

LAND USE COMMISSION

STATE OF HAWAII

Hearing held on February 21, 2019

Commencing at 9:00 a.m.

Maui Arts & Cultural Center, Higashi Meeting Room

One Cameron Way, Kahului, Maui, Hawaii 96732

AGENDA

IX. Call to Reconvene

X. Continued Action

A94-706 Ka'ono'ulu Ranch (Maui)

XI. Adjournment

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.
Dept. Of Corporation Counsel
MICHELE McLEAN, Planning Director
ANN CUA, Planner VI
For County of Maui

RANDALL F. SAKUMOTO, ESQ.
CATHERINE TASCHNER, ESQ.
LISA CATALDO, 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

1 CHAIRPERSON SCHEUER: Aloha mai kakou, good
2 morning.

3 This is the February 21st, 2019 Commission
4 meeting on Docket A94-706 Ka'ono'ulu Ranch.

5 I'll start off by noting that there were
6 some individuals who came to us during our recess
7 meeting and thereafter wondering whether or not
8 public testimony had been closed on this matter.

9 I did accept public testimony yesterday
10 morning, but we are in -- where we are in the
11 proceedings when we recessed from here yesterday
12 afternoon, we had had presentations from the
13 Petitioner, from Honua'ula Partners and from the
14 County of Maui, and Office of Planning, and we were
15 about to proceed with the Intervenor's presentation.

16 Mr. Sakumoto.

17 MR. SAKUMOTO: Thank you, Mr. Chair. I
18 realize it's the Intervenor's turn to speak, but if I
19 may have just two minutes to clarify something from
20 yesterday.

21 CHAIRPERSON SCHEUER: You may proceed.

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

23 Our reference to a modified original plan
24 for the development, which included a cultural
25 preserve, appears to have created some confusion.

1 And to be clear, and as stated yesterday, as a
2 fundamental starting point, Petitioners are prepared
3 to develop a project in substantial compliance with
4 the original plan as reflected in the attachment to
5 the 1995 D&O.

6 While not included as an exhibit to the
7 Motion to Dismiss, that original plan is in the LUC's
8 records and files in this matter. And all parties
9 have long been on notice of that original plan.

10 We showed a modified version of the
11 original plan yesterday that addressed the comments
12 received during our community outreach efforts. As
13 indicated yesterday, the Petitioners were willing to
14 include a cultural preserve within the property.

15 Significantly, and as also stated
16 yesterday, the Petitioners believe that development
17 of the property with this preserve was also
18 substantially compliant with the original plan.

19 The comments and questions received
20 yesterday appear to reflect a belief or concern that
21 the modified original plan is fundamentally different
22 from the original plan, and may therefore raise
23 various issues during these proceedings, including
24 whether the parties were prejudiced by reference to
25 the modified original plan shown yesterday, or

1 whether additional proceedings are required to
2 consider the modified original plan.

3 Based on the concerns raised, and to
4 eliminate any confusion, and to streamline this
5 hearing, the Petitioners withdraw the modified
6 original plan and further consideration of it, and
7 reiterate their intention to develop the project in
8 substantial compliance with the original 1995 plan.

9 Thank you.

10 CHAIRPERSON SCHEUER: Okay. So we spent a
11 considerable amount of time yesterday morning
12 discussing whether or not -- not going onto the
13 substance of anything, we were backing out of the
14 driveway on the road trip and kind of got caught in
15 the driveway on whether or not this particular thing
16 should be entered in, and was part of the record of
17 this hearing.

18 Now, you're trying to withdraw it from the
19 record, is that correct?

20 MR. SAKUMOTO: I'm not withdrawing it from
21 the record, I'm just saying that we introduced it in
22 the spirit of compromise as something which we felt
23 was a project that people could get excited about.

24 Instead, it created a lot of confusion and
25 concern, which was not our intention. And, you know,

1 we feel that that result was unintended, and we would
2 like to do something now to try to provide some
3 clarity going forward.

4 CHAIRPERSON SCHEUER: Okay. Here's what
5 I'm going to do. I'm going to ask the different
6 Parties whether they have an objection to what you're
7 going to try to do, and I will ask the Commissioners
8 in that order whether they have questions on this.

9 Honua'ula?

10 MR. TABATA: We have no objections.

11 CHAIRPERSON SCHEUER: Maui County?

12 MR. HOPPER: The county, consistent with
13 its original position, just wants to know and have
14 the Commission know what is going to be developed and
15 have a clear plan for that.

16 So we don't object, I don't think, to that
17 action, but would like time to review a clear plan of
18 what's going to go forward and have the Commission
19 have time, and the parties have time to comment on
20 what plan is actually going to go forward, because we
21 weren't sure until yesterday.

22 I think that's our position.

23 CHAIRPERSON SCHEUER: Office of Planning?

24 MS. APUNA: We have no objection.

25 CHAIRPERSON SCHEUER: Intervenors, Mr.

1 Pierce?

2 MR. PIERCE: Mr. Chair and Commissioners,
3 this is about as vague as what was presented
4 yesterday, so there's really no difference. So we'll
5 respond in the process of our responding to the
6 Motion to Dismiss.

7 CHAIRPERSON SCHEUER: Commissioners?
8 Commissioner Chang.

9 COMMISSIONER CHANG: Yes. I greatly
10 appreciate the county's comments, because I think
11 that that's personally where I'm at is I'm not really
12 sure what's being proposed.

13 The pleadings reference we're going to go
14 back to the original plan, but yesterday we received
15 a modified plan. And I want to be very, very clear.

16 I applaud the Petitioner for spending the
17 time last year to really consult and work with the
18 community. I applaud you for doing that, because I
19 think that was your representation, and that's
20 probably what should have been done.

21 And I think what you are proposing, the
22 cultural preserve, a lot of the things reflected what
23 the community, their comments during that one-year
24 period. Again, I applaud that effort. And what I
25 don't want to see happen is the Land Use Commission

1 be someway responsible for not -- for now a project
2 that's not going to adhere to the community's
3 concerns. That's just me.

4 But anyway, what I do want to say is, so I,
5 like the county, am not sure what's being proposed.
6 And I'm very uncomfortable with where we are in the
7 Order to Show Cause, because I don't know whether you
8 have complied with all the conditions, in particular,
9 Condition No. 15, because I do not know what plan is
10 actually being proposed.

11 So I, like the county, again, I appreciate
12 the county's comments about wanting to see the plan.
13 And I'm a little reluctant about proceeding without
14 really knowing -- because I can't make a
15 determination whether there's been a violation or
16 not, if we don't know what the plan is.

17 So, again, appreciate the county's
18 position. I feel very similar to what the county is
19 saying about wanting to have a plan come forward that
20 we can determine whether there's any violation of
21 Condition 15 or not. Thank you.

22 CHAIRPERSON SCHEUER: Commissioners, other
23 comments?

24 I think here's where we are at
25 procedurally.

1 In the middle of the first motion that was
2 on our agenda, Motion to Dismiss. Mr. Pierce has not
3 had a chance to present his case. I think we need to
4 let Mr. Pierce present his case.

5 After the presentation, the Commission can
6 ask any further questions of the party and then enter
7 into deliberation.

8 We now have on record that yesterday it was
9 your possible plan, and now it's not. So we will
10 weigh that accordingly.

11 Our options in front of us during
12 deliberation would include either granting the Motion
13 to Dismiss, denying the Motion to Dismiss, or
14 possibly a third option which has been raised by Maui
15 County to defer action on this Motion to Dismiss and
16 schedule for a hearing on what exactly the proposed
17 project is.

18 With that said, Mr. Pierce, are you ready
19 to proceed?

20 MR. PIERCE: Intervenorors are prepared to
21 proceed.

22 CHAIRPERSON SCHEUER: Please go ahead.

23 MR. PIERCE: Thank you.

24 And I just want to first, on behalf of
25 myself and behalf of the Intervenorors, express our

1 thanks and gratitude to the Commission. We know
2 you've had an extremely busy schedule here on Maui.
3 We appreciate you being here on Maui, and we really
4 appreciate, what I know has got to be a difficult
5 task, digging into this case which has such a long
6 history before you.

7 So with that, if you will grant me a little
8 bit of liberty, because of the, what I would call
9 really a surprise to us yesterday in terms of some of
10 the new presentations that are being made that
11 weren't in the Motion to Dismiss.

12 I would just ask for you to give me the
13 liberty of a little bit of time to try to work
14 through each of these issues with the Commission.

15 And, Mr. Chair, if you find that I'm at
16 some point taking too long, please, feel free to
17 speak up on that.

18 CHAIRPERSON SCHEUER: It's never stopped me
19 before. About how long? What is your estimate?

20 MR. PIERCE: I'm going to guess. I'm
21 always wrong on these, but I would need a little more
22 time than I normally would ask for, but I expect ten
23 to 15 minutes, along in there.

24 CHAIRPERSON SCHEUER: Okay, that's fine.
25 Please go ahead.

1 MR. PIERCE: So I first just want to give
2 the Commissioners a road map of some of the issues I
3 think need to be addressed in order for you to really
4 understand why the right thing to do is to deny this
5 Motion to Dismiss.

6 So I want to identify these at the get-go.
7 The first thing I think you need to understand a bit
8 more is a bit of the timeline going all the way back
9 to 1995.

10 Second thing is we have to deal with this
11 issue at some point in this, dealing with substantial
12 commencement. Now, it's Intervenor's position that
13 that issue is not properly before the Commission at
14 this time, because we're not in Phase II.

15 But whether or not the developers have
16 substantially commenced, they argue that it is
17 important in making their case on the 365-day rule.
18 So I'll address that briefly.

19 The third thing is, I want -- I hope that
20 when I have concluded, that you are with us with the
21 Intervenor's on the point that Order to Show Cause
22 hearings are not conducted based upon promises of
23 developers. They're conducted based upon verified
24 evidence taken in a contested case proceedings, and
25 determining what have been the actual actions of the

1 developers, not their promises.

2 So if I leave you with nothing else, I hope
3 that's one of the things you come across with. To
4 just give you a precursor of that, all that took
5 place in Phase I which was concluded in 2013.

6 The next point is, which really is what
7 this Motion to Dismiss is all about, is really a
8 surreptitious attempt to reopen Phase I.

9 So the next thing that I want to hopefully
10 leave you with is that the Commission lacks the power
11 to reopen Phase I.

12 The other thing is that it appears what the
13 Petitioners are seeking to do, and as per the
14 purposes of today, whether they are done with genuine
15 interest in doing the right thing or not, the
16 question is, is the Commission in a position to
17 assist the Petitioners in the way they're asking to
18 be -- to receive assistance.

19 And that is in the middle of an Order to
20 Show Cause hearing, is the Commission able to fashion
21 some type of special protections to the Petitioners?
22 And right now what's being proposed by the county and
23 Petitioners is that we defer yet again, and kind of
24 see what happens.

25 But I want you to know at the end of my

1 arguments today that the Commission would be entering
2 into unchartered territory where there are no
3 Commission rules that permit those activities,
4 because we are in an Order to Show Cause hearing,
5 which has very strict requirements, and that's -- the
6 legislature did those, and we're stuck with them.

7 I actually want to state that I can
8 recognize and sympathize with the Commission's desire
9 to come up with a pragmatic solution. The question
10 is whether the rules, and the way that this case is
11 now before us, whether you are able to engage in
12 pragmatic solutions like that.

13 What I want to conclude with is that even
14 if you deny this, or when you deny this, it is the
15 most prudent and cautious approach the Commission
16 should take, and you are acting here in a
17 adjudicatory capacity. And it's always -- usually
18 the correct approach is for bodies who are deciding
19 decisions like this to take the prudent cautious
20 approach, not the extreme approach.

21 And the dismissal of the Order to Show
22 Cause hearing would be the extreme approach. That's
23 the one the Petitioners are asking for. Instead, I
24 want to show you at the end that the Petitioners are
25 in a position, if they really want to -- we don't

1 know exactly what it is -- but if they want to come
2 up with something that's radically different from
3 what they were proposing in 2012, there's a method
4 for them to do it; and they should do it by the
5 rules, not through some ad hoc process.

