKUMOTO: Today's proceeding is to

1 determine whether there's any violation, and it is
2 not necessary for that determination.

3 Based upon what we filed already, there is
4 enough evidence in the record to determine that there
5 is no violation.

6 COMMISSIONER OKUDA: I thought my question
7 was just a "yes" or "no" answer. Either yes, it's
8 material and necessary to make a determination here;
9 or it's not material or necessary, your client's
10 Declaration.

11 MR. SAKUMOTO: It is not necessary to make
12 a determination on whether there is a violation of
13 the D&O.

14 COMMISSIONER OKUDA: Indulge me just one
15 question more.

16 So there's no declaration in the record
17 authenticating this modified proposal that's being
18 presented, correct? It's only representations of
19 counsel.

20 There's nothing in the record that states
21 in writing, or under oath, or even not under oath,
22 that the owner of the parcel, through an authorized
23 representative, approves the modified original
24 proposal?

25 MR. SAKUMOTO: No.

1 CHAIRPERSON SCHEUER: Thank you, Mr. Chair.
2 I have no further questions.

3 CHAIRPERSON SCHEUER: Commissioner Chang.

4 COMMISSIONER CHANG: Thank you. I have a
5 couple of questions.

6 First question. Did the Petitioner file a
7 Motion to Amend the D&O before you did the EIS?

8 MR. SAKUMOTO: Yes.

9 COMMISSIONER CHANG: So procedurally is
10 that motion still viable? Are you going to withdraw
11 that motion?

12 As I understand your motion today, it is
13 that you are not amending, you're actually going to
14 proceed with the original approved project that was
15 approved under the D&O; is that correct?

16 MR. SAKUMOTO: The proposal is to proceed
17 -- yes, with the original project.

18 COMMISSIONER CHANG: So will you be
19 withdrawing your Motion to Amend?

20 MR. SAKUMOTO: I think it depends upon the
21 outcome of the proceedings, but obviously if there is
22 no Order to Show Cause pending, yes, we would.

23 COMMISSIONER CHANG: Another question.

24 In your presentation you used the words
25 "modified original plan".

1 But you also acknowledge that a cultural
2 feature, which makes a substantial portion of this
3 project, is a different plan, is different from what
4 was originally submitted; is that correct?

5 Was that your presentation and
6 representation on behalf of your client?

7 MR. SAKUMOTO: Yes. I think it's a
8 modified version of the original plan. But I think
9 as we presented it, it still substantially complies
10 with the original plan.

11 COMMISSIONER CHANG: Now, the original plan
12 was based upon an EIS that was submitted prior to
13 1995?

14 MR. SAKUMOTO: No, there was no EIS.

15 COMMISSIONER CHANG: So there was no actual
16 cultural impact. So this cultural feature -- and I
17 applaud the fact that you really took the time to go
18 out and listen to the community, because that's what
19 your representation, and that was -- and maybe this
20 should have been done 25 years ago.

21 But, nonetheless, but this cultural
22 preserve was not part of the original part of the
23 proposal that was submitted to the Land Use
24 Commission when the D&O was approved; is that
25 correct?

1 MR. SAKUMOTO: I'm sorry, your question --
2 the cultural preserve was not --

3 COMMISSIONER CHANG: Not part of the
4 original plan that was approved by -- that was the
5 basis for the D&O?

6 MR. SAKUMOTO: No.

7 COMMISSIONER CHANG: It was not?

8 MR. SAKUMOTO: It was not, as far as I
9 know. I was not there in 1994. But as far as I know
10 -- well, I should say I don't know, because I was not
11 there during the '94 proceeding.

12 COMMISSIONER CHANG: Do you have a copy of
13 the original plan that was submitted with the D&O?

14 MR. SAKUMOTO: Yes, it's attached to the
15 D&O.

16 COMMISSIONER CHANG: In that plan is there
17 a cultural preserve?

18 MR. SAKUMOTO: No.

19 COMMISSIONER CHANG: So it was not part of
20 the original plan, would you agree?

21 MR. SAKUMOTO: Yes.

22 COMMISSIONER CHANG: And this cultural
23 preserve, again, recognizing all the effort that was
24 done, you -- we had a lot of testimony from cultural
25 practitioners, from families who had a connection,

1 and you seem to have integrated that.

2 But that was not -- that was information
3 that you gained over the last year after the EIS, is
4 that correct, after you had submitted the EIS?

5 MR. SAKUMOTO: Not --

6 COMMISSIONER CHANG: Not part of what was
7 originally presented to LUC or that made the original
8 plan?

9 MR. SAKUMOTO: That's correct. I think the
10 message that we received from this Commission was
11 that we needed to do more in terms of listening to
12 the community.

13 COMMISSIONER CHANG: But that was really
14 based upon your presentation of your proposing to do
15 a new project. And you came to LUC with an EIS. And
16 it was based upon those testimony that more work
17 needed to be done with the community, based upon the
18 EIS, not the original proposal; is that correct?

19 MR. SAKUMOTO: I'm sorry, I'm not sure I
20 understand your question.

21 COMMISSIONER CHANG: You're saying, yes,
22 you got this testimony from -- this came out. But
23 that really came out because you were proposing a
24 different project. And you submitted a new EIS for
25 LUC to consider. That was going to be the basis of

1 your Motion to Amend the D&O.

2 MR. SAKUMOTO: I think we heard some of the
3 testimony at that time. We did do investigation and
4 research independent of that as well.

5 It was not just whatever people testified
6 to at the EIS hearing. It was more recent outreach
7 and input that Mr. Lake actually engaged in,
8 information that he was able to take in, and we were
9 trying to be sensitive to that.

10 COMMISSIONER CHANG: And would you agree
11 that, based upon your motion, your motion is that you
12 are essentially proposing the same project that was
13 the basis of the D&O; and that in response to Mr.
14 Okuda's questions, you're saying that the Commission
15 can decide that there's been no violation, that you
16 are in compliance with all the conditions?

17 MR. SAKUMOTO: Yes.

18 COMMISSIONER CHANG: And, again, your
19 motion is that the motion should -- the Intervenor's
20 motion, the Order to Show Cause should be dismissed
21 because there is no violation, because we are going
22 to go back and comply with the original proposal that
23 was the basis for the D&O?

24 MR. SAKUMOTO: That's right. That is our
25 plan. We wanted to share with the Commission this

1 modified plan in order to share with you the fact
2 that we have been trying very hard to listen to input
3 that we've been receiving. And it wasn't intended to
4 try to change the plan in any way.

5 As you can see, we stuck to the plan
6 originally as shown on the 1995 D&O as close to it as
7 possible. And we are still prepared to move forward
8 with the original 1995 plan if that is what this
9 Commission prefers we do.

10 COMMISSIONER CHANG: It's not what the
11 Commission prefers. Isn't that what you are
12 proposing to do? You're proposing to comply with the
13 original plan?

14 MR. SAKUMOTO: We are proposing to comply
15 with the original plan.

16 COMMISSIONER CHANG: A question relating to
17 Condition No. 5.

18 I'm hoping I'm reading the right condition.
19 The Petitioner shall fund, design and construct
20 necessary local and regional roadway improvements
21 necessitated by the proposed development and the
22 design and schedule accepted by the Department of
23 Transportation and the County of Maui.

24 So you presented to us that essentially you
25 said that there's frontage. Has this been approved

1 by the Department of Transportation and the County of
2 Maui?

3 MR. SAKUMOTO: No. We have not presented
4 this to the County of Maui or to the DOT.

5 COMMISSIONER CHANG: So how do we know that
6 it is in compliance with Condition No. 5?

7 MR. SAKUMOTO: We will present it to the
8 DOT. We will present it to the County of Maui. And
9 we will comply with whatever form of frontage road
10 they allow us to have.

11 I think the frontage -- the violation that
12 was cited is that the plans that were presented to
13 the Commission in 2013 did not show a frontage road,
14 and basically we presented a plan that shows a
15 frontage road.

16 COMMISSIONER CHANG: So at this point in
17 time, leaving Condition No. 5, your representation
18 that you're not in violation is somewhat premature.
19 You haven't gotten approvals, acceptance by DOT or
20 the county on what you are proposing?

21 MR. SAKUMOTO: I don't think we are
22 required to have the plan approved beforehand. I
23 think what we're saying is we will have the plan
24 approved once we have this opportunity to have the
25 dialogue with the DOT.

1 COMMISSIONER CHANG: Okay.

2 CHAIRPERSON SCHEUER: We can come back to
3 you too, if you have more questions.

4 Commissioner Ohigashi.

5 COMMISSIONER OHIGASHI: I want to focus in
6 on conditions. Condition No. 5, the reason for it
7 being a violation was that the amended, or the
8 proposed plan you had given in 2013 to the Land Use
9 Commission did not include a frontage road; is that
10 right? And that's the basis for the finding?

11 MR. SAKUMOTO: Yes. It did not show a
12 frontage road.

13 COMMISSIONER OHIGASHI: And I think it was
14 an oral finding, is that right?

15 MR. SAKUMOTO: If you're referring to the
16 February 7, 2013 hearing, my understanding is there
17 was an oral finding; and yes, no written finding.

18 COMMISSIONER OHIGASHI: At that time, if
19 you followed the original plan, the original plan had
20 a frontage road?

21 MR. SAKUMOTO: No. The original plan that
22 was attached to the D&O was I think what the
23 Petitioner represented, and as a result of the
24 hearing that the Petitioner went through, and the
25 input that the Commission received when the

1 Commission issued conditions of approval, they
2 included the frontage road in Condition 5.

3 And so because that was a condition of
4 approval, my understanding is, when the presentation
5 was made, there was no showing of a frontage road.

6 COMMISSIONER OHIGASHI: So this modified
7 plan is modified beyond the original proposal to meet
8 that Condition No. 5; is that right?

9 MR. SAKUMOTO: Yes. It is modified only
10 very slightly to include essentially roadway reserved
11 lots on the two extreme ends, north and south ends of
12 the road that is parallel to Pi'ilani Highway.

13 COMMISSIONER OHIGASHI: And the actual road
14 itself didn't appear on the original plan, didn't
15 appear on the modified plan, it's only appearing on
16 this plan, on this new plan, is a condition that we
17 put on, Land Use Commission put on, and that --

18 MR. SAKUMOTO: When you say "original
19 plan", are you referring to the one that was attached
20 to the 1995 D&O?

21 COMMISSIONER OHIGASHI: Yes.

22 MR. SAKUMOTO: Yes, the original plan that
23 was attached to the D&O in 1995 did not reflect a
24 frontage road.

25 COMMISSIONER OHIGASHI: So in order to meet

1 Condition No. 5, you're showing that you will be
2 including that roadway?

3 MR. SAKUMOTO: Roadway reserve lots on
4 either end of the internal subdivision road to
5 therefore create a frontage road.

6 COMMISSIONER OHIGASHI: Condition 15, would
7 you go over that again?

8 MR. SAKUMOTO: Certainly.

9 Condition 15 requires that the property be
10 developed in substantial compliance with the
11 representations made to the Commission.

12 COMMISSIONER OHIGASHI: Assuming that we
13 agree that we should dismiss this OSC, who makes that
14 decision?

15 MR. SAKUMOTO: Which decision? I'm sorry.

16 COMMISSIONER OHIGASHI: That this preserve
17 or this -- your project is built in substantial
18 compliance, who makes that decision?

19 MR. SAKUMOTO: I believe that's the
20 Commission's decision to make.

21 COMMISSIONER OHIGASHI: So in other words,
22 our job would be to follow up on whether or not you
23 actually are building it in substantial compliance?

24 MR. SAKUMOTO: Yes. You have jurisdiction
25 over the property while the D&O is still pending, I

1 mean until all conditions have been satisfied and we
2 file annual reports with the Commission to update you
3 as we go forward.

4 COMMISSIONER OHIGASHI: And so if you are
5 not in substantial compliance, for example, if
6 there's an allegation that a cultural preserve that
7 you place in there is not in substantial compliance
8 with our D&O, then someone can complain at a status
9 hearing and an OSC can be filed; is that right?

10 MR. SAKUMOTO: Essentially, yes. I think
11 any party can bring to the Commission's attention the
12 fact that there may be grounds to believe that the
13 Petitioner is not in compliance with conditions of
14 the D&O.

15 COMMISSIONER OHIGASHI: When does the issue
16 of this cultural preserve get placed as part of the
17 project? Is it now or is it later? Or is it --

18 MR. SAKUMOTO: When does it get placed?

19 COMMISSIONER OHIGASHI: Our decision today
20 is only for the purpose -- maybe I should -- our
21 decision today, maybe we can find out whether or not
22 you're going to meet the requirements or the
23 conditions, right?

24 MR. SAKUMOTO: Yes.

25 COMMISSIONER OHIGASHI: If you say you're

1 going to meet the conditions, or we find that you're
2 meeting the conditions, then the OSC is moot. That's
3 what you're saying?

4 MR. SAKUMOTO: Yes.

5 COMMISSIONER OHIGASHI: I'm looking at this
6 -- so it's not our job right now -- I'm trying to get
7 at, is that -- can you explain to me how does this
8 cultural preserve fall into that analysis? That's
9 what I want to know, I guess.

10 MR. SAKUMOTO: I'm not sure I understand
11 the exact question. Let me provide some explanation
12 which hopefully will address what I think your
13 concern is.

14 The establishment of this area, which is
15 about seven-and-a-half acres of the property, will be
16 created when we go in for subdivision approval. So
17 we will have to establish this area within a
18 subdivision plan.

19 And if at some point we do not abide by the
20 representations that we are making in this proceeding
21 to this Commission about maintaining this cultural
22 preserve as we are representing it, then the
23 Commission has the authority to issue another Order
24 to Show Cause and bring us back before them.

25 COMMISSIONER OHIGASHI: We have to decide

1 today whether or not a cultural preserve is in
2 substantial compliance with the D&O.

3 MR. SAKUMOTO: You do not have to decide
4 that, as we said earlier. We were offering this
5 cultural preserve because we really felt that this
6 was the right thing to do. We felt it was being
7 respectful to the people who said to us that, you
8 know, this gully actually had significance to them.

9 So we were trying in good faith to be
10 respectful of that, and took out seven-and-a-half
11 acres out of 88 acres. That's a very significant
12 chunk of property.

13 But to answer your question, do you need to
14 consider the cultural preserve today in order to
15 determine whether we are in -- whether there are any
16 violations? I think I answered that earlier, which
17 is no.

18 We are prepared to develop the property as
19 shown in the original plan. We simply wanted to
20 propose what we thought was essentially a bonus to
21 the original plan. It would have seven-and-a-half
22 acres of open space, preserve an area that members of
23 the Native Hawaiian community have said is important
24 to them.

25 It reduces the density of the property

1 which would have other beneficial impacts, we think.
2 In spite of the fact that we no longer have the
3 ability to sit down and work out a stipulation, we
4 were still are trying our best to find a win/win
5 solution.

6 And that's what this was really all about.
7 So it was our attempt to try to find that winning
8 solution.

9 If that is something that is going to
10 create a procedural problem for the Commission, you
11 know, we will simply withdraw that and go back to the
12 original 1995 plan. We think that what we're saying
13 in the modified plan is better for everybody
14 concerned, but procedurally if that creates a
15 problem, then we can go back to the 1995 plan, and I
16 think make it crystal clear that there are no
17 violations to the D&O.

18 COMMISSIONER OHIGASHI: I don't have any
19 questions.

20 CHAIRPERSON SCHEUER: Commissioners?
21 Commissioner Okuda. I will have some questions of my
22 own when you're all done.

23 COMMISSIONER OKUDA: Thank you, Mr. Chair.
24 Following up, Mr. Sakumoto.

25 So is it your client's position that your

1 client is in compliance with Condition 15?

2 MR. SAKUMOTO: Yes.

3 COMMISSIONER OKUDA: And your client
4 believes it's in compliance with Condition 15 because
5 at some point in the future it will develop the
6 property in accordance to its representations; is
7 that the position of your client?

8 MR. SAKUMOTO: It is not only some point in
9 the future, it is at the immediate future, yes.

10 COMMISSIONER OKUDA: How many years has
11 passed since the D&O, which contained this Condition
12 No. 15? How many years have passed since that
13 condition was placed in the D&O and today?

