

STATE OF HAWAI'I

LAND USE COMMISSION

Hearing held on October 24, 2019  
Commencing at 3:44 p.m.

The Grand Naniloa Resort-Crown Room  
93 Banyan Dr., Hilo, HI 96720

VOLUME II  
(Pages 179 through 249)

I. CALL TO ORDER

II. ADOPTION OF MINUTES

III. TENTATIVE MEETING SCHEDULE

IV. ACTION

DR19-67 KU'ULEI HIGASHI KANAHELE

Consider Petition of Ku'ulei Higashi Kanahele  
and Ahiena Kanahele, individuals, for a

"Declaratory Order concerning the invalid  
classification of the de facto and improper  
industrial use precinct on approximately 525  
acres of State Land Use Conservation District  
lands located in Mauna Kea and Hilo, County of  
Hawai'i. Tax Map Key Nos. 4-4-015:009 (por)"

V. RECESS/ADJOURNMENT

BEFORE: Laura Savo, CSR #347

1 APPEARANCES:

2 COMMISSIONERS:

3 JONATHAN SCHEUER, Chair  
4 NANCY CABRAL, Vice Chair  
5 EDMUND ACZON  
6 DAN GIOVANNI  
7 LEE OHIGASHI  
8 GARY OKUDA  
9 ARNOLD WONG

10 STAFF:

11 PATRICIA OHARA, ESQ.  
12 Deputy Attorney General  
13 DANIEL ORODENKER, Executive Officer  
14 RILEY K. HAKODA, Planner/Chief Clerk  
15 SCOTT DERRICKSON, AICP/Planner  
16 ARIANA MASUOKA, Planner

17 ALSO PRESENT:

18 BIANCA ISAKI, ESQ.  
19 1720 Huna Street, B401  
20 Honolulu, Hawai'i 96817

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1 CHAIRPERSON SCHEUER: Aloha. We're back  
2 in session, 3:44 p.m., and our next witness is Ross  
3 Shinyama here on behalf of the TMT International  
4 Observatory, LLC.

5 MR. SHINYAMA: Thank you, Chair. Good  
6 afternoon, Chair, fellow commissioners.

7 Two points of clarification before I  
8 start my testimony if I may --

9 UNIDENTIFIED SPEAKER: Can he adjust the  
10 microphone?

11 COMMISSIONER CABRAL: Yeah, really loud.

12 MR. SHINYAMA: Can everyone hear me now?

13 COMMISSIONER CABRAL: Can you make sure  
14 it's turned up all the way?

15 CHAIRPERSON SCHEUER: There's a volume  
16 switch in the middle.

17 MR. SHINYAMA: Testing one, two, three.

18 CHAIRPERSON SCHEUER: There you go.

19 MR. SHINYAMA: Okay. Perfect.

20 Two points of clarification, if I may, of  
21 procedural objections. I would like to join in the  
22 University of Hawaii's objections with respect to the  
23 procedure that is being employed permitting  
24 petitioners' counsel to ask questions or  
25 cross-examine witnesses. I fully recognize and

1 acknowledge that counsel, Ms. Isaki, has not abused  
2 that privilege, but I do believe it is not proper  
3 given the rules for the LUC.

4 The LUC rules, specifically HAR  
5 15-15-98(a), say that a petitioner, which the  
6 petitioners are here, is not a party, but is an  
7 interested person. And under 15-15-10(b), interested  
8 parties are allowed in an open meeting the  
9 opportunity to submit data, views, arguments or  
10 present on oral testimony on any agenda item. That  
11 does not include questioning. So I would renew or  
12 join the objection raised by the University of  
13 Hawai'i counsel.

14 CHAIRPERSON SCHEUER: Okay. Your  
15 objection as well as acknowledgement that that  
16 privilege has not been abused is noted.

17 MR. SHINYAMA: I appreciate that. And  
18 the other thing I would like to bring up is I do  
19 appreciate the verbal disclosures made by the chair,  
20 Commissioner Okuda and others. I do believe, and I  
21 think Commissioner Okuda would at least agree with  
22 me, that in this day and age, there has been a shift  
23 in terms of what is required in terms of disclosures,  
24 and particularly that written disclosures should be  
25 and is the prudent thing to do, particularly when you

1 are dealing with a standard of appearance of  
2 impropriety. So I would ask that the commissioners  
3 and the chair put their written disclosures or their  
4 disclosures in writing before any decision is made to  
5 allow any interested person an opportunity to  
6 respond.

7 CHAIRPERSON SCHEUER: As a matter of law,  
8 financial disclosures are filed with the state and  
9 are online.

10 MR. SHINYAMA: Chair, respectfully, I am  
11 referring to the disclosures that you and Mr. Okuda  
12 made, for example, your relationship with counsel for  
13 the petitioners. I believe those disclosures should  
14 be in writing. I also believe a general statement  
15 that you had used Ms. Isaki in a subcontracting  
16 capacity, I don't think that is sufficient for what  
17 is required now under appellate rules with respect to  
18 evaluating whether or not there is an appearance of  
19 impropriety.

20 CHAIRPERSON SCHEUER: And do you have a  
21 citation for that?

22 MR. SHINYAMA: You can look at the TMT  
23 decision that just came out because the opponents to  
24 the project, including some of them that are sitting  
25 here, raised the issue of an appearance of

1       impropriety with respect to the hearing officer,  
2       Judge Riki May Amano.

3               CHAIRPERSON SCHEUER:   So your reference  
4       is to TMT II?

5               MR. SHINYAMA:   Yes, Your Honor.   I'm  
6       sorry.   Chair.   Sorry.   It's natural for me.   I  
7       appear in court, not necessarily administrative  
8       agencies.   So I may slip up a couple more times.

9               CHAIRPERSON SCHEUER:   If you are going to  
10      slip up, slip up in that direction.

11              Okay.   So, now, since you're appearing  
12      not as an attorney but as a public liaison, I will  
13      swear you in and then start your testimony.   Do you  
14      swear or affirm the testimony you are about to give  
15      is the truth?

