

1 LAND USE COMMISSION
2 STATE OF HAWAI'I
Hearing held on August 29, 2019

3 Commencing at 9:00 a.m.

4 Kalanimoku Building, 1151 Punchbowl Street,
5 Basement, Honolulu, HI 96813 B
6 and
7 Hilo State Office Building
8 75 Aupuni Street, Hilo, HI 96720
9 and
10 Lihue State Office Building
11 3060 Eiwa Street, Lihue, HI 96766

12 AGENDA

13 I. Call to Order

14 II. Adoption of Minutes

15 III. Tentative Meeting Schedule

16 IV. DISCUSSION AND ACTION

Adjustment of Executive Director Contract

17 V. DISCUSSION AND ACTION

18 Delay in processing of proposed LUC
19 Administrative Rule Changes

20 VI. ADJOURNMENT

21 HILO, HAWAII AGENDA - AUGUST 29, 2019

22 I. CALL TO ORDER

23 II. ACTION

24 A18-806 BARRY FAMILY TRUST (HAWAI'I)
25 To Consider Petitioner's MOTION FOR ISSUANCE OF
ANTICIPATED NEGATIVE DECLARATION OR ANTICIPATED
FINDING OF NO SIGNIFICANT IMPACT (FONSI)

III. Adjournment

BEFORE: Jean Marie McManus, CSR #156

1 APPEARANCES:

2 JONATHAN SCHEUER, Chair (Oahu)
NANCY CABRAL, Vice Chair and Acting Chair (Hilo)
3 AARON MAHI, Vice Chair
DAWN N.S. CHANG
4 EDMUND ACZON
DAN GIOVANNI (Kaua'i)
5 GARY OKUDA

6 STAFF:

LORI TANIGAWA, ESQ.
7 Deputy Attorney General

8 DANIEL ORODENKER, Executive Officer (Oahu)
RILEY K. HAKODA, Planner/Chief Clerk (Hilo)
9 SCOTT DERRICKSON, AICP/Planner (Kaua'i)

10 DAWN APUNA, Deputy Attorney General
AARON SETOGAWA, Planner
11 For State Office of Planning

12 DANNY PATEL, ESQ.
Deputy Corporation Counsel (Hilo)
13 DUANE KANUHA, Deputy Planning Director
For Hilo, Hawai'i

14 DEREK SIMON, ESQ. (Oahu)
15 For Barry Family Trust

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

PUBLIC WITNESSES:	PAGE
David Arakawa Direct Examination	13
Henry Curtis Direct Examination	28
Dwight Vicente Direct Examination	30
Kenneth Stanley Church Direct Examination	32
<u>A18-806 Barry Family Trust</u>	42
Dwight Vicente Direct Examination	44

1 CHAIRPERSON SCHEUER: Good morning. Aloha.

2 This is the 9:00 a.m. portion of the August
3 29th, 2019 Land Use Commission meeting being held by
4 interactive conference technology linking video
5 conferencing centers on Kauai, Oahu and the Island of
6 Hawai'i. A participating Commissioner is in each
7 designated site, with the Executive Director, Chair
8 and Court Reporter on Oahu, the LUC Chief Clerk in
9 Hilo, and LUC staff planner, Scott Derrickson with
10 Commissioner Giovanni on Kauai.

11 The first order of business is the adoption
12 of minutes.

13 Is there anybody who wants to provide
14 testimony on the adoption of minutes? Seeing none,
15 the first is the adoption of the July 25th and August
16 8th, 2019 minutes. Are there any comments or
17 corrections on the minutes? If not, is there a
18 motion to adopt?

19 COMMISSIONER OKUDA: So moved.

20 CHAIRPERSON SCHEUER: Commissioner Okuda
21 has moved to adopt the minutes of July 25th and
22 August 8th.

23 VICE CHAIR CABRAL: I'll second.

24 CHAIRPERSON SCHEUER: Seconded by
25 Commissioner Cabral in Hilo.

1 On September 11th ACPO conference of
2 Planning Officials conference is being held.

3 September 13th we had a meeting scheduled
4 that has been cancelled.

5 September 25th we will be taking up the
6 Pulelehua matter and the Lana'i matter, and we will
7 be at Maui Arts and Cultural Center on Maui.

8 The next day, September 26th, we will be
9 taking up the Brewer, Mckenna and Pulelehua matters,
10 as well as the status report from Kaonoulu Ranch.
11 That is again on Maui at the Maui Arts and Cultural
12 Center.

13 On October 9th, we will be taking up the
14 Waimanalo Gulch remand, that will be here in
15 Honolulu.

16 We also have October 10th set aside for
17 that matter.

18 On October 23rd we will be holding a
19 videoconference with regard to A02-767 and SP09-403.

20 On October 24th we will be holding a
21 meeting in Honolulu, Motion for Intervention and the
22 Hawai'i Memorial Park matter in that docket.

23 On November 26 we may be on Maui. We've
24 tentatively scheduled -- November 6th, I'm sorry,
25 November 6th.

1 November 6th we will be on Maui for Sacred
2 Earth matter.

3 November 7th we will also be on Maui.

4 November 20th we will be in Honolulu for
5 continuation of the Poma'ikai Partners matter and the
6 Waiawa matter.

7 On November 21st we will on the Big Island
8 at NELHA for the U of N status report, and HHFDC and
9 special permit.

10 On December 4th we will be on Kaua'i for
11 the Hokua matter.

12 December 5th we will also be on Kaua'i for
13 the Hokua matter.

14 December 18th will be the continuation of
15 Hawaiian Memorial Park matter on Oahu, and
16 December 19th as well.

17 January 8th and 9th and January 22nd, 23rd
18 are currently open, however, given as you can see we
19 have a very, very busy schedule, and given what we
20 have in front of us, those dates will be taken up
21 fairly quickly. That's it.

22 CHAIRPERSON SCHEUER: Commissioners, any
23 questions for Dan? Thank you, Dan.

24 Our next two agenda items involve
25 discussion and action on the adjustment of the

1 Executive Director's contract and the delay in
2 processing of the proposed LUC Administrative Rule
3 changes.

4 Is there anybody who wishes to provide
5 public testimony on these administrative matters?

6 MR. ARAKAWA: Yes, but the last time I said
7 "I do", I got married. But I do.

8 CHAIRPERSON SCHEUER: Sit right next to
9 Jean. I just want to double check with Hilo. You're
10 going to testify on the Church docket, the public
11 testifier in Hilo?

12 CHIEF CLERK: He said he would also like to
13 say something on the rules.

14 VICE CHAIR CABRAL: Mr. and Mrs. Church are
15 here, but they're not asking to testify on anything
16 at this point.

17 CHAIRPERSON SCHEUER: We will begin with
18 the representative from the Land Use Research
19 Foundation.

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

22 THE WITNESS: Yes, I do, but I have no idea
23 what the presentation is going to be about, so I
24 would rather hear what the presentation is about and
25 then be able to comment on that. I have no idea.

1 You know this agenda item, you know, under
2 Chapter 91, this agenda item doesn't explain exactly
3 what the position of LUC is.

4 It doesn't give us enough information so
5 that I can fairly comment on it. So I would
6 definitely --

7 CHAIRPERSON SCHEUER: Are you unfamiliar
8 with -- can you be more -- I'm not actually
9 understanding your claim.

10 THE WITNESS: Okay. All I'm asking --

11 CHAIRPERSON SCHEUER: I know you're deeply
12 familiar with the Land Use Commission's rules.

13 MR. ARAKAWA: And the Office of Information
14 Practices agenda item. And the agenda item is
15 supposed to give fair notice to the public on what's
16 going to be discussed and what the issues are.
17 Right?

18 And so we would just -- I checked the
19 website and there's no report. I don't know if
20 there's a report by the LUC on this, LUC staff on
21 this.

22 So what I'm saying is I would like to hear
23 what is going to be presented by the LUC staff first.
24 That's all.

25 CHAIRPERSON SCHEUER: I'm going to turn to

1 our attorney general for procedural guidance on this.

2 MS. TANIGAWI: It's within your discretion
3 if you want to hear public testimony before --

4 CHAIRPERSON SCHEUER: So we can do a
5 presentation from the staff, then hear public
6 testimony, then move to discussion?

7 MS. TANIGAWI: Yes.

8 MR. ARAKAWA: Will the public be allowed to
9 comment on the presentation by LUC after or --

10 CHAIRPERSON SCHEUER: We are going to
11 handle it the way I've seen other boards and
12 commissions handle it where the staff will do a very
13 brief presentation. The public will have a chance to
14 give testimony, and then I will close testimony and
15 then the Commission will deliberate on the matter.