14 MR. SAKUMOTO: I would say 25 years.

15 COMMISSIONER OKUDA: So during this
16 25 years there's been no compliance with Condition
17 15, correct?

18 MR. SAKUMOTO: No, that's not correct.

19 COMMISSIONER OKUDA: You're probably
20 correct on that point. Except for the belief or the
21 feeling or whatever it might be, that in the future
22 your client would comply with the condition. There's
23 been no actual steps taken to develop the property,
24 correct?

25 MR. SAKUMOTO: No, that's not correct.

1 COMMISSIONER OKUDA: Was Mr. Lake's
2 testimony about use of the property, or existence of
3 use correct or not correct?

4 MR. SAKUMOTO: I think the question that
5 Mr. Lake was asked is how is the land being used now.
6 And the land is -- you saw it, it's being used to
7 store construction materials. So I think he answered
8 not in the legal sense, but in the lay sense that
9 nobody is on the property right now, and the reason
10 for that is the stay that was imposed by this
11 Commission.

12 COMMISSIONER OKUDA: And to get the stay
13 imposed by the Commission, your client made certain
14 representations; correct?

15 MR. SAKUMOTO: Yes.

16 COMMISSIONER OKUDA: And did any of those
17 representations deal with whether or not it would be
18 using the land during the stay?

19 MR. SAKUMOTO: No.

20 COMMISSIONER OKUDA: Were any of the
21 representations made to obtain the stay have to deal
22 with any construction that would take place on the
23 property?

24 MR. SAKUMOTO: Yes. The condition imposed
25 by this Commission was the stay would be granted on

1 two conditions. One was that there would be no
2 construction on the property; and two, that a Motion
3 to Amend the D&O be filed by no later than
4 December 31 of 2013.

5 COMMISSIONER OKUDA: Wasn't there also
6 representations made about whether or not your client
7 would substantially commence use of the land?

8 MR. SAKUMOTO: No.

9 COMMISSIONER OKUDA: Your client didn't say
10 once the LUC issues an OSC, the relevant
11 considerations to be taken into account -- excuse me,
12 let me back up.

13 Did your client state that it would not
14 develop the property or the project during the term
15 of the stay?

16 MR. SAKUMOTO: I believe what was stated
17 was there would be no construction on the property
18 during the stay. The stay specifically applied to
19 construction, and that stay has been respected.

20 COMMISSIONER OKUDA: So there's no
21 representations made about whether or not there would
22 be development of the property? The word "developed"
23 wasn't used?

24 MR. SAKUMOTO: I believe it was
25 construction. I don't have the transcript in front

1 of me. My understanding it was no construction on
2 the property during the stay.

3 COMMISSIONER OKUDA: Thank you, Mr. Chair.
4 I have no further questions. The record speaks for
5 itself.

6 CHAIRPERSON SCHEUER: Commissioner Chang.

7 COMMISSIONER CHANG: Mr. Sakumoto, I'm just
8 a little confused, based upon your responses to
9 Commissioner Ohigashi.

10 Is what you submitted today, where it says,
11 "we seek approval to preserve", is this the modified
12 plan that you're now representing to the Land Use
13 Commission that you intend to develop the property?
14 And that this is in substantial compliance with
15 representations made to the Commission?

16 MR. SAKUMOTO: Yes.

17 COMMISSIONER CHANG: And you said -- this
18 is my recollection -- is that when Mr. Ohigashi said,
19 we don't have to address whether the issue, like the
20 cultural preserve, is a new or changed from the
21 original, because that's not necessary to reach the
22 conclusion that you're in substantial compliance of
23 Condition No. 15?

24 MR. SAKUMOTO: I'm sorry, I did not
25 understand the question. Could you repeat the

1 question?

2 COMMISSIONER CHANG: When Commissioner
3 Ohigashi was asking you, do we need to address today
4 the issue of the cultural preserve, because that is
5 in your modified plan, and you -- it was your
6 representation and admission that the cultural
7 preserve was not part of the original proposal that
8 formed the basis for the D&O, right?

9 MR. SAKUMOTO: Yes.

10 COMMISSIONER CHANG: Maybe I misheard, but
11 I thought your response to Commissioner Ohigashi that
12 we don't have to address the issue today whether the
13 cultural preserve is in substantial compliance with
14 the representations made to the Commission.

15 MR. SAKUMOTO: I think his question to me
16 was do we need to decide that the inclusion of the
17 cultural preserve would be in substantial compliance
18 in order to dismiss the OSC; and my answer was no.

19 We are prepared to move forward without the
20 cultural preserve if it creates a technical problem.
21 We just offered it up as what I thought would be a
22 beneficial sacrifice that basically we were giving up
23 about seven-and-a-half acres of the property.

24 Maybe I misunderstood Commissioner
25 Ohigashi's question.

1 COMMISSIONER CHANG: That's what I meant by
2 I was confused. Because I was confused, because I
3 thought your representation today is this is the
4 modified original plan that is in substantial
5 compliance with the original D&O.

6 MR. SAKUMOTO: We believe it is.

7 COMMISSIONER CHANG: I just don't want to
8 beat a dead horse. I'll let the Chairperson ask the
9 question.

10 CHAIRPERSON SCHEUER: I think the horse may
11 have passed awhile ago.

12 VICE CHAIR CABRAL: Wait a minute, my
13 horse? My horse? (Laughter.)

14 CHAIRPERSON SCHEUER: We will have time for
15 deliberation and questions, and all the other parties
16 are going to have their chance sometime tomorrow
17 clearly to ask questions.

18 Are there any other questions at this time
19 for the Petitioner, Commissioners?

20 If you'll indulge me then.

21 Mr. Sakumoto, how many lots now will exist
22 on this modified plan?

23 MR. SAKUMOTO: I believe that with the
24 modified plan, and the removal of the lots within the
25 seven-and-a-half acres, I think that there are 12

1 fewer lots than the 123.

2 CHAIRPERSON SCHEUER: So approximately ten
3 percent reduction?

4 MR. SAKUMOTO: Yes.

5 CHAIRPERSON SCHEUER: Are you familiar with
6 Finding of Fact 50 in the original D&O?

7 MR. SAKUMOTO: I can be if you give me time
8 to look at it.

9 CHAIRPERSON SCHEUER: On August 30th, 1994,
10 the Petitioner moved a petroglyph to an existing
11 garden at Ka'ono'ulu Ranch Headquarters in Kula,
12 Maui, Hawai'i, within the mauka portion of the
13 Ka'ono'ulu Ahupua'a for preservation and maintenance.
14 A primary concern, the relocation of the petroglyph
15 was safety and security. The petroglyph has been
16 placed within a garden cared for by the Rice family
17 and Ka'ono'ulu Ranch employee. At the time the
18 boulder containing the petroglyph was moved, the
19 persons involved with its relocation had no knowledge
20 that DLNR approved a preservation plan was required
21 prior to that relocation.

22 Does the proposed cultural preserve create
23 a place, or have anything to do with this petroglyph
24 that was removed from the property?

25 MR. SAKUMOTO: My understanding of this

1 petroglyph is that it certainly can be included in
2 the cultural preserve, but my understanding is the
3 Petitioner does not have any rights over, or control
4 over the petroglyph at this point.

5 It's no longer on the property and beyond
6 our ability to get it back.

7 CHAIRPERSON SCHEUER: Was there Condition
8 10 in the original Decision and Order that required
9 that a long-term preservation plan for the petroglyph
10 stone be reviewed and approved by the State Historic
11 Preservation Division? Are you aware whether or not
12 that plan has been approved?

13 MR. SAKUMOTO: I need time to review the
14 record. If you would give me time to check. I only
15 want to be sure before I say something on the record.

16 CHAIRPERSON SCHEUER: In the gully area
17 that, as you have called it, that you're proposing
18 for cultural reserve, what physical features are in
19 that area other than natural topography?

20 MR. SAKUMOTO: To our knowledge, that is
21 the physical feature that was identified by members
22 of the community. It was the gully itself. And I
23 think it was the gully and the area adjacent to the
24 gully, and that's why we didn't reserve just the
25 gully, but we have an area beyond it.

1 CHAIRPERSON SCHEUER: There's no stone
2 formation or other kinds of --

3 MR. SAKUMOTO: Not to our knowledge.

4 CHAIRPERSON SCHEUER: So does, what you
5 have presented as the cultural preserve, require any
6 further compliance with Condition 9 of the original
7 D&O?

8 MR. SAKUMOTO: I think we have stated --
9 there are no human burials or other artifacts that we
10 are aware of. I think we have done, and we submitted
11 to this Commission numerous archaeological reports.
12 I think we stand by those reports. And we will
13 observe whatever the findings were in the reports
14 that we submitted.

15 I'm not sure I answered your question.

16 CHAIRPERSON SCHEUER: No, you answered my
17 question.

18 MR. SAKUMOTO: I believe, Chair, that there
19 was a preservation plan that was submitted to SHPD
20 and approved by SHPD in accordance with this
21 condition.

22 CHAIRPERSON SCHEUER: I have nothing
23 further.

24 Commissioners, questions for the
25 Petitioner? It's 3:08 p.m. Let me check in with the

1 executive officer and administrative officer on our
2 timing.

3 Mr. Hakoda, what time do we need to break
4 up to safely make our way to Kihei for the after
5 recess? 4:00 o'clock, okay. So we have some time.

6 So we're done with the Petitioner's
7 representation. We can move on to Mr. Tabata.

8 MR. TABATA: Thank you, Mr. Chair.

9 Honua'ula Partners joins in Pi'ilani
10 Promenade's arguments.

11 In addition, we are making a jurisdictional
12 argument. We believe that the Order to Show Cause
13 should be dismissed based on a lack of subject matter
14 jurisdiction. That's based on the 365-day deadline.
15 That's in HRS 205-4(g).

16 That deadline was discussed in the Bridge
17 Aina Lea case and has been briefed by the parties.
18 There's been some questions as to when this deadline
19 starts to run. I believe that it starts to run as
20 soon as the OSC is issued, based on the clear
21 language in the Bridge Aina Le'a case.

22 Turning to page 714 of the Bridge Aina Le'a
23 case, which citation is 134 Hawai'i 187, Page 216 for
24 the official report.

25 Beginning with the paragraph starting with

1 "moreover". Court states that: Moreover, the
2 circuit court correctly concluded that the LUC
3 violated HRS Section 205-4(g) in failing to resolve
4 the OSC within 365 days.

5 The circuit court concluded that the OSC
6 had to be resolved by September 9, 2009, i.e.,
7 365 days after the initial OSC was issued on
8 December 9th, 2008.

9 That was affirmed by the Hawaii Supreme
10 Court of the circuit court's analysis of the 365-day
11 deadline. The supreme court makes clear that the
12 circuit court commenced its counting of the days
13 after the issuance of the OSC.

14 In our case, that would have been in 2012,
15 and the 365 days would have expired in 2013, long
16 ago.

17 Now, the next question is, is this 365 days
18 mandatory or jurisdictional?

19 And the answer to that question is, yes, it
20 is statutory and it is jurisdictional. The Hawaii
21 Supreme Court has stated that statutory time
22 constraints are jurisdictional. Tribunals whose
23 statutory authority is laid out by the legislature
24 have no power to expand upon it. That is
25 jurisdictional and it cannot be waived.

1 In Cabral V State, 127 Hawai'i 175, the
2 court clearly stated that statutory time constraints
3 limiting jurisdiction is jurisdictional.

4 In re Doe 105 Hawai'i 505, statutory
5 jurisdictional requirements cannot be disregarded.
6 Cannot be waived.

7 Intervenors have made arguments that we
8 have waived any rights to challenge the 365 deadline
9 based partly on questions that Commissioner Okuda
10 made as far as representations made regarding
11 promises not to do construction or development.
12 Those representations were basically that we would
13 not do construction, that's the context of the word
14 "development".

15 The making use of the land had begun years
16 and years ago through soft cost, engineering and so
17 forth. We've made those substantial commencement
18 arguments.

19 So factually we dispute any kind of waiver
20 argument. But even if this Commission were to rule
21 that a waiver occurred, those waiver have no power
22 whatsoever to expand on your jurisdictional limits.

23 They cannot be waived, it's that clear. So
24 those two questions are when does the 365 days start
25 to run? According to the Bridge case, black and

1 white, it started to run in 2012.

2 Hawaii Supreme Court case law further
3 states that that deadline is jurisdictional. It
4 cannot be waived. Those two cases that I cited, that
5 I discussed, were appeal cases, when you can file
6 appeal, notice of appeal.

7 So our case is a little different because
8 we have a deadline for the 365 days. I would cite
9 the Town versus Land Use Commission where the Hawaii
10 Supreme Court stated time constraints in 205-4 are
11 mandatory, cannot be waived. I think that goes to
12 show how the 365 days is jurisdictional.

13 Therefore, this case must be dismissed for
14 lack of subject matter jurisdiction. Thank you.

15 CHAIRPERSON SCHEUER: Commissioners, might
16 you have any question for Mr. Tabata?

17 Commissioner Wong.

18 COMMISSIONER WONG: So the question I have
19 is the Bridge Aina Le'a, was it, this is just a
20 question I have because I am not sure about this.

21 The question I have is when they cited
22 about 365 days, was that specifically just for Bridge
23 Aina Le'a or just in general?

24 MR. TABATA: The Bridge case dealt with the
25 facts in that project while applying the law, and

1 what the supreme court did, I think they did a really
2 good job in providing guidance for us. So in their
3 published opinions, like the Bridge case, they
4 published these opinions to give guidance for people
5 like us on how to proceed with respect to these legal
6 issues. And I thought they did a pretty darn good
7 job giving us guidance.

8 COMMISSIONER WONG: So not just only
9 specifically for that case, because each case has its
10 different twists, right?

11 MR. TABATA: Correct. Every case is
12 different. But when they make statements in their
13 holdings, if your case is analogous, then you can
14 apply that law to your case.

15 In our case now, the way it's similar, is
16 that in the Bridge case they issued an OSC, the Land
17 Use Commission did. And the time to count the
18 365 days began after the initial OSC was issued.

19 How it applies to our case here today is
20 you go to the OSC that the Land Use Commission issued
21 in September of 2012, and you start counting from
22 September 2012 until you reach 365 days in September
23 of 2013.

24 COMMISSIONER WONG: So hypothetically then
25 the Land Use could say, you know what, because of

1 that 365, let's put another OSC on. We could have
2 done that.

3 MR. TABATA: Somebody would need to file a
4 Motion for Order to Show Cause. If you were to
5 dismiss this OSC based on 365 day, somebody, if they
6 want to, would need to file a Motion for Order to
7 Show Cause based on the facts that exist today.

8 COMMISSIONER WONG: Thank you for the
9 clarification.

10 MR. TABATA: You're welcome.

11 CHAIRPERSON SCHEUER: Commissioner Okuda.

12 COMMISSIONER OKUDA: Thank you, Mr. Chair.

13 Mr. Tabata, the 365-day rule comes out of
14 HRS Section 205-4, correct?

15 MR. TABATA: To 205-4(g).

16 COMMISSIONER OKUDA: In Bridge Aina Le'a
17 the supreme court said before you decide to determine
18 whether you have to apply the provisions of HRS
19 205-4, including 4(g), you have to look at whether or
20 not there was substantial commencement of use of the
21 land in accordance with the representations being
22 made; or if there wasn't substantial commencement of
23 use of the land in accordance with representation,
24 that that's the trigger to determine whether or not
25 you follow the requirements of 205-4 or you don't

1 follow those requirements; correct?

2 MR. TABATA: The court stated that the
3 threshold question of substantial commencement needs
4 to be determined. And if there is substantial
5 commencement, then you have to follow 205-4 and the
6 district boundary amendment procedures.

7 My reading of that is you have to do a
8 full-blown petition for district boundary amendment
9 subject to the content requirements of 15-15-50(c),
10 maybe even an EIS.

11 Now, if there is no substantial
12 commencement, then you go on and do 15-15-93 and
13 figure out substantial compliance, and that's the
14 significance of the substantial commencement issue.

15 When does the 365 days start to run is a
16 separate question. And to be honest, I've been
17 reading this case over and over for the past several
18 months, years, and until I found that quote that I
19 read to you, I wasn't sure either. But now it's
20 crystal clear. It's 365 days after the initial OSC
21 was issued. That's exactly what this case says.

22 COMMISSIONER OKUDA: I'm looking at the
23 more initial threshold question as far as what
24 portion, or whether the rule applies or not.