16              MR. SHINYAMA:   Yes, I do.

17              CHAIRPERSON SCHEUER:   Okay.   Please  
18      proceed.

19  
20                      ROSS SHINYAMA, ESQ.,  
21              was duly sworn to tell the truth  
22              and testified as follows:

23              MR. SHINYAMA:   Thank you, Chair.   Let me  
24      start, it's actually quite fitting that we are here  
25      at the Grand Naniloa Hotel Crown Room because we,

1 including many of the individuals that are currently  
2 sitting in the gallery, spent a considerable amount  
3 of time in this room before the Board of Land and  
4 Natural Resources. We spent -- we basically engaged  
5 in an unprecedented contested case hearing that  
6 spanned over 14 months. It included 44 days of  
7 evidentiary hearings, oral testimony from 70  
8 witnesses, including Ms. Kanahele. It required the  
9 admission and consideration of 600 exhibits, and it  
10 also required the consideration of 200-plus motions,  
11 objections and submissions.

12 The Board of Land and Natural Resources  
13 did not take the decision to issue a CDUP lightly.  
14 It resulted in a comprehensive and exhaustive  
15 271-page finding of fact, conclusion of law and  
16 decision and order, this brick right here. It  
17 included 1,070 findings of fact, and it includes 512  
18 conclusions of law.

19 And then after the board issued its  
20 decision, it went up to the Hawai'i Supreme Court,  
21 and the Hawai'i Supreme Court affirmed the decision  
22 of the Board of Land and Natural Resources to issue  
23 the CDUP for the TMT project.

24 And let me just raise or address the  
25 issue directly with respect to was the TMT CDUP



1 comprehensive? Yes, it was. Okay. Did it look at  
2 the TMT project itself? Yes. Did it also look at  
3 the additional telescopes, all the other 13  
4 telescopes? Yes, it did. Because the Hawai'i  
5 Supreme Court, when it affirmed the ruling of the  
6 Board of Land and Natural Resources, talked about it,  
7 talked about the fact that the CDUP process itself  
8 cannot justify endless development of telescopes on  
9 Mauna Kea. And so they recognized that the board  
10 address that issue. And how did the board address  
11 that issue?

12 Well, one of the ways the board addressed  
13 that particular issue was requiring the  
14 decommissioning of five observatories. That's a  
15 condition to the building of TMT. So in the end,  
16 ultimately, there are less observatories on Mauna Kea  
17 than there are currently.

18 And so to say that the Board of Land and  
19 Natural Resources and the Hawai'i Supreme Court did  
20 not address the issue of a comprehensive nature is  
21 incorrect. Yes, they looked at the TMT project  
22 itself, but they also looked at the larger picture.

23 And why is this important? Because --

24 (Timer ringing.)

25 Let me just -- I'm already going into

1       trying to address many of the questions raised by the  
2       commissioners. Commissioner Okuda raised the issue  
3       of res judicata. Res judicata is a legal doctrine,  
4       and it's important to consider here. Because what  
5       does that mean? Res judicata says that you are  
6       barred not only from raising issues that were in fact  
7       argued, but you are barred from raising issues and  
8       claims that you could have argued. And so whether or  
9       not the Hawai'i Supreme Court addressed the issue is  
10      not the question. It's could it have been addressed;  
11      could it have been issued. And that is where it is.  
12      And with respect to this issue of not disturbing the  
13      decisions of the Board of Land and Natural Resources,  
14      two cases have been cited. Actually, two cases have  
15      been cited by the petitioners. One is the Citizens  
16      case which Mr. Okuda has referenced. The other is  
17      the case, and I apologize, called Kuleana Ku'ikahi,  
18      LLC, v. State.

19                   CHAIRPERSON SCHEUER: Sorry. Are you  
20      summarizing?

21                   MR. SHINYAMA: Sure. And what that  
22      decision says, what the ICA said in that decision was  
23      HRS 91-8, which is what we are here for today, was  
24      not intended to allow review of concrete agency  
25      decisions for which other means of review are

1       available. It went further. It cannot seriously be  
2       maintained that HRS 91-8 was intended to review  
3       already-made agency decisions. The review of another  
4       body's decisions is simply not a proper use of HRS  
5       section 91-8. And that, quite frankly, is what the  
6       petitioners are asking the LUC to do here.

7               I will field any questions that  
8       commissioners or chair may have.

9               CHAIRPERSON SCHEUER: Thank you.

10              MS. ISAKI: No, I don't have any  
11       questions for the testifier. Sorry. No, I don't  
12       have any questions for the testifier.

13              CHAIRPERSON SCHEUER: Okay.  
14       Commissioners? Commissioner Okuda.

15              COMMISSIONER OKUDA: Good to see you  
16       again, Mr. Shinyama.

17              MR. SHINYAMA: Thank you. I appreciate  
18       the kind words after a very vigorous battle we had.

19              COMMISSIONER OKUDA: No. In all  
20       seriousness, you know, I still have the same kind  
21       words because I think our system of advocacy works  
22       if, in good faith, everybody makes the -- the  
23       objections no matter what. And I know your  
24       character, and I know you take your obligations as an  
25       attorney seriously. If I was in the same shoes, I

1       might have made the same objections.

2               But let me ask you this because regarding  
3       the doctrine of res judicata because, again, so we  
4       don't talk in Latin and I never had a Latin course,  
5       it's basically where if a decision has been made by a  
6       court or some adjudicatory body, then parties to that  
7       decision, and we have to watch the definition of  
8       "parties," but parties to that decision are basically  
9       stuck with the decision or they're stuck with things  
10      that they could have raised but they didn't raise or  
11      litigate in that decision; correct?

12              MR. SHINYAMA: That is correct,  
13      Commissioner Okuda. One thing I would add is that  
14      it's not just parties. It's individuals who are  
15      privy to those parties. And I would argue that  
16      Ms. Higashi Kanahale, as a witness to a party, would  
17      be privy to a party.