16 MR. ARAKAWA: Okay, great.

17 And Mr. Curtis is here, so he understands
18 that also.

19 MR. CURTIS: Although it took me ten
20 minutes to find this place and I didn't see any
21 notices.

22 MR. ARAKAWA: That's another one of my
23 comments.

24 CHAIRPERSON SCHEUER: Hold on.

25 MR. ARAKAWA: Okay, so our --

1 CHAIRPERSON SCHEUER: So you're going to
2 wait to give testimony until we are done giving the
3 staff presentation?

4 THE WITNESS: Please. Thank you very much.

5 CHAIRPERSON SCHEUER: Thank you for the
6 comment.

7 So let's go through them separately.

8 VICE CHAIR CABRAL: Chair, we do have
9 Dwight Vicente who would like to testify.

10 CHAIRPERSON SCHEUER: The procedure that we
11 are going to do, Commissioner, we are going to handle
12 each agenda item of the next two in the following
13 way.

14 First, there will be an extremely brief
15 presentation from the staff. We will then open it up
16 for public testimony. We will then close public
17 testimony. We will then deliberate and take action
18 as the Commission.

19 So I'll give everyone who wants to testify
20 the chance to testify.

21 VICE CHAIR CABRAL: Thank you very much for
22 the clarification.

23 CHAIRPERSON SCHEUER: Mr. Orodénker.

24 EXECUTIVE OFFICER: The agenda item is
25 really just to explain to the Commission why it's

1 taken so long --

2 CHAIRPERSON SCHEUER: Can you be specific
3 which agenda item you're referring to?

4 EXECUTIVE OFFICER: We are discussing the
5 delay in processing of the proposed LUC
6 administrative rule changes.

7 The administrative procedure for the rules
8 was that the Director of the Department of Business
9 and Economic Development signed the transmittal
10 letter sending the rules to the Governor's office for
11 final adoption.

12 CHAIRPERSON SCHEUER: You have to speak
13 loud enough so they can hear you in Hilo and Kauai.

14 EXECUTIVE OFFICER: The change in
15 directors, and the subsequent legislative session,
16 resulted in the director delaying his signature and
17 sending the rules up. He did not want to send them
18 up while session was on.

19 The rules are in front of the governor for
20 his signature, and our understanding is they should
21 be signed in the next week or two.

22 CHAIRPERSON SCHEUER: Okay. So no action,
23 just a report.

24 The current draft of the LUC administrative
25 rules have been signed by DBED director, and are on

1 the governor's desk or in his office; is that
2 correct?

3 EXECUTIVE OFFICER: That's correct.

4 CHAIRPERSON SCHEUER: I've sworn you in.

5 MR. ARAKAWA: Yes.

6 DAVID ARAKAWA

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

10 DIRECT EXAMINATION

11 THE WITNESS: David Arakawa on behalf Land
12 Use Research Foundation, and the Land Use Research
13 Foundation represents major landowners and two of the
14 major power companies or utility companies.

15 CHAIRPERSON SCHEUER: David, let me quickly
16 check.

17 Can you hear on Kaua'i and in Hilo?

18 VICE CHAIR CABRAL: Yes, we can hear.

19 COMMISSIONER GIOVANNI: Yes.

20 THE WITNESS: Many of our members are
21 involved in developing affordable housing, workforce
22 housing and regular market housing.

23 So these rules concern us, because in the
24 past individuals have used this specific section of
25 the rules to try to bring actions, delay or file

1 lawsuits against housing developers. So that's one
2 of our concerns.

3 This issue and these rules and this
4 specific section has been the topic, ongoing topic in
5 the governor's affordable housing working group. And
6 we appreciate the fact that the DBED director and the
7 Land Use Commission, Executive Director and Mr. Chair
8 have been open to meeting with LURF.

9 Everything that was presented by Mr.
10 Orodenker is factually correct. We believe that
11 LURF's -- the issues that LURF and other members of
12 the affordable housing working group, the governor's
13 affordable housing working group, the issues that we
14 brought forth during the affordable housing group
15 working meetings have been and are being considered
16 by the DBED director and the governor.

17 And I have copies of several issues that we
18 have raised, and I apologize for the neighbor
19 islands, not being able to send this to the neighbor
20 islands. But I'll briefly go through this.

21 The first issue is the provisions that are
22 being proposed in the proposed rule do not
23 necessarily specifically track the language of the
24 statute or HRS 205-4(g) or the Aina Le'a case, the
25 footnote in the Aina Le'a case, Footnote No. 16 in

1 the Aina Le'a case.

2 Does everybody have a copy?

3 The second issue -- and that's laid out
4 here. We believe that to the extent possible it
5 should -- the rule should directly follow the
6 application of the court's review in the Aina Le'a
7 case, including amongst other things, what they
8 looked at in rendering their decision.

9 The quote is necessarily correct. I mean,
10 the rules are necessarily correct. Footnote 16 in
11 the Aina Le'a case says that in determining whether a
12 party has substantially commenced use of the land, it
13 will turn on the circumstances of each case, not on a
14 dollar amount or percentage of work completed.

15 And based on a reading of the supreme court
16 case in Aina Le'a, that not on a dollar amount meant
17 you could consider that, but not only that. There
18 are other factors that are involved.

19 So something that reflected the spirit and
20 intent of the Aina Le'a case, we would argue that the
21 rules should reflect the spirit and intent of the
22 Aina Le'a case with respect to substantial
23 commencement.

24 There are three other issues. I'll try to
25 go through it quickly.

1 The second is in the Aina Le'a case, and
2 it's been ruled upon by the supreme court in the
3 Lana'i case also, that under HRS 205-12 the
4 enforcement authority to conditions is rendered to be
5 the counties, except for Conservation District, and
6 except for the exception in 205-4 -- I have a typo
7 (g) -- where it allows the Land Use Commission to
8 revert the property to its original designation or a
9 more appropriate designation.

10 So we believe that the rule should include
11 that important part 205-12.

12 We also believe that the rules should
13 address and cover the legislative history and intent
14 behind 205-4. And the fact that the LUC enforcement,
15 or their reversion power, their sole enforcement
16 power is reversion. That power, enforcement power
17 for the LUC, the intent was to prevent speculation.

18 And I included a direct quote from the
19 supreme court case, the Aina Le'a case, that the
20 legislature was trying to deter speculators who
21 obtain favorable land use rulings, and then sat on
22 the land for speculative purposes.

23 So we would support adding that to the
24 rules to give some guidance to the Commission and
25 petitioner, any intervenors, and opposition and give

1 guidance to the public.

2 So we believe that these three things would
3 help.

4 So number one was 205-12 enforcement of LUC
5 conditions by the county.

6 Number two would be the legislative history
7 and intent behind the LUC sole enforcement power.

8 And then 205-4, and that's to prevent or
9 deter speculators.

10 And lastly, the third issue is that there's
11 been an important difference noted by the supreme
12 court in Aina Le'a on the LUC procedures depending on
13 whether or not there was substantial commencement of
14 use of the property, or not substantial commencement
15 of use of the property.

16 And to the extent that the supreme court
17 laid out the procedure, we believe that it would be
18 helpful to the Commission, helpful to the petitioners
19 and any parties to the case, any intervenors and the
20 public, if that was spelled out in the LUC rules.

21 So we support the LUC's efforts to amend
22 their rules; and we believe that LUC made a good
23 faith effort in doing so.

24 There were some issues on wrong wording and
25 language, but that was cleared up. So we hope to

1 work together with the LUC in the future on issues
2 such as this, the rules.

3 CHAIRPERSON SCHEUER: Thank you very much,
4 Mr. Arakawa.

5 Let me see if there's Commissioners on the
6 other islands or on this island who want to ask you
7 questions.

8 On Kaua'i, Commissioner Giovanni, any
9 questions?

10 COMMISSIONER GIOVANNI: No questions.

11 CHAIRPERSON SCHEUER: Commissioner Cabral?

12 VICE CHAIR CABRAL: No questions, but I
13 absolutely thank you for your input, and to me it was
14 clearly put. Thank you.

15 CHAIRPERSON SCHEUER: Oahu? Commissioner
16 Okuda, followed by Commissioner Aczon.

17 COMMISSIONER OKUDA: First I would like to
18 disclose for the record that I've known Mr. Arakawa I
19 think since the time we first took the bar exam
20 together in 1981.

