

STATE OF HAWAII

LAND USE COMMISSION

June 10, 2019

Commencing at 9:30 a.m.

Natural Energy Laboratory of Hawai'i Authority
73-790 Makako Bay Drive
Kailua-Kona, Hawai'i 96740-2637

AGENDA

I. Call to Order

II. Adoption of Minutes

III. Tentative Meeting Schedule

IV. ACTION

A19-807 TRUSTEES OF THE ESTATE OF BERNICE
PAUAHI BISHOP dba KAMEHAMEHA SCHOOLS (HAWAI'I)

* Consider Petitioner's Motion Requesting the
Land Use Commission 1) to be the Accepting
Authority for an Environmental Statement; 2)
Determine that the Proposed Action Warrants
the preparation of an Environmental Impact
Statement, to be initiated with the
preparation of an Environmental Impact
Statement Preparation Notice

V. ACTION

A06-767 WAIKOLOA MAUKA LLC, (HAWAI'I)

* Discussion and/or Action Regarding Decision
and Order for Order to Show Cause Why Tax
Map Key No. (3)6-8-002:016(portion) Should
Not Revert to Its Former Land Use
Classification or be Changed to a More
Appropriate Classification

VI. RECESS

BEFORE: Jean Marie McManus, CSR #156

1 APPEARANCES:

2 COMMISSIONERS:

3 JONATHAN SCHEUER, Chairperson

NANCY CABRAL, Vice Chair

4 AARON MAHI, Vice Chair

GARY OKUDA

5 EDMUND ACZON

LEE OHIGASHI

6 ARNOLD WONG

7 RANDALL S. NISHIYAMA, ESQ.

Deputy Attorney General

8 STAFF:

9 DANIEL ORODENKER, Executive Officer

RILEY K. HAKODA, Chief Clerk/Planner

10 SCOTT A.K. DERRICKSON, AICP

BERT SARUWATARI, Planner

11
12 DAWN APUNA, ESQ.

Deputy Attorney General

13 Rodney Funakoshi, Department of Planning

State of Hawai'i Office of Planning

14 RON KIM, ESQ.

15 Deputy Corporation Counsel

DUANE KANUHA, Deputy Director

16 County of Hawai'i Planning Department

17 ANDREA K. USHIJIMA, ESQ.

18 For A19-807

19 STEVEN LIM, ESQ.

20 For A06-767 Waikoloa Mauka

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1 CHAIRPERSON SCHEUER: Aloha mai kakou.
2 Good morning.

3 This is the July 10th to 11th, 2019 Land
4 Use Commission.

5 Our first order of business is the adoption
6 of the June 27th minutes. Are there any comments or
7 corrections on the minutes? Seeing none, is there a
8 motion to adopt?

9 VICE CHAIR MAHI: I move.

10 CHAIRPERSON SCHEUER: Moved by Commissioner
11 Mahi.

12 COMMISSIONER OHIGASHI: Second.

13 CHAIRPERSON SCHEUER: Seconded by
14 Commissioner Ohigashi. Any discussion on the motion?
15 Hearing none, the minutes are unanimously adopted.

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

18 EXECUTIVE OFFICER: Thank you, Mr. Chair.

19 Tomorrow we will be on Oahu at the Honolulu
20 International Airport for the Charitable Trust
21 Foundation.

22 On the 25th of July, tentative schedule to
23 be on Kaua'i for the Kealia matter on the EIS.

24 And on August 14th and 15th we have
25 Commissioner training session at He'eia State Park on

1 Oahu.

2 August 28th, scheduled to take the Waiawa
3 matter in Honolulu and Poma'ikai Partners, IAL also
4 on Oahu.

5 On the 29th on Kaua'i for the Hokua docket.

6 September 11th, 12th and 13th HCPO.

7 On the 13th we are holding a tentative
8 hearing on C. Brewer and the McKenna matter status
9 report.

10 And in October we tentatively have
11 scheduled a meeting on the 9th, WGSL, and October
12 23rd and April 24th Hawai'i Memorial Park matter on
13 Oahu.

14 CHAIRPERSON SCHEUER: Thank you, Mr.
15 Orodénker.

16 Commissioners, any questions for Dan?

17 A19-807

18 Our next agenda item action meeting on
19 Docket A19-807 Trustees of Bishop Estate dba
20 Kamehameha Schools' Motion Requesting the Land Use
21 Commission:

22 1) to be the accepting Authority for an
23 Environmental Statement;

24 2) Determine that the Proposed Action
25 Warrants the preparation of an Environmental Impact

1 Statement, to be initiated with the preparation of an
2 Environmental Impact Statement Preparation Notice.

3 Will the parties please identify themselves
4 for the record?

5 MS. USHIJIMA: Thank you for that
6 instruction.

7 Good morning, Commissioners. My name is
8 Andrea Ushijima representing Kamehameha Schools.

9 MR. KIM: Good morning, Chairperson, Deputy
10 Corporation Counsel Ron Kim representing the County
11 of Hawaii; and with me is Deputy Director of Planning
12 Department Duane Kanuha.

13 MS. APUNA: Good morning, Deputy Attorney
14 General Dawn Apuna on behalf of State Office of
15 Planning. Here with me is Rodney Funakoshi.

16 CHAIRPERSON SCHEUER: Let me update the
17 record.

18 On June 21, 2019, the Commission received
19 Petitioner's Petition for a District Boundary
20 Amendment and Petitioner's Motion Requesting the Land
21 Use Commission:

22 1) to be the Accepting Authority for an
23 Environmental Statement;

24 2) Determine that the proposed Action
25 Warrants the preparation of an Environmental Impact

1 Statement to be initiated with the preparation of an
2 Environmental Impact Statement Preparation Notice,
3 with a \$5000 filing fee check.

4 On July 1, 2019, the Commission mailed an
5 agenda notice letter to the Parties, Statewide, Oahu
6 and the Hawaii County mailing and emailing lists.

7 On July 3, 2019, the Commission received
8 OP's response to Petitioner's Motion and Petitioner's
9 Errata to its Petition and Exhibit 13.

10 Let me briefly describe our procedure for
11 today on this docket.

12 First, I will give opportunity for the
13 Petitioner to comment on the Commission's Policy
14 governing reimbursement of hearing expenses.

15 Secondly, I will then call for those
16 individuals desiring to provide public testimony to
17 identify themselves. Just by looking around the
18 room, I don't believe anyone is here desiring to give
19 public testimony. If there is, we will provide that
20 opportunity.

21 After that, I will close public testimony
22 and the Petitioner can make its presentation.

23 After that we can receive any comments from
24 the County of Hawai'i Planning Department and Office
25 of Planning. Then we will conduct our deliberations.

1 From time to time I will notify you that we
2 will take breaks during these presentations.

3 Any questions on our procedures today?

4 If you will actually orally respond, then
5 the transcript will reflect that.

6 MS. USHIJIMA: No questions from the
7 Petitioner.

8 MR. KIM: No questions from the County.

9 MS. APUNA: No questions.

10 CHAIRPERSON SCHEUER: Thank you.

11 Ms. Ushijima, have you reviewed the Hawai'i
12 Administrative Rules 15-15-45.1 with regards to
13 reimbursement of hearing expenses?