18              COMMISSIONER OKUDA: Yes. And that  
19      concept in the law is known as virtual  
20      representation, and correct me if I'm wrong, that  
21      rule comes out of this case, I think, called Estate  
22      of Dowsett, D-O-W-S-E-T-T. I don't have the reported  
23      citation, but as I recall, that's the case because  
24      I've kind of cited it on both sides of the fence. Is  
25      that your recollection?

1           MR. SHINYAMA: I believe that is the  
2           seminal case.

3           COMMISSIONER OKUDA: Yeah. But it comes  
4           down to a question about -- about closeness of the  
5           parties and all these other factors. Let me just get  
6           to the bottom line here. What evidence do you have  
7           that the Kanaheles, in fact, were parties to the  
8           underlying or prior TMT hearing that took place in  
9           this room in front of Retired Judge Riki Amano,  
10          R-I-K-I, A-M-A-N-O, who was the hearings officer?

11          MR. SHINYAMA: Commissioner Okuda, the  
12          only fact that I can point to is the fact that  
13          Mrs. Kanahele testified as a witness for a party.  
14          But, you know, I did reference the Citizens case as  
15          well as the Kuleana case where I believe borrowed  
16          concepts probably of res judicata, but does not have  
17          the same stringent requirements of res judicata. And  
18          that's basically saying when you have a sister agency  
19          that has made a decision, the LUC or any other agency  
20          cannot make a decision and reconsider or review that  
21          critique.

22          COMMISSIONER OKUDA: Yeah, and I agree,  
23          and that's, I think, a different issue. I'm just  
24          trying to stick to this res judicata issue because I  
25          think that's an important issue. Do you agree with

1 me that there is no Hawai'i appellate case, including  
2 unreported appellate cases, that hold that merely  
3 being a witness in a case creates this virtual  
4 representation or res judicata effect?

5 MR. SHINYAMA: I'm not familiar with a  
6 Hawai'i case on holding either way.

7 COMMISSIONER OKUDA: Okay. Okay. I just  
8 wanted to make sure that if there is a controlling  
9 authority, of course, we have to follow that  
10 controlling authority.

11 Let me ask you this: In the Mauna Kea --  
12 let's call it the Mauna Kea II case, which is the  
13 appeal and affirmation by the Hawai'i Supreme Court  
14 of Judge Amano's findings of fact -- actually, it's  
15 the affirmance of the Board of Land and Natural  
16 Resources' decision which incorporated Judge Amano as  
17 hearings officer's findings of fact, conclusions of  
18 law to a major extent. In that case, the board or  
19 the Hawai'i Supreme Court found that there would be  
20 no disqualification of Judge Amano; is that correct?

21 MR. SHINYAMA: That is correct.

22 COMMISSIONER OKUDA: Is it your position  
23 that I'm biased against you in this case?

24 MR. SHINYAMA: Commissioner, no. My  
25 objection has nothing to do with me believing that

1 any particular commissioner or chair is biased. What  
2 I am saying is that disclosure is required, and in  
3 this day and age with respect to appearance of  
4 impropriety, the first step is full disclosure. And  
5 I don't believe that the oral disclosure made, though  
6 appreciated, is sufficient given the TMT case and  
7 other cases that have come up.

8 COMMISSIONER OKUDA: Does the TMT case,  
9 and we're talking about Mauna Kea No. 2, does that  
10 case specifically require that disclosures be in  
11 writing, or is the standard that's set forth in that  
12 case that the disclosure, however made, must be  
13 complete and accurate?

14 MR. SHINYAMA: It wasn't an issue because  
15 the disclosures made by Judge Amano were in writing,  
16 and it was about four or five written disclosures.

17 COMMISSIONER OKUDA: Right. But the  
18 Supreme Court did not render any ruling that said an  
19 oral disclosure is not sufficient; correct?

20 MR. SHINYAMA: That is correct.

21 COMMISSIONER OKUDA: And in this case,  
22 whatever disclosures that have been made on the  
23 record, it basically is part of the record and it's  
24 going to be part of a written transcript; correct?

25 MR. SHINYAMA: I understand that, but I

1       also believe that there is some clarity that is  
2       required that has not been provided with respect to  
3       some disclosures.

4               COMMISSIONER OKUDA:   Okay.   Let me just  
5       shift the question slightly because I guess at this  
6       hour in the afternoon, it seems like we might be  
7       beating a dead horse that's no longer in the room.  
8       Yeah?

9               MR. SHINYAMA:   I think we all wish we  
10       were not in the room.

11              COMMISSIONER OKUDA:   You've heard --  
12       you've been here since the morning and heard all the  
13       testimony?

14              MR. SHINYAMA:   For the most part.

15              COMMISSIONER OKUDA:   Yes.   And this might  
16       not be a legal question I'm asking you, but more a  
17       question based on the fact that, you know, I've  
18       litigated a very contentious case with you, and  
19       sometimes they say you really get to know somebody  
20       when you're either their law partner or you litigate  
21       against them.

22              You've heard -- or would you agree that  
23       it seems like there's a need for more outreach,  
24       engagement, talking story so that, frankly, whatever  
25       decisions take place in the future, we might not have



1 100 percent agreement because that's very difficult  
2 to get in any kind of thing, but we could have  
3 possibly more consensus, more community so, you know,  
4 those of us are less at each other's throat?

5 MR. SHINYAMA: I will not say or  
6 foreclose -- obviously, discussion is beneficial.  
7 But I think it also needs to take into context that  
8 TMT TIO has been engaging in discussions for a very  
9 long time.

10 COMMISSIONER OKUDA: Yeah. And the only  
11 reason why I raise that is I think sometimes there's  
12 issues of credibility, and this is not a question.  
13 This is more a statement. You know, I hope moving  
14 forward, your clients can look to you as someone who  
15 can talk to people in the community because I know  
16 you are a strident advocate to your clients. Yeah,  
17 strident advocate. You are. But you also love the  
18 community.