21 Mr. Arakawa, regarding your second point
22 about adding language with respect to the legislative
23 intent. Isn't it true that underlying the use of the
24 word "representation", in other words, where an
25 applicant does not, or fails to comply with the

1 representations to the Land Use Commission, we're
2 really talking about integrity of the process? In
3 other words, if an applicant represents and tells not
4 only the LUC, but the community at large that certain
5 things are going to be done, and nothing is done,
6 where there's not only no substantial commencement of
7 the use of the land in accordance with the
8 representations, because I think that's the phrase
9 used by the supreme court in the Aina Le'a case, but
10 not only lack of substantial commencement, but we
11 have seen some cases where there is no commencement.

12 It's not only an issue of protecting the
13 community from land speculation, whether or not
14 there's speculation, we're talking about the
15 integrity of the process; correct?

16 THE WITNESS: Correct.

17 COMMISSIONER OKUDA: And so there can be
18 situations where there might not be evidence of
19 speculation, but if there's evidence that an
20 applicant has made representations to the Commission
21 and to the community about doing certain things, and
22 these things aren't done, the Land Use Commission, in
23 fact, should and has to take a look at that situation
24 without prejudging the outcome.

25 You agree with that; right?

1 THE WITNESS: You know, going back and
2 answering Mr. Okuda's questions, we have known each
3 other since 1981. We have been on the opposite side
4 of litigation. And Mr. Okuda is an excellent
5 attorney, and every chance I get, I avoid any cases
6 involving Mr. Okuda, because he's that sharp.

7 But to answer your question, yes, it's the
8 integrity of the process and the representations, but
9 for 205-4(g) that lane or that box that LUC has
10 jurisdiction over covers where there is no
11 substantial commencement. And it can be -- I'm not
12 going to say "summarily", but the law says they may
13 revert the property to its former land use
14 classification without following procedures otherwise
15 applicable under 205-4; and the petition, or the land
16 use designation is voided.

17 The supreme court says the original land
18 reclassification is simply voided.

19 So in cases that you talk about, the two
20 examples you gave, right, where there's no
21 commencement at all, or no substantial commencement
22 at all, the law and the supreme court has said, hey,
23 the LUC can void it. We support that. We support
24 that 100 percent, we support that.

25 Now, where there is an issue of whether

1 there's been substantial commencement or not, we
2 believe that this legislative intent is instructive
3 and could help. It's not dispositive. It's not
4 going to decide the case, you know, guaranteed, but
5 it's something for the Commission to consider, the
6 legislative intent. Because the supreme court is
7 going to consider it anyway, and that's what happened
8 in this case; right?

9 CHAIRPERSON SCHEUER: If I may procedurally
10 just mark a couple things.

11 Because of the nature of the update from
12 the Executive Director, as the Executive Director of
13 the Commission, we are not going to be taking any
14 action. It was simply notifying us where the rules
15 are at in the process.

16 So I have possibly more from Commissioner
17 Okuda, Commissioner Aczon, Commissioner Chang. We
18 have one other testifier on Oahu as well as a
19 testifier on Hawai'i Island.

20 THE WITNESS: And so just to address the
21 Chair. The Chair is entirely correct. I'm here just
22 to explain why these rules might have been delayed,
23 because we have approached the administration and the
24 governor's office on the affordable housing and
25 working groups. So these are the issues.

1 I'm not trying to ask for any action, I'm
2 just explaining what they may be considering, and why
3 in addition to what the Executive Director said the
4 legislative session and the new direct -- in addition
5 to that, this is what we believe may be being
6 considered right now.

7 COMMISSIONER OKUDA: May I --

8 CHAIRPERSON SCHEUER: A brief follow up.

9 COMMISSIONER OKUDA: Regarding this -- and
10 Mr. Arakawa, I'm all in favor of, you know,
11 participation in government. I think our community
12 is better when we all participate.

13 But in approaching, as you just testified,
14 the governor's office, was LURF's approach to
15 basically stop the enactment of these rules?

16 THE WITNESS: No. Well, it depends on what
17 you mean by "stop the enactment of these rules".

18 What LURF, in the meetings, we said the
19 rules should include these things. So if that meant
20 stop, go back, reconsider, work together with the
21 stakeholders, work out the language, put in
22 information relating to the Aina Le'a case, important
23 issues, if that's what you mean by "stop", yeah.

24 But our intent was never to stop. And
25 these issues were brought up early on. They weren't

1 brought Johnny-come-lately.

2 COMMISSIONER OKUDA: Again, I have nothing
3 against participation and full use of the political
4 process. One concern I have is that these rules were
5 subject to public hearings. And I think, to be fair
6 to other groups in the community, you know, it might
7 be good that if there is going to be these
8 approaches, that other groups be at least given some
9 notice that the vetting process is still continuing
10 so that maybe other people in the community might
11 have other input.

12 Again, I think more input is the better
13 because that gives a better product. I have no
14 further questions.

15 THE WITNESS: We agree 1000 percent that
16 perhaps this should be opened and any stakeholders
17 should be able to comment. And that was our
18 testimony when we were asked to give testimony,
19 submit testimony.

20 We said there are changes that should be
21 made, and we should get involved in working with LUC
22 even in a working group.

23 CHAIRPERSON SCHEUER: Commissioner Aczon.

24 THE WITNESS: The EIS process --

25 CHAIRPERSON SCHEUER: We've got to move

1 this along.

2 COMMISSIONER ACZON: I guess my comment is
3 along the line of Commissioner Okuda. I'm not -- I'm
4 kind of confused about the process. I believe the
5 process went with a hearing about the rule changes,
6 public hearings, before going to the governor's
7 office. Now it's in the governor's office.

8 Are we able to make changes again? I
9 believe those issues that Mr. Arakawa's testimony
10 that they should have been discussed during those
11 hearings, public hearings before the thing goes to
12 the governor.

13 CHAIRPERSON SCHEUER: Commissioner Aczon,
14 these comments are actually probably good but not
15 during public testimony, but after public testimony
16 is closed.

17 And you can address those questions to the
18 Executive Officer. So that wasn't really directed
19 towards you.

20 THE WITNESS: But I can give an example --

21 CHAIRPERSON SCHEUER: But I'm going to --

22 THE WITNESS: Wait one second --

23 CHAIRPERSON SCHEUER: No, please be quiet
24 or --

25 THE WITNESS: The governor's rules were on

1 the governor's desk --

2 CHAIRPERSON SCHEUER: -- I'm going to ask
3 you to remove yourself from this hearing.

4 Mr. Arakawa, please leave the hearing. You
5 are not actually respecting the Chair.

6 THE WITNESS: (Indecipherable)

7 CHAIRPERSON SCHEUER: You're done. I asked
8 you to stop speaking. I tolerated you greatly.
9 Please leave.

10 THE WITNESS: So there is a process for
11 reviewing it back, for you guys to take it back.

12 CHAIRPERSON SCHEUER: Please leave now.

13 THE WITNESS: Very interesting reaction.
14 You know, I'm here to answer any questions by any of
15 the Commissioners.

16 CHAIRPERSON SCHEUER: Please leave.

17 THE WITNESS: I'm being kicked out I guess.

18 CHAIRPERSON SCHEUER: You have been asked
19 and directed to cease talking until other
20 Commissioners were able to address. You refused to
21 acknowledge the Chair. And you insisted on keeping
22 on speaking.

23 You are very well aware that successful
24 public processes require a certain modicum of respect
25 of the process.

1 THE WITNESS: But it also involves the
2 truth, and if a commissioner has a legitimate
3 question, and maybe the AG or in executive session
4 they're not aware of what happened --

5 CHAIRPERSON SCHEUER: Commissioner Aczon.

6 COMMISSIONER ACZON: Can we have a recess,
7 please?

8 CHAIRPERSON SCHEUER: Five minute recess.

9 (Recess taken.)

10 CHAIRPERSON SCHEUER: We are back in
11 session. I'm going to read from Hawai'i Revised
12 Statute Chapter 92, Section 3, Open meetings.

13 Every meeting of all boards shall be open
14 to the public and all persons shall be permitted to
15 attend any meeting unless otherwise provided in the
16 constitution or as closed pursuant to Section 92-4
17 and 92-5; provided that the removal of any person or
18 persons who willfully disrupts a meeting to prevent
19 and compromise the conduct of the meeting shall not
20 be prohibited -- the data, views, or arguments, in
21 writing on any agenda item -- sorry.