14 MS. USHIJIMA: Yes, we are familiar with
15 it.

16 CHAIRPERSON SCHEUER: And you're going to
17 comply with that policy?

18 MS. USHIJIMA: Correct.

19 CHAIRPERSON SCHEUER: Final check, is there
20 anybody in the audience who desires to give public
21 testimony? Seeing none, Petitioner, you can make
22 your presentation.

23 MS. USHIJIMA: Thank you.

24 Kamehameha Schools filed its Petition for
25 Land Use District Boundary Amendment to reclassify

1 lands that are currently designated in the State Land
2 Use Conservation District to redesignate those lands
3 into the State Land Use Agricultural District.

4 The lands are located in Puna on this
5 island. And as you're aware, reclassification of
6 Conservation Land triggers a Chapter 343
7 Environmental Review Process.

8 Therefore, we submitted our Petition, and
9 we acknowledge it was incomplete, but our
10 understanding was it was a necessary step in order
11 for us to initiate this motion, which is to designate
12 the LUC as the accepting authority, and also to
13 request that the Applicant can go directly to an
14 EISPN and EIS.

15 We received your letter dated July 5th,
16 2019, with your comments. And once the Environmental
17 Review Process is complete, we will amend our
18 Petition to address your comments, and also amend the
19 Petition to be fully responsive to the requirements
20 under the rule.

21 With respect to our motion to designate the
22 Land Use Commission as the accepting authority, we
23 feel that is appropriate because the Chapter 343 is
24 what triggers this action before this Commission.

25 And as is evidenced by the Petition

1 requirements, a lot of the requirements are based on
2 the substance of the EIS, and a lot of the analysis
3 that helps to inform the Commission's decision is
4 based on the content of the EIS.

5 Therefore, we request that the LUC be the
6 accepting authority for the EA or EIS application and
7 for this project.

8 With respect to our request to go directly
9 to an EISPN and EIS, as you know, the Environmental
10 Review Process traditionally begins with an
11 Environmental Assessment to determine whether there
12 is any significant impact; and if there is, then an
13 EIS will be prepared.

14 However, the law also provides that if an
15 agency determines through its judgment and experience
16 that the project is likely to have significant
17 impact, then the agency can authorize the applicant
18 to bypass the EA step and go directly to the EIS.

19 Section 11-200-12(b) of the Hawai'i
20 Administrative Rules sets forth the significant
21 criteria used to determine whether the project will
22 likely have significant impact.

23 Under the rule, an action shall be
24 determined to have a significant impact on the
25 environment if it may -- and there are 13 different

1 criteria, but the two that we think are especially
2 applicable here are:

3 1) that there's a substantial affect on
4 rare, threatened or endangered species, and;

5 2) the project is likely to suffer damage
6 by it being located in an environmentally sensitive
7 area such as geologically hazardous area.

8 So I think it was pretty evident last year
9 that the Kilauea eruption was pretty disruptive in
10 the Puna community, particularly to the Leilani
11 Estate Subdivision which is adjacent to the Petition
12 Area.

13 On the other factor, the rare, threatened
14 and endangered species, there was a prior biological
15 study performed on the larger land in which the
16 Petition Area is situated.

17 And that biological study, although it was
18 pretty high level and didn't specifically distinguish
19 which lands were the Petition Area lands and which
20 were the rest of the land, that study did find
21 endangered plant species and other native plants.

22 The area is also possibly a nesting ground
23 for certain endangered or threatened birds.

24 So for these reasons, we respectfully
25 request that this Commission:

1 1) Agree to be the accepting authority and
2 approving agency for the Environmental Review
3 Process;

4 2) That the Commission in its judgment and
5 experience authorize the Petitioner to forego the
6 preparation of an environmental assessment, and
7 instead directly proceed to the EISPN and EIS.

8 We know that the Commission has granted
9 similar motions on two other pending dockets
10 involving bonding amendments, and we respectfully
11 request the same on this docket. Thank you.

12 CHAIRPERSON SCHEUER: Thank you.

13 Commissioners, any questions for the
14 Petitioner?

15 Hawaii County, Mr. Kim, do you have any
16 comments on behalf of the Hawaii County Department of
17 Planning?

18 MR. KIM: The Hawaii County Department of
19 Planning has no comments and no objections to the
20 request.

21 CHAIRPERSON SCHEUER: Thank you.

22 Ms. Apuna for the Office of Planning.

23 MS. APUNA: Thank you. Office of Planning
24 has the same, no objection to Petitioner's motion.

25 CHAIRPERSON SCHEUER: Commissioners, what

1 is your pleasure on this matter?

2 If not pleasure, what are you willing to
3 do?

4 Brief recess.

5 (Recess taken.)

6 CHAIRPERSON SCHEUER: We're back on the
7 record.

8 Ms. Cabral, and I apologize to everybody,
9 this is late, but I believe you wish to make a
10 disclosure on this docket.

11 VICE CHAIR CABRAL: I wanted to disclose --
12 although I don't think it's material to the subject
13 matter at hand today -- that I have had business
14 dealings with your operator of that quarry, Stanford,
15 and so I just wanted to let you know that he owns a
16 lot in one of my subdivisions.

17 CHAIRPERSON SCHEUER: Do you believe that
18 you can act -- first of all, you're clarifying you
19 have no financial benefit from any decisions we make
20 regarding this?

21 VICE CHAIR CABRAL: No, none

22 CHAIRPERSON SCHEUER: And you are able to
23 be fair and impartial in deliberations on this?

24 VICE CHAIR CABRAL: Yes.

25 CHAIRPERSON SCHEUER: Are there any

1 objections to Ms. Cabral's participation by the
2 Petitioner?

3 MS. USHIJIMA: No objection.

4 MR. KIM: No objection.

5 MS. APUNA: No objection.

6 CHAIRPERSON SCHEUER: We are at the point
7 where someone may wish to make a motion.

8 Commissioner aczon: (Indecipherable).

9 COURT REPORTER: I'm sorry, I didn't hear
10 that.

11 CHAIRPERSON SCHEUER: Mr. Aczon will defer
12 to the Hawai'i Island Commissioner to make the
13 motion.

14 VICE CHAIR CABRAL: I would like to go
15 ahead -- and I know there is better wording in my
16 notes here -- I would like to go ahead and accept the
17 request to have the Land Use Commission be the
18 accepting party for the Environmental Impact
19 Statement; and furthermore, that we would allow then
20 the Commission Chair to sign any order on this matter
21 on behalf of our Commission -- yes, and to move
22 directly to an EIS, Environmental Impact Statement.

23 CHAIRPERSON SCHEUER: A motion has been
24 made by Commissioner Cabral. Is there a second?

25 VICE CHAIR MAHI: Second.

1 CHAIRPERSON SCHEUER: Seconded by
2 Commissioner Mahi. Is there any deliberation on the
3 motion, Commissioners? Seeing none, Mr. Orodenker,
4 please poll the Commission.

5 EXECUTIVE OFFICER: Thank you, Mr. Chair.
6 The motion is to grant the motion for the LUC to be
7 the accepting authority for an EIS, and to
8 directly -- to allow the Petitioner to directly draft
9 the Environmental Impact statement.