6 So those are the points that I want to make
7 and hopefully you'll be able to follow me as I go
8 through these.

9 Just a reminder, the reason that this
10 Motion to Dismiss comes up is because back in late
11 November we filed a Motion to Conclude. And the
12 Motion to Conclude actually was ironically extremely
13 simple. It simply asked for three procedural steps
14 that would have provided for an orderly process. It
15 said lift the stay pending since 2013, conclude the
16 Phase I findings, which would provide an opportunity
17 for us to deal with all the issues associated with
18 the findings from the previous Commission members,
19 and then begin the evidentiary hearing for Phase II.

20 But what I want to say before that is that
21 there is a great deal of discussion about why the
22 Intervenors -- yesterday, about why the Intervenors
23 stepped away from the design process, the community
24 outreach process that was being suggested by Koa
25 Partners.

1 We have bent over backwards to try to
2 accommodate the proposals of the developers
3 subsequent to the 2012 hearing, 2012 and 2013
4 hearing.

5 But what is the backdrop that my clients,
6 who were here, Maui Tomorrow, South Maui Citizens for
7 Responsible Growth, and Daniel Kanahele each
8 represent very unique interest. Maui Tomorrow and
9 South Maui Citizens for Responsible Growth, the whole
10 point of their being here is because they want to
11 make sure that planning is done right on the Island
12 of Maui, and specifically in Kihei, which has
13 significant planning problems.

14 We also have Mr. Kanahele who is here, who
15 wants to make sure that all the cultural rights are
16 preserved.

17 So what we were constantly doing as we were
18 evaluating the developers' proposal was testing them
19 back against the 1995 Decision and Order, because it
20 had to meet that, and also had to be consistent with
21 the Commission's rules.

22 What we found was, as we continue to look
23 at that is that there is no way that they were ever
24 going to be able to present a plan that would be
25 appropriate at this point in time, 25 years after the

1 1995 Decision and Order. And why is that? You have
2 traffic patterns have changed since 1995. The
3 traffic reports are absolutely stale from that. You
4 have businesses and developments that weren't
5 foreseen or contemplated back in 1995 that now
6 exists, or that where they already have the
7 entitlements and they're going to be proceeding
8 forward.

9 All of those have economic, social and
10 traffic related facts associated with whether or not
11 what the Petitioners are now proposing would be
12 appropriate.

13 The market conditions have changed
14 radically. And the state law has changed. We now
15 have a much more robust cultural law requirements
16 than we had in 1995. So the question -- the
17 Petitioners are saying dismiss Intervenors' Order to
18 Show Cause hearing, and let's proceed upon a Decision
19 and Order that's 25 years old and is based upon
20 reports that are worthless. Let us go forward.

21 And we're not sure exactly what it is we're
22 doing yet, but let us go forward anyway. You should
23 dismiss this because you can trust us. That is not a
24 prudent course of action for this Commission.

25 So that's why we were here and request a

1 Motion to Conclude, and we are sorry that it's
2 created the complications in terms of how the motions
3 have been filed subsequently.

4 One of the things I would like to point out
5 is -- mentioned yesterday -- that there had not been
6 a withdrawal of the Motion to Amend. But there was a
7 formal statement made in July of 2018 on the record
8 where it was clearly stated that the Petitioners were
9 abandoning the Motion to Amend.

10 There is no reason to take that in any form
11 or fashion except that it's been withdrawn. And I
12 think that's important in terms of procedurally where
13 we are in the case.

14 In fact, one of the other things that the
15 Petitioners have consistently recognized during the
16 past year is that they would need a stipulation of
17 Intervenor in order for them to be able to proceed
18 with anything, and they know that because we are in
19 the middle of an Order to Show Cause hearing.
20 Certainly that's one of the reasons they filed the
21 Motion to Dismiss. If they can get rid of the
22 Intervenor, then they can do whatever they want with
23 the Commission. They no longer have a say.

24 But the Commission -- we had to file a
25 Petition to Intervene. We had to state why our

1 rights were sufficiently strong enough to where we
2 should be granted the same party status as everyone
3 else here at the table. And the Commission, after
4 deliberating on that issue and reviewing the
5 arguments and the submissions, concluded that we
6 should have a seat at this table.

7 So we're asking that we continue to have a
8 seat at this table, which means that you would deny
9 the Motion to Dismiss.

10 So if I may briefly just talk about the
11 timeline which I think would be helpful.

12 The reports were started being prepared for
13 Ka'ono'ulu Ranch, the original Petitioner back in
14 probably 1993, 1994. They were proposing 123 lot
15 light industrial complex. Importantly, their whole
16 presentation was that there would not be a
17 significant increase in traffic, because those lots
18 were going to be purchased by small business owners.

19 Essentially what they were going to do, was
20 they were just going to create lots, stub them out,
21 and then sell them, and then let each of the small
22 business owners come in and do their own build out of
23 the project.

24 They said this is going to be an
25 opportunity for small business owners. They said

1 this is going to provide local service to the hotels
2 and retailers. It was supposed to be very
3 concentrated focused in that area.

4 And the Commission based a lot of its
5 decision-making on that, and certainly that's what
6 the 1995 Decision and Order is based upon.

7 What's really an important point to note is
8 that the original Petitioner said that these would go
9 on the market fast, and that certainly made sense
10 because all they had to do was go in do some small
11 grading, stub out, paving, and then they would have
12 the lots available. And this is confirmed in No. 22,
13 Finding of Fact No. 22 of the Decision and Order.

14 It says: Petitioner anticipates that the
15 project will be available for sale to the public in
16 the fourth quarter of 1996. 1996. And that the
17 entire project can be marketed by 2000.

18 Of course, it would take time to sell those
19 lots to each one of the small business owners. But
20 they were anticipating that they would be -- and in
21 fact, some of the representations upon which that
22 finding were based upon, and I will look back at it,
23 they were talking about the fact that it was going to
24 be very easy for them to get the project done.

25 But after the 1995 Decision and Order was

1 granted, what happens? Ten years go by with the
2 original Petitioner doing nothing. Ten years. And I
3 want the Commission to remember the fact that they
4 have a ten-year rule in their Commission rules, which
5 really bring into question the viability of a project
6 that doesn't go forward in a timely fashion.

7 So what happens in 2005 is that the
8 original Petitioner sells Maui Industrial Partners.
9 And the best way of describing what happens then is
10 that Maui Industrial Partners goes rogue. They stop
11 submitting annual reports for the years 2006, 2007,
12 2008 and 2009.

13 I want to bring to attention one of the
14 things that the Petitioners argued yesterday as a bit
15 of a tangent. Yesterday they argued, well, we're in
16 compliance with Condition 17 regarding the annual
17 reports now, because we are going to be filing them
18 and we submitted post filings for the old ones.

19 Well, that's not the purpose of annual
20 reports. The purpose of annual reports is to provide
21 timely notice to the public, to the county, and to
22 the Commission as to what activities are happening.
23 No one had an opportunity to challenge what Maui
24 Industrial Partners went on to do. And what they
25 want on to do during that period is to develop a four

1 lot subdivision. And the purposes behind this four
2 lot subdivision, irrespective of what the Petitioners
3 may say, was clearly to sell three of them to
4 Pi'ilani Promenade, which they ultimately did for
5 retail shopping, okay.

6 What has been called the mega-mall, because
7 it's hundreds of thousands of square feet of retail
8 shopping. Had nothing to do with light industrial.
9 And then they sold the other part for affordable
10 housing, something that is -- neither one of these
11 had ever been before the Commission back in 1995.

12 And what I would point out is that the
13 other thing the Petitioners talked about, and this
14 goes to the substantial commencement part, the
15 Petitioners are arguing that they spent millions of
16 dollars already. Well, if you look at the rules, and
17 you look at the Aina Le'a case, it says very clearly
18 that the development activities must be in
19 substantial compliance with the Decision and Order.

20 That means that Maui Industrial Partners,
21 when they went rogue, were their activities
22 consistent with the representations? No. In fact,
23 what we have is at the conclusion of Phase I, Office
24 of Planning drafted their Findings of Fact No. 45.
25 The Petitioner's current proposal to subdivide the

1 Petition Area into four, rather than 123 lots, and
2 then lease space, rather than sell lots, is not in
3 substantial compliance with the Petitioner's original
4 representations in 1994. That's coming from the
5 Office of Planning.

6 So to the extent -- and this would require
7 an evidentiary hearing and an opportunity for
8 Intervenors to cross-examine the witnesses -- to the
9 extent that the Petitioners are arguing that any of
10 their development activities that they say were
11 substantially commenced, the Commission has an
12 obligation to determine whether they were done in
13 support of a conforming project.

14 And the answer already is, no. That was
15 already concluded in Phase I.

16 So the point I make is now going back to
17 the timeline, because I got off on my timeline there
18 momentarily. We're now at the stage of 2005 where
19 Maui Land & Pine -- excuse me -- Maui Industrial
20 Partners purchases the land, and then they hold onto
21 it, and then they sell it.

22 And I would just point out to the
23 Commission their own rule, 15-15-79 which says,
24 performance time, petitioners granted district
25 boundary amendment shall, not may, it says shall make

1 substantial progress within a reasonable period as
2 specified by the Commission.

3 We already know 1996 was the date from the
4 day of approval of the boundary change and
5 development of redistrict area. The Commission may
6 act to amend, nullify, change, reverse its Decision
7 and Order if the Petitioner fails to perform as
8 represented to the Commission within the specified
9 period.

10 Why does it make sense with that rule and
11 the Commission rules for us to be contemplating
12 promises that were thrown upon us yesterday at the
13 last minute, then changed again? We know nothing
14 about them. They're simply vague promises made by
15 the Petitioner.

16 Why would the Commission, with these types
17 of Commission rules, saying there's a certainty
18 involved when you're granted district boundary
19 amendment? Why would we be dismissing the Order to
20 Show Cause hearing, and continuing on at that level?

21 CHAIRPERSON SCHEUER: You're at the
22 15 minutes now.

23 MR. PIERCE: Thank you.

24 So what I would like to do now, and of
25 course, we also have the separate rule

1 15-15-50(c)(19), which is the ten-year rule, which
2 says that there is a ten-year requirement. Once
3 again, there is an opportunity to nullify.

4 What I would like to do very quickly, Mr.
5 Chair, is just talk about the 365-day rule. That's
6 the timeline.

7 And I guess I need also to finish off the
8 timeline very quickly, is that we filed our Petition
9 for an Order to Show Cause, Motion for Order to Show
10 Cause back in August of 2012 after we found out about
11 the retail shopping center complex and the affordable
12 housing.

13 And it's really critical for the
14 Commissioners to know that at that point in time the
15 primary arguments that were being made by the
16 Petitioners were that the frontage road didn't work,
17 and that none of the agencies wanted it; that there
18 was no market for light industrial; and that broad
19 commercial uses were permitted by the 1995 D&O, and
20 housing was permitted.

21 And we went through a five-day -- this is
22 in contrast to what the Office of Planning attorney
23 said yesterday. It really was a mischaracterization
24 of what happened back when we had our hearing. And I
25 would just point out, I have two boxes here of the

1 evidence. We have two boxes of evidence. There were
2 hundreds of exhibits that were submitted. We took
3 the testimony of numerous witnesses, and these even
4 included Martin Luna. Mr. Martin Luna who was the
5 attorney for the original Petitioner.

6 So these were all steps that were taken
7 before the Commission decided in Phase I that there
8 had been a violation.

9 So what I would point out is that the
10 Petitioners continually are making inconsistent
11 statements to the statements they made earlier.

12 But after that phase, after Phase I, when
13 it was clear that Intervenors had prevailed, and the
14 Commission made an oral ruling at a hearing like this
15 after hearing all the evidence, and found that the
16 Petitioners were in violation of Condition 5,
17 relating to the frontage road, 15 relating to
18 substantial compliance, and 17 relating to annual
19 reports.