22 The boards shall afford all interested
23 persons an opportunity to submit data, views, or
24 arguments, in writing, on any agenda item. The
25 boards shall also afford all interested persons an

1 opportunity to present oral testimony on any agenda
2 item. The boards may provide reasonable
3 administration of oral testimony by rule.

4 And further, Section Hawai'i Administrative
5 Rules 15-15-14: Removal of persons from meetings.
6 The presiding officer or executive officer may remove
7 any person who willfully disrupts the meeting or
8 hearing or other proceeding before the commission.

9 As Chair, and with respect for the work in
10 general, and the efforts that Mr. Arakawa does for
11 this state and for our proceedings he was willfully
12 disrupting this when I asked him -- so I asked him to
13 be removed.

14 We're going to move on to the next
15 testifier.

16 THE WITNESS: And I respect and agree with
17 the law. I disagree with the application --

18 CHAIRPERSON SCHEUER: Mr. Arakawa, I have
19 asked for you to be removed.

20 THE WITNESS: -- but I will leave.

21 CHAIRPERSON SCHEUER: Would you leave,
22 please?

23 THE WITNESS: Yes. But I just wanted to
24 state our position, and I --

25 CHAIRPERSON SCHEUER: No. I said you have

1 been removed. I think that you have been removed and
2 you're refusing to remove yourself.

3 THE WITNESS: I'm leaving.

4 CHAIRPERSON SCHEUER: I apologize to my
5 fellow Commissioners.

6 Mr. Curtis, I understand you want to
7 testify. If you would sit in the Chair next to our
8 Court Reporter.

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

11 THE WITNESS: I do.

12 CHAIRPERSON SCHEUER: Please proceed.

13 HENRY CURTIS

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

17 DIRECT EXAMINATION

18 THE WITNESS: Aloha. I'm Henry Curtis,
19 Executive Director of Life of the Land.

20 First, on the record, I found finding this
21 place enormously difficult. First I went to the
22 Chairman's office, DLNR, then I called LUC, but I got
23 a phone message. So I found it difficult.

24 I want to address the rules which we
25 support and to give an example.

1 D.R. Horton, which is seeking to build
2 affordable units, is not putting rooftop solar on any
3 of the new houses which will raise the long-term cost
4 of everyone who moves in. And right now the Public
5 Utilities Commission and energy stakeholders are
6 trying to figure out how to build the infrastructure,
7 the generation, and the transmission distribution
8 that everybody will pay for including the
9 economically challenged to figure out how to
10 subsidize D.R. HORTON. That is clearly a problem.

11 And under Chapter 344 all commissions must
12 address environmental issues. Thank you.

13 CHAIRPERSON SCHEUER: Thank you.

14 Are there any questions on Kaua'i for Mr.
15 Curtis?

16 COMMISSIONER GIOVANNI: No questions on
17 Kaua'i.

18 CHAIRPERSON SCHEUER: Hilo?

19 VICE CHAIR CABRAL: No, no questions from
20 the Big Island.

21 CHAIRPERSON SCHEUER: Oahu?

22 Thank you very much.

23 We have two testifiers on Hawai'i Island.

24 Mr. Vicente, do you swear or affirm the
25 testimony you will give is the truth?

1 THE WITNESS: I do.

2 CHAIRPERSON SCHEUER: Please proceed.

3 DWIGHT VICENTE

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

6 DIRECT EXAMINATION

7 THE WITNESS: As far as your rules, I look
8 at the documented history and the law, and say that
9 the Land Use Commission being formed in 1955 was the
10 means to usurp power over the lands that was not
11 illegally ceded by the Banana Republic of Hawai'i in
12 1898, that's 1,750,000 acres. There's over 2 million
13 acres that the State of Hawai'i is trying to usurp
14 power over which was not ceded because of the
15 long-term lease under King Kalakaua for 25 years.
16 That's why in 1898 it was not ceded.

17 So the leases ended between 1915 and 1920.
18 And the lessee was claiming to own the lands by
19 adverse possession, which is a crime because these
20 are crown and government lands, and there's native
21 tenant rights attached to them, and it still does.
22 It still belongs to Hawaiian Kingdom and still has
23 native tenant rights attached to them.

24 So your jurisdiction should be limited to
25 the ceded lands which is the 1,750,000 acres, so

1 rebranded in 1920 as Hawaiian Homelands.

2 Until that issue is resolved, but to
3 crossover the great divide so you can develop them
4 and take them out of agriculture use, which was what
5 it was leased as is a violation.

6 And I think your rules should reflect the
7 limited jurisdiction of the Land Use Commission to
8 the justice ceded lands for now until that issue is
9 resolved in Washington D.C., because it was illegally
10 incorporated Article 4, Section 3, Clause 2, no
11 amendment Mulberry versus Madison.

12 CHAIRPERSON SCHEUER: Thank you very much.
13 Commissioner Cabral, questions for the
14 testifier?

15 VICE CHAIR CABRAL: No questions.

16 CHAIRPERSON SCHEUER: Commissioner
17 Giovanni?

18 COMMISSIONER GIOVANNI: No questions, thank
19 you.

20 CHAIRPERSON SCHEUER: Oahu?

21 Thank you very much for your testimony.

22 And then I believe followed by Mr. Church.

23 Good morning.

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

1 THE WITNESS: I do.

2 CHAIRPERSON SCHEUER: Please proceed.

3 KENNETH STANLEY CHURCH

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

7 DIRECT EXAMINATION

8 THE WITNESS: I have two concerns relative
9 to the rule changes. I've carefully read the statute
10 that generates your Rule 15-15, I believe that's 205.

11 205 appears to contemplate that there are nine
12 Commissioners. And that when you rezone, when an
13 applicant applies to rezone any land that's in the
14 Conservation District, it takes six affirmative
15 votes.

16 It appears within the rules that the rules
17 do not bring forward the intent of the statute
18 because there are several examples of where there are
19 fewer than nine Commissioners, and yet the rule of
20 six affirmative votes still applies.

21 Is there any new -- are the new rules in
22 any way improving on the apparent inconsistency
23 between the statute and the rules?

24 CHAIRPERSON SCHEUER: Is that the
25 conclusion of your testimony, Mr. Church?

1 THE WITNESS: No, I have one other.

2 The Supreme Court of the United States just
3 made a ruling about effective taking of lands, and it
4 was a California case had to do with an unmarked
5 cemetery on a private property where local laws tried
6 to allow public access onto the property. And
7 Supreme Court made a ruling in this regard. And I
8 think it would be useful if the rules that are
9 currently under consideration for modification
10 consider that recent ruling and, if appropriate,
11 reflect same.

12 That's the end of my testimony.

13 CHAIRPERSON SCHEUER: Thank you.

14 Commissioner Cabral, do you have questions
15 or comments for the testifiers?

16 VICE CHAIR CABRAL: No, I do not.

17 CHAIRPERSON SCHEUER: Commissioner
18 Giovanni?

19 COMMISSIONER GIOVANNI: No questions.
20 Thank you.

21 CHAIRPERSON SCHEUER: Oahu?

22 I'll just address two things.

23 Very briefly, Mr. Church, the rules are an
24 attempt, and I believe a successful one, to more
25 closely have both case law and the statute reflected

1 in the administrative rules.

2 Thank you for your testimony.

3 Is there anybody else wishing to testify on
4 this particular agenda item? Seeing none, there is
5 no action. Is there any further closing public
6 testimony on this? Is there any further Commission
7 discussion on this matter?

8 Commissioner Aczon, you had a procedural
9 question about where we are in this process.

10 Could you restate it for the flow of our
11 discussion?

12 COMMISSIONER ACZON: I just felt that the
13 testimony that Mr. Arakawa brought up, issues that he
14 brought up should have been discussed during the rule
15 change public hearings before the thing goes to the
16 governor. But now it's on the governor's desk, so
17 are we able to change or --

18 CHAIRPERSON SCHEUER: Well, in part that is
19 a legal question. So I'll ask the attorney general
20 to address the legal portion of your question. Could
21 those rules be amended while they're at the
22 governor's office?

23 MS. TANIGAWI: I would invite the
24 Commission, if they would like to consult with their
25 attorney, to maybe consider going into executive

1 session pursuant to 92-5(a)(4).

2 CHAIRPERSON SCHEUER: Mr. Executive
3 Officer.

4 EXECUTIVE OFFICER: From a procedural
5 standpoint, and this is what has been set down from
6 the governor's office with regard to how these things
7 are supposed to progress, and I don't know the basis
8 for the rules that the governor's office has provided
9 with regard to how rules are supposed to be
10 processed. We are following their guidance.