10 Commissioner Cabral?

11 VICE CHAIR CABRAL: Yes

12 EXECUTIVE OFFICER: Commissioner Mahi?

13 VICE CHAIR MAHI: Aye.

14 EXECUTIVE OFFICER: Commissioner Aczon?

15 COMMISSIONER ACZON: Yes.

16 EXECUTIVE OFFICER: Commissioner Ohigashi?

17 COMMISSIONER OHIGASHI: Yes.

18 EXECUTIVE OFFICER: Commissioner Okuda?

19 COMMISSIONER OKUDA: Yes.

20 EXECUTIVE OFFICER: Commissioner Wong?

21 COMMISSIONER WONG: Yes.

22 EXECUTIVE OFFICER: Commissioner Giovanni
23 and Commissioner Chang are absent.

24 Chair Scheuer?

25 CHAIRPERSON SCHEUER: Aye.

1 EXECUTIVE OFFICER: Thank you, Mr. Chair,
2 the motion passes unanimously.

3 CHAIRPERSON SCHEUER: We will take a brief
4 recess while the Commission gets ready for the next
5 Docket on A06-767 Waikoloa Mauka.

6 (Recess taken.)

7 CHAIRPERSON SCHEUER: We are back on the
8 record.

9 A06-767 WAIKOLOA MAUKA

10 Next agenda item is an action meeting on
11 Docket A06-767 Waikoloa Mauka to Discuss and/or Act
12 Regarding a Decision and Order for Order to Show
13 Cause Why Tax Map Key No. (3)6-8-002:016 (portion)
14 Should Not Revert to its Former Land Use
15 Classification or be Changed to a More Appropriate
16 Classification.

17 Will the Parties please identify themselves
18 for the record?

19 MR. LIM: Good morning, Mr. Chairman,
20 members of the Commission, Steven Lim of Carlsmith
21 Ball, representing the Successor Petitioner Waikoloa
22 Highlands, Inc.

23 MR. KIM: Good morning, Chairperson,
24 members of the Commission, Deputy Corporation Counsel
25 Ron Kim representing County of Hawaii, and with me is

1 Deputy Director for the County of Hawai'i Planning
2 Department.

3 MS. APUNA: Good morning, Deputy Attorney
4 General Dawn Apuna on behalf of State Office of
5 Planning.

6 CHAIRPERSON SCHEUER: Let me update the
7 record on this docket.

8 The Commission met in Kailua-Kona, Hawai'i
9 on May 7, 2018. At that meeting, prior to voting,
10 all the Commissioners present (Commissioner Aczon was
11 absent and excused, and there were eight seated
12 Commissioners at that time) affirmed that they had
13 reviewed the record and transcripts for this docket
14 and they voted that:

15 1. Mr. Lim shall provide the LUC a written
16 statement of the issues he raised in his statements
17 at the hearing held on May 7, 2019. The statement
18 shall include appropriate legal citations to
19 statutes, administrative rules, and court decisions.
20 The written statement shall be due to the LUC and
21 copies provided to and served upon the County and the
22 Office of Planning by close of business (4:30 p.m.)
23 on Friday May 10.

24 2. The Office of Planning and the County
25 will have until close of business (4:30 p.m.) on

1 Friday May 17 to deliver to the LUC and serve on the
2 other parties comments and responses to Mr. Lim's
3 written statement.

4 3. Mr. Lim will have until close of
5 business (4:30 p.m.) on Monday May 20 to deliver to
6 the LUC and serve on the Office of Planning and the
7 County responses to the Office of Planning and/or
8 County comments.

9 The Commission voted 7-0 unanimously in
10 favor of this motion.

11 On May 9, 2019, the Commission received
12 Petitioner's Memorandum of Law Regarding the
13 Requirement for Issuance of Proposed Findings of
14 Fact, Conclusions of Law, and Decision and Order.

15 On May 10, 2019, the Commission mailed a
16 collection notice for Court Reporter fees to
17 Petitioner's attorney.

18 On May 21, 2019, the Commission received
19 OP's Response to Petitioner.

20 On May 22, 2019, the Commission received
21 WHI's Response to OP's Response to Petitioner's
22 Memorandum.

23 On June 2, 2019, the Commission received
24 payment for Court Reporter fees.

25 On June 4, 2019, the Commission emailed and

1 mailed copies of the Proposed Findings of Fact,
2 Conclusions of Law, and Decision and Order to the
3 Parties.

4 On June 20, 2019, the Commission received
5 WHI's Comments and Objections to the Proposed
6 Findings of Fact, Conclusions of Law and Decision and
7 Order.

8 On June 21, 2019, the Commission received
9 OP and County's Comments on the LUC's proposed
10 Findings of Fact, Conclusions of Law and Decision and
11 Order.

12 On July 1, 2019, the Commission mailed an
13 agenda notice letter to the Parties, Statewide, Oahu
14 and the Hawaii County mailing and emailing lists.

15 Let me briefly describe our procedure for
16 today on this docket.

17 First, I'll call for any individuals
18 desiring to provide public testimony to identify
19 themselves. Anyone here for public testimony? No,
20 okay.

21 If there's no one, after dealing with
22 public testimony, the Petitioner can make its
23 presentation.

24 After the completion of the Petitioner's
25 presentation, we will receive any comments or

1 arguments from the County of Hawaii Planning
2 Department and the State Office of Planning.

3 I will then reaffirm that all Commissioners
4 have reviewed the materials and transcripts for this
5 docket and are prepared to deliberate, and the
6 Commission will then conduct its deliberations.

7 From time to time, I may call for short
8 recesses.

9 Are there any questions on the procedures?

10 MR. LIM: No questions.

11 MR. KIM: No questions.

12 MS. APUNA: No questions.

13 CHAIRPERSON SCHEUER: Last call, anybody in
14 the audience wishing to provide public testimony?
15 Seeing none.

16 We can proceed, Mr. Lim, with your
17 presentation, comments or additional argument.

18 MR. LIM: Thank you, Mr. Chairman. On
19 behalf of Waikoloa Highlands, I would like to express
20 our thanks for hearing the clients when they came to
21 testify. They appreciated that. I'll be short
22 today.

23 We received the Commission's June 4th, 2019
24 version of the proposed Findings of Fact, Conclusions
25 of Law, and Decision and Order, and submitted WhI's

1 comments and objections on June 20th. So we stand on
2 the record on those.

3 I'll be brief.

4 As we've said from the get-go, and I think
5 as was recognized by the Aina Le'a decision by the
6 Supreme Court, there are different types of projects
7 that come before the Commission at different stages
8 of development, both different stages of development
9 and for different types of projects.

10 The Aina Le'a project was a development,
11 which was 3,000 acres, many, many, many units, and
12 their requirement they were trying to satisfy was
13 vertical construction of housing structures.

14 In this particular case, the big difference
15 is that the affordable housing condition was subject
16 to the approval of the County Housing Department.
17 And basically, as the record shows from testimony by
18 the Planning Department, Mr. Jeffrey Darrow, is that
19 this project was proposed subdivided lots with no
20 structures, could obtain final subdivision approval
21 and sell all the lots, which was the goal of the
22 project, without touching the ground, without doing
23 the groundwork.

24 And so that's why we believe that this is
25 different in time from both the Aina Le'a project,

1 and other projects that the Commission has seen.

2 Another big difference for this project is
3 that the project was zoned by the County before it
4 even came to the Land Use Commission, which is very
5 unusual. I think you understand that usually the
6 Land Use Commission does the reclassification first,
7 and then the petitioners will go back down to the
8 County to get the zoning. This was the other way
9 around. That's why we say this is a different
10 project.