25 MR. TABATA: And the significance of this

1 quote is if you start counting as soon as the initial
2 OSC is issued, the clock starts to run before you
3 determine substantial commencement. The clock starts
4 to run even before you have a hearing. As soon as
5 the order is issued, the clock starts running.

6 So you're not waiting for substantial
7 commencement to be determined, and you're not waiting
8 for reversion to occur. You're not. The clock is
9 already running, and the clock doesn't stop once it
10 starts to run.

11 COMMISSIONER OKUDA: Well, you know, I'm
12 just asking everyone to maybe consider, because we
13 all got to follow the law, right?

14 What the supreme court said at 134 Hawai'i
15 at 209, which is also 339 Pacific 3d at 707, and I
16 quote:

17 To the extent DW and Bridge argue that the
18 LUC must comply with the general requirements of HRS
19 Section 205-4 any time it seeks to revert property,
20 they are mistaken. The expressed language of HRS
21 Section 205-4(g) and its legislative history
22 establish that the LUC may revert property without
23 following those procedures provided that the
24 petitioner has not substantially commenced use of the
25 property in accordance with its representations. In

1 such a situation, the original reclassification is
2 simply voided.

3 Is that an accurate statement of the law as
4 I read it?

5 MR. TABATA: What the landowners were
6 saying in that case is that whenever you revert or
7 reclassify the land under OSC, you've got to comply
8 with all of 205-4 requirements, like a district
9 boundary amendment petition.

10 What the court told, was no, no, not if
11 there is no substantial commencement. But that's not
12 the 365-day discussion. That discussion takes place
13 on Page 216.

14 COMMISSIONER OKUDA: My question was
15 actually more narrow than that.

16 It was just simply what I read, for
17 whatever it's worth, was that an accurate statement
18 of the law as I read it?

19 MR. TABATA: Not with respect to 365-day,
20 it is not applicable.

21 COMMISSIONER OKUDA: Okay, I understand.
22 Thank you.

23 CHAIRPERSON SCHEUER: For the record,
24 Commissioner Chang has asked for one more question.

25 COMMISSIONER CHANG: I'm only going to ask

1 one question.

2 Mr. Tabata, you know Bridge Aina Le'a so
3 much better than I do, but in Bridge Aina Le'a did
4 any of the parties file motions to stay?

5 MR. TABATA: I don't believe they did. But
6 if they had done so, I don't think it would have made
7 a difference.

8 COMMISSIONER CHANG: But you would agree
9 that that is a factual issue which may be a
10 dispositive basis for distinguishing Bridge from this
11 particular instance?

12 MR. TABATA: You know, I take no pleasure
13 in -- the Motion to Stay, yes, the landowners did ask
14 for it. And we followed through on it. We filed
15 Motions to Amend. Pi'ilani Promenade went through
16 great effort and expense of doing an EIS, put it
17 before you folks. It wasn't accepted.

18 So, yes, the Motion to Stay was requested,
19 was granted, and the landowner, Petitioners did
20 follow through. So with that, we have a clear
21 conscious.

22 The law, however, says that it's
23 jurisdictional. It's not waiveable.

24 COMMISSIONER CHANG: But would you agree
25 that the fact upon Bridge Aina Le'a may be

1 distinguishable from the facts of this case, so the
2 Bridge case may not necessarily be precedential to
3 the Land Use Commission's application?

4 MR. TABATA: For this case it would be. It
5 would apply. It would apply with finding of fact
6 because its jurisdictional, it's not waiveable. The
7 fact that a stay was granted in this case is
8 irrelevant.

9 COMMISSIONER CHANG: All right.

10 CHAIRPERSON SCHEUER: Commissioners?
11 Commissioner Wong.

12 COMMISSIONER WONG: I need clarification
13 again about this issue.

14 So we have -- going back to Bridge Aina
15 Lea.

16 So that one, Commissioner Okuda said was
17 commencement versus compliance, is that correct?
18 Because Bridge Aina Le'a, the issue was commencement,
19 and this one is compliance, if I see it on the screen
20 right now.

21 MR. TABATA: That's correct. Pi'ilani
22 Promenade has made an argument that Petitioners are
23 in substantial compliance with its representations,
24 and therefore, the OSC should be dismissed, that's
25 correct.

1 COMMISSIONER WONG: Commencement is when
2 you dig dirt?

3 MR. TABATA: No. Substantial commencement
4 is when -- that's a whole other discussion, but if
5 you ask me, I'm going to say that substantial
6 commencement occurs where there is no evidence to
7 support land speculation. That's a totally different
8 discussion. It's not really a part of the 365-day
9 issue.

10 COMMISSIONER WONG: Then we had a question
11 about stay. Stay means to hold or stop everything,
12 right?

13 MR. TABATA: Correct.

14 COMMISSIONER WONG: In layman's terms, just
15 stop everything?

16 MR. TABATA: That's correct.

17 COMMISSIONER WONG: Stopwatch and stop
18 everything.

19 MR. TABATA: If you have the power to stop
20 that clock, because then it would stop. But if it's
21 jurisdictional -- if the legislature says you cannot,
22 your power is from this time to time. If the
23 legislature says that you cannot expand upon it, you
24 cannot stop it or delay it.

25 If you made your own rules, your own Land

1 Use Commission rules, and you say, I have this
2 deadline here to do this or act, you can waive it
3 because you created it.

4 But if the legislature enacts a statute
5 that says you cannot, you got to do your case by a
6 certain time period, then that tribunal is bound by
7 that limitation and time, and you cannot expand on
8 it, cannot delay it. It's deemed non-waiveable.

9 COMMISSIONER WONG: Thank you.

10 CHAIRPERSON SCHEUER: Commissioner
11 Ohigashi.

12 COMMISSIONER OHIGASHI: So what would you
13 say about an estoppel argument?

14 MR. TABATA: It's irrelevant.

15 COMMISSIONER OHIGASHI: Why?

16 MR. TABATA: Because it's non-waiveable.
17 If what I say can change the clock, stopping or
18 starting or whatever, then the Hawaii Supreme Court
19 wouldn't issue cases saying it's non-waiveable, that
20 it's jurisdictional.

21 If you can't stop the clock, I can't stop
22 the clock is another way of looking at it.

23 COMMISSIONER OHIGASHI: Is there a case you
24 can cite me about it? Because I'm not sure, is there
25 a case that you can cite that prevents estoppel from

1 acting?

2 In other words, it would seem that there is
3 a question as to whether or not the people who ask
4 for the stay and receive the stay can invoke the time
5 limit.

6 MR. TABATA: The parties are not invoking
7 time limit. The jurisdictional requirement exists
8 for you constantly. It can be raised at any time.
9 If you see it, you have a duty to raise it yourself.
10 I could be mentioning this argument for the first
11 time today, and that doesn't make any difference. If
12 jurisdiction becomes an issue, you must address it at
13 any time.

14 CHAIRPERSON SCHEUER: Is there anything
15 further, Commissioners?

16 How is our court reporter doing? You can
17 continue?

18 COURT REPORTER: Yes.

19 CHAIRPERSON SCHEUER: Can our Commissioners
20 continue for the next 15, 20 minutes?

21 Thank you, Mr. Tabata.

22 I'm sure, Mr. Hopper, you have no problem
23 with filling that time with your extensive argument.

24 MR. HOPPER: Thank you, Mr. Chair.

25 County of Maui has submitted a response to

1 the Motion to Dismiss and the Intervenor's Motion to
2 Conclude Phase I and move on to Phase II. I think
3 our arguments are consistent in both.

4 The county's position right now is that the
5 Commission -- and we would note before today we have
6 not seen this plan, just like everybody else, that
7 was submitted today.

8 But our request to the Commission is that
9 the Commission allow the Applicant to provide a
10 detailed plan as far as what they plan to go forward
11 with, and evaluate whether or not that is in
12 substantial compliance with the decision and order.

13 Going through a bit of the history of this
14 case. Originally the landowners proposed a
15 predominantly commercial project that the Land Use
16 Commission determined was not in compliance with the
17 1995 Decision and Order.

18 Subsequent to that there has been some
19 discussion. There was a stay requested by the
20 landowners, granted by the Commission. And the
21 landowners submitted a Motion to Amend and planned to
22 develop a project that would be in compliance with
23 the Decision and Order as amended.

24 However, the EIS that they had submitted
25 for that plan was rejected by the Commission and

1 therefore that plan did not move forward.

2 Subsequent to that, on the county's
3 understanding, the landowners -- the landowner's plan
4 was to move forward with a plan that would require no
5 further amendments to the decision and order, would
6 be in compliance with the Land Use Commission
7 Decision and Order, and therefore, began meeting with
8 stakeholders, including the Intervenor.

9 As you've been kept up-to-date, those
10 apparently did not prove fruitful. And what the
11 county had expected after that point was that there
12 be a plan submitted to the Commission. The
13 Commission could review it and determine if it was in
14 substantial compliance with the original Decision and
15 Order.

16 That's important, I think, for the county
17 to have that determination from the Commission in
18 this case, because if the Order to Show Cause
19 proceeding were dismissed in a normal case, the next
20 step would be a submission to the county for some
21 sort of approval, whether it be a subdivision or
22 other types of approval, and then the county would be
23 in the position of determining whether or not that
24 plan is in substantial compliance with the 1995
25 Decision and Order.

1 However, in this case the county has been
2 in a disagreement, the Planning Department has been
3 in disagreement with the Commission, Office of
4 Planning and Intervenors as to what constitutes
5 substantial compliance with that Decision and Order.

6 And so if this was dismissed, and the plan
7 came to the county, and the county had any question
8 as to whether or not it was in substantial
9 compliance, we would most likely request that the
10 landowner obtain a declaratory ruling from the
11 Commission as to whether or not the project was in
12 substantial compliance.

13 And so rather than have that happen, we
14 would prefer that there be a determination -- and
15 again, the county did not plan to have this
16 discussion on this plan today. We have not had a
17 chance to review this plan. And that's something
18 that I think that my clients -- I haven't really had
19 a chance to discuss with them -- as to what their
20 position is on this plan.

21 We want to know things such as what is the
22 development timetable, a breakdown of uses, how much
23 of this would be light industrial, how much would be
24 commercial, and things like that.

25 And I think it's important -- we would like

1 the Commission to make that determination, because in
2 the past the county has been in disagreement with the
3 Commission as to what constitutes substantial
4 compliance with your order.

5 That's what we request in this case with
6 respect to both motions. It's ultimately up to the
7 Commission. So I think that's where we are at here.
8 Again, we don't have a clear position on this plan
9 yet because it was just submitted to us, and we think
10 that something like this could be submitted as a
11 matter of record. The parties have a chance to
12 review it, and maybe give their positions to the
13 Commission.

14 I think most important to us is for the
15 Commission to indicate they believe the plan is or is
16 not in substantial compliance with the Decision and
17 Order.

18 To briefly address the jurisdictional
19 argument, I think the county did that in response to
20 Motion to Dismiss. There was a quotation from
21 Petitioners on page eight of their motion.

22 Here, where there is no reversionary
23 action, application of the 365-day deadline as set
24 forth in section 205-4(g) is inappropriate, and the
25 court's analysis in Bridge Aina Le'a is irrelevant.

1 We do believe that case applies if there is
2 a reversionary action, and it appears there's an
3 argument that's synonymous with the Order to Show
4 Cause, the start of the Order to Show Cause
5 proceeding. And we don't think that's necessarily
6 the same thing.

7 In this case there hasn't been a
8 determination of substantial commencement of the use
9 of the property, and if that's made and it's
10 determined that there is substantial commencement of
11 the use, then I think the proceeding to revert the
12 property would be subject to the district boundary
13 amendment proceeding. But obviously we are at
14 disagreement with Petitioner on that issue.

15 But our reading of that case is that if
16 there is reversionary proceedings, that that subject
17 to the 365-day deadline -- sorry -- if there is
18 reversionary proceedings as to property, whether
19 there has been substantial commencement, then that's
20 considered to be subject to 365-day deadline.

21 In this case, because of the way that the
22 hearing was set up, Phase I for compliance, Phase II
23 for whether there would be reversion, we believe that
24 that timeframe hasn't begun yet.

25 Again, obviously an argument as to when

1 that is begun, and I think you can rely on your
2 attorney general to advise you on those issues.

3 At that point, I think that concludes our
4 argument. Again, we have made substantially similar
5 arguments in both of our responses to Motion to
6 Dismiss as well as the Intervenor's motion.

7 CHAIRPERSON SCHEUER: Thank you, Mr.
8 Hopper. Commissioners?

9 Commissioner Chang, Commissioner Ohigashi,
10 then Commissioner Cabral.

11 COMMISSIONER CHANG: Thank you, Mr. Hopper.
12 I just want clarification.

13 Is it the county's position that this
14 current Motion to Dismiss the Order to Show Cause, if
15 it is based upon the modified plan, is premature
16 until the plan has been submitted with greater detail
17 to all the parties?

18 MR. HOPPER: Well, thank you, Mr. Chair.

19 What we have to look at in the filings, we
20 didn't see any type of a plan. So that was our
21 response there. We would like to have a plan. We
22 didn't know if there was going to be 111 lots, 123,
23 50 lots or similar to the conceptual plan in Exhibits
24 1 and 2 of Mr. Lake's Declaration and the Motion to
25 Dismiss. So that was our position there.

1 I do think, in our view, the Motion to
2 Dismiss I think you could defer until you get that
3 specific information that we are asking for. We want
4 to try to avoid having to come back here when there's
5 a subdivision plan submitted to the county, if we're
6 unclear on whether it's substantial compliance. And
7 we have had that disagreement before with the
8 Commission and OP, so that's what we are trying to
9 avoid.

10 COMMISSIONER CHANG: You're saying defer
11 until there has been -- at least all the parties have
12 had an opportunity to review this proposed modified
13 plan?

14 MR. HOPPER: Yes. I think argument number
15 two of the Motion to Dismiss is that the Petitioner
16 is in compliance because they plan to build something
17 that is in compliance.

18 And we believe that, based on the current
19 D&O, it is possible to build something in substantial
20 compliance with that Decision and Order. We just
21 wanted to see what would be built and have that
22 confirmed.

23 CHAIRPERSON SCHEUER: Thank you.

24 CHAIRPERSON SCHEUER: Commissioner
25 Ohigashi.

1 COMMISSIONER OHIGASHI: Put the same
2 question only my spin on it. My understanding is
3 that before you issue any county approvals on any
4 plan, that you're going to ask the Petitioner to file
5 for declaratory ruling to say that that plan is in
6 substantial compliance with our D&O. Is that my
7 understanding?

8 MR. HOPPER: No. Because if we can
9 determine it's in compliance then, yes, but we have
10 had problems with that in the past and would rather
11 have the Commission make that determination now.

12 COMMISSIONER OHIGASHI: You understand that
13 there's no declaratory ruling request before us? And
14 that there is none -- this is not a situation where
15 we can make that determination whether or not it is
16 in substantial compliance.

17 So I'm trying to understand the county's
18 position. The county's position is that if we decide
19 to dismiss the OSC, we decide to dismiss the OSC, if
20 they present a plan that is the same as what it was
21 before attached to the D&O, the county would probably
22 accept it and process the permits.

23 If they propose a different plan than what
24 was attached to the D&O, my understanding the county
25 would require them to get a declaratory ruling to say

1 whether or not that is in substantial compliance; is
2 that right?

3 MR. HOPPER: There is a couple parts to
4 that question.

5 I do think the Commission is in position to
6 determine whether or not a project is in substantial
7 compliance because that's the heart of the Order to
8 Show Cause proceeding as well as the argument number
9 two of the Motion to Dismiss.

10 The second part is, I believe, that if
11 there is a plan that is submitted that is not
12 consistent with the conceptual site plan that was
13 submitted to the Land Use Commission, that we most --
14 county most likely would request a declaratory ruling
15 by the Commission.

16 COMMISSIONER OHIGASHI: I'll modify my
17 question.

18 Your statement then is that it's not
19 necessary for us to determine whether this modified
20 plan is in substantial compliance, since you received
21 -- you received a proposal that matches the D&O
22 proposal, then that would be processed, and only if
23 it deviates from the D&O proposal would you require
24 the Petitioner to get a declaratory ruling?