11 UNKNOWN SPEAKER: Can you please speak up?

12 EXECUTIVE OFFICER: We're following their
13 guidance.

14 Once the rules are on the governor's desk,
15 they are, for all intents and purposes, final. If we
16 were to make changes to the rules, my
17 understanding -- or if we desire to make changes to
18 the rules at this point, we would have to request
19 that the governor send them back to us. And then we
20 would have to begin the process all over again
21 including going out for public hearing and, you know,
22 take public testimony, submitting them once again to
23 the director's office for final submission to the
24 governor's office.

25 COMMISSIONER ACZON: That's my kind of

1 point is. It's just that his testimony doesn't
2 belong to this meeting, belongs someplace else.

3 EXECUTIVE OFFICER: If I may, once again,
4 Mr. Chair, this is not new information that -- he
5 provided this to us.

6 CHAIRPERSON SCHEUER: For the record, for
7 everybody, including the benefit of new
8 Commissioners, we have heard the testimony throughout
9 the process in the Land Use Research Foundation.
10 They made some specific comments that they thought
11 was so valuable that after one full round of public
12 hearing we made changes to the administrative rules,
13 and sent them out for another round of public
14 hearing.

15 And I am very eager personally to see these
16 rules enacted, because of the specific guidance they
17 give us, not only on Bridge-related matters, but also
18 regards to climate change.

19 COMMISSIONER ACZON: I just thought that
20 Mr. Arakawa was trying to really dictate the issue
21 one more time. I hate to say it, just a waste of
22 time.

23 CHAIRPERSON SCHEUER: And though I
24 shouldn't have to say this for the record -- but for
25 the record, I had no concern whatsoever with the

1 content of Mr. Arakawa's testimony. It was his
2 refusal to stop speaking when directed to by the
3 Chair.

4 COMMISSIONER ACZON: Thank you, Mr. Chair.

5 CHAIRPERSON SCHEUER: Anything else on this
6 matter?

7 Moving back to Agenda item IV, Adjustment
8 of Executive Director's Contract.

9 Unfortunately, we did a review of the
10 Executive Director's performance, that was led by
11 Commissioner Wong, who is not here with us today.
12 The salaries were recently made public in Civil Beat.
13 We believe Mr. Orodener is not -- first of all, has
14 performed extremely well in the service of this
15 Commission, and is deserving of a raise to bring him
16 close, not even fully comparable to his peers within
17 this department.

18 So there is going to be a recommendation
19 for doing a one time five percent adjustment to his
20 salary with funds that are existing in the budget and
21 available for that purpose.

22 Is there anything you want to say about
23 that matter, Dan, right now before we go to public
24 testimony on this matter?

25 EXECUTIVE OFFICER: Nothing, other than to

1 express my appreciation to the Commission, and how in
2 actuality I really enjoy working with this
3 Commission. I think we have a good group of people.

4 One question, Mr. Chair, because it's going
5 to need to be clarified for the Administrative
6 Service Office, is that retroactive --

7 CHAIRPERSON SCHEUER: Retroactive to
8 July 1st of this year.

9 EXECUTIVE OFFICER: Thank you, Mr. Chair.

10 CHAIRPERSON SCHEUER: Anybody who wishes to
11 provide public on this agenda item, starting with
12 Hilo.

13 VICE CHAIR CABRAL: No, I don't think so.

14 CHAIRPERSON SCHEUER: No one on Kaua'i?

15 COMMISSIONER GIOVANNI: We're good.

16 MS. TUMMONS: Go, Dan.

17 CHAIRPERSON SCHEUER: For the record, Pat
18 Tummons of Environment Hawai'i says, "Go, Dan".

19 EXECUTIVE OFFICER: Thank you, Pat.

20 CHAIRPERSON SCHEUER: Kaua'i, no one there
21 but you guys, right?

22 COMMISSIONER GIOVANNI: Correct.

23 CHAIRPERSON SCHEUER: Oahu?

24 MR. CURTIS: Ditto.

25 CHAIRPERSON SCHEUER: Ditto from our

1 previous testifier from Life of the Land.

2 I'm closing public testimony on this
3 matter. Commissioners, is there a motion? Then we
4 can go into discussion.

5 Why don't we start with Nancy and then
6 we'll go to Ed.

7 VICE CHAIR CABRAL: I would like to make a
8 motion to support your statement asking for the five
9 percent increase retroactive to July 1st for our
10 Executive Officer.

11 CHAIRPERSON SCHEUER: Is there a second?

12 COMMISSIONER ACZON: Happy to second
13 Commissioner Cabral's motion.

14 CHAIRPERSON SCHEUER: So the motion has
15 been made by Commissioner Cabral and seconded by
16 Commissioner Aczon.

17 Is there discussion on the motion?
18 Commissioner Okuda.

19 COMMISSIONER OKUDA: Mr. Chair, I would
20 like to speak in favor of the motion. First of all,
21 there was a specific method of evaluating the
22 Executive Director's performance which was done
23 confidentially among the Commissioners using a rubric
24 that Commissioner Wong circulated which I believe
25 fairly and accurately listed the qualifications and

1 items for evaluation.

2 Secondly, in observing not only the
3 Executive Officer's performance, but his interactions
4 and the staff that he's been able to develop here, I
5 believe that the motion is well supported by the
6 actual facts in the record.

7 CHAIRPERSON SCHEUER: Commissioner Mahi.

8 VICE CHAIR MAHI: I would like to make
9 my -- exert my support of the motion. And I've
10 always felt wonderful support that Dan has offered,
11 also the Commission, but myself in terms of
12 understanding the various issues that we face. His
13 communication with me has been really valuable. And
14 due to that, I support this motion.

15 CHAIRPERSON SCHEUER: Anything further on
16 the lovefest? I'll just add, if I could pay him
17 more, I would. He certainly deserves it.

18 I'm going to call for the question. All in
19 favor say "aye". Anybody opposed? The motion
20 carries unanimously.

21 EXECUTIVE OFFICER: Thank you, Mr. Chair.
22 Thank you, Commissioners, for your support.

23 CHAIRPERSON SCHEUER: Now to substantive
24 business. At this point let me go back to the
25 script.

1 This concludes the Honolulu portion of the
2 agenda. The 9:00 a.m. portion of the agenda of the
3 meeting is adjourned.

4 The Commission will convene the next
5 meeting in Hilo, Hawai'i immediately via
6 videoconference. The Honolulu-based video meeting is
7 now adjourned.

8 Then I will start with the bang of my water
9 bottle which you heard a few times this morning.

10 EXECUTIVE OFFICER: It's not broken?

11 CHAIRPERSON SCHEUER: It's not broken.

12 This is the 9:30 a.m. portion of the August
13 29, 2019 Land Use Commission Meeting being held by
14 interactive conference technology linking video
15 conferencing centers on Kauai, Oahu and the Island of
16 Hawai'i.

17 A participating Commissioner is in each
18 designated site, with the Executive Director, Chair
19 and Court Reporter on Oahu, the LUC Chief Clerk in
20 Hilo, and LUC staff planner, Scott Derrickson on
21 Kauai with Commissioner Giovanni.

22 The first order of business is to assign
23 Commissioner Nancy Cabral to serve as the presiding
24 Chair for the Hilo Hawaii videoconference based
25 proceedings.

1 Commissioner Cabral, do you agree to
2 preside over the morning's proceedings?

3 VICE CHAIR CABRAL: Yes, I do.

4 CHAIRPERSON SCHEUER: Please continue.

5 ACTING CHAIR CABRAL: Thank you.

6 This is the Hilo, Hawai'i August 29th, 2019
7 Land Use Commission meeting being held by interactive
8 conference technology linking videoconferencing
9 centers on Kauai, Oahu and the Island of Hawai'i. A
10 participating Commissioner is in each designated
11 site, with the Executive Director, Chair and Court
12 Reporter on Oahu, the LUC Chief Clerk in Hilo and LUC
13 staff planner, Scott Derrickson on Kauai with
14 Commissioner Giovanni.

15 A18-806 Barry Family Trust (Hawai'i)

16 This is an action meeting on Docket A18-806
17 Barry Family Trust to Consider Petitioner's MOTION
18 FOR ISSUANCE OF ANTICIPATED NEGATIVE DECLARATION OR
19 ANTICIPATED FINDING OF NO SIGNIFICANT IMPACT (FONSI).

20 Please let the record reflect that the main
21 meeting locale for this meeting is at the Hilo,
22 Hawai'i videoconference site.