19 Okay. Thank you.

20 CHAIRPERSON SCHEUER: Thank you,  
21 Commissioner Okuda.

22 Commissioners?

23 Thank you very much. We're done.

24 MR. SHINYAMA: Thank you.

25 CHAIRPERSON SCHEUER: Next up is the

1 Office of Planning.

2 Do you have any objections you want to  
3 start off with, Mr. Yee?

4 MR. YEE: We will have one procedural  
5 issue, and that is -- I might have misheard, but I  
6 believe that the Land Use Commission indicated that  
7 it assumed that the facts of the petition were true.  
8 To be clear, if you need to rely upon the truth of  
9 the factual allegations for your decision, then I  
10 believe you would need to hold a contested case  
11 hearing to allow people to intervene and potentially  
12 disagree with those allegations. You may make a  
13 decision today if you do not need to rely upon the  
14 truth of the particular facts alleged. So I just  
15 wanted to make that clarification from a statement  
16 that I, at least, thought I heard.

17 CHAIRPERSON SCHEUER: I believe what I  
18 said was that the facts were not the issue of the  
19 dispute today, but it was, rather, the application of  
20 the law as to the disputed facts, such as was a  
21 permit issued.

22 MR. YEE: Okay. So, hopefully, we're  
23 consistent with that.

24 CHAIRPERSON SCHEUER: So I guess this is  
25 the one time I get to do this. I'm going to swear

1       you in.

2                   Do you swear or affirm the testimony  
3       you're about to give is the truth?

4                   MR. YEE:   Yes, I do.

5                   CHAIRPERSON SCHEUER:   Please proceed.

6

7                   BRYAN YEE, ESQ.,

8                   was duly sworn to tell the truth

9                   and testified as follows:

10                  MR. YEE:   Thank you.   Deputy Attorney  
11       General Bryan Yee on behalf of the Office of  
12       Planning.

13                  In case I run out of my three minutes, I  
14       want to tell you that I wanted to focus on four  
15       issues:

16                  One, that this is a Chapter 183C issue,  
17       not a Chapter 205 issue;

18                  Two, the petition necessarily requires  
19       you to rule upon the correctness of the BLNR decision  
20       which is a matter not within your jurisdiction;

21                  Three, the petition may impact the  
22       liability of the state in a reasonably anticipated  
23       future litigation;

24                  And four, you cannot issue a decision  
25       consistent with the petitioner's view without

1 providing a contested case hearing.

2 First, this is a Chapter 183C issue, not  
3 a Chapter 205 issue. It would be an LUC issue to  
4 decide whether to grant a district boundary amendment  
5 to put land either into or take land out of the  
6 conservation district. But once it is in  
7 conservation, it is a BLNR decision as to the  
8 appropriate uses, just like it's up to the county to  
9 decide what uses are allowed in the urban district,  
10 and is up to -- in this case, it is up to BLNR for  
11 the conservation district.

12 We point to HRS section 205A-5 which says  
13 that conservation lands are governed by BLNR pursuant  
14 to Chapter 183C. We also point to HRS 205-15, which  
15 states that except as specifically provided, the  
16 authority for the administration of Chapter 183C is  
17 not affected by Chapter 205. So there is nothing --  
18 and in reviewing Chapter 205, we found nothing in  
19 there which specifically provided otherwise.

20 So although the LUC can decide whether to  
21 put lands into or out of the conservation district  
22 based in part on section 205-2, it is BLNR and not  
23 the LUC which has the authority to determine the uses  
24 of the conservation district.

25 You have heard a number of testifiers

1 support the petitioner and ask you to overrule the  
2 BLNR decision. As the chair noted, the LUC does not  
3 have the authority to do so. But this demonstrates  
4 the common sense and, I think, clear fact that any  
5 attempt to refashion or reword this request of the  
6 petitioner to be a review of Chapter 205, it is  
7 nevertheless necessarily a need to rule upon the  
8 correctness of the BLNR decision.

9 Chapter -- HRS section 205-2 does allow  
10 for uses consistent with a multi-use conservation  
11 district. Chapter 205 says nothing about what it  
12 means to be a multi-use conservation district, and  
13 the LUC has no rules about this. In contrast,  
14 Chapter 183C and its rules set forth an entire  
15 regulatory process and scheme with criteria for this  
16 determination and specifically requires a  
17 determination by BLNR that the use is consistent with  
18 the purpose of the conservation district.

19 So granting petitioner's request --

20 CHAIRPERSON SCHEUER: Three minutes.

21 MR. YEE: -- would require the LUC to  
22 determine whether BLNR was correct in its  
23 determination that the use was consistent with the  
24 purpose of the conservation district, and for that  
25 the LUC has no jurisdiction.

1                   Realizing that there are other issues to  
2 be told, I think I will rest upon my statement so  
3 far.

4                   CHAIRPERSON SCHEUER: Thank you, Mr. Yee.

5                   MS. ISAKI: We have no questions. Thank  
6 you.

7                   CHAIRPERSON SCHEUER: Commissioners?

8                                 Commissioner Wong.

9                   COMMISSIONER WONG: Thank you, Mr. Yee.  
10 Thank you, Chair.

11                   First off, Mr. Yee, where's your coat?  
12 Sorry. It's just --

13                   MR. YEE: I brought that all the way from  
14 Honolulu, and it's sitting over there.

15                   COMMISSIONER WONG: And you're not  
16 wearing it.

17                   MR. YEE: Yeah, it's my bad. I  
18 apologize. But I didn't -- I would be the only  
19 person in this entire room other than, you know,  
20 counsel --

21                   COMMISSIONER WONG: And you would look  
22 sharp.

23                   CHAIRPERSON SCHEUER: For the benefit of  
24 folks who do not regularly come to LUC meetings,  
25 Bryan's always dressed in a coat and tie.

1 MR. YEE: I apologize.

2 CHAIRPERSON SCHEUER: Okay. Do you have  
3 questions?

4 COMMISSIONER WONG: Yes. So the question  
5 I have is what -- in your mind, what is the  
6 petitioner asking the LUC?

7 MR. YEE: The petitioner is asking LUC to  
8 determine that the astronomy facilities on Mauna Kea  
9 are a violation of Chapter 205-2 which necessarily  
10 requires a review of the BLNR decision.