20 At that point in time they asked for their
21 stay. And they said the Intervenors won't suffer any
22 prejudice. We cited all this. I'm not going to
23 spend a lot of time, but these are direct quotes.
24 Intervenors will suffer no prejudice because of the
25 stay. The stay does not terminate this action. No

1 prejudice results to anyone. These are all quotes.
2 A stay operates merely to preserve the status quo.

3 So at any rate, once the Motion to Amend is
4 determined, then the Commission can ascertain whether
5 to proceed to Phase II, that was another one of their
6 quotes.

7 And I want to go to one other thing Mr.
8 Sakumoto was asked about yesterday.

9 Someone asked: What was originally
10 promised by the Petitioners? Was it that they would
11 do no construction during the stay, or before the
12 stay, or no development? And Mr. Sakumoto said that,
13 oh, no, it just related to construction.

14 That's entirely not consistent with the
15 Petitioner's representations. And I just need to
16 give you just a couple of examples of the quote.

17 In response to one of our motions to try to
18 conclude back then, the Petitioners argued, contrary
19 to Intervenor's assertion, the public is not being
20 harmed by the procedural posture of the stay.

21 Then they go onto say: We have not
22 committed to take any action to develop -- this is a
23 direct quote -- the subject property.

24 Then they go onto say: Where there's been
25 no violation yet, because the '95 Decision and Order

1 was based not on actual construction or development,
2 but rather on a proposed plan and development. In
3 other words, they were arguing that they were just
4 making proposals at that point. There had been no
5 development.

6 Honua'ula represented that it had no
7 present intention to commence construction or
8 development. Those are direct quotes. Pi'ilani has
9 not begun any active development of the Pi'ilani
10 parcels. Thus, while there was an intention -- this
11 is their words -- an intention to develop the
12 Pi'ilani Promenade project, and plans were made for
13 said project, no actual development of the land at
14 issue has commenced. No actual development.

15 There's nothing in there that's the type of
16 parsing that Mr. Sakumoto was talking about
17 yesterday.

18 So what I would just point out by those, is
19 that with respect to the 365 rule, and with respect
20 to the Petitioners' arguments, they have consistently
21 said that this Commission was going to have its
22 powers later on to continue to oversee this, and that
23 Intervenor would still be a party and have a right
24 to continue the case.

25 What I would just add, with respect to the

1 365-day rule, is that the language of Aina Le'a --
2 well, the first thing I'll point out is that the
3 Petitioners' description of 15-15-74(b), that's what
4 they're really hanging their entire 365-day argument
5 on. That section, and I think this is one of the
6 places where I'm in agreement with the County of
7 Maui, the County of Maui says that rule is
8 inapplicable in an Order to Show Cause hearing.
9 That's how I understand the county's argument. We
10 would agree with that.

11 And it says, that particular rule says it's
12 for District Boundary Amendment Petitions, and the
13 point is that here the hearing before us was actually
14 one that we initiated. If anyone was entitled to
15 conclusion, it was the Intervenor's were to entitled
16 to have an earlier conclusion and still being out
17 here. So it has nothing to do with the Petition that
18 was filed where the -- where there's a time-sensitive
19 issue with respect to whether the Petitioners can
20 proceed with the development.

21 What I would just point out is the Aina
22 Le'a, despite the Petitioners' arguments, that you
23 have to read the entire document. Aina Le'a, I think
24 the court went out of their way to make this as clear
25 as possible regarding the Commission's authority.

1 Said it twice. Said it once and this language was
2 actually quoted by Commissioner Okuda yesterday.
3 They said it once. And then they said it again two
4 pages later, and I think it's worth reading to the
5 Commission the second quote:

6 The proper procedure to be followed by the
7 LUC in ruling on the OSC, therefore, depends on
8 whether the Petitioner has substantially commenced
9 use of the land in accordance with its
10 representations.

11 That's the language that Aina Le'a said.
12 Where the LUC issues an OSC, and seeks to revert
13 property based on a Petitioners' failure to
14 substantially commence use of the land in accordance
15 with its representations, the LUC is not required to
16 follow the procedures otherwise applicable to
17 boundary changes.

18 Thus -- and I'm going a little bit
19 further -- thus when a Petitioner has not
20 substantially commenced, the LUC may revert the land
21 without following the procedures set forth in HRS
22 205-4. I think this clearly states the 365-day rule
23 is not application. And that's really the issue that
24 is properly before the Commission right now.

25 I think that I've probably addressed for

1 the Commission this issue of substantial commencement
2 sufficiently, so I'll skip over that.

3 What I would like to also point out is that
4 we are in the middle of an Order to Show Cause
5 hearing, and that is governed by 15-15-93, that
6 section is called Enforcement of Conditions,
7 Representations or Commitments.

8 And what it states is -- I'm going to once
9 again paraphrase. It says: When the Commission has
10 reason to believe that there's been a failure to
11 perform -- doesn't say based upon promises -- it says
12 the failure to perform according to the conditions
13 imposed, the Commission shall issue and serve upon
14 the party -- and it goes on and says -- why the
15 property should not revert to its former land use
16 classification.

17 That same section goes onto say that: If
18 it concludes that there has been a violation, the
19 Commission shall amend its Decision and Order to
20 incorporate the Order to Show Cause by including the
21 reversion of the property to its former land use
22 classification, or to a more appropriate
23 classification.

24 The point I want to make with that is that
25 there's nothing in there that provides the Commission

1 with the ability to fashion a special remedy for a
2 Petitioner who is making promises like here. That
3 may be unfortunate for us, maybe it would be a better
4 thing if it didn't, but the legislature hasn't given
5 the Commission those powers yet. And under the
6 circumstances, the Commission is left with the simple
7 task of moving to Phase II, which we are requesting,
8 and determining whether or not the land should be
9 reverted.

10 What I would ask you to just -- the final
11 thing is with respect to the surprised design that we
12 received yesterday, is if you put yourself back in
13 the shoes of the Commissioners who sat through the
14 five-day hearing back in 2012 and 2013, and many
15 other additional hearings like these where we were
16 dealing with procedural issues, at the conclusion the
17 Commission stated that there were violations. What
18 if at that point in time the attorney for the
19 Petitioners had reached into the emergency briefcase
20 and pulled out a design and said, wait a second,
21 actually, we're ready to proceed based upon the
22 original plan.

23 What would the Commission have done in that
24 situation? They would have said "too late". We just
25 completed an evidentiary hearing. You had every

1 opportunity before and during to present something
2 different, but you adhered and stuck to your retail
3 shopping plan and your affordable housing plan.

4 The point I want to make is that Phase I is
5 concluded. The Commission cannot undue Phase I.
6 They cannot. This is one of the big points in their
7 Motion to Dismiss, they say that the Commission can't
8 enter Findings of Fact because the facts have
9 changed.

10 This goes to a final point here. We are in
11 the middle of an Order to Show Cause hearing. Mr.
12 Lake presented the design yesterday as a public
13 testifier. Public testifiers can come and say
14 whatever they want, but that doesn't mean that it was
15 introduced into evidence as part of the contested
16 case proceeding. Only parties can do that. And it
17 has to be done pursuant to the rules. And those
18 rules provide very clearly that there's an
19 opportunity to put the witness on the witness stand,
20 and for the Intervenor to have an opportunity to
21 cross-examine those witnesses.

22 That is how evidence is properly presented,
23 and that's why, by the way, our Motion to Strike is
24 proper is because all of the information in there, we
25 have had no opportunity to review that.

1 So in conclusion, and I think the
2 Commissioners were giving me the liberty of a long
3 argument, we're asking you to take the cautious
4 approach. The dismissal that is being argued, the
5 Motion to Dismiss is an extreme resolution. It's not
6 really a resolution, it's an extreme decision that
7 really would create more problems.

8 It would throw out the contested case that
9 was completed after very diligent work by the prior
10 Commission members. It would enter the Commission
11 into undocumented territory where there's no rules
12 permitting these types of activities. It would be
13 based upon nothing more than Petitioners' promises.
14 And the question I would ask is, what kind of trust
15 should we give to the Petitioners at this stage when
16 they have flipped and flopped over arguments over the
17 past six years, and when they, for lack of a better
18 word, they sandbag the Parties by providing a design
19 at the last minute yesterday that we had no
20 opportunity or recognition of before; and then they
21 reversed their decision and made something slightly
22 different today.

23 Why would this be a good cautious, prudent
24 approach for us to proceed on upon based upon those
25 types of promises?

1 What we're asking instead is our Motion to
2 Conclude takes the cautious approach. It asks for
3 you to take the deliberative steps, maintain the
4 contested case evidentiary proceeding protocol that's
5 laid out in your rules, and take it step by step in a
6 way where a good record is made for all the Parties,
7 not just Petitioners, not just Intervenors, but all
8 Parties.

9 The final thing I would state, this is
10 really not harmful to the Petitioners. If they
11 really in their heart of hearts want to go back to a
12 design similar to this, why don't they do it the
13 right way and start with district boundary amendment?
14 Get the reports done properly, present it to the
15 Commission, and do it the right way where there is an
16 opportunity for the community process that is laid
17 out in the Commission rules.

18 For those reasons we're asking you to deny
19 the Motion to Dismiss. And I thank you very much for
20 your attention.

21 CHAIRPERSON SCHEUER: Thank you, Mr.
22 Pierce.

23 Commissioners, questions for Mr. Pierce? I
24 wasn't prepared for that. Are you going to save me,
25 Gary? Commissioner Okuda.

1 COMMISSIONER OKUDA: Mr. Pierce, I
2 recognize this proceeding is not necessarily governed
3 by Hawai'i Rules of Civil Procedure, but what is the
4 standard of review that this Commission should apply?

5 MR. PIERCE: For a Motion to Dismiss?

6 COMMISSIONER OKUDA: Yes, for this specific
7 Motion to Dismiss.

8 MR. PIERCE: Well, a Motion to Dismiss --
9 that's actually a very excellent question. I thank
10 you for that. And it's one of the things I've
11 overlooked.

12 In a Motion to Dismiss the facts are to be
13 taken from the perspective of -- all reasonable doubt
14 is to be put on the person who's being knocked out of
15 the case, because the law affords a trial on the
16 merits.

17 So what essentially is happening here is,
18 that after we are partially through a trial, the
19 Petitioners are asking for us to be knocked out upon
20 the pretences that they propose.

21 So what the law says is that when a
22 defendant -- ordinarily it's a defendant -- in this
23 case it's the Petitioners come in and seek to dismiss
24 a party and cause them to lose their rights. The law
25 says that you have to look at the facts and the law

1 in the light most favorable to the Intervenor in
2 this instance. That is the standard.

3 So that means to the extent that there are
4 questions in your mind as to what you should be
5 thinking about right now, you need to consider them
6 in the light most favorable to the Intervenor
7 because they are the movants of this whole Order to
8 Show Cause hearing. Thank you for that question.

9 COMMISSIONER OKUDA: The reason why I asked
10 that question -- I'm not aware of what -- or a
11 Hawai'i case, it may be that other counsel can help
12 me out on that. I'm not aware of a Hawai'i appellate
13 case that lays out the standard with respect to
14 administrative agency.

15 Because as we all know, those of us who do
16 litigation, right, if it's in court and it's a Motion
17 to Dismiss under Rule 12(b)(6), you treat what's
18 filed by the claimant as being totally true.

19 In other words, you don't get into whether
20 or not there is a factual dispute. If it's a motion
21 for summary judgment, under Rule 56, you look to see
22 whether or not there's any dispute as to material
23 fact. And if there is a dispute as to material fact,
24 then you let the investigation, the fact-finding
25 process go forward with the case.

1 I'm just trying to figure out which
2 standard do we apply with respect to an
3 administrative agency, and what's the case, if any,
4 in Hawai'i, or legal authority that says we have to
5 apply the standards?

6 In other words, do we just say, well, look,
7 gee, if the Intervenor on their paperwork makes it
8 look like they have a claim, which the law provides a
9 relief for, we just have to take your word for it?

10 Or do we apply standards saying, well, if
11 we believe there are really material facts in
12 dispute, we have to let the process go forward?