23 At this point let me update the record.

24 The Commission met in Hilo, Hawai'i on
25 January 23rd, 2019 and unanimously voted to grant

1 Petitioner's Motion Requesting the LUC be the
2 approving authority for the Environmental Assessment.

3 From January 31, 2019 to July 16, 2019 the
4 Commission received various correspondence regarding
5 Petitioner's consultation and the draft Environmental
6 Assessment which were filed and made part of the
7 record.

8 On July 26, 2019, the Commission received
9 Petitioner's Motion for Issuance of Anticipated
10 Negative Declaration or Anticipated Findings of No
11 Significant Impact, with Exhibits 1 and 2.

12 On August 21, 2019, the Commission mailed
13 an agenda notice to the Parties, the Statewide, Oahu,
14 Kauai and Hawai'i mailing lists.

15 Will the Parties please identify themselves
16 for the record?

17 MR. SIMON: Derek Simon for Petitioners
18 Kenneth and Monica Barry as Trustees of the Barry
19 Family Trust.

20 MS. APUNA: Deputy Attorney General Dawn
21 Apuna on behalf of State Office of Planning. Here
22 with me is Aaron Setogawa.

23 MR. PATEL: Good morning, Commissioners,
24 Danny Patel, Deputy Corporation Counsel, with me is
25 Deputy Planning Director Duane Kanuha.

1 ACTING CHAIR CABRAL: Thank you.

2 Are there any public witnesses that will
3 need to be sworn in at this time regarding this
4 matter, the Barry Family Trust?

5 We have with us one public testifier that
6 is Dwight Vicente, and we will have him squeeze up
7 here and come and testify.

8 I believe our Chair swore you in previously
9 and I would consider that swearing in would still be
10 in effect; is that correct?

11 CHAIRPERSON SCHEUER: Sure.

12 VICE CHAIR CABRAL: Thank you.

13 Go ahead and testify.

14 DWIGHT VICENTE

15 Was called as a witness by and on behalf of the
16 Public, was previously sworn in, was examined and
17 testified as follows:

18 DIRECT EXAMINATION

19 THE WITNESS: Dwight Vicente representing
20 the Hawaiian Kingdom, and I'm going to give you a
21 little history of how we come to this point.

22 The history can go back to 1820 with
23 President Monroe appointed John C. Jones in charge of
24 the missionary family and U.S. Navy, so you can see
25 the colonial process taking place.

1 No amendment to the U.S. Constitution
2 Mulberry vs. Madison.

3 Now, in 1875 under King Kalakaua the
4 Reciprocity Treaty was not signed by either King
5 Kalakaua or the U.S. president. It was signed by
6 three United States senators in Washington D.C. which
7 is not authorized under the U.S. Constitution.

8 From that point on, the U.S. citizens can
9 be called illegal aliens here in this kingdom,
10 because there's no valid treaty.

11 Then go back to 1893, where they removed
12 the queen, because she promulgated a new constitution
13 that would eliminate the U.S. citizen, so they took
14 action against her. It was hoping to declare war on
15 the Hawaiian Kingdom which never happened, so it does
16 not fall under the Laws of Nation, where war is
17 declared, and there is a peace treaty.

18 Instead you have Queen Liliuokalani on
19 January 17, 1893, filing a protest against U.S.
20 Minister Stevens for an illegal and unconstitutional
21 act being that he was here without a valid treaty.

22 And then going back to 1897, the other
23 treaties with the other countries all ended.

24 And before that, going back, I think to
25 1890, King Kalakaua had bumped up those leases from

1 three to five years to 25 years. Sort of what you
2 would refer to as the agricultural lands.

3 So in 1898 the Banana Republic did not cede
4 these 2.2 million acres because of the lease contract
5 which would end between 1915 and 1920.

6 So the only lands that was ceded was the
7 1,750,000 acres of crown and government land that did
8 not possess a lease contract, and was incorporated
9 under Article 4, Section 3, Clause 2 of the U.S.
10 Constitution to amendment.

11 ACTING CHAIR CABRAL: I want to ask you to
12 conclude in another minute or so.

13 THE WITNESS: Okay.

14 So these lands here, the state has no
15 jurisdiction. The federal government has no
16 jurisdiction. The county has no jurisdiction over
17 the lands in question.

18 Whereas you have an individual claiming to
19 own either the crown or government lands that are all
20 subject to native tenant rights and political rights
21 to this land.

22 So the jurisdiction of this Commission, and
23 including the County Planning Commission, is in
24 question. They're going beyond their limit usurping
25 power over lands that still belong under the

1 jurisdiction of the Hawaiian Kingdom. The only
2 reason why the Kingdom is not in operation, because
3 the State Land Use, State Historic Preservation is
4 holding Iolani Palace hostage at the moment. It's
5 held as a museum to prevent the kingdom from being
6 operated.

7 And the kingdom was -- the Iolani Palace
8 was not ceded in 1898. Just as this meeting is being
9 held in Hilo, Hilo is still a part of the Hawaiian
10 Kingdom, yet it was not ceded in 1898.

11 So with that, I'll end. Thank you.

12 ACTING CHAIR CABRAL: Any questions of our
13 witness? State? County of Hawai'i? Any questions,
14 Commissioners for our witness?

15 MS. APUNA: No questions.

16 VICE CHAIR CABRAL: Thank you. Let us
17 proceed then.

18 Thank you very much for the public
19 testimony. Very interesting.

20 I would like to proceed. Is that Mr. Lim
21 or Mr. Simon? I'm sorry.

22 Mr. Simon is on Oahu. Would you go ahead
23 and make your presentation at this time?

24 MR. SIMON: Good morning. Thank you very
25 much for holding this agenda item just for this

1 motion that we did file on behalf of the Barrys.

2 As a reminder, this is related to a
3 half-acre parcel on the coastline of Hawaiian
4 Paradise Park.

5 The Barrys are seeking to reclassify it
6 from the Conservation District to the Agricultural
7 District. To that end, we filed a preliminary
8 petition with the Commission back in December of
9 2018. One of the contents requirements for a
10 petition out of the Conservation District is either
11 an accepted EIS or an issuance of a finding of no
12 significant impact.

13 So this motion today is a part of that
14 process as was previously noted. The Commission did
15 agree and voted to be the approving agency for the
16 purpose of this environmental assessment.

17 One minor thing I would like to clarify.
18 Another document was filed just last week to clarify
19 the effect of the new rules which the governor
20 recently signed into law.

21 We are in a bit of a precarious position
22 with the timing. We wanted to get on the agenda for
23 this item and file our motion to give the parties
24 plenty of time to review as well as the Commission.

25 However, shortly after filing the motion,

1 the new rules were signed into law and the new EA, or
2 our EA that hopefully will be published in the near
3 future, will be processed under the new rules.

4 Nevertheless, the documents we provided the
5 Commission, including a memorandum regarding the
6 significance criteria for assessing applicant actions
7 as well as the preliminary environmental assessment
8 we filed, together with the motion, both meet the
9 requirements of the new rules from a content
10 respective. There's some rewording and other stuff
11 that will be updated prior to publication.

12 Other than that, I would just submit to the
13 Commission that the motion is well supported by both
14 the memorandum we submitted, and the preliminary
15 draft assessment that was filed with the motion, and
16 ask that the Commission vote to issue the FONSI and
17 clear the way to publish a draft environmental
18 assessment.

19 ACTING CHAIR CABRAL: Before we have any
20 questions of the Petitioner, I do think I should
21 declare that I am familiar with the area that this
22 land is located in the Hawaiian Paradise Park
23 Subdivision here in East Hawai'i; and I own a parcel
24 of land there that is vacant land somewhere in the
25 middle of it.

1 And I also, from approximately June of 1998
2 until sometime in 2003, I was appointed by the Third
3 Circuit Court to be the court appointed property
4 manager for that homeowners association. And under
5 that court order, I did an extensive amount of work.
6 I am familiar with the general location of this
7 parcel, but I have no personal connections to the
8 Barry family or any personal knowledge of the
9 absolute details of that parcel versus any of the
10 other 8,835 parcels.

11 Thank you.

12 Does anyone think I might have a conflict
13 here? Any other potential conflicts?

14 Commissioner Okuda, you usually have
15 something.

16 COMMISSIONER OKUDA: Madam Chair, I have
17 nothing to add on this matter.

18 CHAIRPERSON SCHEUER: Madam Chair, if I
19 might suggest, you might just check with each of the
20 parties whether they have any objection to your
21 continuing this matter.