11 COMMISSIONER WONG: Okay.

12 MR. YEE: I mean, it's more complicated  
13 than that, but I think you wanted a --

14 COMMISSIONER WONG: Yeah. Okay. And I  
15 was asking Mr. Souki, and he stated that BLNR is the  
16 landowner and UH is the lessee or like the renter; is  
17 that correct?

18 MR. YEE: I think that's essentially  
19 correct. Just for my friends, the Land and  
20 Transportation Division, who constantly tell me this,  
21 DLNR or BLNR is not the owner of the land. The state  
22 is the owner of the land, but control of the lands is  
23 held by DLNR unless otherwise provided by executive  
24 order or other statute.

25 COMMISSIONER WONG: So could the BLNR

1 tell UH or even themselves to say we're going to go  
2 for a district boundary amendment?

3 MR. YEE: Yeah. That's a good question.  
4 It's difficult to tell hypothetically. The rules --  
5 I'm going to put aside the rules because I think you  
6 know what the rules are. So let's just focus on  
7 maybe what the authority is of DLNR absent those  
8 rules.

9 DLNR's authority to ask for -- to put  
10 land into the conservation district exists. They  
11 can. They may be constrained by other matters such  
12 as if they had a lease which would -- if they  
13 violated the lease, for example, by doing so, that  
14 would be a problem. But the DLNR does have the  
15 authority to go to the Land Use Commission and ask  
16 that land be put into the conservation district?

17 COMMISSIONER WONG: Okay. Let's do a  
18 hypothetical. So let's just say we go through a  
19 process, hypothetical now -- I'm not saying one way  
20 or the other -- and we say, "Okay, let's change the  
21 district boundary and make it into urban," which I  
22 think the petitioner wants us to do, does that mean  
23 BLNR has no say in that district because the zoning,  
24 in fact, is not conservation anymore?

25 MR. YEE: There are two different issues



1       involved. The conservation district rules would no  
2       longer apply, correct. When the land isn't urban,  
3       the uses are determined generally by the county, and  
4       the county is the sole determinant of the uses there.  
5       Because this is state lands, it's less clear about  
6       the interplay between county requirements on state  
7       property. There is an argument to be made that  
8       because the state is a sovereign, county rules don't  
9       apply and the state never has to comply with those  
10      county requirements. Having said that, the state, in  
11      a number of instances, is required to do so for  
12      various practical reasons, such as getting necessary  
13      permits from the county who would not issue them  
14      unless there is compliance.

15               I'm sorry. There's a more complicated  
16      answer to what you had said -- to what you had asked,  
17      but that's the best I can give you at the moment.

18               COMMISSIONER WONG: So let's -- I'm going  
19      hypothetical again and a step further. So let's just  
20      say -- sorry. I'm going to Honolulu because I know  
21      Honolulu a little better. Ko'olau, the watershed  
22      area, that's all conservation; am I correct?

23               MR. YEE: I believe that's correct.

24               COMMISSIONER WONG: Okay. So let's just  
25      say somehow we say let's urbanize it and let's

1       have -- and whatever happens happens. I mean, let's  
2       build a high-rise, you know, at the top of Ko'olau, I  
3       mean, because it's now urban. That's possible too?

4               MR. YEE: A terrible decision, but, yes,  
5       it's hypothetically possible. It would be -- in my  
6       particular example, without county approval, it would  
7       be a high-rise condominium which would not have a  
8       certificate of occupancy from the county, and,  
9       therefore, would be almost impossible to get  
10      insurance or renters or purchasers, but, yes, they  
11      could build it.

12             COMMISSIONER WONG: So let me ask you  
13      this then: So if we go down this road  
14      hypothetically, we can -- the Land Use can say from  
15      now on, we don't want any conservation land and we  
16      want all urban and then let the counties decide?

17             MR. YEE: Well, there would have to be a  
18      petition.

19             COMMISSIONER WONG: Right.

20             MR. YEE: The landowners would have to  
21      agree. Understand that over half of the state, I  
22      believe, is in conservation and that there is  
23      actually a relatively small percentage urban. So it  
24      would be a major social dislocation. But if you did  
25      that, then those lands would never be protected by

1 the various rules and statutes applicable to  
2 conservation land. They would be subject only to  
3 those requirements set forth by the county.

4 COMMISSIONER WONG: Okay. Thank you. No  
5 other questions.

6 CHAIRPERSON SCHEUER: Commissioner  
7 Ohigashi followed by Commissioner Cabral.

8 COMMISSIONER OHIGASHI: So I enjoyed  
9 reading your -- your position statement. I'm  
10 assuming that you wrote or you participated in  
11 writing it?

12 MR. YEE: Yes.

13 COMMISSIONER OHIGASHI: Because it sort  
14 of, like, cleared up a lot of things in my mind. And  
15 I'm going to give you an opportunity because you cite  
16 the case Kuleana Ku'ikahi Docket No. DR04-30 on  
17 page -- I think it's 7.

18 MR. YEE: Go ahead and ask.

19 COMMISSIONER OHIGASHI: So I'm just going  
20 to give you an opportunity to discuss how that case  
21 specifically applies to the present situation. I was  
22 going to set it up and ask you has there been a time  
23 the Land Use Commission has ever deferred action or  
24 deferred it to review or to issue a declaratory  
25 ruling under similar circumstances or circumstances

1     you may feel are similar; can you explain how this  
2     case exhibits or supports that or goes against that?  
3     So rather than do that, I'm just going to ask about  
4     it.

5             MR. YEE: I appreciate it. Thank you.  
6     Just so we're all on the same page, Kuleana Ku'ikahi  
7     was a declaratory petition which asked the LUC seven  
8     different questions. Of those seven questions, the  
9     LUC said, "We have no jurisdiction to consider five  
10    of them." They did agree to decide whether or not  
11    certain farm dwellings or certain dwellings on  
12    agricultural property were consistent with Chapter  
13    205.