13 Or if it's a jurisdictional issue, like Mr.
14 Tabata raised, I think that's similar to Rule 12(h),
15 I think it is, you look and determine the
16 jurisdictional issue, and that's just done by the
17 paperwork.

18 I'm just trying to find out what standard
19 are we supposed to follow.

20 MR. PIERCE: Let me help in this way. I
21 don't have a case that I can cite, but what I can say
22 is we have to look at the procedural process of this
23 case. Phase I has been completed, and the
24 Intervenor prevailed in Phase I.

25 So the question is -- this is one of the

1 reasons it's been difficult to actually respond to
2 this Motion to Dismiss is that the reasons presented
3 by the Petitioners don't really bear any resemblance
4 to anything that happens in the law.

5 You don't moot a case. And on this point I
6 must disagree with Office of Planning, and with what
7 they stated in their response. They stated that if
8 the Petitioners are now -- the first assumption is
9 that somehow or other the Petitioners have the
10 ability to cure their violations. And you have to
11 think about it from the perspective that Phase I was
12 concluded, and it was based upon everything that
13 happened in this timeline over here.

14 You don't have the ability to
15 perspective, or look into the future to see whether
16 you can resolve those. That's a new issue. That's
17 why you have new district boundary amendments, where
18 petitions -- or motions to amend.

19 So the point I would just make there is
20 that we're in the middle of an evidentiary hearing.
21 We have already prevailed. Why would it be
22 appropriate for us to be dismissed?

23 And I want to point one thing on this
24 jurisdictional issue. I'm glad you mentioned that,
25 and it was in my notes here.

1 I think the jurisdictional issue, as
2 presented by Mr. Tabata, is incorrect. And all the
3 time it happens in cases where statutes of
4 limitation -- and here in a way this 365-day rule is
5 a statute of limitation. Statute of limitations may
6 be tolled on all sorts of different purposes.
7 Sometimes they're tolled equitably, sometimes because
8 two parties want it to be tolled.

9 What I mean by "tolled", stops the clock,
10 stops the clock from running. Mr. Tabata argued that
11 it was non-waiveable or unwaiveable, and that is not
12 the case. It may be that it's held off. But as Aina
13 Le'a says, I think the issue is really a red herring,
14 because Aina Le'a says, you first got to look at
15 whether there's been substantial commencement. If
16 there's been a substantial commencement as
17 represented by the parties in the original Decision
18 and Order, if that hasn't been met, then the 365-day
19 rule is inapplicable anyway.

20 So just going back and trying to conclude
21 that. Under the posture as we are right now, where
22 we have been a prevailing party, where the Order to
23 Show Cause hearing was stayed as a request of the
24 Petitioner, why would it make sense under any shape
25 or form of the law to dismiss the Intervenor at this

1 stage of the game?

2 COMMISSIONER OKUDA: Chair, if I can have a
3 follow up question.

4 CHAIRPERSON SCHEUER: Yes.

5 COMMISSIONER OKUDA: Let's assume the
6 Motion to Dismiss is not granted. Can you state for
7 the record, so that we're clear, even though we've
8 read your moving papers, what the Intervenors plan to
9 do in Phase II, and how those actions are relevant to
10 the issue that the Commission still has to decide or
11 should decide?

12 In other words, what do you plan to do in
13 Phase II? And number two, what's the relevance of
14 those actions or the materiality of those actions
15 with respect to decisions which the Commission has to
16 make or should make?

17 MR. PIERCE: So we've identified three
18 steps, procedural steps that would have to be
19 conducted by the Commission.

20 First is lifting the stay. Because the
21 stay has been what has kept the contested case from
22 going forward. And the stay was conditioned upon a
23 Motion to Amend being pursued. And we know that is
24 no longer being pursued. That's the first step.

25 The second step is to enter findings of

1 fact, and all that requires is -- it requires the
2 Commissioners to make sure that they have reviewed
3 enough of the record. We have already cited this in
4 our Motion to Conclude, so I'm just going to
5 summarize it quickly.

6 But we already have proposed findings of
7 fact that were presented to the Commission, but which
8 were never acted upon. So findings need to be
9 entered for Phase I.

10 When we get to Phase II -- and this is a
11 critical point -- Phase II is an evidentiary hearing.
12 It's established to protect the Petitioners as well
13 as Intervenors' rights. There's an opportunity for
14 identifying the exhibits that are going to be
15 provided. This is all laid out in the Commission's
16 rules already. Establish the exhibits. This would
17 all be done with the assistance of the executive
18 officer. We've identified exhibits. The witnesses
19 are going to be called. Then we would schedule the
20 hearing date. And once that occurs, there would be a
21 deliberate process where each piece of evidence is
22 presented. There is an opportunity for them to be
23 questioned before it's admitted, and the evidence of
24 the testifiers has an opportunity to be
25 cross-examined, as well as an opportunity for

1 rebuttal witnesses. That would be the methodical
2 process.

3 Now, of course, there is one other
4 possibility. And I want to mention the fact that
5 before we ever filed a Motion to Conclude -- and this
6 was talked about I think even in papers -- I
7 contacted Mr. Sakumoto, because from our perspective
8 it says, if the Petitioners want to do the right
9 thing, why don't they just go ahead and agree and
10 stipulate to reverter the property and start with the
11 clean slate which is what this community needs and
12 what the Commission rules requires. But we are not
13 there, so we have to go through this reverter
14 process.

15 On Phase II, I think the first step would
16 be a motion as to whether the Commission even needs
17 to hear evidence. And the issue of that is whether
18 the prior statements of the Commissioners, as well as
19 the status of the case is such to where there's no
20 evidence to present. No evidence that they could
21 present that would change the fact that they have not
22 substantially commenced. That would be an
23 opportunity for the Intervenor to properly brief
24 that issue. But setting that aside there would be an
25 evidentiary hearing.

1 COMMISSIONER OKUDA: I'm sorry, Mr. Chair,
2 one final question.

3 CHAIRPERSON SCHEUER: Please proceed.

4 COMMISSIONER OKUDA: Mr. Pierce, if the
5 stay is lifted, isn't it true that -- or would there
6 be anything that would prevent the Petitioner from
7 starting to develop the property and, you know, as
8 long as proper permits and other governmental
9 approvals are received to go ahead with its
10 development?

11 MR. PIERCE: We think that the Petitioners
12 have no ability to proceed. And if they were, we
13 could readily go into court and get a temporary
14 injunction based upon the rulings from the Commission
15 on Phase I. The Petitioners don't have a right to
16 proceed right now.

17 One of the things I would like to point out
18 is irrespective of our Order to Show Cause hearing,
19 as we have already briefed, the Commission is in a
20 position independently at any time to take matters
21 into their own hands, and essentially nullify the
22 1995 Decision and Order, based upon the ten-year rule
23 and some of the other rules that we've briefed in our
24 pleadings.

25 CHAIRPERSON SCHEUER: Commissioners, any

1 other questions for Mr. Pierce? Commissioner
2 Ohigashi.

3 COMMISSIONER OHIGASHI: In their motion,
4 they site that Condition No. 5 -- and Condition No. 5
5 deals with the front roadway parallel to Pi'ilani
6 Highway.

7 If they submit a plan at this point to
8 provide for that, would they be in violation of
9 Condition No. 5?

10 MR. PIERCE: My answers are very -- it may
11 not be one that the Commission likes, but I think
12 it's what the rules require, which is that that
13 decision was already made by the prior Commissioners
14 in Phase I when they concluded that there was a
15 violation.

16 And it's important to point out, once
17 again, the rules state that it has to be based upon
18 the activities and actions of the developer up to the
19 point of the Order to Show Cause hearing. It's not
20 based upon promises. It has to be based upon the
21 actual actions that are presented in evidence.

22 And the evidence did not support them at
23 that point in time, setting aside the fact that the
24 frontage road, as I looked at the design yesterday,
25 and as we looked at it, it's unclear exactly where it

1 goes or what it does, but it wasn't just that any
2 frontage road would work.

3 I will actually look back at the findings
4 of fact and conclusions, the decision, the original
5 Decision and Order, and it had very clear statements
6 as to what that parallel roadway was supposed to do
7 in terms of traffic flow.

8 Now, the point I would just make at this
9 stage was -- and I would actually point out is that I
10 think that the Petitioners' witnesses at that point
11 were actually fairly persuasive. They said at that
12 point in time, Department of Transportation doesn't
13 want a frontage road. They explain that, and they
14 brought in witnesses to make that point. And they
15 explained why it didn't make sense for a frontage
16 road.

17 But if that's the case, then they need to
18 start over and get it done right, and deal with what
19 are the current existing traffic issues, not those in
20 1995.

21 So the question is, I guess, would it make
22 sense, based upon this timeline that we presented to
23 you, and based upon this incredible amount of time,
24 even if the rules permitted it, would it make sense
25 to discuss a frontage road where there is no traffic

1 report to support a current traffic report or
2 anything, or Department of Transportation or
3 testimony or reports to state that it is helpful or
4 if not, even a public health and safety issue.

5 COMMISSIONER OHIGASHI: Mr. Pierce, it was
6 a simple question. So your answer was no, because
7 they have already established violation?

8 MR. PIERCE: That's correct, Your Honor.

9 COMMISSIONER OHIGASHI: You don't have to
10 call me Your Honor.

11 MR. PIERCE: It's a force of habit.

12 COMMISSIONER OHIGASHI: I call my wife
13 that.

14 The second part would be No. 17. It seems
15 to indicate that they failed to file reports. Are
16 you saying then that the reports that they have
17 subsequently updated continue to be violation of rule
18 17?

19 MR. PIERCE: No. What I'm saying is that
20 the harm was done from the lack of the reports back
21 in the early 2000s. That was the opportunity for
22 early notification to the public, to the agencies, as
23 required by the public reports.

24 And you can't unring the harm that was
25 caused by that by promising or submitting new reports

1 that corrected past activities. You just can't do
2 that. And I guess just once again, as I was
3 grappling with this issue, and I'm trying to think
4 about it from Commission's perspective, what does the
5 Order to Show Cause hearing state in it? It doesn't
6 provide an opportunity -- if we were in court, and we
7 were -- and the court had equitable relief, perhaps
8 in that kind of situation where intervenors had been
9 seeking injunctive relief, perhaps in that kind of
10 situation the court can say, well, look, I understand
11 that these guys are actually trying to cure things,
12 and that's okay.

13 But here, unfortunately, the legislature
14 didn't give the Commission the power to fashion those
15 kinds of equitable remedies to deal with this. They
16 gave the Commission one ability, which is reverter.

17 CHAIRPERSON SCHEUER: Do you have more?
18 I'm inclined to take a break.

19 COMMISSIONER OHIGASHI: I don't mind taking
20 a break, but I would have a few more questions.

21 CHAIRPERSON SCHEUER: That's fine, after
22 the break. It is currently 10:04. We will start
23 exactly at 10:14.

24 (Recess taken.)

25 CHAIRPERSON SCHEUER: It's 10:14. Thanks

1 for being respectful of everybody's time.

2 Mr. Ohigashi, you were continuing with
3 questions for Mr. Pierce.

4 MR. PIERCE: Mr. Chair and Commissioner
5 Ohigashi, may I just add a bit more about your last
6 question with respect to annual reports?

7 CHAIRPERSON SCHEUER: Briefly.

8 MR. PIERCE: The point I just want to make,
9 I'm not sure I was clear on this, those reports Maui
10 Industrial Partners for those years that I mentioned
11 in the 2000s failed to provide those. Those annual
12 reports, not just documents that get submitted, they
13 require a detailed discussion by the developers and
14 the owners about what the status of it is and how
15 they're continuing to meet those conditions.

16 If that information had been available to
17 the public when it was required to be available, we
18 might not be here right now, because we would have
19 been able to identify the violations when Maui
20 Industrial Partners started to go rogue.

21 One of the things I need to point out is,
22 and this is in the record in the evidence, Mr.
23 Charlie Jencks, who was --

24 CHAIRPERSON SCHEUER: Briefly.

25 MR. PIERCE: This is it.

1 Mr. Charlie Jencks submitted an affidavit
2 to the county stating that there were no conditions
3 or other aspects that did not permit him to move
4 forward with this four-lot subdivision.