25 MR. HOPPER: At this stage we want the

1 Commission to be clear --

2 COMMISSIONER OHIGASHI: I know what you
3 want, but I'm just telling you what -- I'm just
4 asking you what you're willing to take. I don't have
5 to.

6 MR. HOPPER: I believe we set forth our
7 position on that issue.

8 CHAIRPERSON SCHEUER: Commissioner Cabral,
9 thank you for your patience.

10 VICE CHAIR CABRAL: I just wanted some
11 clarification.

12 You're with County of Maui, Office of
13 Planning, and you are -- you work with them? Are you
14 the attorney that represents the Maui County Office
15 of Planning?

16 MR. HOPPER: I represent the Department of
17 Planning in this docket who is the party before you.

18 VICE CHAIR CABRAL: So you're an
19 independent lawyer retained --

20 MR. HOPPER: No, I'm Deputy Corporation
21 Counsel. I work for the County of Maui.

22 VICE CHAIR CABRAL: You referenced you
23 needed to consult with your client, made me think
24 that maybe you weren't part of the county directly,
25 but you are --

1 MR. HOPPER: The purpose was -- I got this
2 right here with the rest of you. And I didn't want
3 to speak on behalf of Acting Planning Director on
4 this without first having the opportunity to confer
5 because we haven't seen this before the meeting.

6 VICE CHAIR CABRAL: So client, being Office
7 of Planning, as opposed to county in general. Thank
8 you. I just was confused.

9 CHAIRPERSON SCHEUER: Commissioners? Thank
10 you, Mr. Hopper.

11 How long do you think, Ms. Apuna?

12 MS. APUNA: Five minutes.

13 CHAIRPERSON SCHEUER: What I'm going to
14 propose is we go through OP, any questions, and call
15 it a day. We will continue this at 9:00 a.m.
16 tomorrow which will give full chance to the
17 Intervenor.

18 Please proceed.

19 MS. APUNA: First my a apologies for OP's
20 late amended response to this Motion to Dismiss. The
21 reason for the change in position was first an
22 attempt to better assist the Commission; and
23 secondly, while all the parties are striving for some
24 sort of finality or outcome in this matter, it's
25 important that we don't overlook the proper

1 procedures that should be followed.

2 We shouldn't let the desired outcome
3 dictate the procedure, rather the properly applied
4 procedure will produce the outcome.

5 So there has been a flurry of motions and
6 various arguments made between the Intervenor and
7 the Petitioners that aren't all necessarily relevant
8 to this Motion to Dismiss. It's important that this
9 Commission not be distracted by issues of substantial
10 commencement, ten-year rule, 365-day deadline,
11 etcetera, but focus merely on whether there are
12 sufficient grounds to dismiss the Order to Show
13 Cause.

14 All that this Commission should consider
15 under this Motion to Dismiss is whether the
16 Petitioner continues to be in violation of Conditions
17 5, 15 and 17. If Petitioners have sufficiently
18 demonstrated to the Commission that they are no
19 longer in violation of these three conditions, there
20 can be no basis for the Commission to move forward to
21 Phase II, the Order to Show Cause. Therefore, the
22 OSC should be dismissed.

23 We note, however, that if the OSC is
24 dismissed, Intervenor or any other interested party
25 are not precluded from filing a new motion for the

1 issuance of an Order to Show Cause on any existing or
2 new violations by the Petitioners. The Commission
3 would then have the authority to issue a new OSC if
4 it is so inclined.

5 However, if the Commission does find
6 Petitioner to be in continued violation of Condition
7 5, 15 or 17, then we move forward with Phase II. For
8 Phase II, which would be for another day, that is
9 when the Commission should consider the issues of
10 substantial commencement, good cause and reversion,
11 etcetera.

12 I would like to offer that if Petitioner is
13 pulling the plug on the cultural preserve to just go
14 forward with the original D&O plan, procedurally they
15 could address the inclusion of that plan in a
16 Declaratory Ruling or in a Motion to Amend on another
17 date.

18 And then when there was discussion by the
19 Commissioners about compliance with Condition 5 and
20 15, I think there is a difference between the
21 Petitioner's compliance with these conditions as
22 opposed to their continued violation.

23 I think there are two different things,
24 whether their plans are now consistent going forward,
25 or if they are still in conflict with those

1 conditions which I think they were previously found
2 to be in conflict with those conditions as found by
3 the Commission back in 2012.

4 And that's it, thank you.

5 CHAIRPERSON SCHEUER: Thank you, Ms. Apuna.

6 Commissioners, do we have questions for the
7 Office of Planning? Commissioner Chang.

8 COMMISSIONER CHANG: Of course I have a
9 question.

10 Ms. Apuna, I guess I'm a little confused.
11 The representation by the Petitioners is the modified
12 plan, that's what they showed us today, this is their
13 proposal. They didn't show us what was originally
14 submitted, although there's been statements, that if
15 this is going to cause -- we really did this in
16 response to the community, but if this is going to
17 cause us to be in procedural defect, we will go back
18 to the original.

19 But as I understand it, this is the
20 modified original proposed plan. Doesn't the
21 Commission have to address the question of whether
22 this plan is in substantial compliance with the
23 representations made to determine whether they're in
24 violation of Condition 15?

25 MS. APUNA: Yes, I think that's correct. I

1 also did hear the discussion that went between
2 Petitioner and yourself as far as them possibly
3 taking that out, so that would make it procedurally
4 cleaner for the Commission to make a decision today.

5 So I can't speak for the Petitioner, but I
6 thought that that might be an option that they were
7 looking at as the discussion was unfolding.

8 CHAIRPERSON SCHEUER: Commissioners? Mr.
9 Hopper.

10 MR. HOPPER: If you would indulge me, I
11 just wanted to add to one of my responses to the
12 Commission on a previous question.

13 CHAIRPERSON SCHEUER: Very cautiously, is
14 there any objection to my allowing this?

15 MR. SAKUMOTO: No objection.

16 MR. TABATA: No.

17 MS. APUNA: No.

18 MR. PIERCE: No.

19 MR. HOPPER: What I wanted to add to Mr.
20 Ohigashi's question was that the county, we did talk
21 about potentially sending a declaratory ruling
22 request if there is a proposal before the county that
23 we would be uncertain as to whether it's in
24 compliance with the Decision and Order.

25 I don't want to represent that we would

1 have a legal obligation to do that in all cases, we
2 wouldn't necessarily do that in all cases. I just
3 didn't want the Commission to say that that's going
4 to happen regardless of whether it gets approved,
5 therefore, we can dismiss this and we will see this
6 again. I don't want to guarantee that that will
7 happen. I can't say that and represent that.

8 But I'm giving our position as to what may
9 happen if we get an application that we're not
10 certain regarding.

11 CHAIRPERSON SCHEUER: Thank you, Mr.
12 Hopper. Back to questions for the Office of
13 Planning.

14 Ms. Apuna, I just -- I really want to
15 understand your argument, the distinction you're
16 drawing between the continued violation versus
17 substantial compliance.

18 The point at which this Commission
19 determined and issued the Order to Show Cause, we
20 determined that there was a violation of those
21 conditions at that point in time, is that correct?

22 MS. APUNA: Yes.

23 CHAIRPERSON SCHEUER: And you think the
24 question in front of us right now is to see whether
25 or not that has continued?

1 MS. APUNA: Whether they are in continued
2 violations of the conditions.

3 CHAIRPERSON SCHEUER: And are you familiar
4 with how the Commission determined at that point that
5 they were in violation of those conditions? What was
6 that based on?

7 MS. APUNA: I think it was based on the
8 evidence provided by the Intervenors that the plans
9 were different and they were doing things, there were
10 grading permits and other things going on that showed
11 that it was in conflict with the conditions as
12 written.

13 CHAIRPERSON SCHEUER: Does the still
14 pending Motion to Amend have any bearing on our
15 determination of whether or not there's continued
16 violation?

17 Or to ask it slightly another way, wouldn't
18 it have been much cleaner if the Petitioner's
19 intention was to continue with the original project,
20 to first have withdrawn their Motion to Amend and
21 then filed this motion?

22 MS. APUNA: I don't know. I guess you're
23 saying that would show their intention better. But
24 it seems to be a technical thing that they would need
25 to clean up, I guess. I think they're just -- I

1 don't know. I can't speak for the Petitioner.

2 CHAIRPERSON SCHEUER: I'm not asking you to
3 speak -- just to be clear, I'm not asking you to
4 speak for the Petitioner. I'm asking for your
5 opinion on your argument on whether or not, if you
6 are saying we should look at continued violation,
7 whether the pending Motion to Amend has any bearing
8 on that?

9 MS. APUNA: Possibly.

10 CHAIRPERSON SCHEUER: Any other questions?
11 Okay. Thanks everybody for your patience on this
12 matter. I think the chainsaw was a clear sign that
13 it was time to take a break.

14 We are -- let me make sure I get the
15 wording -- we are recessing until 6:00 p.m. at the
16 Malcolm Center in Kihei.

17 (The proceedings were recessed at 3:57
18 p.m.)

19 Status Report A11-794 Department of
20 Education-Kihei High School

21 CHAIRPERSON SCHEUER: Aloha, good evening.

22 This is the reconvened portion of our
23 February 20th, 2019 meeting of the Land Use
24 Commission to hear the Status Report on Docket
25 A11-794 State of Hawaii, Department of

1 Education-Kihei High School, Maui, to Amend the
2 Agricultural Land Use District Boundaries into the
3 Urban Land Use District for Approximately 77.2 acres
4 of land at Kihei, Maui, Hawaii, Maui Tax Map Key No.
5 2-2-02:81 and 83.

6 Will the parties please identify yourselves
7 for the record, starting with the Petitioner. Make
8 sure you get as close to the microphone as you can
9 and the button is on.

10 MS. NAKATSUKA: I'm Gaylyn Nakatsuka
11 representing the Department of Education Planning
12 Section of the Facilities Development Branch.

13 MR. KOLBE: My name is Tom Kolbe, Deputy
14 Corporation Counsel for County of Maui, and present
15 with me is Michael Hopper, also Deputy Corporation
16 Counsel, as well as Michele McLean, Director of
17 Planning. And in the back, I'd like to acknowledge
18 that Jeffrey Dak from Office of Planning is also
19 here.

20 MS. APUNA: Deputy Attorney General Dawn
21 Apuna on behalf of State Office of Planning. With me
22 today is Rodney Funakoshi.

23 CHAIRPERSON SCHEUER: For the members of
24 the public, before I start to update the record, I
25 apologize for us starting late. As some of you may

1 have known, we continued this from an earlier
2 proceeding that ran a little bit long at the MACC, so
3 we came as quickly as we could. Sorry to keep you
4 waiting.

5 Let me update the record for this docket.

6 On December 5th, 2018, the Commission
7 received correspondence from the Council of Maui
8 County requesting a status report on this matter.

9 On December 7, 2018, I, as the Chair,
10 acknowledged the County Council's request for an
11 evening meeting for a status conference.

12 February 4th, the Commission received
13 correspondence from Council of Maui County advising
14 that a resolution had been adopted requesting that
15 the Commission issue a Declaratory Ruling reiterating
16 and reaffirming the requirement for a pedestrian
17 overpass or underpass to allow safe access to Kihei
18 High School.

19 On February 11, 2019, the Commission mailed
20 agenda meeting notices to the Parties, Statewide and
21 Maui mailing lists.

22 For the members of the public, I would
23 remind you that today we will not be considering the
24 merits of this Petition A11-794; but rather,
25 interested in learning what the current state of the

1 activities related to this docket are.

2 I'll go over our procedures for this
3 docket.

4 First, for those individuals desiring to
5 provide public testimony for the Commission's
6 consideration, you had the opportunity to sign in.
7 You can sign in later after everybody has signed in
8 has gone. Ask you to identify yourself, come to the
9 public witness box, and I'll swear you in before
10 providing testimony.

11 Then at the conclusion of public testimony,
12 we're going to ask the Petitioner, Department of
13 Education, to provide their status update on the
14 matter.

15 And after the Commission questions the
16 Petitioner, the Chair will entertain questions from
17 the County of Maui, Office of Planning and the
18 Commission.

19 From time to time, depending on the length
20 of our proceedings, I will call for breaks, if
21 necessary.

22 Are there any questions from the parties
23 for our procedures today?

24 MS. NAKATSUKA: No.

25 MR. KOLBE: No questions.

1 MS. APUNA: No questions.

2 CHAIRPERSON SCHEUER: Mr. Orodenker, who is
3 the first on the list, and second individual desiring
4 to give public testimony?

5 COMMISSIONER OKUDA: Mr. Chair.

6 CHAIRPERSON SCHEUER: Please tell who it
7 is, and then I'll go to the Commissioners.

8 EXECUTIVE OFFICER: First testifier, Mike
9 Moran, followed by Randy Wagner.

10 COMMISSIONER OKUDA: I would like to
11 disclose the fact that myself and my law firm
12 represent a party in an active lawsuit against the
13 Department of Education.

14 I do not believe that would affect any
15 decision-making I may have been involved in in this
16 case.

17 CHAIRPERSON SCHEUER: And we have no
18 decision-making today. Nonetheless, I'll ask the
19 parties, any objection to Mr. Okuda's continued
20 participation in tonight's hearing?

21 MS. NAKATSUKA: No objection at this time.

22 MR. KOLBE: County doesn't have an
23 objection.

24 MS. APUNA: No objections.

25 CHAIRPERSON SCHEUER: Thank you, Mr. Okuda.

1 Mr. Moran, I think you remember the drill
2 from this morning.

3 THE WITNESS: Yes, sir, I certainly do.

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

7 THE WITNESS: I do.

8 CHAIRPERSON SCHEUER: Please state your
9 name for the record.

10 THE WITNESS: My name is Mike Moran. I'm
11 testifying for the Kihei Community Association. My
12 address is 167 Ahaaina Way in Kihei.

13 MIKE MORAN

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

17 DIRECT EXAMINATION

18 THE WITNESS: Aloha, Chair, and
19 Commissioners, I'm testifying for Kihei Community
20 Association.

21 First, we would sincerely like to thank the
22 Commission for taking up this matter, for holding the
23 hearing right here in Kihei just a shade south of the
24 location, and mostly for scheduling the meeting in
25 the evening, which is extremely helpful to community

1 participation.

2 We well recall about five-and-a-half years
3 ago when the Commission approved the needed land use
4 change for the very long awaited high school here in
5 Kihei, as well as the condition requiring safe
6 pedestrian access to reach it mauka of the highway.

7 Several years before as the community was
8 clamoring for this school, the Department of
9 Education conducted a public meeting with KCA
10 concerning the choice of location for it with three
11 choices, two makai of the highway, and this one.
12 This was the least favorable to the community, but it
13 was selected. Thus when the Commission required an
14 above or below grade crossing, we were relieved.

15 Sometime afterward, we participated in
16 stakeholder meetings concerning a traffic study
17 related to the school from the professionals, Group
18 70 and Munekiyo and Hiraga, which included Dan
19 Burden. It was entitled the Kihei High School,
20 Active Transportation Connections, that moved beyond
21 a pedestrian route study for the high school, to
22 include all of North Kihei and much beyond into the
23 South side as well.

24 Details of that study will be presented by
25 a fellow KCA director shortly, I think she's up next,

1 but pertinent part of that concluded that an
2 underpass was the best decision.

3 Last June the Commission traveled to the
4 site and we gathered on the shoulder of the highway
5 near Kulanihakoi, as after five-and-a-half years it
6 was an entirely new group of Commissioners, since
7 that condition was approved.

8 While there was no public testimony, we all
9 looked across the four undivided lanes of speeding
10 cars and trucks to picture students and teachers
11 walking or cycling from their homes to and from the
12 school.

13 As one who has lived nearby since 2000, I
14 will add a community observation as some will speak
15 against an underpass saying it will not be used.

16 Before the Kihei Charter School opened
17 their new school right up the street from here last
18 fall, their high school was located in the industrial
19 park mauka of this highway, just north of here and
20 just a bit north of the school site.

21 Daily we watched students walk and push
22 bicycles through a drainage culvert under this
23 highway to reach the school safely. If that was a
24 common practice, imagine how many more will use a
25 true safe accessway where they can ride those

1 bicycles and walk uptight.