14            And then the second question, which I  
15    believe was a public trust issue, was dependent upon  
16    whether or not -- how they decided the first  
17    question. They did that because agricultural  
18    districts are matters within both the juris- -- the  
19    jurisdiction of both the state, Chapter 205, as well  
20    as the county. And because there was a joint  
21    jurisdiction to make these decisions, the Land Use  
22    Commission agreed to look at that question.

23            The other issues raised, however, dealt  
24    with the subdivision decisions by the county and the  
25    other decisions by the county to use water and how it

1 affects streams, et cetera. Those decisions, even  
2 though it involved a public trust resource, the  
3 commission said, "It is beyond our jurisdiction. We  
4 do not review the county decisions. We don't look at  
5 subdivision. This land isn't urban." I mean, sorry,  
6 that land isn't urban. The subdivision property is  
7 not a -- is not an LUC decision. And so even though  
8 it involves a public trust question, the public trust  
9 doesn't give us more jurisdiction. It just says if  
10 we have jurisdiction and we look at the question,  
11 then we apply the public trust doctrine. And so  
12 based on that, the LUC refused to hear five of the  
13 issues and that decision was affirmed.

14 COMMISSIONER OHIGASHI: I don't think it  
15 was a reported decision.

16 MR. YEE: It was not.

17 COMMISSIONER OHIGASHI: Could you explain  
18 to us who hardly deal with the appellate workings,  
19 why is that important?

20 MR. YEE: For purposes of citing --

21 COMMISSIONER OHIGASHI: Why not --

22 MR. YEE: I think what you're asking is  
23 for purposes of citing a matter as precedent to a  
24 court, the decision needs to either be published, or  
25 if it is unpublished, there needs to be an

1 explanation for why that particular decision is  
2 somehow relevant to that particular case, and it's a  
3 much narrower allowance. We cited that to you so  
4 that you were aware and could be consistent with past  
5 decisions by the LUC, and so that the LUC can issue  
6 consistent decisions, you know, throughout its --  
7 throughout its life.

8 COMMISSIONER OHIGASHI: Are there any  
9 other cases that you want to alert us to?

10 MR. YEE: I think Commissioner Okuda has  
11 already cited the case involving how Chapter 91-8,  
12 declaratory petitions, cannot be used to overrule a  
13 prior decision in the reckless zoning matter. I  
14 believe there was another case, I'm not sure if you  
15 were referring to, involving Haleakala in which the  
16 Supreme Court found that astronomy facilities could  
17 be appropriate uses within the conservation district.

18 So to the extent that you said there are  
19 no such thing as astronomy facilities in conservation  
20 districts, that they cannot exist, I believe that  
21 case stands for the proposition to the contrary. I  
22 think those would be two other cases that I have to  
23 admit we did not cite in our brief --

24 COMMISSIONER OHIGASHI: Thank you.

25 MR. YEE: -- in our letter.

1                   CHAIRPERSON SCHEUER: Commissioner  
2 Cabral.

3                   COMMISSIONER CABRAL: I just would like  
4 some clarification. You stated that in the event  
5 land, instead of being conservation, that if it were  
6 to be urban, it would not have any guidelines or any  
7 oversight by state agencies, such as the Land Use  
8 Commission, DLNR, or state planning or anyone else;  
9 that it would strictly come under county ordinances,  
10 county councils, county boards of planning and that,  
11 and have nothing to do with it if it was urban as  
12 opposed to conservation? Is that what you stated?

13                  MR. YEE: You know, if I said that, it's  
14 an overstatement. I think what I meant to say is  
15 that the protections provided by Chapter 183C and the  
16 rules and BLNR would no longer apply to those uses.  
17 So, generally, urban uses tend to be --

18                  It's easier to get more uses in urban  
19 property than it is to get on conservation property.  
20 If you go to BLNR and you ask for a conservation  
21 district use permit, it's not an easy process. I  
22 mean, TMT had to get through 44 days of a contested  
23 case hearing. Not even the LUC has 44 days of a  
24 contested case hearing for a single project. But I  
25 think it's an overstatement to say that there are no

1 state protections. There are, obviously, Department  
2 of Health requirements. And if there's a district  
3 boundary amendment, obviously, there may be  
4 conditions imposed. Although, I will note that the  
5 conditions must be related to the impacts caused by  
6 that particular project and that the conditions must  
7 have a -- both a nexus to the impact as well as to  
8 be -- I think it's, like, reasonably or rationally  
9 related in scope. So there are restrictions on what  
10 kinds of conditions the LUC may impose.

11 COMMISSIONER CABRAL: Okay. So I would  
12 not be incorrect in coming to the conclusion that in  
13 terms of protecting the land and preserving the land  
14 in some kind of current or natural state is in a  
15 better position to be in conservation as opposed to  
16 urban --

17 MR. YEE: Yes.

18 COMMISSIONER CABRAL: -- zoning?

19 MR. YEE: Yes.

20 COMMISSIONER CABRAL: Okay. I have one  
21 more question. I think -- and I never even had to  
22 ask this question until all of the statements that  
23 have come up today. When land is owned by the State  
24 of Hawai'i and it is governed by Department of Land  
25 and Natural Resources, who owns the land?



1           MR. YEE: The state owns the land is the  
2 answer. And the control of that land as to which  
3 state agency exercises the control will differ. The  
4 default has been DLNR. But, obviously, there's a lot  
5 of land that's, through executive orders, given to  
6 other state agencies. But the ownership is not DLNR.  
7 The ownership is the state.

8           COMMISSIONER CABRAL: Okay. Then let me  
9 take that one point further. As you may know, I deal  
10 with housing, and I deal with housing under federal  
11 fair housing, and all decisions have to not violate  
12 any type of discrimination based on race, creed,  
13 color, national origin, familial status, sexual  
14 orientation, age, et cetera. Would the state's  
15 ownership and guardianship of land come under those  
16 same types of regulations, or are they able to --  
17 this is what I would call violate because that's what  
18 it would be called if I violated that, but are they  
19 to override those types of categories or  
20 considerations?