5 We know that's not the case. In fact,
6 that's how the Commission concluded otherwise. So
7 there is no way to undo that by promises or by
8 correcting the record later on. That's no help to
9 the public.

10 CHAIRPERSON SCHEUER: Mr. Ohigashi, please
11 continue.

12 COMMISSIONER OHIGASHI: I'm just trying to
13 focus in on what I think is the relevant issues
14 today. And to me there's a Motion to Dismiss. The
15 relevant issues is whether or not this specific
16 violation cited by the Commission in its oral ruling,
17 I guess, are correctable, not correctable, or still
18 in violation absent -- I don't want to trick you or
19 anything like that -- absent the proposed plan for
20 the mall.

21 As I see it, the question turns to me is
22 that would these violations exist if the original D&O
23 was followed? And your statement -- I was trying to
24 get No. 17, you're saying, yes, because No. 17 is a
25 requirement that is just a requirement that they

1 failed to meet. I'm just trying to get --

2 MR. PIERCE: I hope -- the fair response,
3 the fair response is if they had presented what
4 they're presenting now. We don't know exactly what
5 it is. In Phase I, when there was an opportunity for
6 an evidentiary hearing, for the opportunity for
7 cross-examination of the witnesses for full and
8 thorough evidentiary fact-finding process, instead of
9 what we are getting right now which is this
10 willy-nilly promises from the Petitioners.

11 If that process had gone through, at that
12 point in time we could have seen whether or not it
13 worked. But there is no way for us to know that,
14 without going to -- I'll give you one quick example.

15 They showed us a diagram yesterday of 110
16 lots. Well, what are those lots for? Do we know all
17 the things that you, as Commissioners, have to think
18 about from a district boundary amendment are
19 important here?

20 What is the viability of the owner to carry
21 it out? What are the market conditions? Are they
22 going to create something that actually is no help to
23 the community? How does it affect traffic? And that
24 depends on the uses.

25 We don't know right now whether Honua'ula

1 Partners is planning on using some of that for
2 affordable housing. Nothing is known to us, so
3 there's no way for me to respond and say that would
4 have been the case. What I can say is if it had been
5 presented at the appropriate time in Phase I, then
6 the Commission could have evaluated it. The
7 Petitioners, when they had an opportunity to change
8 and reverse course, did not do so. They went full
9 speed ahead with retail shopping and affordable
10 housing, and the Commission ruled, and that's the end
11 of the discussion. Phase I is concluded. They
12 cannot reopen it.

13 In order for them to reopen it, there's no
14 rule -- I looked last night -- there's no rule that
15 permits them to reopen Phase I. If they were, it
16 just would make no sense at this stage.

17 COMMISSIONER OHIGASHI: So I'm not trying
18 to get a dissertation from you, just trying to get a
19 simple answer, if you permit me that simple answer to
20 the question.

21 My simple question is regarding their
22 concerns that they brought up in their motion about
23 Condition No. 15, they made certain representations
24 in Condition 15. This is what the Petitioner
25 represented at the original hearing.

1 Do you have any specific objection to any
2 of those items? And I'm not trying to trick you, but
3 I think it was on pages 17 -- I'm just looking at it
4 right now -- 14 -- I think it's 18 of their motion.

5 And I was just wondering if any of those
6 representations, or if there should be more
7 representations that you believe should be included
8 in there, or is there any -- you know, Condition No.
9 15 is admittedly kind of vague. And it talks about
10 all representations. So the question is, is that are
11 those representations --

12 CHAIRPERSON SCHEUER: What is the question?

13 COMMISSIONER OHIGASHI: Do you consider
14 those are all the representations, or do you believe
15 that there are more, or have you any response to
16 that?

17 MR. PIERCE: And I'm going to attempt not
18 to give you a dissertation, but it's not as simple as
19 a yes or no question. The pages that you are
20 referring to, on pages 14 through 18, Petitioners
21 argue -- this is very important -- there is no
22 evidence being taken here today. We are not in a
23 contested case proceeding where there is evidence
24 being taken currently. They argue that they're going
25 to meet requirements -- by the way, they

1 cherry-picked what they want the Commission to focus
2 on out of the 1995 D&O --

3 COMMISSIONER OHIGASHI: What I'm trying to
4 get --

5 CHAIRPERSON SCHEUER: Gentlemen, gentlemen,
6 our court reporter cannot record two people at once.

7 COMMISSIONER OHIGASHI: I just want to know
8 if there is any other representations that you
9 believe is not included in there, or if you don't
10 have any.

11 MR. PIERCE: And of course this is
12 insufficient for the Commission to base a decision to
13 dismiss on, because those representations are made
14 outside of an evidentiary hearing, and they're made
15 outside of Phase I. So they are not sufficient.

16 COMMISSIONER OHIGASHI: They may or may not
17 be.

18 MR. PIERCE: No, I'm not saying they may or
19 may not be. They're not sufficient because they
20 cannot ever be sufficient because of the fact that
21 Phase I is concluded.

22 CHAIRPERSON SCHEUER: Briefly, are you
23 suggesting another option available to this
24 Commission to move this motion to a formal hearing
25 followed up on your last response?

1 MR. PIERCE: No, I'm not suggesting that.
2 I'm suggesting that there should be no deferral of
3 the Commission's ruling today. They should deny the
4 Motion to Dismiss simply, and then consider our
5 Motion to Conclude in the procedural steps set forth
6 therein.

7 CHAIRPERSON SCHEUER: Commissioner Wong.

8 COMMISSIONER WONG: Chair, sorry. To the
9 issues at hand and all this legal issues that I
10 cannot understand, can we move to executive session
11 so I can ask the board's attorney about our issues
12 about duties, privilege and liabilities on these
13 legal issues and what we have to do or cannot do?

14 CHAIRPERSON SCHEUER: In terms of what
15 options are before us?

16 COMMISSIONER WONG: Yes.

17 CHAIRPERSON SCHEUER: There is a motion
18 made by Commissioner Wong to move into executive
19 session. Is there a second?

20 COMMISSIONER CHANG: Before we move into
21 executive session, can I ask --

22 CHAIRPERSON SCHEUER: Hold on. There is a
23 motion on the table.

24 COMMISSIONER OHIGASHI: Second.

25 CHAIRPERSON SCHEUER: There's a second from

1 Commissioner Ohigashi.

2 Commissioner Chang, if you want to speak.

3 COMMISSIONER CHANG: I'm going to oppose
4 the motion, because I would like to ask Mr. Pierce a
5 question before we go into executive session as it
6 makes a difference for me.

7 COMMISSIONER WONG: I'll hold the motion
8 until.

9 CHAIRPERSON SCHEUER: The movant has agreed
10 to at least temporarily withdraw the motion or hold
11 on it. Does the seconder agree?

12 COMMISSIONER OHIGASHI: Yes.

13 CHAIRPERSON SCHEUER: Please proceed,
14 Commissioner Chang.

15 COMMISSIONER CHANG: Mr. Pierce, I
16 recognize and appreciate that the Intervenor has
17 been persistent. They have stood firm. They have
18 participated throughout this very long process.

19 I also recognize that it is very likely
20 that we're going to get an appeal from somebody on
21 this matter. I also recognize this is an
22 administrative proceeding, not a judicial proceeding.
23 And so I tend to be -- Mr. Okuda tends to be in a
24 very legal, just the citation. I tend to look at
25 this in a very practical way.

1 We've had representations this morning from
2 the Petitioners that have withdrawn the modified
3 plan, they're going to go back to their original
4 plan. And they said they're prepared to proceed.

5 We've also had comments from the county who
6 said, if they proceed, we're going to ask for dec
7 action from LUC.

8 So I guess my question to you, and whether
9 you want to caucus with your clients is, because
10 you've been standing very firm that under no
11 circumstances at this point in time Phase I of the
12 proceeding has concluded, and you can't even defer.

13 But I'm asking you whether the Intervenors
14 would be willing to continue this hearing for a very
15 short period of time, I guess continue this
16 particular hearing, but whether it's deferral or
17 continue for a month, which at that time we would
18 then give the Petitioners an opportunity to fully
19 submit to all of the relevant parties their plan, and
20 how are they going to proceed with their plan, so
21 that we have a fully developed record. So that
22 should anybody take this up on appeal, because I will
23 admit, I did not read the volumes of testimony that
24 were presented in 2013 to the Commission. I was not
25 there.

1 And there are findings of facts that were
2 made, that has not been concluded yet. So for me to
3 look at what is in the best interest of -- including
4 your clients who is interested in preserving the
5 cultural resources on the project. Looking at the --
6 reversion is a very drastic course of action for the
7 Commission -- looking at the potential. Is this the
8 set of facts that we want to take up on appeal,
9 whether 365 days applies or not? I don't know.

10 So I guess I'm asking you this question:

11 Would the Intervenor be willing to
12 continue this for one month, at which time we will
13 have Petitioners provide us a full -- all of their
14 plans and how they intend to proceed with the
15 original plan that was the basis of the 1995 D&O?

16 And then at least I can make a
17 determination whether they have -- whether they are
18 in compliance with the representations that were
19 made, because I think that's the obligation that we
20 have.

21 So that's the question that I have for you
22 right now.

23 MR. PIERCE: Thank you, Commissioner Chang.
24 I understand the question. If you'll bear with me
25 one moment.

1 So I first just want to address first the
2 fact that -- I thank you for using kind words and
3 saying that we have been persistent, and I'm sure
4 some of the Commissioners or Petitioners and others
5 may feel that we're being obstinate instead of
6 persistent.

7 But what we think we're here to do is to
8 understand, to the best of our ability, the
9 Commission's rules.

10 So the question that you're asking is,
11 would the Intervenors be willing to defer for a
12 period of time. And what that unfortunately raises
13 is a bunch of questions that I tried to present in my
14 arguments relating to what the Commission's authority
15 is at this stage under the current circumstances with
16 the Order to Show Cause hearing.

17 The first one is -- and I was quite
18 troubled by what I heard yesterday, so I spent some
19 time yesterday evening. I pulled down the Order to
20 Show Cause rules. This is 15-15-93 and, you know,
21 one of the important ones: The Commission shall
22 conduct a hearing on an Order to Show Cause in
23 accordance with requirements of subchapter 7.

24 What that is really saying is it has to be
25 done in a methodical approach, with taking of

1 evidence, like you normally do with contested case
2 hearing. So far, that's why I am asking, and this is
3 actually -- I'm glad the question was asked before
4 you go into executive session -- the question I think
5 that your attorney has to focus on is what is the
6 Commission's authority to defer. And what's assumed
7 in that is two things.

8 First, that the Commission has the power at
9 this stage to reopen Phase I, and the only way that
10 this could be done properly under the rules is for
11 there to be an evidentiary hearing. Not the way the
12 Petitioners have attempted to do this by having
13 arguments by their counsel and then willy-nilly
14 submitting declarations.

15 It has to be done in an orderly process.
16 But the question is whether you have the ability to
17 reopen it. And based upon our look at the rules, you
18 do not have the ability to reopen Phase I.

19 The second issue is, whether as much as any
20 of us, including the Intervenor might like for the
21 Commission to have the ability to take a practical
22 pragmatic approach based upon the promises of the
23 Petitioners at this stage, and giving them the
24 benefit of the doubt in terms of their interest in
25 being in good faith.

1 The question is under the Order to Show
2 Cause hearing process, whether you have the ability
3 to do that.

4 So I think there's an unfortunate tension
5 here between what the Commissioners would like, and
6 what the Commission rules permit. And from our
7 perspective, for us to say that deferral, sure, we're
8 okay with a deferral, is just acquiescing to a
9 continuation of what we feel is a failure to adhere
10 to the rules that are the Commission's rules.

11 COMMISSIONER CHANG: If I could add. I
12 think during your argument when you were talking
13 about the statute of limitations, that there are at
14 times where the parties can stipulate. So I guess
15 that's what I'm asking.