2 Please stand strong by your condition for
3 the safety of our children. Mahalo.

4 CHAIRPERSON SCHEUER: Thank you, Mr. Moran.
5 Are there any questions for this testifier?

6 MS. NAKATSUKA: I have no questions, but I
7 did want to mention for the three selections --

8 CHAIRPERSON SCHEUER: You will have an
9 opportunity after.

10 MS. NAKATSUKA: No questions.

11 MR. KOLBE: County doesn't have any
12 questions.

13 MS. APUNA: No questions.

14 CHAIRPERSON SCHEUER: Commissioners?

15 VICE CHAIR CABRAL: I would just like to
16 thank you for being present at all these events and
17 for your well prepared and well spoken comments.

18 THE WITNESS: Thank you, and back at you.

19 CHAIRPERSON SCHEUER: We should hold
20 evening meetings more often.

21 EXECUTIVE OFFICER: Next testifier is Randy
22 Wagner followed by Bill Snipes.

23 CHAIRPERSON SCHEUER: Do you swear or
24 affirm that the testimony you're about to give is the
25 truth.

1 THE WITNESS: Yes, it is.

2 CHAIRPERSON SCHEUER: Please state your
3 name and address for the record and proceed.

4 THE WITNESS: My name is Randy Wagner. My
5 address is 1178 Uluniu Road, Kihei. And what was the
6 last question?

7 CHAIRPERSON SCHEUER: Please proceed with
8 your testimony.

9 RANDY WAGNER

10 Was called as a witness by and on behalf of the
11 Public, was sworn to tell the truth, was examined and
12 testified as follows:

13 DIRECT EXAMINATION

14 THE WITNESS: Okay. I'm here because I've
15 lived in Kihei for 27 years. I'm an architect and
16 planner, mother and grandmother, and my grandchildren
17 will probably walk to this school. They, and all the
18 thousands of other children who will come here need
19 to be safe and have a healthy quality of life. Our
20 high school is going to be here for a very long time.

21 Well, in 2014, I walked with some members
22 of Group 70, the architects for the high school,
23 around Kihei, and spoke with them about accessing the
24 school. And they told me about the Dan Burden study
25 that they were going to have done.

1 So I stayed in touch with them throughout
2 that period, and they sent me the Safe Routes to
3 Kihei High School: Pedestrian Route Study as soon as
4 it was available. It may not be the final version,
5 but it was one that they shared early on.

6 So I want to show it to you. I have three
7 copies, if you want to share these pictures; or I can
8 try to see what I'm going to show you. This is the
9 cover which shows the roundabout in front of the
10 intersection -- or at that intersection which is
11 something that Dan Burden highly stresses, because no
12 one can speed through a roundabout. All traffic has
13 to slow down. And we want all traffic, obviously, to
14 slow down at the school.

15 The highway is a really high speed highway.
16 One of our representatives is suggesting that we get
17 rid of this condition. And she said that Baldwin
18 High School does okay the way they are.

19 So this is a picture from Dan's study of
20 Baldwin High School, and what it's like in front of
21 that school. And that street has less traffic flow
22 than the highway and at slower speeds, and it's
23 clearly not acceptable for us.

24 So in Dan's study he talks about his best
25 practices and recommendations, and he chose an

1 underpass, as Mike suggested, and he said of the two
2 gulches, Waipualani Gulch would be the best gulch to
3 start with, because Maui Research and Tech Park has
4 already shared their interest in developing it for
5 their campus.

6 Then he shows in the study some examples of
7 how the underpasses can be developed. And that it's
8 much less expensive than an overpass.

9 And some of the arguments against the
10 underpass are that it will be dangerous during
11 flooding, which I think people can have more credit
12 than that, that the school would disallow the use of
13 it.

14 And it's just logical not to go into a
15 gulch if it's flooding, and also it can be designed
16 in such a way that it can be dealt with. I've been
17 in underpasses right next to big rivers.

18 And also they're saying homeless people
19 will use it. And I think an underpass that is
20 frequented will not be attractive to homeless people.
21 So it's for that reason that I really, really want to
22 request that you do not abandon the condition.

23 But even more importantly, I would like you
24 to advise that we really want this document to be the
25 planning guideline, designed matters. And it's for a

1 really long time, and to rush something that won't be
2 of the highest quality, I mean, it's really going to
3 affect how our community functions and how safe and
4 beautiful it is.

5 So I believe that it's the responsibility
6 and the privilege of the Land Use Commission to
7 maintain the requirement for an underpass. And
8 additionally, to insist that the DOE and the DOT use
9 the same route to Kihei High School as a blueprint
10 for their design.

11 Our community can be safer and more
12 beautiful. That's all I have to say.

13 CHAIRPERSON SCHEUER: Thank you, Ms.
14 Wagner. Are there questions for this testifier?

15 MS. NAKATSUKA: No questions.

16 MR. KOLBE: No questions.

17 THE WITNESS: Also I want to mention that
18 I've given this document on a flash drive to your
19 clerk, and he can distribute the document, because
20 it's gone underground. We don't know where it is.

21 CHAIRPERSON SCHEUER: So stay put. We may
22 have questions for you.

23 MS. NAKATSUKA: No questions.

24 MR. KOLBE: County has no questions.

25 MS. APUNA: No questions.

1 CHAIRPERSON SCHEUER: Commissioner Cabral.

2 VICE CHAIR CABRAL: Thank you also for your
3 well said comments. Are you advocating both for the
4 underpass and for the roundabout?

5 THE WITNESS: I am, and also advocating for
6 two under passes, one at Waipualani and one at
7 Kulanihakoi.

8 You reminded me of something I wanted to
9 say. Jordan Hart, who is the new Deputy Planning
10 Director of Maui County, developed a linear park,
11 which is also in this document, a linear park that
12 goes from the Kulanihakoi underpass, all the way down
13 to South Kihei Road. And there's drawings and
14 schematics of how that could draw so many people into
15 a walking capacity to get to school.

16 So I feel like the first one should be
17 done, that's the High Tech Center wants to work with;
18 and that the second one should also be done, and it
19 will really give a lateral connection to our
20 community which is so divided by this highway.

21 VICE CHAIR CABRAL: Thank you very much.

22 CHAIRPERSON SCHEUER: Other questions?
23 Commissioner Okuda.

24 COMMISSIONER OKUDA: Thank you, Chair.

25 Ms. Wagner, just so we are clear about the

1 document. Does the document have a title and date?

2 THE WITNESS: The document of the Safe
3 Routes to Kihei High School: Pedestrian Route Study,
4 Kihei, Maui 2014 has that, and it's done by the
5 Walkable and Livable Communities Institute for the
6 DOE and Group 70 -- no -- yes, for Department of
7 Education and Group 70, and that information will be
8 on the flash drive.

9 The other document, which is the
10 Kulanihakoi Linear Park also has a title, and that
11 was created by Chris Hart and Partners for a client
12 who owns this land.

13 COMMISSIONER OKUDA: When you mentioned or
14 stated that the document went underground, I really
15 don't care about the circumstances regarding it, but
16 where was the last place the first document was
17 available?

18 THE WITNESS: You know, I don't really
19 know, because I was just dealing personally with
20 Group 70 as a member of the Board of KCA, and I was
21 talking to them about it. And I haven't been able to
22 stay exactly on top of what is happening, but KCA
23 tried really hard -- at one point Roz Baker put forth
24 some funding for a signal at this intersection, and
25 we said, no, no, we don't want a signal, we want a

1 roundabout. We like Dan Burden's study. And she
2 didn't back down from the signal. And it just seems
3 like, you know, with my ear to the coconut wireless,
4 that there's going to be a signal there, and now the
5 underpass is also threatened.

6 CHAIRPERSON SCHEUER: One last question.

7 Ms. Wagner, we will hear from the
8 Department of Education, but my understanding, which
9 may be incorrect, but my understanding is that is
10 they have agreed to do some kind of thing, but not
11 until Phase II, the second 800 students come.

12 THE WITNESS: When you say "some kind of
13 thing", what do you mean?

14 CHAIRPERSON SCHEUER: Either grade or at
15 surface crossing. Do you have concerns about when?

16 THE WITNESS: Yes, I think it should be
17 done before the students come, because the first 800
18 students are going to be compromised.

19 What happens if something happens to one
20 child trying to run across four lanes of road or
21 whatever? I just think it should be in place because
22 things get forgotten too. I can't tell you how many
23 temporary buildings are permanent.

24 CHAIRPERSON SCHEUER: Thank you very much.
25 Mr. Orodenker.

1 EXECUTIVE OFFICER: Andrew Beerer followed
2 by Kelly King.

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

6 THE WITNESS: Yes, I do.

7 CHAIRPERSON SCHEUER: Please state your
8 name and address for the record, then proceed with
9 your testimony.

10 THE WITNESS: Andrew Beerer. I live at 56
11 Kalola Place in Kihei, Hawai'i 96753.

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

16 DIRECT EXAMINATION

17 THE WITNESS: I have been a long-time
18 advocate of this high school for our community. I am
19 the Chairman of the Kihei High School Action Team,
20 and I've work closely with our community, our
21 legislatures and the Department of Education to help
22 push this school forward for the last 10 to 12 years.
23 It's technically been funded since 2004, or the
24 beginning of funding began.

25 Tonight I would like to thank the volunteer

1 Commissioners for coming to Kihei in the evening to
2 hear and testify in support of pedestrian safety.

3 I would like to be on the record as
4 endorsing the Safe Routes to Kihei High School:
5 Pedestrian Route Study by Dan Burden as commissioned
6 by our own DOE previously mentioned by Ms. Wagner.

7 A condition of land use is the only
8 recourse the community has to get necessary
9 infrastructure and community needs.

10 After attending many miscellaneous
11 development meetings over the years, I found out that
12 if there wasn't a condition, they could promise you a
13 hedge of low lighting, anything in the books,
14 crosswalk, underpass, overpass, and yet if there
15 isn't a condition, all those smiling promises are
16 just hyperbole.

17 Working for 10-plus years with Senator Roz
18 Baker on this project, we've had our successes and
19 defeats. It has been arduous and completely
20 deflating at times. I will admit these defeats
21 created an atmosphere of desperation amongst us. We
22 are desperate to do anything and hold onto anything
23 that would give us real traction to build a campus
24 and open classrooms.

25 We naturally became defensive to

1 anything/anyone that could throw it off track, all
2 the while we were continuously trying to push the DOE
3 and DOT.

4 We faced great disappointment in 2014 when
5 the legislature's \$13 million allocation to build the
6 school was lost to general funds. It was then that
7 we realized that our then elementary aged kids
8 wouldn't attend the future KHS.

9 We became desperate again, and even
10 considered the possibility of waiving this important
11 condition, just so we could open the school, which at
12 the time seemed better than waiting for the unlikely
13 compliance of the DOE.

14 After Goodfellow Bros., Inc., got the right
15 to proceed and began grading, my blood pressure
16 dropped as finally the project was in the hands of
17 able contractors. The reality also set in, this
18 school was still nowhere close to opening in a timely
19 manner. Despite all our previous lobbying, sign
20 wavings, letter campaigns, PR blitzes, etcetera, we
21 moved along the legislature and the administration,
22 but we couldn't move the earth ourselves and
23 certainly not any faster.

24 We are now simply subject to the reality of
25 the contractors' timeline and their own challenges

1 with DOE.

2 The desperation has waned for me as reality
3 and the need to follow principles has set in. Seeing
4 that the DOE has done very little in five years to
5 address the under/overpass issue. If there is a
6 delay in opening due to noncompliance, then it is
7 clearly because the DOE ignored the community's
8 condition for necessary pedestrian infrastructure.
9 At that point the community must hold them
10 accountable. A condition is a condition. It's all
11 we have.

12 We have been threatened with fear, fear of
13 them, DOE, not opening the school on time. Fear that
14 we'd somehow be to blame. Fear that floods will
15 sweep innocent people through the underpass. Fear
16 that it will be a haven to homeless and criminal
17 activity. That's all baloney.

18 The more favorable pathway is under the
19 roadway, along with the top of the existing gulch for
20 a number of reasons. It is much more likely to be
21 utilized. It is a lot less expensive. It was
22 recommended in the professional study that was
23 commissioned by the DOE. It can directly connect to
24 the greenway that the county will construct along the
25 North-South Connector Road in the vicinity of

1 Kulanihakoi Road, which will be the vehicle entrance
2 to the school.

3 We endorse the study done by Dan Burden.
4 As a boss of mine used to tell me all the time, plan
5 your work and work your plan.

6 The Department of Education sought one of
7 the world's foremost consultants on this, and are not
8 following the plan. The most favorable pathway is
9 under the roadway along with the top of the existing
10 gulch for a number of reasons as Mike Moran has
11 mentioned.

12 I don't want to be redundant, but is much
13 more likely to be utilized. It is a lot less
14 expensive. It was recommended in the professional
15 study commissioned by the Department of Education,
16 and it can directly connect to the greenway that the
17 county will construct along the North/south Connector
18 Road in vicinity of Kulanihakoi Road which will be
19 the vehicle entrance to the school.

20 I think one thing that we tend to miss
21 is for our whole community. This underpass will
22 allow a better passage on the highway and less
23 traffic interruptions, which in the long term is by
24 far the most beneficial outcome for our community.
25 It's an absolutely necessary piece of infrastructure

1 that comes along with this huge project, and we hope
2 you will stick to your condition, and also somewhat
3 hold the Department of Education accountable to build
4 this wonderful underpass as if it was done in other
5 areas previously, you may not have the conditions
6 they have.

7 We're just being -- we just have foresight
8 here, and we expect you to also have that foresight
9 of what is coming in the future when you look at this
10 community. Mahalo.

11 CHAIRPERSON SCHEUER: Thank you. Questions
12 for this witness?

13 MS. NAKATSUKA: No questions.

14 MR. KOLBE: No questions.

15 MS. APUNA: No questions.

16 CHAIRPERSON SCHEUER: Commissioners?

17 Thank you very much. Council King.

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

20 THE WITNESS: I do.

21 CHAIRPERSON SCHEUER: Please state your
22 name and address and proceed.

23 KELLY TAKAYA KING

24 Was called as a witness by and on behalf of the
25 Public, was sworn to tell the truth, was examined as

1 follows:

2 DIRECT EXAMINATION

3 THE WITNESS: My name is Kelly Takaya King.
4 I live at 72 Kaloa Place in Kihei. I'm following my
5 neighbor down the street, although he may look like
6 he could be my brother, but he's from a much younger
7 generation that followed after me in trying to get
8 this high school built.

9 I was involved in the early efforts to get
10 Kihei High School back, and I thought my children
11 would be able to go there. Most of my children have
12 since received their master's degree from the UH, but
13 I'm still very concerned.

14 I've been a 40-year resident in Kihei. I
15 previously served on the Board of Education, so I
16 have that background too, and I would like to speak
17 from that background as well.

18 The Board of Education is very different
19 today. In my day it was elected, and we were much
20 more involved. We actually had a budget to travel
21 and to take these meetings. And I'm understanding
22 from talking to our current board member that they
23 don't have that any more, so much less active, and I
24 know she cares about this issue as well.

25 County Council, as you mentioned earlier,

1 did pass a resolution, and there is a unanimous
2 commitment to safety first. There is an irritation,
3 to say the least, among council members just at the
4 thought of students walking across this four-lane
5 highway with or without light, with or without
6 roundabout, but that was the impetus for us passing
7 that resolution, asking to file that declaratory
8 ruling.

9 I'm also very -- I came out of -- into the
10 Board of Education as being very involved in the PTA
11 at Kihei School, and fighting for better conditions
12 there. So it takes a long time.

13 But this is an extremely important
14 condition, and if it holds up the high school for one
15 year or two years, and it even saves one life, it
16 would be worth it. And I'm sure whoever those
17 parents are whose child's life would be taken would
18 agree with me.

19 So I don't accept the fact that it's okay
20 for the first 800 students to walk across the highway
21 and we can wait until the next phase.

22 I want to thank all the members here in the
23 community who -- and I think a lot more would be here
24 if it wasn't for our wonderful representation of the
25 Kihei Community Association. They pretty much do a

1 good job of representing, but looks like it's a good
2 thing they aren't, because there's not very much room
3 in this structure here the way it's set up.

4 But I also want to thank the information
5 that came before. And I also support the Dan Burden
6 study, and the condition of the underpass.