21           MR. YEE: I think what I would say is  
22 there are different sets of requirements than the  
23 Fair Housing Act. So -- if we're talking about the  
24 same requirement. So if the state has, what you said  
25 broadly, land, so if the state has lands, the Fair

1       Housing Act may not apply, but the state is  
2       prohibited from discrimination unlike private  
3       companies which require laws like the Fair Housing  
4       Act. The state is governed by the various  
5       prohibitions on invidious discrimination for the  
6       various categories that you've described.

7               So the state -- I mean, it's hard to talk  
8       completely in the abstract because there's a universe  
9       of possibilities. But let's suppose there is a  
10      government facility, an office, and we're renting the  
11      office out to other people. The state cannot  
12      discriminate on the basis of race, creed, color,  
13      national origin, religion or age. Not necessarily  
14      because of the statute. Although, I'm not so  
15      familiar with the federal requirements, but because  
16      that's just a constitutional prohibition.

17              COMMISSIONER CABRAL: Thank you. Thank  
18      you.

19              MR. YEE: Okay.

20              CHAIRPERSON SCHEUER: Thank you,  
21      Commissioner Cabral.

22              Commissioner Okuda.

23              COMMISSIONER OKUDA: Thank you,  
24      Mr. Chair.

25              Mr. Yee, looking at Kuleana Ku'ikahi,

1 K-U-I-K-A-H-I, the unreported decision, what is the  
2 legal effect of an unreported decision?

3 And for explanation to those in the  
4 audience, a reported decision is one which we say is  
5 published, meaning it ends up in the law books to be  
6 researched and cited as precedent. An unreported  
7 decision is one that is not put in the law books.  
8 Law books, meaning the Hawai'i reports or the  
9 unofficial version of the legal opinions which is the  
10 Pacific Reporter.

11 What's the legal effect of an unreported  
12 decision or maybe, more specifically, you know, to  
13 what extent do government agencies have to follow an  
14 unreported decision?

15 MR. YEE: When you say "legal effect," I  
16 think what you're asking is the precedential  
17 effect --

18 COMMISSIONER OKUDA: Yes.

19 MR. YEE: -- which is that unpublished  
20 decisions are not -- cannot be cited for precedent.

21 There is a further impact from unreported  
22 decisions, though, on the agency that issues the  
23 decision. That has been our argument. I guess if  
24 you're asking could I issue a decision that is  
25 inconsistent with a prior decision? The answer would

1 be yes, but the prior decision you issued would then  
2 be used, you know, as, one, a legitimate argument for  
3 saying be consistent just as a matter of argument.  
4 And, two, if you're inconsistent, it is very possible  
5 the courts may ask why are you being inconsistent.  
6 But is it binding? No.

7 COMMISSIONER OKUDA: Okay. So in other  
8 words, even though there's this unreported decision  
9 that exists, it's not binding on the Land Use  
10 Commission?

11 MR. YEE: Outside of that case, right. I  
12 mean, obviously, you have to follow in Kuleana  
13 Ku'ikahi's case, but you're not legally obligated to  
14 follow it. But understand, I didn't actually cite  
15 the case necessarily for just what the Intermediate  
16 Court of Appeals said. I said it to demonstrate to  
17 you what the Land Use Commission said. So that's --  
18 I mean, that was sort of a bigger point to me.

19 COMMISSIONER OKUDA: Yeah. Well, the  
20 reason why I'm asking this question is not to be  
21 theoretical or esoteric. I believe we have a duty to  
22 strictly follow the law, and we have a duty to  
23 strictly follow the law even if sometimes we don't  
24 like the law for many reasons which we don't have to  
25 get into here.

1           Let me ask you this, because I know you  
2 analyzed these cases, you know, very carefully. The  
3 Citizens Against Reckless Development case was cited  
4 and quoted at length in the Ku'ikahi case; is that  
5 correct?

6           MR. YEE: That's my recollection. I  
7 didn't look. I'll be honest, I didn't look quite so  
8 closely how many -- exactly what was cited and said,  
9 but, yes, I recall it was in there.

10           COMMISSIONER OKUDA: Okay. Because --  
11 and maybe later on the petitioner can correct me.  
12 But it appears that even though the unreported case  
13 was unreported, it seems to basically merit a  
14 statement of the Hawai'i Supreme Court in its  
15 reported case. And a reported case is binding  
16 precedent and, frankly, an instruction by the Hawai'i  
17 Supreme Court that we better follow that case or  
18 else; correct?

19           MR. YEE: Correct. Thank you,  
20 Commissioner Okuda. Yes. So even though the Kuleana  
21 Ku'ikahi case may not be precedent, it's still useful  
22 to look at for the cases that are cited therein and  
23 see how those cases -- those binding cases apply to  
24 this decision here, yes.

25           COMMISSIONER OKUDA: Okay. And, of

1 course, I'm sure we're all trying to follow the  
2 Citizens Against Reckless Development case; although,  
3 we'd withhold our judgment on what that case means  
4 until we hear from the petitioners.

5 Can I ask you this about jurisdiction?  
6 In the unreported case, the Ku'ikahi case, the  
7 appellate court basically affirmed or okayed the fact  
8 that the Land Use Commission decided, for reasons  
9 that are set forth in the case, not to exercise any  
10 jurisdiction over the matter; is that correct?

11 MR. YEE: Yes. Although, you state it as  
12 a permissive jurisdictional, I think it was a  
13 yes-or-no question for the LUC, did it or did it not  
14 have jurisdiction, not did it have permissive  
15 jurisdiction. So --

16 COMMISSIONER OKUDA: Yes. Okay. And,  
17 again, not to get too esoteric or theoretical here,  
18 but just so that we're clear about our authority, is  
19 there any authority from the Hawai'i Supreme Court or  
20 Hawai'i Intermediate Court of Appeals that holds that  
21 the Land Use Commission does not have concurrent  
22 jurisdiction with the Board of Land and Natural  
23 Resources over what may or may not be a permissible  
24 use within a conservation district? I understand the  
25 argument regarding what the statute says, but my

1 question is do we have any guidance from the Hawai'i  
2 appellate courts? And by the way, either reported or  
3 unreported decisions about whether or not there is no  
4 concurrent jurisdiction because I couldn't find any.