22 ACTING CHAIR CABRAL: County of Hawaii, any
23 objection?

24 MR. PATEL: No objection?

25 ACTING CHAIR CABRAL: State of Hawai'i

1 Office of Planning?

2 MS. APUNA: No objection.

3 ACTING CHAIR CABRAL: Petitioner, any
4 objection?

5 MR. SIMON: None from the Petitioner.

6 VICE CHAIR CABRAL: Any other of my fellow
7 Commissioners have any objections?

8 Thank very much.

9 Let me proceed then. Do we have any
10 questions at this time of the Petitioner? And I
11 would start then with County of Hawai'i. Do you have
12 any questions of the Petitioner?

13 MR. SIMON: No questions. Just state for
14 the record that the County has no objection to the
15 motion.

16 ACTING CHAIR CABRAL: That was County of
17 Hawai'i. No objections to that motion.

18 Office of Planning?

19 MS. APUNA: No questions.

20 VICE CHAIR CABRAL: Thank you, no questions
21 from Office of Planning.

22 Fellow Commissioners, do you have questions
23 at this time of the Petitioner?

24 Commissioner Chang.

25 COMMISSIONER CHANG: One procedural

1 question. First procedural question.

2 So if under -- is this motion premature
3 since you're going to resubmit environmental
4 assessment? So while you say you substantively have
5 complied, procedurally is this premature and you have
6 to reapply?

7 MR. SIMON: Commissioner Chang, no, I do
8 not believe it is premature. The EA that was filed
9 with the Commission was for the purpose of the
10 Commission evaluating whether or not a negative
11 declaration or a FONSI is warranted. That has not
12 about been published.

13 The published EA will conform to any
14 substantive procedural changes in the new rules. But
15 the preliminary EA is essentially a means to provide
16 the Commission with the information it needs to make
17 its own assessment under the significance criteria.

18 I hope that answers your question.

19 COMMISSIONER CHANG: I am going to defer to
20 to you if that's your interpretation.

21 Let me ask you two substantive questions
22 related to the Ka Pa'akai analysis.

23 First question is related to -- there is an
24 old government road. Could you tell me in
25 relationship to the Barry property, where is the old

1 government road?

2 MR. SIMON: It runs makai. Geographically
3 I don't know the land that well. But it is -- not
4 makai, mauka of the property.

5 COMMISSIONER CHANG: So the old government
6 road doesn't transect the property?

7 MR. SIMON: It does not, no.

8 COMMISSIONER CHANG: Second question
9 involves, under the findings and conclusions of --
10 well, Ka Pa'akai analysis, it says the collection of
11 marine resources for subsistence purposes is a
12 traditional and customary practice, and while such
13 activity may be taking place in the vicinity of the
14 current study parcel, it is our contention that the
15 proposed rezoning action will not adversely affect
16 this practice, nor will it impair access to the
17 coast.

18 So could you explain to me, is there --
19 where is the access; and on what basis will it not
20 affect access to the coast?

21 MR. SIMON: My understanding is that one of
22 the more common but unofficial coastal access points
23 is just north of the property.

24 CHAIRPERSON SCHEUER: I think everybody
25 needs to speak loud just to make sure the other

1 islands can hear you.

2 MR. SIMON: Just north of the property I
3 believe there is an unofficial access road. There is
4 no access to the coastline through the property at
5 issue here. It's heavily vegetative. It hasn't been
6 cleared, if ever.

7 And I believe to the extent that the report
8 contends it will not be an interference with this
9 practices, that those practices are really carried
10 out on the rocky shelf along the coastline there
11 where no improvements are proposed, and where access
12 would not be inhibited.

13 COMMISSIONER CHANG: So I just want to
14 confirm, there is alternative public access near the
15 property but not on the property?

16 MR. SIMON: That is correct.

17 COMMISSIONER CHANG: Thank you very much.

18 ACTING CHAIR CABRAL: Thank you. Fellow
19 Commissioners, any other questions of the Petitioner?

20 COMMISSIONER OKUDA: Yes. Gary Okuda.

21 ACTING CHAIR CABRAL: Proceed.

22 COMMISSIONER OKUDA: Thank you.

23 Mr. Simon, and tell me if my understanding
24 is wrong.

25 Parcels around the Barry parcel were

1 redesignated from Conservation to Agriculture under a
2 Land Use Commission order entered in 1976; correct?

3 MR. SIMON: That is correct.

4 COMMISSIONER OKUDA: And this one parcel
5 was not part of all those other boundary
6 redesignations because of the fact that the then
7 owner could not be contacted or identified, or
8 something along that line?

9 MR. SIMON: That is correct.

10 COMMISSIONER OKUDA: So I do recognize the
11 fact that the parcel is surrounded by other parcels
12 which no longer carry the Conservation designation.
13 Let me ask you this.

14 What type of agriculture do the Barrys
15 really intend to pursue here?

16 MR. SIMON: They're looking at a number of
17 options as noted in the draft EA. Mrs. Barry, Monica
18 Barry is an active participant in the West Hawaii
19 Gardener's Program which is done through UH Hilo.
20 They've looked at a number of things including bee
21 keeping, aquaponics, the propagation of native
22 plants. A number of different agricultural uses that
23 will satisfy 205 in the county code.

24 COMMISSIONER OKUDA: Okay. Because the EA
25 is intended to address a petition to redesignate this

1 property agriculture. But one interpretation, when
2 you look at the underlying findings, and I think we
3 as Commissioners, we can bring our experience, not
4 necessarily specific investigation, but our general
5 experience and maybe common sense to that extent into
6 decisionmaking.

7 One concern I might have is the fact that
8 this is really a disguise attempt to get Urban use in
9 an Agriculture parcel, and should the EA in fact
10 address whether or not this parcel should in fact be
11 redesignated Urban and not Agriculture.

12 MR. SIMON: Your concerns regarding the
13 seeking redesignation to Ag for Urban purposes is
14 well-taken. I do understand that there's history
15 behind gentlemen ranches, and those issues are out
16 there.

17 I would state that the Barrys are very
18 sincere people, very honest people. You'll likely
19 hear from Monica Barry during the course of the dba
20 proceedings, and they're sincerely and genuinely will
21 be implementing an agricultural use in connection
22 with their reclassification.

23 To the extent you're asking whether or not
24 this is more appropriate for an Urban designation, I
25 don't know if Urban is appropriate for the Hawaiian

1 Paradise Park, per se, not that it couldn't be. I
2 don't know the County's or OP's beliefs on that
3 designation for this parcel.

4 But, again, I believe the intent of the
5 Barrys was to seek harmony of the existing
6 neighborhood as well as the overall nature of the
7 subdivision, as well as underlying County planning
8 and zoning as well.

9 COMMISSIONER OKUDA: Thank you very much.

10 VICE CHAIR CABRAL: Thank you.

11 Any other Commissioners with questions of
12 the Petitioner? No questions. Okay.

13 I have a couple of questions. And I just
14 actually want confirmation I think of what was
15 previously said since I am familiar with it, as
16 indicated, its boundaries are, one side of the ocean
17 are the cliffs and the rocks. The other side -- on
18 both of the other sides, on the right and the left
19 side of the parcel would be additional lots that are
20 currently zoned Agriculture.

21 And then the street, the privately-owned
22 road owned by Hawaiian Paradise Park Owners
23 Association, the other fourth boundary. I wanted a
24 confirmation on that; and then also that there is
25 several public parks along that same oceanfront, one

1 of which I think is only a few lots away from this.

2 Is that your understanding, Mr. Simon, of
3 the general vicinity of this parcel?

4 MR. SIMON: Chair Cabral, you're correct as
5 to your first question regarding the surrounding
6 parcels and uses.

7 Again, all the parcels surrounding the
8 Barry property are in the Agricultural Land Use
9 District, State Land Use District.

10 Obviously the Barry property is not. They
11 all enjoy the same County zoning designation.

12 And the mauka boundary of the property is
13 Paradise -- Alakai Drive, a private road owned by the
14 association.

15 Can you restate your second question? I
16 apologize.

17 ACTING CHAIR CABRAL: Are you aware of the
18 location -- and I didn't drive down there to double
19 check. I think it's only a few lots -- are you aware
20 there are several parks along that way that are
21 actually open to the public to allow for ocean -- I
22 hesitate to say beach access because there is not
23 what one considers a beach, but at least access to
24 the ocean and rocks along there?

25 I just wanted to clarify that that is your

1 understanding, or that is the correct location of
2 open public access, large access, not just a pathway
3 or trailway in the very close vicinity?