7 Looking at the overpass -- I've had this
8 discussion with some of you even -- looking at the
9 overpass it would be a lot more expensive, it would
10 be something that would probably have to be caged.
11 If you look at where over passes are now on the
12 mainland versus where they used to be 30 years ago,
13 everything has to be caged because otherwise people
14 throw things off the overpass. So that's an issue.

15 I understand they have to do the drainage,
16 anyway, so some of that work is going to be done.

17 I agree with our architects on our board,
18 Randy Wagner, and (indecipherable) would agree if she
19 was here, Linda Barry. The fact that it can be done,
20 it can be done in a way in concert with the drainage
21 underneath.

22 And the reasons that are being talked
23 about, that were pushed back against us, the one that
24 bothers me the most is the idea that there may be
25 homeless congregating there.

1 We have a lot of parks homeless congregate
2 in. It's been one of the big issues since I became a
3 council member over two years ago, but what our
4 reaction to that needs to be enforcement, not running
5 away from having parks. I mean if that was a reason
6 to not put this underpass, we wouldn't even have
7 parks because people congregate there. We wouldn't
8 have beach parks. It's a community solution that we
9 are looking for, and it goes hand in hand with
10 enforcement.

11 So the last thing I wanted to say was that
12 I, at one point when my kids were little and I
13 thought we could get a high school built here in time
14 for them to go to it, eventually they graduated,
15 moved off island, because, of course, easier to buy a
16 house on the Big Island. And I never really thought
17 about my grandchildren. My kids right now are trying
18 to move back, and I live in North Kihei, so I live
19 close to that vicinity, and I do see my grandchildren
20 one day going to that high school.

21 I would, rather than let them walk across
22 the highway, I would drive them to school even though
23 it's probably less than five minutes from my house.
24 I don't want that kind of traffic on that highway. I
25 think schools work best when they're in

1 neighborhoods, when kids can walk and bike to them.

2 And I think we have to do everything in our
3 power to make that possible for our high school.

4 It's taken a long time, but I don't think we should
5 skim on safety to get to the end goal.

6 Thank you for hearing me. Thank you for
7 your conditions and being committed to the safety of
8 our students and our parents, because parents may be
9 walking there as well.

10 This is going to be part of a bigger
11 community some day, because we are planning
12 affordable housing mauka and makai of the highway, so
13 let's get this right the first time. Thank you.

14 CHAIRPERSON SCHEUER: Thank you. Questions
15 for Ms. King. Department of Education?

16 MS. NAKATSUKA: No questions.

17 MR. KOLBE: No questions.

18 MS. APUNA: No questions.

19 CHAIRPERSON SCHEUER: Commissioners?
20 Commissioner Okuda.

21 COMMISSIONER OKUDA: Thank you, Mr. Chair.

22 Chair King, being someone who was on the
23 Board of Education before, have you tried to talk to
24 the people at the Department of Education about these
25 concerns that you have not only articulated or talked

1 about here, but the other concerns that have been
2 raised in testimony up until now?

3 THE WITNESS: I haven't because it's a very
4 different Department of Education. I was on the
5 state board back in the '90s, and so the same people
6 aren't there any more. And there's much less access
7 to the department and the Board of Education these
8 days because of the lack of funding, so it's really
9 difficult.

10 I mean, most of the people on this island
11 don't even know who our Board of Education member is,
12 and they're not very connected. Unless you have a
13 child in the school, and you're involved in that
14 school and you know the teachers and the principal,
15 you probably don't even know who our district's
16 superintendent is. You know, people are very
17 disconnected from the whole system these days because
18 of what happened.

19 And to me it's not a criticism of having an
20 elected person or appointed, it's a criticism of
21 having taken that ability away from the board by
22 removing funding. So you don't see a lot of board
23 members on the island these days.

24 COMMISSIONER OKUDA: Perhaps I should have
25 asked the question of some of the earlier witnesses

1 to find out what their interaction, or what type of
2 consultation has there been with the Department of
3 Education? Maybe I'll reserve that question for the
4 Department's witness.

5 But your local board member from Maui, Kili
6 Namau'u, she's a pretty responsive person, is that
7 correct?

8 THE WITNESS: I don't know. I was hoping
9 she would be at this meeting. I know her, and I know
10 that she's very involved in Punana Leo. And actually
11 back in the day when she was starting that, I was
12 probably one of the few board members that supported
13 Punana Leo.

14 I don't see a lot of board members, and
15 when I go to Oahu or Big Island, I don't see a lot of
16 interaction between Board of Education and the public
17 like we used to have.

18 COMMISSIONER OKUDA: My question really was
19 aimed more at interaction between like people on the
20 Department of Education staff, educational officers
21 or planning people with the community, but I'll
22 reserve.

23 THE WITNESS: Most of that planning doesn't
24 happen on Maui, so it's not really accessible to
25 people on Maui. Just to let you know, Commissioner

1 Okuda, my interaction with this kind of came up in
2 the last year when I realized they were thinking
3 about not doing an underpass or overpass, because to
4 me it was sort of a no brainer, and I thought that
5 was the direction we were moving in.

6 And I think pretty much 95 percent of our
7 community wants to see an underpass.

8 COMMISSIONER OKUDA: I don't know to what
9 extent you might be familiar with some of the recent
10 Hawai'i Supreme Court cases like Bridge Aina Le'a
11 case, but there's a pretty strong view that the
12 Hawai'i Supreme Court has that essentially ties the
13 Land Use Commission's hands in certain cases of
14 enforcing conditions.

15 For example, in Bridge Aina Le'a, I believe
16 the supreme court said we had no power to issue Order
17 to Show Cause. So we're hearing everything, we're
18 listening to it, but the fact that we may not take
19 the action which maybe even we personally would like
20 to do if we had the magic wand, so it does not mean
21 that we're not concerned about the community, and
22 definitely it wouldn't mean that we're not concerned
23 about students' safety.

24 THE WITNESS: Yeah, my understanding is
25 that where we are at from conversations with some of

1 the Commissioners, is that where we are at in this
2 process is that since there has been a start in
3 construction, that the Commission can't stop it. But
4 the point of doing -- and I want to thank the
5 Planning Department for filing the Declaratory
6 Ruling. The point of getting that Declaratory Ruling
7 was to file the original intent because now it's in
8 the hands of the county with our planning and
9 permitting process.

10 And I think what we need to know is if that
11 was the original intent, we would like to back up
12 that intent and make sure we don't make a misstep in
13 our permitting process before we have those
14 conditions filled.

15 COMMISSIONER OKUDA: So not to put words in
16 your mouth, but one of the options the county is
17 looking at that depending on what the Commission
18 decides, the county itself may take action to enforce
19 conditions. Am I stating the situation correctly?

20 THE WITNESS: I don't want to put words in
21 the Planning Department's mouth, but that would be my
22 intent.

23 COMMISSIONER OKUDA: Thank you very much.

24 CHAIRPERSON SCHEUER: Thank you. Are there
25 any others questions? Thank you very much.

1 We have one final person signed up, Mr.
2 Orodenker.

3 EXECUTIVE OFFICER: Desiree Austin.

4 CHAIRPERSON SCHEUER: If there are others
5 that wish to provide testimony, but are not yet
6 signed up --

7 Good evening. Do you swear or affirm that
8 the testimony you're about to give is the truth?

9 THE WITNESS: Yes, I do.

10 CHAIRPERSON SCHEUER: State your name and
11 address, then proceed with your testimony.

12 DESIREE AUSTIN

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

16 DIRECT EXAMINATION

17 THE WITNESS: My name is Desiree Austin, 365
18 Hale Kai in Kihei. I am a public school teacher,
19 parent and resident of North Kihei, and I've been
20 watching these proceedings this evening and following
21 some of the news with a lot of interest.

22 Although my own children -- I really can't
23 add much more than the intelligent research and well
24 prepared speeches that came before me, but I just
25 wanted to add my own experience with my children who

1 attended Kihei Charter High School which was
2 temporary at the business park off Ohukai.

3 My son, just for reference, was biking, and
4 he was biking across the freeway on his way from
5 between home, school and work, and he was almost
6 clipped by a car. That has always stuck in the back
7 of my mind.

8 So when I heard that there was a
9 possibility that there would not be an under or
10 overpass, I became concerned. So I wanted to share
11 that experience as a parent, that he was forever like
12 scared of walking across the freeway, and I don't
13 blame him.

14 So I just wanted to share that experience
15 with everyone here, and I can only support everyone
16 who has gone before me. I can't add much more than
17 what has already been said.

18 CHAIRPERSON SCHEUER: Thank you. Are there
19 questions?

20 MS. NAKATSUKA: No questions.

21 MR. KOLBE: No questions.

22 MS. APUNA: No questions.

23 CHAIRPERSON SCHEUER: Commissioners? Thank
24 you very much for your testimony. Anybody else in
25 the audience wishing to provide testimony on this

1 matter. Seeing none.

2 Sorry, I could not see quite behind me. If
3 you would proceed over there.

4 I'm assuming at this point you know what
5 the drill is.

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

8 THE WITNESS: I do.

9 CHAIRPERSON SCHEUER: Please state your
10 name and address for the record, then testify.

11 THE WITNESS: My name is John Fluke. The
12 address, I live in North Kihei, 285A Noe Street.

13 JOHN FLUKE

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

17 DIRECT EXAMINATION

18 THE WITNESS: First of all, thank you for
19 allowing us to present testimony here. I've been a
20 resident of North Kihei since I moved here in '99. I
21 have a son that was born in 2000.

22 So he's a little bit past high school age,
23 but I guess -- I only want to keep this short, but
24 just I guess I want to mention I know this is
25 probably mentioned before, but there was a little

1 girl, sophomore at Kihei Charter crossing the street
2 at Pi'ilani at Kaiwahine not too long ago, and she
3 got hit at night. And there's a memorial to her.

4 So I just think that safety just needs to
5 be the most important thing for our children, our
6 keiki. And that the danger is very real, and it's
7 not something that happens once in a century, it
8 happens all the time.

9 Well, you know, people get hurt; pets get
10 hurt. There was a bicyclist that was killed four
11 years ago on Pi'ilani.

12 So maybe that was already brought up
13 before, but that's all I really want to say is that
14 for the sake of our keiki here in North Kihei, please
15 build the overpass or the underpass. Thank you very
16 much.

17 CHAIRPERSON SCHEUER: Thank you.
18 Questions?

19 MS. NAKATSUKA: No questions.

20 MR. KOLBE: No questions.

21 MS. APUNA: No questions.

22 CHAIRPERSON SCHEUER: Commissioners? Thank
23 you very much.

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

1 THE WITNESS: Yes.

2 CHAIRPERSON SCHEUER: Please state your
3 name and address then continue.

4 THE WITNESS: Tanya Lee Greg. I live at 15
5 Kulanihakoi Street, down the road.

6 TANYA LEE GREG

7 Was called as a witness by and on behalf of the
8 Public, was sworn to tell the truth, was examined and
9 testified as follows:

10 DIRECT EXAMINATION

11 THE WITNESS: And, again, I just, after
12 hearing the different testimony about people's
13 experiences with crossing these streets, I just
14 thought I would contribute a little to that story and
15 advocate for safe either underpass or overpass, or
16 just safe pedestrian access across Pi'ilani Highway.

17 My keiki went to Kihei Elementary. And
18 just anecdotally just sharing with you the
19 experiences from time to time, I like to have them
20 walk to school, and it was difficult to come from
21 Kulanihakoi Street all the way to Kihei Elementary.
22 The pedestrian sidewalks are not in very good
23 condition, and safety along South Kihei Road was
24 terrible.

25 In that experience crossing the street

1 using that side street at a signalized
2 intersection -- I can't remember the name of that
3 cross street -- it was difficult, or it felt
4 dangerous to get my children safely across the
5 crosswalk, even when they're in a crosswalk, because
6 people are in a rush to get to work.

7 I live on Kulanihakoi Street, and even with
8 signalizing that intersection, the traffic that goes
9 back and forth on Pi'ilani Highway is very brisk.
10 And anecdotally, people are sometimes red light they
11 stop and, you know, sometime they don't stop, they
12 just speed up.

13 So I've had experiences with that and tried
14 to walk to work up to the tech park by dropping my
15 car off at Kihei Community Center and trying to make
16 that crossing across four lanes of traffic safely.
17 Even when, you know, having drivers in the early
18 morning, and they're rushed to get to work, paying
19 attention to the side streets or the right-hand and
20 left-hand merge lanes.

21 So getting cross, even for an adult,
22 crossing Pi'ilani Highway at a signalized
23 intersection can be quite daunting and maybe a little
24 bit hazardous from time to time.

25 So I wanted to share those experiences of

1 pedestrian access of our keiki to existing Kihei
2 schools and how dangerous that is, as well as my own
3 experiences as an adult trying to cross Pi'ilani
4 Highway at a signalized intersection, just this Lipoa
5 intersection.

6 So however that can help to have you
7 deliberate on this subject, I advocate for safe
8 pedestrian access.

9 CHAIRPERSON SCHEUER: Mahalo. Are there
10 any questions?

11 MS. NAKATSUKA: No questions.

12 MR. KOLBE: No questions.

13 MS. APUNA: No questions.

14 CHAIRPERSON SCHEUER: Commissioners?
15 Mahalo.

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

18 THE WITNESS: I do. Albert Perez, 55 North
19 Church Street in Wailuku.

20 ALBERT PEREZ

21 Was called as a witness by and on behalf of the
22 Public, was sworn to tell the truth, was examined and
23 testified as follows:

24 DIRECT EXAMINATION

25 THE WITNESS: I wasn't planning to testify

1 today, but I did think -- I got here a little late,
2 so I apologize if this has already been said, but my
3 understanding, and you might want to check on this,
4 is that Pi'ilani Highway is designed for speeds in
5 excess of the posted speed limit.

6 And so it's 40 miles an hour for most of
7 its length, and 45 some places. I think it's 40 in
8 this spot. But just because the speed limit is
9 posted there, doesn't mean that's the speed that
10 people go. They fly down that road. And it's a
11 dangerous scenario, especially when there is just a
12 double solid line and no median and people are doing
13 55 on average.

14 So I would like to encourage the Land Use
15 Commission to do whatever it can to provide safe
16 pedestrian access. Thank you.

17 CHAIRPERSON SCHEUER: Are there questions
18 for Mr. Perez?

19 MS. NAKATSUKA: No questions.

20 MR. KOLBE: No questions.

21 MS. APUNA: No questions.

22 CHAIRPERSON SCHEUER: Commissioners?
23 Mahalo.

24 Are there any other individuals from the
25 public wishing to provide testimony? If not, will

1 Ms. Nakatsuka, we can proceed with your status
2 report.

3 MS. NAKATSUKA: Good evening, Chair Scheuer
4 and members of the Commission. My name is Gaylyn
5 Nakatsuka and I am a planning coordinator with the
6 Department of Education. I'm providing a Status
7 Report on A11-794 for the new high school in Kihei.

8 My involvement with the Kihei High School
9 project includes planning coordination for the site
10 selection, environmental impact statement, design and
11 the land use entitlements process.

12 Here's a brief update on the school
13 project. The Final EIS was dated November 2012, and
14 a Petition for District Boundary Amendment was filed
15 in February 2013.

16 Preliminary well work included an
17 archaeological monitoring plan and was completed in
18 2016 and received certification of well construction
19 completion in January 2017.

20 After multiple revisions, the Hawai'i
21 Department of Transportation approved the TIAR and
22 the Pedestrian Route Study in July 2017 as required
23 by the LUC Decision and Order. The reports show that
24 the current conditions warrant a signalized
25 intersection at Pi'ilani Highway and Kulanihakoi

1 Street, and that a grade separated pedestrian
2 crossing is not warranted at this time for the
3 traffic conditions now, or as studied with the Phase
4 I of the high school for a design enrollment of 800
5 students.

6 The DOT made Condition 1 of the Decision
7 and Order to require that the DOE provide the TIAR
8 and Pedestrian Route Study to show that proper
9 calculations and analyses were used to support safe
10 traffic and pedestrian access to the school site,
11 including, if necessary, a grade separated pedestrian
12 crossing, which could be an overpass or underpass.

13 The project proceeded with Phase I
14 construction for the infrastructure work that is now
15 underway, NTP for that was June 2018; and Phase II
16 construction for the classroom houses to accommodate
17 400 students each and administration, cafeteria,
18 library, and locker room buildings and support
19 facilities and site improvements, including parking,
20 driveways and landscaping. This phase is still
21 resolving bid protests, but NTP is anticipated around
22 August 2019.