16 Notwithstanding your interpretation of the
17 rules, can the parties stipulate to a deferral of
18 this matter to provide the Petitioners what their
19 representations are that they are going to develop
20 this property as they represented in the original
21 petition. So that's what I'm asking. Are you
22 willing to stipulate to that?

23 MR. PIERCE: And on that part, I obviously
24 haven't had a chance to check in with all my clients.
25 Maybe we can do that during your executive session.

1 What I would just say at the outset from
2 just consulting with Mr. Hyde here for South Maui
3 Citizens for Responsible Growth. You know,
4 stipulation is a two-way street, right? There's two
5 parties involved. And so far what Petitioners have
6 been attempting to do is push this through
7 unilaterally and to the prejudice of the Intervenors.

8 And, of course, none of this was ever
9 presented. And Mr. Perez spoke yesterday. Mr. Perez
10 and Mr. Hyde, none of the Intervenors have seen what
11 was presented yesterday. If it were presented, and
12 if the Commission's rules permit it, of course, we
13 are open to considering it. However, after we have
14 done our thorough review, that is why we have taken
15 this persistent approach is because we didn't see
16 another one.

17 But setting that aside, we are open of
18 course to doing it. We need to see that they have
19 actually engaged in a robust community involvement
20 and not selectively taken certain parts of the
21 community's -- we would want to see, just to restate
22 that last part, we want to see robust involvement of
23 the community.

24 COMMISSIONER CHANG: So is it your position
25 that you're willing to stipulate?

1 MR. PIERCE: I think I need to discuss that
2 with my clients.

3 CHAIRPERSON SCHEUER: Okay.

4 MS. APUNA: Chair, can Office of Planning
5 provide some information that we think is pertinent
6 to this discussion?

7 CHAIRPERSON SCHEUER: Any objection from
8 any of the parties?

9 MR. SAKUMOTO: No objections.

10 MR. TABATA: No objection.

11 MR. HOPPER: No.

12 MR. PIERCE: No objection.

13 CHAIRMAN SCHEUER: Please proceed. After
14 that I have one quick informational factual question
15 about the record that you prepared, and Commissioner
16 Cabral has a question for Mr. Pierce.

17 MS. APUNA: Thank you, Chair.

18 So that rule section that Mr. Pierce
19 pointed to with regard to the Order to Show Cause
20 proceeding includes a section (c), that is
21 15-15-93(c) that says that any procedure in an order
22 to show cause hearing may be modified and waived by
23 stipulation of the parties. And informal disposition
24 may be made in any case by stipulation, agreed
25 settlement, order or default.

1 And also subsection (c) says that the
2 Commission shall follow subchapter 7, which under
3 section 15-15-63(1) provides that at the hearing the
4 presiding officer may require the production of
5 further evidence through testimony or exhibits upon
6 any issue. The presiding officer may authorize the
7 filing of specific documentary evidence as a part of
8 the record after the close of the hearing subject to
9 the rights of the parties to request reopening of the
10 hearing within a specified time after the receipt of
11 such evidence, or may keep the hearing open until
12 such time that evidence is received by the
13 Commission.

14 So I do believe the Commission is
15 authorized to, as Mr. Pierce said, reopen Phase I in
16 order to receive additional evidence at this time.

17 CHAIRPERSON SCHEUER: Thank you, Ms. Apuna.

18 My quick question for Mr. Pierce, solely
19 based upon the record.

20 Can you state in the record whether the
21 Intervenors objected to the stay?

22 MR. PIERCE: Oh, yes, we did. We filed an
23 objection to the stay.

24 CHAIRPERSON SCHEUER: Commissioner Cabral.
25 And then after Commissioner Cabral, we will retake

1 the pending motion to go into executive session.

2 VICE CHAIR CABRAL: I want to follow up on
3 fellow Commissioner Chang who commented that she's
4 very practical, and I'm -- she is an attorney still,
5 so somehow she can still follow all of this.

6 I am extremely practical in my world and
7 not an attorney.

8 So I've watched this back and forth, very
9 complicated, and I just keep wondering, and would
10 like to think that everybody might bring it back
11 to -- somehow we've gotten into who's right, who's
12 wrong, who's wrong, who's right.

13 And I keep thinking, I think we lost what
14 is best for the people and what is best for the
15 community. And, Mr. Pierce, I don't know the
16 background on your group, because I'm not from this
17 island. So I just kind of am wanting to sort of ask
18 everybody as this moves forward, to get back to the
19 base, which in theory what was pertinent in 1995 is
20 what are the needs of the community and how do we
21 best serve them.

22 And I think I just would like to ask, if
23 your group is community based, or what is going on
24 that we can be assured that the community is really
25 being represented? Maybe I'm asking who do you

1 represent? You say your clients, but I don't know
2 who that is.

3 MR. PIERCE: Sure. I think what I can
4 actually do is provide some reference to the record.
5 Maui Tomorrow is a large nonprofit organization here
6 on Maui, and Albert Perez is here. And if the
7 Commission will permit, it might be better to hear
8 from him at the appropriate time. But hopefully I
9 can paraphrase Maui Tomorrow's mission, which is
10 really about sustainable and appropriate planning and
11 development on the Island of Maui.

12 CHAIRPERSON SCHEUER: A very brief listing
13 of your clients right now.

14 MR. PIERCE: And that certainly is they
15 have a very broad outreach, and are significantly
16 known and have been very much involved in these
17 issues along the way.

18 South Maui Citizens for Responsible Growth
19 is more focused on this particular issue. But as
20 their name suggests, they are interested in
21 specifically what is happening in the
22 Kihei/Wailea/McKenna area and making sure that the
23 growth that occurs there is done in a responsible
24 fashion. And once again, pursuant to the rules.

25 And finally, but certainly not last, Mr.

1 Kanahale, Daniel Kanahale, he really wears two hats.
2 He's been very involved in all issues relating to
3 South Maui where he lives with respect to sustainable
4 and responsible growth there; and as well he has
5 continued in many different proceedings including
6 this one to make sure that cultural rights are
7 preserved.

8 VICE CHAIR CABRAL: Thank you very much.

9 And you've been to our group before, but I
10 wasn't clear when you referred to who your clients
11 were. Thank you.

12 CHAIRPERSON SCHEUER: Commissioner Aczon,
13 and then we are going to take up the motion to go
14 into executive session.

15 COMMISSIONER ACZON: Same with Commissioner
16 Cabral, I'm not a lawyer. Going along with
17 Commission Cabral and Commissioner Chang, the
18 Commission, the Land Use Commission's mission is to
19 make sure the land is being used for the benefit of
20 State of Hawai'i.

21 I think 25 years is enough with that. I
22 think we lost track of those vision. So my comment
23 is we talking about these groups and everything, and
24 the more rules we throw out there, the more the
25 parties are digging their heels.

1 So I don't really see any end game of this.
2 And the only thing is what, like Commissioner Chang
3 said, and that as she said has to be at least two
4 parties, cannot be one.

5 So if the parties are willing to do that, I
6 think we're going to get something. But if everybody
7 is going to be digging at this rules and everything,
8 I don't even know the end results that your clients
9 are trying to achieve, short of reverting the
10 property. If that's the goal, then we're not going
11 to go anyplace. Just my comment.

12 CHAIRPERSON SCHEUER: We're taking up the
13 motion to move into executive session made by
14 Commissioner Wong and seconded by Commissioner
15 Ohigashi. Any further discussion on that motion?

16 COMMISSIONER CHANG: Mr. Chair, I know --
17 please bear with me.

18 CHAIRPERSON SCHEUER: I will respectfully
19 and kindly limit you to speaking about the motion to
20 go into executive session.

21 COMMISSIONER CHANG: Just about the motion
22 to go into ex -- I guess what I want to ask is much
23 more broader than that. I want to hear from the
24 other parties whether they're going to stipulate.

25 CHAIRPERSON SCHEUER: That's outside the

1 motion that's in front of us. You're certainly free
2 to vote against the motion. Any further discussion
3 on the motion to go into executive session?

4 Hearing none. All in favor of going into
5 executive session say "aye". Is there anybody -- and
6 I also vote "aye". Anybody opposed?

7 COMMISSIONER CHANG: I would oppose.

8 CHAIRPERSON SCHEUER: Commissioner Chang
9 opposed. We're going into executive session.

10 (Executive session and recess.)

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

13 We were still following the presentation by
14 Mr. Pierce, asking questions of Mr. Pierce by the
15 Commission.

16 Are there further questions from the
17 Commissioners for Mr. Pierce?

18 Seeing none, we are on the Motion to
19 Dismiss the Order to Show Cause. What is the
20 pleasure of the Commission?

21 COMMISSIONER CHANG: Mr. Chair.

22 CHAIRPERSON SCHEUER: Commissioner Chang.

23 COMMISSIONER CHANG: While I don't have a
24 question for Mr. Pierce, may I ask the other parties
25 the same question I asked Mr. Pierce. Whether they

1 would stipulate to a continued hearing on receiving
2 the Petitioners' plans?

3 CHAIRPERSON SCHEUER: Please proceed.

4 COMMISSIONER CHANG: Petitioner, would you
5 be willing to stipulate?

6 MR. SAKUMOTO: I think we would be willing
7 to consider it once we understood the terms of the
8 stipulation, and, you know, exactly what it means to
9 go forward. We would like to hear more and then I
10 think I would ask for some time to discuss it with my
11 client.

12 COMMISSIONER CHANG: As I understood it,
13 based upon, one, the Petitioners' original pleadings,
14 which were that the Motion to Dismiss is because it's
15 essentially moot. We are going to go back and
16 develop as we had originally proposed. And then
17 yesterday's hearing we received a modified plan, that
18 today was subsequently withdrawn.

19 So my understanding, my questioning with
20 Mr. Pierce was could we get an opportunity, or the
21 parties stipulate to continued hearing to receive the
22 Petitioners, your plans, and how it -- what are you
23 proposing to do and when?

24 CHAIRPERSON SCHEUER: Let me interject
25 here. I believe that the Chair -- I don't think the

1 parties need to stipulate. If this Commission
2 chooses to schedule this for evidentiary hearing, I
3 think we have the power to do so without stipulation,
4 but it might give some of our members certain comfort
5 if the parties stipulated to that.

6 COMMISSIONER CHANG: Yes, thank you. It
7 would give me much better comfort.

8 CHAIRPERSON SCHEUER: Have you received a
9 response from the Petitioner?

10 COMMISSIONER CHANG: No. Now that you know
11 at least what I understood the continued hearing to
12 be on --

13 MR. SAKUMOTO: So I would like time to
14 discuss that with my client.

15 CHAIRPERSON SCHEUER: Mr. Tabata?

16 MR. TABATA: I would like some time to
17 confer with co-counsel. In addition, we would like
18 an opportunity to respond to some of the Intervenor's'
19 legal arguments.

20 If we are not given that opportunity, we
21 would like to make objections on the record as to
22 what we would like to further discuss.

23 COMMISSIONER CHANG: County.

24 MR. HOPPER: I think that's consistent --

25 CHAIRPERSON SCHEUER: One second. I just

1 did not understand the last sentence from Mr. Tabata.

2 MR. TABATA: We are requesting an
3 opportunity to respond to Mr. Pierce's legal
4 arguments, as briefly as possible. I don't think it
5 will take more than five or ten minutes.

6 Secondly, if we are not going to be given
7 this opportunity, we would like to make an objection
8 on the record as to what he has said.

9 CHAIRPERSON SCHEUER: Thank you.

10 County, responding to Commissioner Chang's
11 question.

12 MR. HOPPER: I don't think we have an
13 objection to that process.

14 CHAIRPERSON SCHEUER: Thank you. Office of
15 Planning?

16 MS. APUNA: We wouldn't object to that
17 process either.

18 MR. PIERCE: Mr. Chair, when I gave -- when
19 I responded to this question before, I did so without
20 having an opportunity to consult with my clients, and
21 they have asked me to clarify our position. May I do
22 so?