4 MR. SIMON: Yes, that is correct. There
5 are several county-owned shoreline parcels. They're
6 within a couple blocks. They're close, but I
7 wouldn't say neighboring this parcel.

8 And I don't know if they're improved parks.
9 I don't know if the County considers those to be
10 official coastal access points, but I assume that
11 access can be had through those parks as well.

12 VICE CHAIR CABRAL: Thank you very much.

13 Do we have any questions? County of
14 Hawaii, did you want to give any input or make any
15 comments on the possible zoning question?

16 MR. PATEL: None from the County.

17 ACTING CHAIR CABRAL: Office of Planning,
18 any additional comments?

19 MS. APUNA: Office of Planning has no
20 objection to Petitioner's motion.

21 ACTING CHAIR CABRAL: Any other comments
22 from the Commissioners?

23 At this point in time, what is the pleasure
24 of the Commission? Any Commissioners want to take
25 any action at this point in time?

1 Commissioner Mahi, did you have your hand
2 up?

3 VICE CHAIR MAHI: I wish to make a motion
4 in favor of issuance of this anticipated negative
5 declaration of anticipated findings of no significant
6 impact. If I get a second on that, I would like to
7 consider that.

8 ACTING CHAIR CABRAL: Do I hear a second to
9 Commissioner Mahi's motion of no significant impact?
10 Anyone wanting to second that at this time?

11 COMMISSIONER OKUDA: Second.

12 ACTING CHAIR CABRAL: Is that Commissioner
13 Okuda?

14 COMMISSIONER OKUDA: Yes.

15 ACTING CHAIR CABRAL: At this point a
16 motion has been made by Commissioner Mahi and
17 seconded by Commissioner Okuda to approve the motion
18 of no significant impact.

19 Is there any further discussion?

20 COMMISSIONER CHANG: Chair Cabral.

21 ACTING CHAIR CABRAL: Commissioner Chang.

22 COMMISSIONER CHANG: I'm inclined to vote
23 in favor of the motion based upon the representation
24 by the Petitioner's counsel that when the actual EA
25 is filed, there will be no -- it will be essentially

1 the same EA that's already been on the record, so
2 that there's no changed condition.

3 Because my understanding is that this is a
4 motion of an anticipated negative declaration. So
5 that is -- my position is that based upon their
6 representation.

7 COMMISSIONER OKUDA: Chair.

8 ACTING CHAIR CABRAL: Thank you,
9 Commissioner Chang. Commissioner Okuda.

10 COMMISSIONER OKUDA: The reason why I
11 seconded this motion and will vote for it is because
12 I believe the record supports, at this point in time,
13 a finding of no significant impact. This includes
14 the status of the surrounding parcels.

15 However, when we get to making, at some
16 point in time, a final decision on the Petition, I
17 still do have a concern about whether or not these
18 types of petitions to redesignate land from
19 Conservation District to Agricultural District is in
20 fact something which is a disguised nonagricultural
21 use.

22 Now, I understand that agricultural
23 dwellings do not have to look bad. There's nothing
24 that prohibits a swimming pool on Agricultural
25 District. There's nothing that says a person

1 engaging in agriculture has to live in a type of
2 house that I grew up in. Nothing in the law that
3 says that.

4 But at the same time I think there is a
5 concern that there shouldn't be approval by
6 government agencies where in fact the dwellings are
7 not with accessory to agriculture, you know, having a
8 situation where the agriculture is with accessory to
9 the dwelling, and almost used as a subterfuge that's
10 a fact finding issue that the Commission has to look
11 into.

12 So even though I support this motion, I
13 just like to state for the record that is my concern
14 that, where property is being designated agriculture,
15 essentially taken out of the Conservation District,
16 which, by constitution, has certain policy
17 protections that the constitution requires agencies
18 to follow. I believe that that's the scrutiny, at
19 least I personally will be looking at as this
20 petition goes forward. Thank you.

21 VICE CHAIR CABRAL: Thank you, Commissioner
22 Okuda.

23 Commissioner Aczon, I think that's your
24 hand up.

25 COMMISSIONER ACZON: Madam Chair, to

1 support the motion, if I may, I want to make a
2 friendly amendment. Like to request that the
3 Petitioner work with LUC staff to put together all
4 the necessary documents required by OEQC under HRS
5 11-200.1-5 and 19 for publication, and public review
6 for an environmental assessment.

7 VICE CHAIR MAHI: I have no problem.

8 COMMISSIONER OKUDA: As a seconder, I
9 agree.

10 VICE CHAIR CABRAL: Is that amendment
11 acceptable to Commissioner Mahi, the maker of the
12 motion?

13 COMMISSIONER MAHI: Yes, it is.

14 VICE CHAIR CABRAL: It is. Okay. And is
15 it acceptable to Commissioner Okuda as the party who
16 seconded the motion?

17 COMMISSIONER OKUDA: Yes.

18 ACTING CHAIR CABRAL: So we now have a
19 motion to accept the Petition but with amendment to
20 that, the Petitioner would work with the LUC
21 specifically regarding proper documentation regarding
22 revised statutes and rules and regulations.

23 Continued comments from Commissioners at
24 this time.

25 CHAIRPERSON SCHEUER: Chair.

1 ACTING CHAIR CABRAL: I can't see who that
2 that is. Is that Commissioner Shorue (phonetic)?

3 CHAIRPERSON SCHEUER: Yes, it is.

4 Bringing back many, many years at Iolani.
5 Thank you, Commissioner Cabral.

6 I'm just going to agree with Commissioner
7 Okuda's comments speaking in favor of the motion, but
8 also just add that I appreciate that this, even
9 though this is a very small half-acre parcel, I
10 appreciate that rather than trying to shoehorn in
11 this kind of use into the Conservation District and
12 force a whole bunch of entities to go into
13 contortions to claim that this is deserving of a
14 Conservation Use Permit, instead they're actually
15 going through the redistricting which is exactly the
16 kind of procedures that the framers of 205 intended.
17 Thank you.

18 ACTING CHAIR CABRAL: Thank you,
19 Commissioner Scheuer. Any other comments from
20 Commissioners?

21 I will speak also in favor of this motion,
22 and the amendment with much of the same concerns and
23 reservations in that I do not likely take changing
24 land, taking land out of Conservation, but in light
25 of the history of this particular small parcel in the

1 middle of those other parcels and my extensive
2 knowledge of that subdivision, I see no benefit to
3 our County, our State to continue to have .51 acres
4 of parcel in Conservation in that particular setting.

5 I think we have much better use of that
6 type of zoning in areas to preserve our land. So I
7 too will vote in favor.

8 Any other comments from Commissioners at
9 this time? May I ask our Executive Director to poll
10 the Commissioners on this matter.

11 EXECUTIVE OFFICER: Thank you, Madam Chair.

12 The motion is in favor of finding of no
13 significant impact with a friendly amendment to work
14 with staff on proper documentation on rulings and
15 statutes.

16 Commissioner Mahi?

17 VICE CHAIR MAHI: Aye.

18 EXECUTIVE OFFICER: Commissioner Okuda?

19 COMMISSIONER OKUDA: Yes.

20 EXECUTIVE OFFICER: Commissioner Giovanni?

21 COMMISSIONER GIOVANNI: Yes.

22 EXECUTIVE OFFICER: Commissioner Aczon?

23 COMMISSIONER ACZON: Yes.

24 EXECUTIVE OFFICER: Commissioner Chang?

25 COMMISSIONER CHANG: Yes.

1 EXECUTIVE OFFICER: Commissioner Scheuer?

2 CHAIRPERSON SCHEUER: Aye.

3 EXECUTIVE OFFICER: Chair Cabral?

4 VICE CHAIR CABRAL: Aye.

5 EXECUTIVE OFFICER: Thank you, Madam Chair.

6 The motion passes unanimously.

7 Commissioners Wong and Ohigashi are absent.

8 ACTING CHAIR CABRAL: Thank you very much.

9 At this time I would like to ask if there
10 is any additional Hawai'i Island business that needs
11 to be attended to? If not, then I declare the Hilo,
12 Hawai'i site meeting adjourned, and I will return the
13 proceedings back to our illustrious Chair Scheuer.

14 CHAIRPERSON SCHEUER: Thank you,
15 Commissioner Cabral.

16 Members, is there any other business to
17 discuss from what we walked in thinking was going to
18 be a simple and brief meeting?

19 Seeing none, this meeting is adjourned.

20 Thank you.

21 (The proceedings adjourned at 10:37 a.m.)

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE
STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on August 29, 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 29th day of August, 2019, in
Honolulu, Hawaii.

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