23 Per coordination with the DOT, they will
24 start work on a three-way signalized intersection in
25 May 2019 when utilities that are part of the Phase I

1 construction for the school are completed at the
2 intersection. The intersection will be converted to
3 a four-way signalized intersection as part of the
4 Phase II construction prior to the school opening.

5 Per the conditions, the DOE will provide
6 updated reports one year after the school has opened
7 so the DOT can review conditions, including if a
8 grade separation crossing is warranted or not.

9 Another update is required prior to the
10 issuance of a certificate of occupancy for LUC Phase
11 II buildings, and another a year after full build out
12 of LUC Phase II.

13 I also wanted to maybe go over some, or
14 address some of the testimony questions and concerns.

15 Someone brought up that this site was the
16 only one on the mauka side of the highway. And
17 actually of the three final sites, they were all on
18 the mauka side of the highway.

19 It was just which area of the highway, and
20 the site that was selected was more of an economical
21 condition as well, because it was the one with the
22 least amount of slope on the property.

23 Regarding the traffic at Baldwin, that is a
24 really terrible situation right now. We, or the DOE
25 right now has a project that's looking to improve the

1 traffic flow on the site.

2 I think part of the trouble there is that
3 the traffic backs up onto the street, and then you
4 have cars from all directions trying to turn into the
5 school, but you have a backup of cars that are
6 already on the street.

7 So with the new school, there is going to
8 be a roadway that goes up the grade, and then the
9 school has its own driveway access points and drop
10 off.

11 So we don't anticipate any backup onto the
12 highway, although at peak hours there will be slower
13 traffic in the area.

14 I can't quite remember, or go back and look
15 at my -- I'll have to go back and look at my records
16 on the Dan Burten study and what things occurred
17 there, or what issues are there. I know the DOT did
18 have a look at that, and their concern -- or it's not
19 their concern, they told us they did not support
20 roundabouts. I think it might be something to do
21 like if it slows down, the traffic, the concern might
22 be that the traffic will be slow even when there is
23 no school, or there's no other event at the school.
24 So there might -- you might have just caused a
25 condition that's going to slow down the traffic all

1 the time there.

2 I'm not a traffic engineer, so I can't
3 really explain how that works, but I know for DOE, we
4 have been working with DOT to make sure that what we
5 provide is what -- or actually that our work would be
6 approved before we would move forward. And that's
7 been the process of our submittals to the DOT.

8 And per the requirements of the order, it
9 specifically identifies that we shall make our
10 submissions until the DOT is satisfied, and that's
11 why we have been working with them to get that
12 approval. And their agreement that at least for
13 Phase I it will -- we will have an intersection with
14 a crossing. There might be ways that we work with
15 them to make sure that during the peak hours that the
16 walk lights are longer for student access to get
17 across.

18 They might be doing things like all red
19 signals so that there's a safer buffer between when
20 pedestrians might start walking, and when traffic is
21 allowed to move. But those are things that we can
22 still look at.

23 The DOE is not opposed to an overpass or
24 underpass when it's warranted. I think at this time,
25 because of the approval and DOT's conditions, which

1 said that we can proceed with the on-grade crossing,
2 we've already done the design and the bidding of the
3 project.

4 Now we're just waiting for the
5 construction. We estimate it's going to take that
6 time in order to get the school open in July 2021,
7 and to start school then.

8 If there's anything that's needed, or if
9 there is any other condition that's stipulated which
10 we think is not in the spirit and intent of what the
11 condition was, that -- and I think someone mentioned
12 it, if you wanted an overpass or underpass available
13 for the day one of school, then it would definitely
14 be something that might holdup the opening of the
15 school.

16 I have no other testimony.

17 CHAIRPERSON SCHEUER: County, do you have
18 questions for the Department of Education?

19 MR. KOLBE: County doesn't have any
20 questions at this time.

21 CHAIRPERSON SCHEUER: Office of Planning?

22 MS. APUNA: No questions.

23 CHAIRPERSON SCHEUER: Commissioners?
24 Commissioner Cabral.

25 VICE CHAIR CABRAL: Thank you for your

1 information.

2 I looked up our decision here, and although
3 I did have a tour of the site within the last year or
4 so, I think I was on the ground, although I was not
5 on the Land Use Commission when the initial decision
6 was made, but I'm reading it, and it says
7 Petitioner -- that's my understanding, that's you --
8 shall cause to be constructed or ensure that there is
9 an available above or below-ground pedestrian
10 crossing.

11 So I went to public school. But ensure
12 that there is an available above or below-ground
13 pedestrian crossing, and implement such mitigation or
14 improvements that may be required or recommended by
15 the study and analysis to the satisfaction of DOE
16 prior to the opening of Phase I of the project.

17 So I see where you're picking up on the
18 analysis to the satisfaction of DOT, but you missed,
19 I think, the first part of this. I read it that it
20 calls that there will be, shall be above or below
21 ground. And then other improvements, that would mean
22 like you have to enter it properly, you have to exit
23 it, put the grading, whatever, to that.

24 And so I think that's what the community I
25 hear them saying is that there is to be, period. I

1 mean, that sentence could have ended right there, and
2 then all the other improvements have to be
3 improvements to make that above or below-ground
4 pedestrian crossing safe.

5 And I would have to say, I hear the
6 community, and I stood on that side of that roadway
7 and would be terrified. It's terrifying to drive
8 across it with a car, let alone with a bicycle, or
9 think I'm going to run across it even if you have a
10 light.

11 Because we all know -- I mean, look at
12 what's happening with our pedestrians. The death of
13 pedestrians is terrifying in this state.

14 So I don't know whether we have -- we don't
15 have the power, I don't think, but I've got to tell
16 you as a Land Use Commissioner, I read it as you are
17 to do a below or above-ground pedestrian crossing.
18 Thank you.

19 CHAIRPERSON SCHEUER: Were you wanting to
20 respond?

21 MS. NAKATSUKA: So --

22 CHAIRPERSON SCHEUER: You don't have to,
23 but you may.

24 MS. NAKATSUKA: I'm probably thinking just
25 that -- I know you're saying there should have been a

1 period there, but there is no period there. So I
2 think the interpretation might be a little different.

3 CHAIRPERSON SCHEUER: Commissioners, other
4 questions? Commissioner Okuda.

5 COMMISSIONER OKUDA: Well, Ms. Nakatsuka, I
6 find of share the interpretation of Ms. Cabral,
7 because I think the supreme court has made it clear
8 when you look at the plain language of the word, and
9 you read the plain language. But be that as it may.
10 You testified that grade separation is not
11 warranted at this time. When you use the word
12 "warranted", what do you mean?

13 MS. NAKATSUKA: The Department of
14 Transportation has the tests or analyses they do, and
15 they look at "warrant". So when they go to a site,
16 they look at -- they have the study done where the
17 traffic consultant will bring up various kinds of
18 traffic counts, and study what type of traffic is
19 there at different times of the day, and those
20 numbers. They process it, and they run it through a
21 test to determine whether it's warranted or not.

22 So when I speak of warrant, that's the
23 language that they use. And they tell us through the
24 studies whether it's warranted, meaning that it
25 triggers something that would need improvement at

1 that time.

2 CHAIRPERSON SCHEUER: Mr. Okuda, I've had a
3 couple of Commissioners whisper to me that it would
4 be a good time for a break. So would it be okay if
5 we take a five minute break?

6 COMMISSIONER OKUDA: Yes. Thank you, Mr.
7 Chair.

8 CHAIRPERSON SCHEUER: We will reconvene at
9 7:14.

10 (Recess taken.)

11 CHAIRPERSON SCHEUER: We're back on the
12 record. Sorry to interrupt you, Commissioner Okuda.
13 Would you like to continue?

14 COMMISSIONER OKUDA: Thank you, Mr. Chair.

15 Continuing on about this issue of when
16 certain types of mitigation or action is warranted,
17 isn't it true that these studies are not the end all,
18 that there's discretion or input that professionals
19 perhaps like you, as planners, take into account?

20 In other words, the studies or the
21 calculations, you know, something definitely to look
22 at and rely on, but you also use your common sense,
23 correct?

24 MS. NAKATSUKA: Yes.

25 COMMISSIONER OKUDA: And I don't mean to be

1 facetious about it, because we are talking about
2 safety issues, so if your common sense indicated to
3 you that perhaps, notwithstanding the study, that
4 there is an issue of safety, you would try to
5 mitigate those safety concerns, correct?

6 MS. NAKATSUKA: I think that's what the
7 intent of the project is.

8 COMMISSIONER OKUDA: Right.

9 And, you know, I don't mean to take it to a
10 real extreme, and I'm not trying to ask you for
11 speculation to things that might not have taken
12 place, but if, heaven forbid, you had a signalized
13 crossing, the lights were red, there were delays in
14 having the walk signals come on, after the delay the
15 walk signals came on and we had high school students
16 come into the roadway, and for some reason some car
17 came speeding down the highway and seriously injured
18 or even killed some of the students.

19 I mean, at that point in time, wouldn't the
20 Department of Education take a second look at whether
21 or not, gee, maybe we should have looked at a grade
22 separated crossing after all?

23 MS. NAKATSUKA: Well, I think you're
24 bringing up a point that you could bring up at any
25 case where somebody gets hit at an intersection,

1 including the one that just happened near Ala Moana,
2 and say that every intersection then should have a
3 grade separation to save people from crossing large
4 highways and intersections.

5 COMMISSIONER OKUDA: And you make a good
6 point about that. And I'm not trying to encourage
7 lawsuits or anything like that, but it's a question
8 of foreseeability of potential harm.

9 I mean, unlike what happened in Kaka'ako,
10 where I was in the general area at the time, but
11 unlike what happened in Kaka'ako, here you have what
12 seems to be unanimous testimony from members of the
13 community saying that there's really a concern here
14 about safety.

15 So wouldn't the Department of Education be
16 concerned that with this type of testimony, perhaps
17 the department should take a second look at
18 conclusions that it's reaching by, you know, taking
19 second look at the conclusions it's reaching?

20 MS. NAKATSUKA: So the department is not
21 making the conclusion, I guess that's why we hired a
22 consultant. And we work with the DOT to make sure
23 that they're the ones that are in agreement with and
24 collaborating with us. I'll put it that way.

25 COMMISSIONER OKUDA: I would like to know,

1 you know, frankly speaking, where does the decision
2 buck stop here? Who has made the decision that there
3 is not going to be an underpass or a grade separated
4 crossing? I mean who made this decision?

5 Because if someone gets hurt, you know, at
6 least we will have a name of whose doorstep the
7 result lies at. So who made this decision?

8 MS. NAKATSUKA: So there was a study that
9 was done. The DOT reviewed it, and it agreed that
10 there was no need for a grade separated crossing, as
11 they would look at any other intersection.

12 COMMISSIONER OKUDA: So is it the
13 Department of Education's position then that this was
14 not a DOE decision, it's really a DOT decision?

15 MS. NAKATSUKA: Well, they reviewed the
16 study. And then the study, they interpret whether
17 they're in agreement with it or not.

18 COMMISSIONER OKUDA: I'm trying to find out
19 who made the final decision. I don't mean to be
20 harsh or anything like that, but frankly, you know,
21 why sometimes the public doesn't like us government
22 officials, even though we're private citizens, why
23 the public gets fed up with us as government
24 officials is none of us are willing to take
25 responsibility for what is going on.

1 So the question is, which department made
2 this decision about whether we're going to have a
3 grade separation crossing or not? Was it the DOT?
4 Was it the DOE? Or you don't know?

5 MS. NAKATSUKA: So if someone is
6 testifying, it's like I want to put a bridge in my
7 backyard or something, it's -- I think what I'm just
8 saying is that a study was done. It was identified,
9 based on the warrant system, and with the review of
10 the study by Farrer and Pierce (phonetic), that a
11 grade separated crossing was not required.

12 There was no decision of let's decide
13 whether we should put one in or not. It was just
14 looking at what was warranted based on the study.

15 CHAIRPERSON SCHEUER: Mr. Okuda. I have a
16 line of questioning along this line.

17 COMMISSIONER OKUDA: I'll defer to the
18 Chair. Thank you, Mr. Chair.

19 CHAIRPERSON SCHEUER: I went both public
20 and private school, but I do know what passive voice
21 was. So a study was done. Who wrote the scope of
22 work for the study? Which individual at the
23 Department of Education to hire the consultant who
24 did the transportation study?

25 MS. NAKATSUKA: So the department hires the

1 main consultant, which is Group 70 doing the planning
2 and architectural design, and one of the requirements
3 is this traffic study.

4 So when the conditions came in that we need
5 a TIAR and the pedestrian route study, that was then
6 put into the Group 70 requirement of providing this
7 study.

8 CHAIRPERSON SCHEUER: Did anybody from the
9 Department of Education approve the subcontract to do
10 the TIAR? I am familiar with state procurement.

11 MS. NAKATSUKA: Yes.

12 CHAIRPERSON SCHEUER: Who signed off on
13 that?

14 MS. NAKATSUKA: Our boss -- or the Public
15 Works administrator.

16 CHAIRPERSON SCHEUER: Named?

17 MS. NAKATSUKA: Dwayne Kashiwai, who is now
18 retired.

19 CHAIRPERSON SCHEUER: And is it correct or
20 incorrect that the Department of Transportation does
21 not approve or disapprove of whether there should be
22 a pedestrian underpass or overpass, but merely
23 comments on the technical adequacy of the TIAR?

24 MS. NAKATSUKA: Yes, but they did --

25 CHAIRPERSON SCHEUER: Yes, they do review

1 it solely for the technical adequacy of the TIAR?

2 MS. NAKATSUKA: They also make
3 recommendations if they don't believe that the data
4 used is appropriate and so --

5 CHAIRPERSON SCHEUER: Did they make those
6 recommendations in this case?

7 MS. NAKATSUKA: Yes.

8 CHAIRPERSON SCHEUER: So can you elaborate
9 on that, please?

10 MS. NAKATSUKA: I think there's all these
11 technical aspects that I'm not understanding fully,
12 but they have all these LO -- different conditions
13 and grading of conditions. Different types of counts
14 that they use. And so they did come back and say
15 that you need to use certain types of information, or
16 certain counts and include things.

17 So basically saying that the study had to
18 be changed to include certain information.

19 So they kind of determine how you should,
20 or what kind of counts and things that should be
21 included in the study.

22 CHAIRPERSON SCHEUER: But they did not make
23 a determination, per se, that an underpass or
24 overpass was not required? They merely agreed that
25 the study was technically done correctly.

1 MS. NAKATSUKA: Technically done, and that
2 they looked at and confirmed whether the warrants
3 were appropriate.

4 CHAIRPERSON SCHEUER: I have a different
5 set of questions.

6 Forgive me, my fellow Commissioners.

7 We had a site visit to this. At the time
8 of the site visit it was my understanding we were
9 doing a site visit because the Department of
10 Education was considering approaching the Land Use
11 Commission to modify that condition.

12 That is a question. Is that correct?

13 MS. NAKATSUKA: Yes.

14 CHAIRPERSON SCHEUER: But you didn't come
15 to us to modify the condition?

16 MS. NAKATSUKA: No.

17 CHAIRPERSON SCHEUER: How was that
18 determination made?

19 MS. NAKATSUKA: So I guess when we looked
20 at the condition initially, it was told to us that
21 the condition was made because the DOE and the DOT
22 had not consulted before we were requesting the
23 approval, and that the DOT had some concerns.

24 And so they put this condition in because
25 it was felt that the DOT wasn't satisfied beforehand,

1 and this condition would make sure that the DOE was
2 working with the DOT to provide the safe route.

3 CHAIRPERSON SCHEUER: But do you understand
4 that it is not the DOT who puts the condition in, but
5 this Commission?

6 MS. NAKATSUKA: Yes.

7 CHAIRPERSON SCHEUER: And you understand
8 that it's normally the process that if you're unclear
9 about what the condition means, you would approach
10 the Commission?

11 MS. NAKATSUKA: Yes.

12 CHAIRPERSON SCHEUER: This Commission, at
13 least speaking for myself, is incredibly clear at
14 what that condition meant. And it is for grade
15 separated bypass prior to the opening of the first
16 phase.