11 The record shows that the project was zoned
12 in 1990 for multi-family residential and open uses,
13 and then went through a series of other rezonings to
14 reach the residential-agricultural RA-1A zoning, the
15 one acre lots. And only after the time extension was
16 granted on the Ordinance 05-157 in 2005 did the
17 requirement for this project to come to the Land Use
18 Commission arrive. That's why we are here today.

19 So those are the reasons why we believe the
20 project is different in time from all the other
21 projects you've been looking at over the past
22 approximately 12 months on your Order to Show Cause
23 or your status hearings that you've had.

24 And that's why we still firmly believe that
25 the Petitioner's motion to defer action on the OSC

1 for about 12 months to allow the Petition to return
2 to the County to refresh its zoning first, and then
3 come back to the LUC on a motion to amend to conform
4 the Land Use Commission decision.

5 So that didn't happen, obviously, but we
6 still feel that was the proper methodology.

7 In light of the Commission's recent actions
8 in the past year or so on these orders to show cause
9 and status hearing matters for other projects, we
10 believe for Waikoloa Highlands that the question
11 arises whether an unequal treatment of Waikoloa
12 Highlands rises to the level of abuse of discretion.

13 The comments on the proposed Decision and
14 Order are contained in our June 20th filing. But one
15 issue that we saw in the Commission's proposed
16 Decision and Order was the discussion relating to
17 affordable housing which is Condition 9. And
18 essentially we saw some language in there that we
19 think misapprehended was the requirement -- we saw
20 language in the Commission's proposed Decision and
21 Order relating to Condition 9, affordable housing,
22 that misapprehended what the requirement actually was
23 because it relates -- some of the language stated
24 that, for instance, proposed Finding 120 with respect
25 to LUC Condition 9, Petitioner has not commenced

1 construction of affordable housing in accordance with
2 applicable affordable housing requirements of the
3 County.

4 As the record shows, that was never going
5 to happen. The affordable housing condition was
6 satisfied by the conveyance of the 11.7-acre parcel
7 to the County. And we believe the record also shows
8 that the Petitioner complied with that requirement,
9 and that the only reason for noncompliance was issued
10 by the County during these proceedings was that the
11 deed that was recorded did not match the deed that
12 the Petitioner provided to the County.

13 If you recall that the Director of the
14 Office of Housing and Community Development admitted
15 that somewhere between the time that his office
16 received the deed, and the deed being recorded, the
17 deed was altered to change the designation of the
18 grantee from a limited liability company to a
19 nonprofit organization.

20 So we believe that the facts and
21 circumstances of the affordable housing conveyance of
22 the land, which was irrevocable, because that land is
23 no longer available to the County or to the
24 Petitioner. It has been sold to another third-party.

25 Our further evidence of the reason why the

1 Commission should not revert it, we believe that goes
2 to the issue of substantial commencement of
3 development of the land.

4 Lastly, in any event, as agreed by the
5 County of Hawaii, if the Commission is to take any
6 action on this Order to Show Cause, the land should
7 remain in the Rural District. It's been in the Rural
8 District and it's been General Planned by the County
9 of Hawaii since 2005 in the Rural District.

10 So we have got evidence on the record that
11 there's very little agricultural use for the land.
12 And so we think that reversion to the Agricultural
13 District would be inappropriate. It would not be a
14 more appropriate designation for the land.

15 So with that I'm going to close. And as I
16 said before, we appreciate the Commission's attention
17 to the matter. We disagree with the direction the
18 Commission is going in, but I think that we feel like
19 we put our presentation on the record, and we'll
20 stand on those. Thank you.

21 CHAIRPERSON SCHEUER: Thank you, Mr. Lim.
22 You were indeed brief.

23 Commissioners, are there questions for The
24 petitioner? Commissioner Okuda.

25 COMMISSIONER OKUDA: Thank you, Mr. Chair.

1 Mr. Lim, I apologize if my questions might
2 be a little bit longer than your statement. The
3 reason for that is I believe we owe it to whoever
4 files objections to not only demonstrate that we have
5 carefully read through and considered all those
6 objections, and that we have the full information
7 before we make a ruling one way or the other on
8 whatever has been filed.

9 So if you can indulge me with some of these
10 questions.

11 First of all, and this goes to the section
12 in your filing that dealt with due process issues.
13 Can you identify in the transcript, and when I use
14 the word "identify", I mean by date of hearing, page
15 and line, where you believe you were prevented from
16 making any arguments you thought were necessary to be
17 made in front of the Commission?

18 MR. LIM: I think our point was that not
19 that we were prevented from making arguments, but
20 that we were prevented from introducing some
21 evidence.

22 COMMISSIONER OKUDA: And the evidence that
23 you were prevented from introducing, so that we are
24 clear, because I was a little bit unclear looking at
25 your objections, what evidence were you prevented

1 from introducing?

2 MR. LIM: We wanted to question the Office
3 of Planning's planner, Mr. Funakoshi, regarding
4 similarly situated projects. We, as a Petitioner,
5 have no means to obtain that information, and so we
6 wanted to question the Office of Planning's witness
7 who is a mandatory party to all these order to show
8 cause and status hearings, at least why the Office of
9 Planning was taking certain positions on other
10 projects.

11 Basically, as we said during the hearing,
12 with the exception of petitions or docket numbers
13 which consented to be reverted back to their original
14 designation, there are no other petitions or dockets
15 that we are aware of that have been reverted other
16 than the Aina Le'a case, which of course was
17 reversed.

18 COMMISSIONER OKUDA: Besides that evidence
19 with respect to Mr. Funakoshi, can you identify any
20 other evidence or materials that you were prevented
21 or precluded from submitting to the Commission with
22 respect to this hearing or this docket?

23 MR. LIM: We also made requests for the
24 Commission to take administrative notice of those
25 particular status hearings and order to show cause

1 files, and we frankly don't know if the Commission
2 did that or not.

3 COMMISSIONER OKUDA: Besides that item, so
4 we have your statement regarding calling Mr.
5 Funakoshi as a witness; No. 2, taking administrative
6 notice of these other dockets. Were there any other
7 evidence or items that you contend you were prevented
8 from submitting to the Commission?

9 MR. LIM: Not that I can recall at this
10 time. I would have to rely on the record.

11 COMMISSIONER OKUDA: I'm not trying to play
12 hide the ball here. The reason why I'm asking for
13 this is that we all rely on the record, but we're
14 also relying on what all the parties' positions are,
15 so we can focus in on the record.

16 If we are not told that certain things
17 should be focused in on, we're not going to focus in
18 on it. So I'm asking, is there anything else that
19 you contend, or your client contends that you
20 attempted or wanted to present into evidence in front
21 of this Commission regarding this matter that you
22 were prevented from presenting?

23 MR. LIM: Not that I can recall at this
24 time.

25 COMMISSIONER OKUDA: Thank you.

1 Can you identify any arguments -- so I'm
2 asking something broader than specifically
3 introduction of evidence, but was there any arguments
4 or any presentation that you believed that the
5 Commission prevented you from presenting to the
6 Commission? And let me clarify that question.

7 I'm not asking you to, you know, list or
8 cite things which you presented, but you may disagree
9 with the proposed findings of the Commission in
10 thinking of entering, I'm just trying to find out
11 whether there was a presentation that you were just
12 shut off from, or were just prevented from presenting
13 the matter to the Commission?