23 CHAIRPERSON SCHEUER: Please.

24 MR. PIERCE: So first of all, I want to
25 preface this by saying that we're, of course, open to

1 any process, resolution process that the Commission
2 thinks would be helpful. I'll preface it with that.

3 Having said that, and this is also speaking
4 to Commissioner Cabral in terms of the refinement.
5 All three of my clients stand for what we can boil
6 down as three important concepts.

7 Robust community input, transparency in the
8 process, and adherence to the state and county land
9 use law.

10 That's always been our guiding light in
11 terms of how we have represented ourselves before the
12 Commission on this case.

13 What my clients want you to understand is
14 that they, back in February of 2018, initiated work
15 with extensive discussions with community that
16 involved Kihei Association, some of those meetings
17 going all the way back to 2012. We had as many as
18 200 people at the meetings. So there was a lot of
19 community folks there.

20 They also have consulted repeatedly with
21 Aha Moku Council as well as lineal descendants. And
22 in each one of those situations have gone through all
23 the different possibilities that can play out here.
24 They discussed all the pros and cons, including the
25 issue of reverter, which is one of the ones that the

1 Commissioners are concerned with, but also keeping at
2 the forefront some of the primary concepts of the
3 community you're interested in.

4 What was ultimately decided from those
5 meetings was that the Petitioners were unable to
6 present something that meets the needs of the
7 community. And so, therefore, the community has --
8 and this is the Intervenor based upon their robust
9 engagement with the community, they believe -- and
10 also received the community's support that reverter
11 back to agriculture was the best way to do this so
12 that we can start over with a clean slate, new
13 reports, that type of thing.

14 And this is more from me, but also was
15 clarified by my clients. We don't want to be
16 perceived as being somehow entrenched in a position
17 that's unreasonable. If I may --

18 CHAIRPERSON SCHEUER: Just to be honest,
19 I'm sort of lost a little bit on how you're
20 responding to Commissioner Chang's question.

21 MR. PIERCE: My understanding was would we
22 be willing to stipulate to something other than the
23 rule-making process. And the answer is --

24 CHAIRPERSON SCHEUER: Specifically, right,
25 one of our abilities is to schedule this motion made

1 by the Petitioner for an evidentiary hearing.

2 And the question from Commissioner Chang
3 is: Would you be willing to stipulate to that, even
4 though I said I don't believe that we need your
5 stipulation in order to schedule that?

6 MR. PIERCE: I may have misunderstood then.
7 I apologize.

8 So there is no longer a proposal to have
9 the parties continue to talk, but instead there would
10 be an evidentiary hearing?

11 CHAIRPERSON SCHEUER: Those two things are
12 not mutually exclusive, but the question -- let me
13 step back for all the parties' purposes and also
14 address the issue raised by Mr. Tabata.

15 Right now, Mr. Pierce, all you're being
16 asked is: Are you willing to stipulate -- knowing
17 the stipulation is not necessary -- to the fact that
18 one of the options in front of the Commission is to
19 schedule this motion for an evidentiary hearing
20 narrowly on that motion?

21 MR. PIERCE: On the Motion to Dismiss?

22 CHAIRPERSON SCHEUER: Correct.

23 MR. PIERCE: And we don't know -- it's not
24 being categorized as being part of Phase I or Phase
25 II, just an evidentiary motion?

1 CHAIRPERSON SCHEUER: It's a hearing on
2 that motion.

3 MR. PIERCE: I'm going to have to do the
4 same as Petitioners and check with my clients on
5 that.

6 CHAIRPERSON SCHEUER: Thank you. Briefly,
7 Commissioner Cabral.

8 VICE CHAIR CABRAL: I just want to thank
9 attorney Pierce for that explanation, because that
10 was more of what I was asking, not just the names of
11 the groups, but who are those people, since I'm not
12 from here I'm not familiar. So thank you very much
13 for the clarification.

14 CHAIRPERSON SCHEUER: Thank you.

15 Here's what I would like to request that we
16 do. There was a request from Mr. Tabata to respond
17 to some of the arguments. What I'm willing to do
18 with the time that we have is to allow each of the
19 parties no more than five minutes to make any final
20 comments. You don't have to use the five minutes.

21 After that, this Commission will proceed to
22 decision-making on the motion that is before us, the
23 Motion to Dismiss. And the options we have are to
24 grant, to deny, to schedule for further evidentiary
25 hearing, and not necessarily exclusive of that, to

1 enter into some sort of stipulation that would allow
2 the Chair to hold a settlement conference on these
3 matters.

4 So are the parties ready to proceed in that
5 manner?

6 MR. TABATA: Yes, thank you.

7 CHAIRPERSON SCHEUER: I would normally start
8 with the Petitioner.

9 MS. CATALDO: Thank you, Chair. I wanted
10 to address the issue of standard of review.
11 Commissioner Okuda raised that issue whether there
12 was a standard of review for this Motion to Dismiss.

13 Mr. Pierce went on at some length, I
14 believe, talking I think in terms of a Motion to
15 Dismiss or Motion for Summary Judgment standard.

16 At the end of that, he conceded that there
17 was no case that set forth any standard. And so to
18 the extent that Mr. Pierce left the Commission with
19 the understanding that they had to indulge any doubt
20 on the Motion to Dismiss in favor of Intervenors, I
21 would want to stress that that is an incorrect
22 statement of the law.

23 I also wanted to address very briefly the
24 365-day rule. Pursuant to the OSC order, this
25 Commission made the hearing conditioned on HRS

1 Chapter 91 and HAR subsections 7 and 9, which
2 includes the 365-day obligation.

3 The Commission and the parties understood
4 there would be Findings of Fact and Conclusions of
5 Law. The Commission at that time requested that they
6 be submitted. The parties submitted proposed
7 findings and conclusions. And so it has always been
8 an understanding that the Commission was required to
9 issue its findings and conclusions after Phase I.

10 There is no basis to argue that that
11 requirement can be tolled. Under 15-15-74 there are
12 only two instances that can deviate from the 365;
13 court action, or this Commission's agreement for a
14 very brief limited extension of 90 days, neither of
15 which existed in this case.

16 Petitioners are unable to confer in any way
17 through a request for a Motion to Stay, or this
18 Commission's issuance of a Motion to Stay. There is
19 no way we can relieve you of your obligation to honor
20 the 365-day rule. Thank you.

21 CHAIRPERSON SCHEUER: Thank you. Mr.
22 Tabata.

23 MR. TABATA: Thank you.

24 The 365-day requirement applies from the
25 beginning of the issuance of the OSC. Now, there's

1 been an argument that if there is no substantial
2 commencement, then the procedure of 205-4 no longer
3 applies, and therefore the 365-day requirement does
4 not apply.

5 That argument is logically flawed, because
6 if you were to negate requirements of 205-4, you
7 would also negate your powers to conduct an Order to
8 Show cause. It is a self-defeating dead-end
9 argument.

10 In addition to the Order to Show Cause,
11 there is the question of how many votes this
12 Commission is going to require to pass this motion.
13 Is it five or six?

14 If it's six, then those six votes arise
15 from 205-4(g). 205-4(g) contains the 365-day
16 requirement. It contains the Order to Show Cause
17 power that you possess. It also contains the
18 two-thirds vote requirement.

19 I believe it's 205-4(h) that contains the
20 six vote requirement, which is equivalent to the
21 two-third vote requirement.

22 So these requirements survive even if --
23 and we are not admitting -- but even if you find that
24 there is no substantial commencement, the 365-day
25 requirement time limit will survive that process, and

1 does apply in either event. And that's why Hawaii
2 Supreme Court stated that the time for the running of
3 the 365 days starts upon the issuance of the Order to
4 Show Cause.

5 Real quick. Tolling of statute of
6 limitation, I join in my co-counsel's argument. Also
7 want to add that Land Use Commission does not have
8 equitable power to toll the statute of limitation.
9 There is no equitable power granted to the Land Use
10 Commission. Thank you.

11 CHAIRPERSON SCHEUER: Thank you, Mr.
12 Tabata.

13 Mr. Hopper, does the county have anything?

14 MR. HOPPER: Just briefly. We reiterate
15 the position that we have taken on the motion. We
16 think that the Commission should be aware of what is
17 being proposed and confirm that that is in compliance
18 with the Decision and Order in 1995 before
19 proceeding. And the county would want that
20 information, as a matter of record, and thinks that
21 is important.

22 So I think that's the only (indecipherable)
23 -- from our moving papers and our argument, but
24 wanted to reiterate that is still our position.

25 CHAIRPERSON SCHEUER: Ms. Apuna.

1 MS. APUNA: I think OP's position on the
2 365-day, what we understand it to be, is that unless
3 the Commission finds that there is substantial
4 commencement, then the 365 would apply; and the
5 Commission has not yet determined substantial
6 commencement.

7 So we don't think that it has -- we think
8 it's tolled. We don't think that -- we don't think
9 it applies yet until the Commission determines
10 substantial commencement, then it would apply. If
11 the Commission found there was substantial
12 commencement, then it would have -- the OSC would
13 have had to be completed within 365 days and
14 reversion.

15 CHAIRPERSON SCHEUER: Thank you. Mr.
16 Pierce.

17 MR. PIERCE: The only thing I'm going to
18 add, not going to respond further on the 365-day rule
19 except that everything that Mr. Tabata and
20 Petitioners have said is absolutely inconsistent with
21 the clear simple language in Aina Le'a.

22 But what I really want to point out is what
23 the Petitioner just said with respect to the Findings
24 of Fact. And this is in our reply memo with respect
25 to our motion to go forward and conclude the

1 hearings.

2 And we cited specifically to the record,
3 and to the fact that we asked for back in 2012 or
4 2013, we asked that a hearing be set -- this is a
5 quote -- that a hearing be set at the earliest
6 practicable time to render written findings with
7 respect to Phase I.

8 And the Petitioners' responded as follows:
9 Intervenors essentially seek to compel the Commission
10 to enter Findings of Fact and Conclusions of Law as
11 to Phase I.

12 Then they go on and say, well, whether or
13 not you do that is up to the Commission, but the
14 Commission needs to look at this in light of the fact
15 that there is a pending motion to stay.

16 In other words, the Petitioners were
17 opposed to us entering findings of facts at that
18 point in time. Certainly they should not now be in a
19 position to use that as a sword against the
20 Intervenors.

21 CHAIRPERSON SCHEUER: Thank you, Mr.
22 Pierce.

23 Commissioners, we can now entertain motions
24 related to the motion before us, which is the Motion
25 to Dismiss the Order to Show Cause.

1 As I stated, I think we have at least four
2 options in front of us, some of which are mutually
3 exclusive, some of which are not.

4 We could grant the motion; we could deny
5 the motion, clearly those two are exclusive.

6 We could schedule this motion for a further
7 evidentiary hearing, if you so chose. You could also
8 take some action regarding trying to empower the
9 chairperson to hold a settlement conference on these
10 matters.

11 The last thing I'll say before anybody
12 makes a motion is that I'm fond of this radio show
13 I've been listening to that's on personal finance,
14 and I would say about five to ten percent of the time
15 somebody calls in with a question that's phrased as a
16 financial question, and the guy ends up saying, you
17 don't have a money problem, you have a marriage
18 problem.

19 So to a certain degree it appears to me
20 that, you know, all these parties in front of us are
21 coming to us for a settlement within these sort of --
22 for resolution of these issues within our framework
23 when your fundamental issues are relationship issues.

24 Commissioner Ohigashi.

25 COMMISSIONER OHIGASHI: I'm going to move

1 that we set an evidentiary hearing on the issue -- on
2 the issues presented in the Motion to Dismiss. The
3 key in my mind -- well, rather than explain why.

4 CHAIRPERSON SCHEUER: Why don't you -- is
5 that the full motion?

6 COMMISSIONER OHIGASHI: That's the full
7 motion at this time to set evidentiary hearing.

8 CHAIRPERSON SCHEUER: If there is a second,
9 then I'll allow you to speak to the motion.

10 COMMISSIONER WONG: Second.

11 CHAIRPERSON SCHEUER: Motion made by
12 Commissioner Ohigashi to schedule this matter for a
13 hearing, evidentiary hearing, and it was seconded by
14 Commissioner Wong. Did I capture that correctly?