17 Now, our hands are tied, because of the
18 Bridge Aina Le'a case, there has been substantial
19 commencement. It means the county is responsible in
20 enforcing it. All we can do is clarify what our
21 intentions were, and have a little bit of moral
22 indignation. And let me say I have a lot of moral
23 indignation.

24 This is a classic case of unacceptable
25 bureaucrats working behind the scenes without

1 consulting with the community, without consulting
2 with legal authorities about exactly what was meant.

3 And the testifiers have made it really
4 clear. If I'm a little bit worked up about it, I
5 have a nine-year old kid. I can't imagine what my
6 life would be like if he was hit and killed.

7 It is a money saving activity. It is
8 thwarting what this Commission asked you to do, asked
9 the Department of Education to do. And I hope this
10 Commission will do everything we can to work with the
11 county to ensure that this is enforced.

12 Commissioner Cabral.

13 COMMISSIONER CABRAL: I'll add to that
14 heated statement. I am getting upset -- that's my
15 nicer language -- of your double talk as far as I see
16 it. I'm not paid for this job, so I can be whatever.

17 So you're very good at your double talk, in
18 my opinion, and all I want to say is that may it be
19 you with your injury and your little scooter to be
20 the first one to go across that road and see if you
21 can make it across or not during the time that you
22 may have not a car running you over, let alone some
23 small child.

24 I'm a blown away. We met on the side of
25 that roadway, and we totally talked about that, that

1 had to be happening. And we met there because you
2 were supposed to come if you wanted a change of that.
3 Now all of a sudden -- again, like our Chair said,
4 you didn't come back.

5 And here you go, just making your backdoor
6 deals because because you have a different
7 interpretation of what "shall" means.

8 So, again, interesting, interesting. And I
9 sure hope that when, not if, but when that injury
10 happens, and I am guaranteed it will at some point in
11 time, that somebody's head rolls for it. I hope
12 whoever signed off is still around to have that pain
13 and suffering, not just parents.

14 CHAIRPERSON SCHEUER: Commissioner Chang.

15 COMMISSIONER CHANG: Sort of in all due
16 respect, Ms. Nakatsuka, I do not -- and I don't only
17 speak on my behalf. I don't think what the
18 Commission here is looking at you to blame. Like I
19 said, I have children. I have grandchildren. So I
20 think we all -- this is really emotional, but I think
21 I just want to -- I don't think we're looking at you
22 and going to blame you if something happens. But I
23 think you heard the message from the Land Use
24 Commission.

25 Clearly what the county said, their

1 position was, they want to know what the intent, what
2 is Land Use Commission's intent when this provision
3 condition was adopted. I think you've heard it
4 really clearly, and I think it warrants going back to
5 the Department of Education.

6 I would urge you to have a meeting with the
7 community, have DOT at the meeting as well, so DOT
8 hears firsthand how impassioned the community is
9 about the safety concerns.

10 But I think there is no doubt the intention
11 of the Land Use Commission when that condition was
12 adopted. I think you've heard it really clearly.
13 And, again, I do not believe anybody here is blaming
14 you. I think you just have to be the messenger back
15 from the Department of Education, because I think now
16 the county is empowered, they know what the LUC's
17 intention is.

18 So I think you can either voluntarily
19 choose to do the right thing, or the county I think
20 is going to take appropriate actions to ensure that
21 that occurs.

22 MS. NAKATSUKA: Thank you for clarifying
23 the LUC, the Commissioners' intentions, understanding
24 of the statement. I think, and maybe it's more my
25 error that that was the understanding that I had, but

1 didn't go check with the LUC to understand what your
2 interpretation of the intent is.

3 Now that's clearly stated, I can definitely
4 go back and work with our department to make sure
5 that's understood and expressed.

6 CHAIRPERSON SCHEUER: Thank you.

7 Are there other questions or comments from
8 the Commissioners? Commissioner Ohigashi.

9 COMMISSIONER OHIGASHI: So what would be
10 necessary to make sure that it's opened on time?

11 MS. NAKATSUKA: I think the challenge of
12 that is we're looking apartment 2021 opening, and in
13 order for that to have happened, we had the bids
14 already done. I think the challenge for having a
15 pedestrian overpass or underpass provided in that
16 same window is going to be a real challenge. And
17 it's probably going to be more of a challenge with an
18 overpass, which I think --

19 COMMISSIONER OHIGASHI: Would the DOE be
20 able to provide to the Commission a status report,
21 within a few months at least, as to what steps should
22 be implemented in order to make the necessary time
23 opening?

24 MS. NAKATSUKA: So for us with the budget,
25 I can tell you now, it's really difficult to get

1 anything done by 2021, so it might have to --

2 COMMISSIONER OHIGASHI: If you would report
3 to us as to what has to be done.

4 MS. NAKATSUKA: Well --

5 COMMISSIONER OHIGASHI: And I would
6 prefer -- I'll ask the Chair to order that in writing
7 as part of a status report, because if you're saying
8 that you're unsure whether or not you can meet the
9 deadline, what types of things must happen if you
10 were to provide above -- what type of things must
11 happen in order to meet the deadline of 2021 --

12 MS. NAKATSUKA: I want to understand the
13 deadline is --

14 CHAIRPERSON SCHEUER: Let Commissioner
15 Ohigashi -- it's very hard for the court reporter to
16 hear two voices at once. Were you done?

17 COMMISSIONER OHIGASHI: I'm done. Need to
18 move on.

19 MS. NAKATSUKA: So I think the challenge
20 for us is we have a design and construction period,
21 and including permitting in the middle, so because of
22 our interpretation and understanding that the next
23 review of the traffic study would have been one year
24 after completion of construction, that there's no
25 push on the design of an overpass or underpass

1 because the push was to get the school completed.

2 With the bid that went out already, it's
3 providing the basic facility so that we can open a
4 school, but we still need additional facilities,
5 including a gym component and elective courses that
6 will be brought in maybe within a year after the
7 school --

8 CHAIRPERSON SCHEUER: There's not a
9 requirement to answer Mr. Ohigashi's question now.

10 MS. NAKATSUKA: I can provide --

11 CHAIRPERSON SCHEUER: Status report.

12 MS. NAKATSUKA: -- Status report.

13 CHAIRPERSON SCHEUER: Commissioner Wong.

14 COMMISSIONER WONG: Several questions that
15 came up during the public's testimony.

16 First is the -- first I just wanted to know
17 the interpretation you had previously, who gave you
18 that interpretation, or was it just from the DOE?

19 MS. NAKATSUKA: It's our project manager,
20 myself and our project coordinator.

21 COMMISSIONER WONG: So it's a DOE
22 interpretation of the condition?

23 MS. NAKATSUKA: And in talking with DOT.

24 COMMISSIONER WONG: Someone from highways
25 department?

1 MS. NAKATSUKA: Yes.

2 COMMISSIONER WONG: So the question I have
3 is, you know, someone was talking about a roundabout.
4 So, you know, how much would it delay if you put in a
5 roundabout? Because I guess Mr. Perez said this
6 place is -- this highway, people are zooming, and if
7 someone is drunk they're going to zoom more, right?

8 So what, how much would it take for a
9 roundabout, or what is the delay?

10 MS. NAKATSUKA: I would have to go back and
11 check. A roundabout would require more land because
12 it would have to curve out, so the concern would
13 probably be -- you would have to take residential
14 land in order to make it work on the makai side, and
15 take some of the school property to make it work on
16 the mauka side.

17 COMMISSIONER WONG: The other question that
18 came about is, I guess from my knowledge, is sometime
19 floods in this area because of the heavy rain. So
20 you need big culverts of drainage to shoot the water
21 into the ocean.

22 Is there supposed to be like a drainage
23 from the high school towards the ocean?

24 MS. NAKATSUKA: I am not familiar -- the
25 project won't be touching the gulches. So one of the

1 concerns was that we weren't going to be adding any
2 more runoff to the gulches.

3 So the school design includes a retention
4 basin on the campus. So anything that comes down
5 will be retained in that area and percolate. There
6 is no drainage channel that we're creating for the
7 school.

8 COMMISSIONER WONG: I thought someone said
9 they were thinking of drainage.

10 MS. NAKATSUKA: No.

11 COMMISSIONER WONG: Because they were
12 saying going into a drainage.

13 MS. NAKATSUKA: There won't be any.

14 COMMISSIONER WONG: Thank you. That's all
15 the questions.

16 CHAIRPERSON SCHEUER: Thank you,
17 Commissioner Wong. Commissioner Cabral.

18 VICE CHAIR CABRAL: You keep referring to a
19 study that was done that supports your opinion or
20 DOT's, or I guess people that don't care's opinion,
21 but everyone else, the testifiers were referring to
22 Dan Burten's study that was done.

23 So that's not the study you're referring
24 to, I take it, because he was apparently really
25 requesting that you have both roundabouts and the

1 underpass.

2 So what, did you guys commission two
3 studies, and say we will go with the cheap one, or
4 what was the decision?

5 MS. NAKATSUKA: That's why I said I need to
6 look back at what happened with the Dan Burten study.
7 I know that was done earlier, but the one that was
8 provided along with the TIAR Wilson Okamoto was done
9 by Farrer and Pierce (phonetic) for the pedestrian
10 route study.

11 VICE CHAIR CABRAL: When this study was
12 done by your people that support your opinion that
13 safety doesn't matter, did they know it was going to
14 be a school with children going to be up above that
15 or open pasture that it is now that you would be
16 providing a stoplight for? I mean did they really
17 know it was going to be a school was going to be
18 there?

19 MS. NAKATSUKA: Yes.

20 VICE CHAIR CABRAL: Interesting. Thank
21 you.

22 CHAIRPERSON SCHEUER: Commissioners, are
23 there any further questions? Commissioner Chang.

24 COMMISSIONER CHANG: Have you had an
25 opportunity to speak to the community?

1 MS. NAKATSUKA: Yes.

2 COMMISSIONER CHANG: So you heard a lot of
3 the testimony that was provided tonight?

4 MS. NAKATSUKA: Yes.

5 COMMISSIONER CHANG: And notwithstanding
6 that testimony, DOE, in consultation with DOT,
7 concluded that an underpass and overpass was not
8 warranted at this time; is that what you're saying?

9 MS. NAKATSUKA: Yes. We understand that
10 that's something that is, you know, wanted by the
11 community, and it's something that we think is going
12 to be warranted in time, but just with the traffic
13 that's going to be using it with Phase I, it wasn't
14 warranted.

15 I understand that it's wanted and that the
16 DOT would support it, it's just for the opening of
17 the school we felt that it might not be warranted at
18 this time.

19 COMMISSIONER CHANG: I guess what I heard
20 tonight was that, one, you were going to check on the
21 status of what happened to the Burten study, why
22 wasn't that considered.

23 Two, you were going to go back and look at
24 a timeline as to considering what would it take to
25 build an overpass or underpass and provide a timeline

1 or include that in your update.

2 I also heard testimony from the community
3 that safety is first, even if it meant potentially a
4 delay. Sounds like maybe there needs to be more
5 meetings with the community to find out is there a
6 way to accommodate both.

7 And I think keeping them informed of what
8 you're doing, that they seem to be -- safety is the
9 first thing, even if it means as long as they have
10 been waiting for this school to open, some of them
11 seem to be willing to sacrifice the timely opening of
12 the school to ensure that it's -- that the school is
13 open in a safe condition.

14 So I would urge you -- you now know the
15 intention of the Land Use Commission in adopting that
16 amendment, and you've heard the community, and you
17 seem like you have got some studies that would help
18 you support this determination of building an
19 underpass at least. Thank you.

20 MS. NAKATSUKA: I did want to say that,
21 based on the administrators of other high schools who
22 were involved in the design of the school, and
23 discussion of overpasses and underpasses, that they
24 were very concerned about the underpass because it
25 provides an area that is not readily surveilled and

1 there might be -- if there's any issues occur there,
2 that there's no faculty or position that would be
3 doing security off of the campus.

4 So it was a question raised that their
5 preference would be for overpass versus underpass.
6 But those are things that we would have to look at
7 when we move forward.

8 COMMISSIONER CHANG: I would urge that you
9 should talk to the community about that. They may
10 have a reasonable solution to address your concern.

11 CHAIRPERSON SCHEUER: Commissioners, I have
12 one question for the county to clarify, and I'll try
13 and summarize where we're at.

14 My understanding is the county has filed
15 with us a Petition for Declaratory Ruling regarding
16 this matter. Is that correct?

17 MR. KOLBE: That's correct. Yesterday we
18 mailed out to the Commission our Petition for
19 Declaratory Order which obviously it appears we still
20 definitely need. And we put forward three arguments
21 about why this Commission made it very clear there
22 was a requirement whether there was an under and
23 overpass.

24 The language is plain, but more
25 importantly, when you voted for it, the original

1 proposed Decision and Order didn't include an under
2 and overpass. And then this body decided that it
3 wanted to modify and put in a requirement.

4 And so -- and then the county had to rely
5 on the representations made by the state that they
6 were going to do one or the other.

7 So this body needs to make it very clear in
8 their order.

9 CHAIRPERSON SCHEUER: So we don't need to
10 go into the arguments for the Petition right now. I
11 just wanted to confirm for the record that you had
12 filed that?

13 MR. KOLBE: It was mailed out yesterday and
14 provided electronic copies to the various parties.

15 CHAIRPERSON SCHEUER: So we have 90 days in
16 which to take up this matter. I believe after we
17 hear this, when we make a ruling, that will then give
18 the county at least great confidence in enforcing the
19 conditions with powers available to the county. That
20 is one thing that's going to be going on.

21 So I think it should be very clear to the
22 Department of Education's representative, and you can
23 report up the chain, this is the path that we are on
24 to clarify and firmly be an order exactly what was
25 meant by that condition, if you heard the statement

1 of some of the individual Commissioners today, was
2 prior to the opening of the school.

3 So that said, there was a request from
4 Commissioner Ohigashi that a status report be done.
5 What would be really helpful when the DOE comes to
6 participate in that hearing on the county's petition,
7 that you also come with a plan, how can this be done?
8 When can this be done?

9 And I will say for myself, I think many of
10 the other members of this Commission, as well as
11 members of the public, if it takes writing letters or
12 contacting our legislature, whatever is necessary to
13 be done to get to ensure that the high school opens
14 on time with the required underpass or overpass, we
15 want to participate in that, not just say here's what
16 the condition meant, but how do we successfully
17 together as a community get to that outcome.

18 Mr. Ohigashi.

19 COMMISSIONER OHIGASHI: Maybe that was
20 implicit in my request, but if there is legislative
21 funding required, additional legislative funding are
22 required, we would like to know, because essentially
23 the legislature can't say no more funding, and the
24 county can enforce the order, and you don't have a
25 school, you have an empty school. That's the

1 reality.

2 You won't get a CO, if the county wants to
3 play. So that's a question. The question is, what
4 necessary steps must be done in order to get this
5 matter on track?

6 CHAIRPERSON SCHEUER: Anything else,
7 Commissioners? Commissioner Wong.

8 COMMISSIONER WONG: So, Mr. Chair, just for
9 clarification, because there is a dec ruling --

10 CHAIRPERSON SCHEUER: Petition for
11 Declaratory Order.

12 COMMISSIONER WONG: -- in the midst. Do we
13 have to continue as to who was the questioning, or
14 it's going to be coming up again?

15 CHAIRPERSON SCHEUER: It will come up.

16 COMMISSIONER WONG: So what should we do
17 now?

18 CHAIRPERSON SCHEUER: So I think for now we
19 sort of stated where we are in the process. We will,
20 if there's no other comments from any of the
21 Commissioners, we will recess for the evening before
22 reconvening on the other docket that we're taking up
23 tomorrow morning.

24 COMMISSIONER WONG: Thank you, Chair.

25 CHAIRPERSON SCHEUER: Anything else,

Commissioners?

Just confirming this is a status report.
We're not required to take action at this time.
There is a pending Petition for Declaratory Order.
Hearing none, this hearing is recessed until
9:00 a.m. at the MACC tomorrow morning.

(The proceedings recessed at 7:51 p.m.)

CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on February 20, 2019, at 10:00 a.m., the proceedings contained herein was taken down by me in machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct copy of the proceedings had in the foregoing matter.

I further certify that I am not of counsel for any of the parties hereto, nor in any way interested in the outcome of the cause named in this caption.

Dated this 20th day of February, 2019, in Honolulu, Hawaii.

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