14 MR. LIM: The only arguments that I can
15 think of at this time would have arisen from
16 introduction of some of the evidence that we wanted
17 introduced but were precluded from.

18 COMMISSIONER OKUDA: You've already listed
19 that and we just discussed that.

20 MR. LIM: That's right.

21 COMMISSIONER OKUDA: So can't think of
22 anything else at this point?

23 MR. LIM: Not at this time.

24 COMMISSIONER OKUDA: Now, you or your
25 office or your staff or your associates in preparing

1 your objections, you all of course read through the
2 proposed Findings of Fact, the proposed Conclusions
3 of Law and the proposed Decision and Order; correct?

4 MR. LIM: That's correct.

5 COMMISSIONER OKUDA: Can you identify by
6 number which Conclusions of Law you believe are not
7 an accurate statement of the law?

8 And let me clarify what my question
9 intended to seek.

10 The question is not whether you disagree
11 with the application of the Conclusion of Law. My
12 question is where, if you can identify or point out
13 to us, which statements in the Conclusion of Law is
14 an inaccurate statement of the law?

15 MR. LIM: I'm just going to have to rest on
16 our statement of objections.

17 COMMISSIONER OKUDA: And the reason why I'm
18 asking that is that, at least when I looked through
19 the objection, I did not see a specific
20 identification stating that a conclusion of law or a
21 quotation of the law or citation was an inaccurate
22 citation or a misstatement or misquote, whether that
23 misquote was intentional or a typographical error or
24 inadvertent.

25 I read the objections as being disagreement

1 in the application, and so my question goes to asking
2 if you can assist us by pointing out any conclusion
3 of law which you contend is an inaccurate statement
4 of the law, not an inaccurate application of the law,
5 but an inaccurate statement of the law?

6 MR. LIM: Not at this time, other than
7 those we've already raised in the record.

8 COMMISSIONER OKUDA: Now, and this is not a
9 trap, so let me tell you why I'm asking this
10 question, because we all know that on appeal, or an
11 appeal of an administrative agency's decision,
12 findings of fact are judged by a clearly erroneous
13 standard.

14 Do you agree with that general principle?

15 MR. LIM: Yes.

16 COMMISSIONER OKUDA: And you've looked
17 through the proposed Findings of Fact and reviewed
18 them, correct?

19 MR. LIM: Yes.

20 COMMISSIONER OKUDA: Can you list by number
21 which Finding of Fact or Findings of Fact you contend
22 are clearly erroneous?

23 MR. LIM: As I said, there's numerous
24 instances that we pointed out in our pleadings, but
25 let me point you to one.

1 For example, relating to the affordable
2 housing issue, Finding of Fact 123 that states:

3 The 20 percent housing requirement for
4 Petitioner's proposed project (being 80 units or
5 credits) will not be met on 11-plus acres ("AH
6 parcel") transferred by Petitioner to a third-party
7 (where only 32 units are planned). Number 123.

8 The record clearly shows that the
9 11.7 acres that we keep talking about that was
10 conveyed by the Petitioner to the company designated
11 by the County of Hawai'i is sufficient to develop the
12 80 affordable units or credits. And the only reason
13 why the 80 units or credits were not being
14 constructed on that 11.7 acres was because the owner
15 at this time, Mr. Julkowski, was proposing a True
16 Value Hardware store that took up almost half of the
17 property. He also have -- he could have either taken
18 off the True Value Hardware Store and put more
19 affordable housing units to reach the 40; or he could
20 have gone up three stories and reached the 40, but he
21 chose not to for market reasons.

22 So I think that's all in the record, and
23 that's why Finding of Fact 123 is an example of an
24 erroneous Finding of Fact.

25 COMMISSIONER OKUDA: I'll come back to

1 Finding of Fact 123.

2 But besides Finding of Fact 123, are there
3 any other Findings of Fact which you contend or your
4 client contends are clearly erroneous?

5 MR. LIM: Other than been's raised in our
6 pleadings, no. I can't recall at this time.

7 COMMISSIONER OKUDA: When I looked through
8 the pleadings, I didn't see any kind type of table or
9 statement clearly listing or stating that here is a
10 list of the Findings of Fact which are clearly
11 erroneous.

12 I read your submission as arguing that
13 there might be a different interpretation or
14 different results that could come from the facts, but
15 I didn't see an analysis focusing on whether
16 something was clearly erroneous or not.

17 So my question again is, can you assist us
18 by identifying which Findings of Fact, besides
19 Finding of Fact 123, are clearly erroneous?

20 MR. LIM: We're not going to waive, through
21 my answers today, any erroneous Findings of Fact or
22 Conclusions of Law. I'm trying to do my best to
23 answer your questions right now.

24 So I'm saying at this time now, no, I don't
25 know any right now. If that's what you're trying to

1 do, you're trying to have me articulate for you every
2 single legal error that we may or may not file on an
3 appeal on this decision, I can't do that for you
4 right now.

5 COMMISSIONER OKUDA: No, no, no. My
6 intention is not to do that. What I'm trying to do
7 is to try to have you assist us in identifying which
8 additional Findings of Fact you contend are clearly
9 erroneous. Let me try to ask the question this way.

10 Can you identify which Finding of Fact has
11 absolutely no evidence supporting the findings?
12 Because as you know, if there is a dispute about what
13 the facts really are, it's vested with the fact
14 finder in this case, the administrative agency, the
15 Land Use Commission to weigh the credibility of
16 witnesses, evaluate the evidence that's presented,
17 the documents, and basically make a call like an
18 umpire whether this is a ball, strike or something
19 else.

20 So my question is: Which Findings of Fact
21 have absolutely no evidentiary support in the record?
22 In other words, not even a scintilla of evidentiary
23 support. Are you able to answer that question?

24 MR. LIM: I'm not able to answer that
25 question at this time.

1 COMMISSIONER OKUDA: Going back to Finding
2 of Fact 123, you do agree, however, that the position
3 of the County of Hawaii is that your client has not
4 and has not satisfied Land Use Commission Condition
5 No. 9 with respect to affordable housing?

6 MR. LIM: No, we disagree. I agree that
7 that's what the County's position is currently, but
8 we disagree with that position, obviously.

9 COMMISSIONER OKUDA: Well, but you do agree
10 that by the County -- strike that.

11 The County, on the record, gave testimony
12 that their position is that Condition No. 9 has not
13 been satisfied, correct?

14 MR. LIM: That's correct.

15 COMMISSIONER OKUDA: And that is testimony
16 that the Land Use Commission can rely on in making
17 its final decision in this case.

18 You do agree with that, correct?

19 MR. LIM: If the facts are in dispute, I
20 think the Land Use Commission can choose the facts it
21 wants to support its decision.

22 COMMISSIONER OKUDA: Okay, thank you.

23 Mr. Lim, thank you, very much.

24 Mr. Chair, thank you, I have no further
25 questions.

1 CHAIRPERSON SCHEUER: Thank you.

2 Commissioners, other questions for the
3 Petitioner at this time? Seeing none, Hawaii County.

4 MR. KIM: Thank you, Chairperson.

5 The County would like to stand on the
6 record and the comments the County submitted. Just a
7 few additional oral comments.

8 Looking through Petitioner's comments and
9 objections to real fundamental concepts,
10 administrative law comes to mind.

11 One, administrative body's order, written
12 order should conform to the decision that the body
13 made, which I believe the draft order by and large
14 does.