15 COMMISSIONER OHIGASHI: Yes.

16 CHAIRPERSON SCHEUER: Do you want to speak
17 to the motion?

18 COMMISSIONER OHIGASHI: I would like to
19 speak to the motion because it appears there's
20 several statements regarding the three conditions
21 that are contained in Petitioners' findings of his
22 Motion to Dismiss.

23 When I asked the Intervenor whether or not
24 these actions are necessarily -- he agreed with them,
25 or if he disagreed with them. Absent what I got --

1 from the long answers that I got was that essentially
2 they don't agree with what is being represented in
3 that area.

4 And I think an evidentiary hearing focusing
5 on what, if there -- what the proposal may be or what
6 the violations will be; or if it has been corrected,
7 or if they can corrected would help a lot.

8 We would have somebody on the record, and
9 I'm guessing from the Petitioners' side to indicate
10 what exactly, and how exactly their proposed
11 development will conform with the existing D&O. And
12 the questions would be subject to cross-examination
13 by the parties.

14 So I think that would go a long way to help
15 the Commission to make a determination in this
16 matter.

17 CHAIRPERSON SCHEUER: Thank you,
18 Commissioner Ohigashi.

19 Does anybody else want to speak to this
20 motion? Commissioner Okuda.

21 COMMISSIONER OKUDA: Thank you, Mr. Chair.
22 I'm inclined to vote in favor of the
23 motion, and let me state the reasons why.

24 Cases should be decided on its merits. If
25 we took the strict, narrow application of a Motion to

1 Dismiss, under Rule 12(b)(6) of the Rules of Civil
2 Procedure, recognizing that the rules don't
3 necessarily apply in this proceeding, we would have
4 to assume that all the statements that the
5 Intervenor's have made are true and correct. And that
6 would be basically automatically denying the Motion
7 to Dismiss.

8 So to give everyone a fair shot at
9 presenting their complete record and facts, and so
10 that we have it very clear on the record what
11 everybody's position is, I believe that an
12 evidentiary hearing is the most appropriate way of
13 doing it.

14 If I can also say one thing with the
15 understanding that my following statement is not to
16 prejudice any of the results of this case. And I
17 don't believe any of the other Commissioners, by
18 giving statements that they did, intend to prejudice
19 what they intend to do.

20 Because I found everybody here to be very
21 open minded as far as how they view the evidence, but
22 just to balance a little bit off. I recognize the
23 benefit that the Intervenor's bring to a proceeding
24 like this. I believe that the system, even though we
25 all frankly would like to see things worked out and

1 not have litigation, but sometimes it's important
2 that issues be fleshed out by people who are willing
3 to take their time, sometimes their money, and to sit
4 in and present issues and evidence and things of that
5 sort.

6 So I think all parties, including the
7 Intervenors, should be commended based on their
8 willingness to participate in important
9 decision-making.

10 I firmly believe that the more admissible
11 evidence that we have, and the more complete record
12 that we have makes for a better decision, and frankly
13 for a better democracy.

14 For those reasons and other good reasons in
15 the record, I would be voting in favor of this
16 motion.

17 CHAIRPERSON SCHEUER: Thank you,
18 Commissioner Okuda. Is there further discussion on
19 the motion?

20 Seeing none, Mr. Orodenker, would you
21 please poll the Commission?

22 EXECUTIVE OFFICER: Thank you, Mr. Chair.

23 The motion is to schedule an evidentiary
24 hearing on issues presented in the Motion to Dismiss.

25 Commissioner Ohigashi?

1 COMMISSIONER OHIGASHI: Aye.

2 EXECUTIVE OFFICER: Commissioner Wong?

3 COMMISSIONER WONG: Aye.

4 EXECUTIVE OFFICER: Commissioner Chang?

5 COMMISSIONER CHANG: Aye.

6 EXECUTIVE OFFICER: Commissioner Okuda?

7 COMMISSIONER OKUDA: Yes.

8 EXECUTIVE OFFICER: Commissioner Cabral?

9 VICE CHAIR CABRAL: Yes.

10 EXECUTIVE OFFICER: Commissioner Aczon?

11 COMMISSIONER ACZON: Yes.

12 EXECUTIVE OFFICER: Commissioner Mahi?

13 VICE CHAIR MAHI: Aye.

14 EXECUTIVE OFFICER: Chair Scheuer?

15 CHAIRPERSON SCHEUER: Aye.

16 EXECUTIVE OFFICER: Thank you. Motion
17 passes unanimously.

18 CHAIRPERSON SCHEUER: Commissioner
19 Ohigashi.

20 COMMISSIONER OHIGASHI: I would like to
21 make another motion.

22 I would like to move to grant the authority
23 to the Chair to enter into settlement negotiations or
24 to enter into settlement conference with the parties
25 regarding the Motion to Dismiss, and in addition to

1 that, this motion is subject to the parties agreeing,
2 stipulating.

3 The Chair would not be foreclosed from
4 participating in any hearings, or subsequent
5 hearings, or any kind of evidentiary hearing after
6 this by participating in this settlement conference.

7 And the third part of the motion is that it
8 would give the authority of the Chair to actually set
9 the time for the proposed evidentiary hearing in this
10 matter.

11 CHAIRPERSON SCHEUER: A motion has been
12 made by Commissioner Ohigashi with three parts to it,
13 and it is being --

14 VICE CHAIR CABRAL: I will go ahead and
15 second that motion.

16 CHAIRPERSON SCHEUER: It is seconded by
17 Commissioner Cabral.

18 Does the movant or seconder want to speak
19 to the motion before we open up to discussion?

20 COMMISSIONER OHIGASHI: No, I think it's --

21 CHAIRPERSON SCHEUER: Is there any further,
22 or is there any discussion on this motion by the
23 Commission? Commissioner Chang.

24 COMMISSIONER CHANG: Thank you.

25 I guess I just want clarification from

1 Commissioner Ohigashi. I really do appreciate the
2 opportunity if the parties are willing to come
3 together, but that is not -- this motion is separate
4 and apart from the motion that was just passed to
5 conduct an evidentiary hearing. That it is dependent
6 upon the parties agreeing to enter into settlement
7 conference.

8 CHAIRPERSON SCHEUER: Mr. Ohigashi.

9 COMMISSIONER OHIGASHI: I believe that the
10 motion is clear. I just want to make it clear.
11 Settlement conference is not required by anybody to
12 participate, that's my understanding, we're just
13 authorizing the Chair to act as settlement conference
14 with the understanding that if he should -- they will
15 have to agree that he would be able to participate in
16 any further evidentiary hearing in this matter.

17 If he does participate -- even if he
18 doesn't have a settlement conference, or he's not --
19 the parties disagree, don't want to become part of
20 the settlement conference, do a settlement
21 conference, the Chair is still empowered to set the
22 time and date of the evidentiary hearing along with
23 staff.

24 COMMISSIONER CHANG: That's clear. I
25 thought it was combining the two.

1 CHAIRPERSON SCHEUER: Commissioner Okuda.

2 COMMISSIONER OKUDA: If I may ask Mr.

3 Ohigashi one additional clarification question?

4 CHAIRPERSON SCHEUER: You may.

5 COMMISSIONER OKUDA: Thank you.

6 So in other words, Commissioner, the
7 parties are not forced to engage in settlement
8 discussions involving the Chair, but if they do, the
9 Chair would act as a facilitator and this is strictly
10 voluntary; but if they do engage and take advantage
11 of the Chair being sort of like a facilitator in
12 these discussions, it's with the understanding that
13 whoever participates waives any objections that they
14 may have to the fact that the Chair is acting as
15 facilitator.

16 COMMISSIONER OHIGASHI: That's correct.
17 And that's why I'm asking the Land Use Commission to
18 give the Chair the authority to do so.

19 COMMISSIONER OKUDA: Thank you, I
20 understand.

21 And based on that, it's my inclination to
22 vote in favor of the motion because it's simply
23 voluntary. Nobody is being forced to do this. And
24 if people participate, it's at least with the implied
25 stipulation that they agree with this fact.

1 And I would like to also state for the
2 record that I don't believe any Commissioner is going
3 to take any negative, or make any negative conclusion
4 if any one or more people decide to decline the
5 invitation to participate.

6 Because there are just some cases where
7 people have to stand their ground and advocate their
8 position. And if there's a decision that settlement
9 discussions are not worthwhile, for whatever reason,
10 I believe that the Commission respects the decisions
11 and the rights the people have.

12 CHAIRPERSON SCHEUER: Thank you,
13 Commissioner Okuda.

14 Commissioner Cabral.

15 VICE CHAIR CABRAL: I wanted to also speak.
16 I was willing to second that motion because, as
17 stated by my more elegant legal lawyers on the
18 Commission, but the hope is that perhaps some common
19 ground could be found because I do hear some of that
20 in the group present here, that there is some effort
21 to perhaps things can be worked out for what I would
22 like to continuously think of what is best for the
23 community.

24 So I seconded it, and I will support the
25 motion in the hope that things might make some

1 progress in some kind of positive manner. Thank you.

2 CHAIRPERSON SCHEUER: Is there further
3 discussion on this?

4 I'll note for the record that I'm willing
5 to do that on a voluntary basis if the parties were
6 so inclined. Commissioner Chang.

7 COMMISSIONER CHANG: My final comment is
8 that in whichever way this proceeds, evidentiary
9 hearing or settlement discussion, that it timely
10 proceeds. That we are moving -- that whatever the
11 schedule is worked out, that 25 years has passed
12 since the original decision was granted. We have had
13 numerous hearings on this.

14 So my request is that there would be a
15 timely schedule for this matter, that it be discussed
16 with the parties, and that either if there's a
17 continued hearing, a quick schedule on that, the
18 scope of that hearing is clearly defined.

19 If it's a settlement discussion, that it be
20 timely scheduled, clear parameters upon that. Thank
21 you.

22 CHAIRPERSON SCHEUER: To that point I'll
23 note that the number one song of 1995 was Gangsters
24 Paradise. It's been awhile.

25 Is there any further discussion on the

1 motion? If not, Mr. Orodenger, ask you to poll the
2 Commission.

3 EXECUTIVE OFFICER: Thank you, Mr. Chair.
4 I don't remember that song.

5 The motion is to grant the authority to the
6 Chair to enter into a settlement conference with the
7 parties with regard to the Motion to Dismiss, subject
8 to the parties' stipulation with regard to the
9 Chair's further participation, and grant the
10 authority to the Chair to schedule the evidentiary
11 hearing.

12 Commissioner Ohigashi?

13 COMMISSIONER OHIGASHI: Aye.

14 EXECUTIVE OFFICER: Commissioner Cabral?

15 CHAIRPERSON SCHEUER: He's still trying to
16 remember the tune to Gangsters Paradise.

17 EXECUTIVE OFFICER: Commissioner Cabral?

18 VICE CHAIR CABRAL: Yes.

19 EXECUTIVE OFFICER: Commissioner Mahi.

20 VICE CHAIR MAHI: Yes.

21 EXECUTIVE OFFICER: Commissioner Aczon?

22 COMMISSIONER ACZON: Aye.

23 EXECUTIVE OFFICER: Commissioner Okuda?

24 COMMISSIONER OKUDA: Yes.

25 EXECUTIVE OFFICER: Chair Scheuer?

1 CHAIRPERSON SCHEUER: Aye.

2 EXECUTIVE OFFICER: Mr. Chair, the motion
3 passes unanimously.

4 CHAIRPERSON SCHEUER: Because of these two
5 motions, the next two motions are necessarily in
6 abeyance until such time as either something comes
7 out of the settlement, or we hold the evidentiary
8 hearing and make a ruling on the motion before us.

9 With that we are adjourned.

10 (The proceedings adjourned at 12:11 p.m.)

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CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on February 21, 2019, at 9:00 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 21st day of February, 2019, in Honolulu, Hawaii.

/s/ Jean Marie McManus

JEAN MARIE McMANUS, CSR #156