15 And two, Findings of Fact should be
16 supported by evidence in the record. And when I look
17 through Petitioner's comments, I saw efforts to bring
18 some extraneous facts into the record, which were not
19 introduced at the hearing, such as the allegation
20 that the County switched out the deed where there
21 wasn't evidence of that presented at the hearing.

22 And then more specifically, to address some
23 of the points raised verbally here.

24 It was not just the deed that the County
25 relied on to say that Petitioner had not met its

1 affordable housing condition, as the Finding of Fact
2 reflects, and as Petitioner's own expert witness
3 stated at the hearing, the property was unsuitable
4 for development of the size of these units. And that
5 specific Finding of Fact, Finding 123, which
6 Petitioner's counsel has pointed out, I believe by
7 Petitioner's counsel's own arguments, you know, he
8 did articulate sufficient evidence to support this
9 Finding of Fact. It is for this Commission to weigh
10 conflicting evidence and then make a decision, which
11 the Commission did at its previous hearing on this
12 matter. And that was all I have. Thank you.

13 CHAIRPERSON SCHEUER: Commissioners, are
14 there questions for Hawaii County?

15 Commissioner Okuda.

16 COMMISSIONER OKUDA: Thank you very much.

17 Mr. Kim, if I can ask this question, and it
18 goes to the County's submissions about the
19 appropriate designation.

20 Do you agree, however, that under the Aina
21 Le'a case, the full citation is in the Conclusions of
22 Law that was proposed by the commission, that if the
23 Commission issues or issues or goes forward with the
24 proposed decision, really what happens legally is
25 that the prior designation is just voided, and so the

1 designation goes back to the original designation.
2 That's really the effect?

3 MR. KIM: Yes, we agree that that's the
4 effect.

5 COMMISSIONER OKUDA: And, of course, the
6 landowner would have to comply with whatever County
7 requirements are, whatever they may be, and if there
8 are inconsistencies that might result, it's just
9 something that -- it's just going to have to be dealt
10 with at that point in time by the landowner?

11 MR. KIM: That's correct, by Mr. Darrow's
12 testimony.

13 COMMISSIONER OKUDA: I just wanted to
14 confirm that, thank you.

15 Thank you, Mr. Chair. No further
16 questions.

17 CHAIRPERSON SCHEUER: Any other questions?
18 Mr. Okuda, thank you for highlighting the comments
19 that were made this morning that were not actually
20 reflected in the evidentiary record.

21 Office of Planning, Ms. Apuna.

22 MS. APUNA: Chair, Office of Planning
23 doesn't have any exceptions or objections to the
24 proposed D&O. However, we did provide some minor
25 edits for your consideration.

1 With regard to Petitioner's exceptions,
2 Petitioner stated on page 20 of its filing, that
3 Finding of Fact 115 and 116 are not supported, should
4 be deleted, and the Commission has failed to cite to
5 a hearing transcript or other evidence in the record
6 to support Findings of Fact 115 and 116 regarding the
7 non-fulfillment of Condition No. 6.

8 However, OP's Exhibit 1, which was attached
9 to our Position Statement filed on October 12, 2018,
10 is a letter from Department of Transportation stating
11 that based on of facts and its interactions with
12 Petitioner, Condition No. 6 remains unfulfilled.
13 OP's Exhibit 1 is part of the record in this docket,
14 and need not be specifically documented in the D&O
15 and Findings of Fact. The Finding of Fact properly
16 references this finding based on the evidence
17 presented by OP.

18 CHAIRPERSON SCHEUER: Thank you, Ms. Apuna.
19 Commissioners, do you have any questions
20 for the Office of Planning?

21 Mr. Lim, do you have any rebuttal?

22 MR. LIM: No. We disagree with the
23 characterization of the testimony of the Office of
24 Housing and Community Development, the Director, Mr.
25 Gyotoku, but other than that, we have no further

1 questions.

2 CHAIRPERSON SCHEUER: Commissioners, do you
3 have any final questions or comments for the parties?

4 Seeing none, our next order of business is
5 to confirm that all of the Commissioners have
6 reviewed the materials and transcripts of this docket
7 and are prepared to deliberate.

8 Commissioner Ohigashi?

9 COMMISSIONER OHIGASHI: Yes.

10 CHAIRPERSON SCHEUER: Commissioner Aczon?

11 COMMISSIONER ACZON: Yes.

12 CHAIRPERSON SCHEUER: Commissioner Cabral?

13 VICE CHAIR CABRAL: Yes.

14 CHAIRPERSON SCHEUER: Commissioner Mahi?

15 VICE CHAIR MAHI: Yes.

16 CHAIRPERSON SCHEUER: Commissioner Okuda?

17 COMMISSIONER OKUDA: Yes.

18 CHAIRPERSON SCHEUER: Commissioner Wong?

19 COMMISSIONER WONG: Yes.

20 CHAIRPERSON SCHEUER: And the Chair is also
21 prepared to participate.

22 Our new and ninth Commissioner Dan Giovani
23 from Kauai and Commissioner Chang are excused from
24 these proceedings.

25 Commissioners, we will now enter

1 deliberations on this matter.

2 Before you for your consideration,
3 deliberation and adoption is the proposed Findings of
4 Fact, Conclusions of Law, and Decision and Order.

5 I would like to remind the Commission that
6 pursuant to HRS 92-11, the Commission should address
7 Petitioner's comments, objections and exceptions in
8 the order to be finalized and prepared by staff.

9 Is there any discussion? Commissioner
10 Okuda.

11 COMMISSIONER OKUDA: Mr. Chair, I would
12 first like to make a motion.

13 CHAIRPERSON SCHEUER: Please proceed.

14 COMMISSIONER OKUDA: I move that the
15 proposed Findings of Fact, Conclusions of Law and
16 Decision and Order regarding the Petition Area be
17 adopted with the following rulings regarding Waikoloa
18 Highland, Inc.'s comments and objections to the
19 proposed Findings of Fact, Conclusions of Law and
20 Decision and Order reverting the Petition Area.

21 If you can indulge me, my motion is a
22 little bit longer than normal, just so it's clear
23 what the substance of the motion is, and what the
24 disposition would be if the motion is granted. So if
25 I may continue?

1 CHAIRPERSON SCHEUER: Please continue.

2 COMMISSIONER OKUDA: Regarding Waikoloa
3 Highlands, Inc.'s objection which is designated "PM
4 35". The reference to "Waikoloa Heights" should have
5 referred to Waikoloa Highlands, Inc.

6 No. 2. This refers to Waikoloa Highlands,
7 Inc.'s "PM 66". The Land Use Commission should find
8 and rule that the names, or the proper names of the
9 parties or persons would be Duane, D-U-A-N-E, Hosaka,
10 H-O-S-A-S-K-A. The entity would be the Office of
11 Housing and Community Development, the acronym would
12 be "OHCD", and the other person's name is Delene,
13 D-E-L-E-N-E, Osorio, O-S-O-R-I-O.

14 Number 3. With respect to the remainder of
15 Waikoloa Highland, Inc.'s comments and objections to
16 proposed Findings of Fact, Conclusions of Law, and
17 Decision and Order reverting the Petition Area, the
18 Land Use Commission shall find and rule that the
19 record of this docket does not support Petitioner's
20 objections or comments which conflict with the
21 Findings of Fact, Conclusions of Law or the Decision
22 and Order which was transmitted previously.

23 No. 4. The decision, or the final Findings
24 of Fact, Conclusions of Law and Decision and Order,
25 which should be prepared by staff and issued by staff

1 in the manner which was stated, shall also include an
2 additional section which reflects the Commission's
3 ruling on the Petitioner's objections, and these
4 rulings should include the following, and this is
5 also part of my motion:

6 First point. This deals with the issue
7 raised in the Petitioner's objections about the
8 authority of the Land Use Commission to issue the
9 Order to Show Cause. The final document should
10 include a reference to the case of D.W. Aina,
11 A-I-N-A, Lea, L-E-A, Development, LLC versus Bridge
12 Aina Lea, LLC, 134 Hawai'i 187 at page 196, which is
13 also 339 Pacific 3d 685 at page 694 at footnote 2
14 where the Hawai'i Supreme Court stated, and I quote,
15 HAR Section 15-15-93 provided:

16 (b) Whenever the commission shall have
17 reason to believe that there has been a failure to
18 perform according to the conditions imposed, or the
19 representations or commitments made by the
20 Petitioner, the commission shall issue and serve upon
21 the party or person bound by the conditions,
22 representations, or commitments, an order to show
23 cause why the property should not revert to its
24 former land use classification or be changed to a
25 more appropriate classification.

1 The final document that is issued should
2 also include a reference to the Petitioner's own
3 annual report of 2016 which, at page 3 it's stated by
4 the Petitioner, and I quote:

5 Although nothing physical has occurred on
6 the ground to date, the Petitioner has been working
7 diligently to secure a development partner, as well
8 as trying to address other conditions of approval as
9 well be discussed below.

10 And the annual report continues, and I
11 quote:

12 The Petitioner understands that its failure
13 to complete buildout of the project or secure a bond
14 will be subject to possible further review by the
15 commission to determine whether the property should
16 revert to its previous Agricultural classification.

17 With respect to the issue of whether or not
18 there was substantial commencement of the use of the
19 property, and No. 2, the issue being raised in the
20 Petitioner's objections about whether there was
21 failure or no failure to satisfy conditions, the
22 final document should also reflect the transcript of
23 October 24, 2018, at page 73, lines 15 through 22,
24 where the Chair asked, quote:

25 Has there been physical improvements to the

1 property since the time that the Decision and Order
2 was passed ten years ago?

3 And the answer by the witness, who was
4 Petitioner's representative Valery, spelled
5 V-A-L-E-R-Y, Grigoryants, spelled
6 G-R-I-G-O-R-Y-A-N-T-S, was, and I quote:

7 I did not notice any changes.

8 And the testimony continues on.

9 The document, or the final order should
10 also include a discussion or colloquy between
11 Commissioner Chang and the Petitioner's development
12 consultant Mr. Joel, J-O-E-L, LaPinta, spelled
13 L-a-P-I-N-T-A, where Commissioner Chang asked, quote:

14 So in your opinion there has been no land
15 use on the property?

16 And the answer by the witness:

17 No, not the land.

18 And that was found at the October 24, 2018
19 transcript, page 134, lines 11 through 13.

20 There's also similar testimony again by Mr.
21 Grigoryants at transcript October 24, 2018, page 50,
22 line 22 to 25, and that should be reflected.

23 Also the final order should reflect the
24 questioning and the answers, questioning by the
25 Office of Planning, and the answers by Mr. LaPinta,

1 about use or what was happening with the subject
2 property.

3 And I apologize for reading it, but I think
4 this testimony or colloquy rather is important to
5 justify or show the disposition of the objection by
6 the Commission.

7 Question by the Office of Planning.

8 Q. The road infrastructure and utilities
9 that you claim are on the Petition Area at this time,
10 were they placed there by the Petitioner since the
11 Decision and Order was made?

12 A. No.

13 Question again by Office of Planning.

14 Q. Are there any other structures on the
15 property that were built by the Petitioner since the
16 Decision and Order?

17 A. Not that I'm aware of.

18 Question by Office of Planning.

19 Q. And to confirm, the backbone
20 infrastructure has not been built out on the Petition
21 Area, is that correct?

22 A. The definition of "backbone
23 infrastructure" is ambiguous. But there is no
24 infrastructure that I see that was built since the
25 2008 Petition.

1 And that's the October 24, 2018 transcript,
2 page 113, lines 1 through 15.

3 The document should also reflect similar
4 responses to further questions by Commissioner Chang
5 found at transcript October 24, 2018, page 77,
6 line -- I believe it might be line 24, but I could be
7 mistaken -- to page 78, line 9.

8 With respect to the objections regarding
9 compliance with Condition No. 6, the transcript for
10 the final order should include the colloquy and the
11 answers given by the Petitioner to questions being
12 raised by Ms. Apuna on behalf of the Office of
13 Planning. That's transcript October 24, 2018, page
14 113, line 6 through page 114, line 10.

15 The final order should also include the
16 references to the County of Hawaii's statement of its
17 position that's been covered here in this hearing,
18 but specifically the reference as far as the
19 statement by the County of Hawaii in response to
20 questions by Commissioner Chang would be the
21 November 28, 2018 transcript, page 90, line 11 to
22 page 91, line 15.

23 With respect to objections regarding
24 violation of equal protection, the final order should
25 include the citation to the cases that deal with the

1 standards to be applied with respect to violation of
2 equal protection. And it should also include this
3 reference or statement by Judge Chang -- by
4 Commissioner Chang in response to Petitioner 's
5 statement about possibly not knowing what had really
6 transpired with the Land Use Commission's intent
7 about why decisions were being made.

8 And let me read Commissioner Chang's
9 statement so that it's clear. This is found at
10 transcript November 28, 2018, page 49, line 4 to page
11 50, line 7.

12 Commissioner Chang, and I quote:

13 I just remind you that the Land Use
14 Commission is probably one of the only commissions
15 that our total deliberation is in public. So I think
16 you have access to all of our deliberations. I have
17 no further questions.

18 The record should reflect -- I'm sorry, the
19 final order should reflect the fact that no evidence
20 was presented on the record of any decision-making
21 based on an improper classification, what we call a
22 suspect classification, such as race, ethnicity,
23 national origin, anyone's use of language, or
24 religion or other prohibited background.

25 The final order should also dispose of the

1 claim by the Petitioner that rulemaking was required.
2 The Hawai'i Appellate Court, Hawaii Supreme Court has
3 made clear that enforcement of a condition does not
4 involve rulemaking.

5 And the citation to that is a case that was
6 also included in the proposed Conclusions of Law
7 which is application of Hawaiian Electric Company,
8 Incorporated, 81 Hawai'i 459, at pages 465 through
9 467, the parallel citation is 918 Pacific 2d, 561 at
10 pages 567 to 69 a 1996 Hawaii Supreme Court case.

11 And the Hawaii Supreme Court has also
12 recognized, and this statement should also be
13 included in the final order that rulemaking is
14 intended to govern future conduct, in contrast to an
15 administrative agency's adjudication of a
16 respondent's possible violation of law caused by past
17 conduct.

18 And the citation to the Hawaii Supreme
19 Court is the case of Pilaa, P-I-L-L-A, 400, LLC
20 versus Board of Land and Natural Resources, which is
21 found at 132 Hawaii 247 at page 266, the parallel
22 citation 320 Pacific 3d 912, at page 931 a 2014
23 Hawaii Supreme Court case.

24 The final order or decision should also
25 include a reference to the definition of substantial

1 commencement, which has been stated by the Hawaii
2 Supreme Court in the Bridge Aina Le'a case, which has
3 been cited earlier.

4 As far as the Petitioner's claim about
5 evidence or suggesting that the Commission's proposed
6 findings about credibility is not supported by the
7 record. The ruling in the final order should include
8 a reference to the colloquy and questioning by the
9 Chair with the witness which is found at transcript
10 October 24, 2018, page 67, line 22, through page 69,
11 line 2 where basically -- let me quote from
12 Chairperson Scheuer:

13 So immediately regarding Exhibit 5, it was
14 given to us as an exhibit by the Petitioner, by you,
15 as a basis for our decision-making, but you're
16 stating now that it's erroneous in regards to Mr.
17 Martirosian's, M-A-R-T-I-R-O-S-I-A-N, ownership and
18 role.

19 THE WITNESS: Yes, and I can explain.

20 And there was an explanation, and the Chair
21 further went on by stating:

22 Thank you.

23 And this is a quote from the Chair.

24 Is there any written documentation
25 otherwise provided to us that explains the error in

1 this record that you've just described?

2 THE WITNESS: As far as I know, no.

3 And finally, as far as a claim of a due
4 process violation, the ruling on the disposition of
5 the Petitioner's objection should include a citation
6 and discussion to the D.W. Aina Lea Development, LLC
7 versus Bridge Aina Lea, LLC case, specifically at
8 page 191 of the Hawai'i Reports, Volume 134, where
9 basically the Hawaii Supreme Court has made clear
10 that enforcement under an OSC proceeding does not
11 create a due process violation.

12 To the extent necessary, similar
13 dispositions should be made with respect to the
14 pleading filed by the County of Hawaii.

15 And my motion concludes with the fact,
16 again, that the Staff and the Chair be authorized to
17 finalize and promulgate the order. And that's the
18 substance of my motion.

19 I apologize to everyone that it took
20 awhile, but I think it's necessary, given the breath
21 of this record, to make that clear.

22 CHAIRPERSON SCHEUER: Is there a second?

23 COMMISSIONER WONG: I second.

24 CHAIRPERSON SCHEUER: Commissioner Wong has
25 seconded the detailed motion by Commissioner Okuda.

1 So we have a motion in front of us. Is
2 there deliberation on the motion? Let me -- Mr.
3 Okuda.

4 COMMISSIONER OKUDA: Thank you, Mr. Chair.

5 I believe that the proposed Findings and
6 Conclusions of Law accurately stated the record and
7 the evidence. And that's also been supported by the
8 responses that were given by the parties at today's
9 hearings. And for those reasons, and other good
10 cause stated in the record, I would ask that the
11 motion be granted.

12 CHAIRPERSON SCHEUER: Thank you, Mr. Okuda.

13 Are there other comments or questions or
14 deliberations on the motion? If there's none, I have
15 a few brief things to say in favor of the motion.
16 Sorry, Commissioner Cabral.

17 VICE CHAIR CABRAL: I would just like to
18 thank my fellow Commissioner Okuda. I know that he's
19 done an extensive amount of reading and additional
20 research on this matter, as a of us have done a lot
21 of reading on this matter in the last year so. I
22 thank him for this extra work he's done here at this
23 hearing.

24 CHAIRPERSON SCHEUER: Commissioners?

25 I will be voting in favor of the motion.

1 I'm going to join Commissioner Cabral in her thanks
2 to all of you for your volunteer time on this really
3 extensive set of proceedings that we had.

4 I want to thank on the record Julia Alos, a
5 member of the public, who has made it to most of our
6 hearings on this matter, because she's concerned
7 about what is happening in her community and the
8 failure to perform.

9 And I just want to say partially in support
10 of the motion and the actions to the statements by
11 the Petitioner in their final arguments on this
12 today.

13 Mr. Lim stated that -- trying to explain
14 the county zoning, the property first, and then the
15 LUC coming in, he said well, that's why we're here
16 today.

17 And I just vigorously disagree that that's
18 why we're here today. That's certainly part of
19 what's happened. But why we're here today is that we
20 had this Order to Show Cause hearing, which in my
21 imperfect pidgin summary of what we're supposed to do
22 is three things.

23 We ask: Did you do what you said you was
24 going do? And the answer was clearly on this docket,
25 no, you did not do anything. You did not do what you

1 said you was going to do.

2 And the follow-up question: Did you do
3 anything? And the record is really extensively
4 clear. Nothing was done to make them satisfied.

5 And then the third question that we get to
6 ask is: Well, you get good reason? Is there good
7 reason why you never did anything? The answer also
8 is really clear on the record that there was no good
9 substantial reason, no good cause as to why this is
10 happened.

11 And that's why we are here today. We're
12 also here today specifically because of procedural
13 objections that were brought up by the last minute by
14 the Petitioner, otherwise we would have taken care of
15 this.

16 With that, I'm prepared to vote.

17 Any other comments from the Commissioners?
18 If not, Mr. Orodenger, will you please poll the
19 Commission?

20 EXECUTIVE OFFICER: Thank you, Mr. Chair.

21 If you'll excuse me if I don't repeat the
22 entire motion.

23 The motion is that the proposed Findings of
24 Facts and Decision and Order be adopted with
25 additional rulings as stated by Commission Okuda and

1 incorporated -- and those statements be incorporated
2 into the proposed Finding of Facts and Decision and
3 Order as stated.

4 Commissioner Okuda?

5 COMMISSIONER OKUDA: Yes.

6 EXECUTIVE OFFICER: Commissioner Wong?

7 COMMISSIONER WONG: Aye.

8 EXECUTIVE OFFICER: Commissioner Aczon?

9 COMMISSIONER ACZON: Aye.

10 EXECUTIVE OFFICER: Commissioner Mahi?

11 VICE CHAIR MAHI: Aye.

12 EXECUTIVE OFFICER: Commissioner Ohigashi?

13 COMMISSIONER OHIGASHI: Consistent with my
14 past vote, I vote no.

15 EXECUTIVE OFFICER: Commissioner Cabral?

16 VICE CHAIR CABRAL: Yes.

17 EXECUTIVE OFFICER: Commissioners Giovanni
18 and Chang are excused.

19 Chair Scheuer?

20 CHAIRPERSON SCHEUER: Aye.

21 EXECUTIVE OFFICER: Thank you, Mr. Chair,
22 the motion passes with six affirmative votes.

23 CHAIRPERSON SCHEUER: Thank you very much.

24 Commissioners, are there any other matters?
25 If not, no further business, I will declare this

1 portion of the meeting recessed. We will reconvene
2 tomorrow morning at the Honolulu Airport Conference
3 rooms to resume proceedings on Honolulu City and
4 County matters.

5 (The proceedings were recessed at 10:50
6 a.m.)

CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on July 10, 2019, at 9:30 a.m., the
proceedings contained herein was taken down by me in
machine shorthand and was thereafter reduced to
typewriting under my supervision; that the foregoing
represents, to the best of my ability, a true and
correct copy of the proceedings had in the foregoing
matter.

I further certify that I am not of counsel for
any of the parties hereto, nor in any way interested
in the outcome of the cause named in this caption.

Dated this 10th day of July, 2019, in Honolulu,
Hawaii.

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