5 MR. YEE: I'm not aware of any. I will  
6 say, though, in the last 15-plus years in which I've  
7 been looking at the LUC cases, I am not aware of a  
8 single matter in which the LUC's ever done anything  
9 which would bring a case like that up on appeal. So,  
10 no, I'm not aware of a particular case about that,  
11 but I'm also not aware of any situation over the last  
12 15 years in which I've personally been involved with  
13 the LUC where that issue would ever have come up.  
14 The LUC has never, as far as I can remember, ever  
15 come close to exercising concurrent jurisdiction with  
16 BLNR.

17 COMMISSIONER OKUDA: Yeah. My question  
18 is just simply whether such cases exist or not exist  
19 so we could look to those cases for guidance.

20 MR. YEE: Not aware of any.

21 COMMISSIONER OKUDA: Okay. Thank you,  
22 Chair.

23 CHAIRPERSON SCHEUER: Thank you,  
24 Commissioner Okuda.

25 Are there further questions from the

1 commissioners?

2 If not --

3 MR. YEE: So close.

4 CHAIRPERSON SCHEUER: -- the second  
5 sentence of your written testimony says "The petition  
6 asks the Land Use Commission or Commission to  
7 determine whether the grant by the Board of Land and  
8 Natural Resources of a conservation district use  
9 permit pursuant to the Hawai'i Revised Statutes,  
10 Chapter 183C, allowing the construction of a 30-meter  
11 telescope is an appropriate action within the state  
12 conservation district."

13 Can you point to me where in the petition  
14 that's actually what was asked?

15 MR. YEE: So that is not intended to be a  
16 quote. It is intended to be a characterization, and  
17 as I characterized the petition, that is what the  
18 petition is asking you to do.

19 CHAIRPERSON SCHEUER: So where is that  
20 characterization drawn from? Because I did not see  
21 anywhere in the petition a request for us to review  
22 as an appellate body the issue of the TMT CDUP.

23 MR. YEE: So as we discussed in both the  
24 letter and my testimony today, in order for you to  
25 determine that the telescope -- the TMT astronomy



1 facilities are not consistent with a multi-use  
2 conservation district, you must necessarily determine  
3 that the BLNR decision was incorrect because BLNR  
4 made that decision in its -- in its, you know,  
5 217-page decision and order.

6 CHAIRPERSON SCHEUER: But the BLNR  
7 decision applied just to the TMT; correct?

8 MR. YEE: And as I read the petition, it  
9 applies to TMT as well.

10 CHAIRPERSON SCHEUER: No. You're --

11 MR. YEE: Maybe I'm -- let me listen  
12 again then.

13 CHAIRPERSON SCHEUER: The TMT was issued  
14 a CDUP?

15 MR. YEE: Correct.

16 CHAIRPERSON SCHEUER: There wasn't a CDUP  
17 sought -- CDUA filed for the entirety of the  
18 collective astronomical facilities and supporting  
19 infrastructure on the summit; correct?

20 MR. YEE: No. The only thing involving  
21 the entire area would be the management plan.

22 CHAIRPERSON SCHEUER: So it's -- I don't  
23 understand how you can say that what the petition in  
24 front of us is asking for is a reversal of the TMT  
25 decision by the Board of Land and Natural Resources

1       which was for a single telescope. In fact, I believe  
2       what the petition distinguishes is it says 14 times,  
3       when you add this together, the entirety of the scope  
4       looks urban, looks industrial, not should they have  
5       issued this one individual a permit.

6               MR. YEE: Certainly, you should feel free  
7       to ask the petitioner, but as I read --

8               CHAIRPERSON SCHEUER: It's your  
9       characterization I'm asking for, though.

10              MR. YEE: Right. So I'm just -- in my  
11      reading of it --

12              CHAIRPERSON SCHEUER: And I will feel  
13      free to ask the petitioner.

14              MR. YEE: -- they ask both things. So  
15      they did -- yes, you're right. They did talk about  
16      the successive grant of the Cдуа -- CDUPs, and I  
17      believe there's been a discussion about how that was  
18      considered as well as in ours about how that was  
19      considered by BLNR, that the additional impact of TMT  
20      upon the mountain, given all the other prior  
21      decision -- prior telescopes that were approved, was  
22      a consideration of BLNR. But I also think that the  
23      petition as I read it does say -- you don't even have  
24      to get to the 13. I think the petition says, even if  
25      you look just at TMT, that is industrial use as how

1       they characterize it which is inconsistent with the  
2       conservation district. I'm willing to be corrected  
3       on that, but that's how I read the petition. That  
4       they do have a successive -- an argument about  
5       successive applications, but they also have an  
6       argument, I believe, about the single approval.

7               CHAIRPERSON SCHEUER: I believe they say,  
8       and we can get into it with them, that one might be  
9       allowed. It is the cumulative --

10              MR. YEE: My reading was -- they should  
11       correct me, but my reading of it was even if one is  
12       allowed, then successive ones are not. But I don't  
13       believe they've ever conceded that one is allowed.

14              CHAIRPERSON SCHEUER: My point or my  
15       questioning is of your characterization because it is  
16       the introduction of your entire analysis that what  
17       we're being asked to review -- in your mind, the  
18       petitioner asked us to review the validity of the  
19       BLNR's decision of the issuance of the CDUP to the  
20       TMT.

21              MR. YEE: That's correct.

22              CHAIRPERSON SCHEUER: But I don't think  
23       that's what we're being asked. If that was indeed  
24       what we were being asked, I think, actually, the  
25       answer would be fairly straightforward. Oh, there's

1 something called the Hawai'i Supreme Court and like  
2 it or not, they've ruled on that, but that's not what  
3 we're being asked. What we're being asked is the  
4 accumulation of the systematic, one, two, three,  
5 four, five, in the aggregate, really started to look  
6 like it is in violation of Chapter 205.

7 MR. YEE: One, I respectfully disagree  
8 because I think that is an accurate characterization  
9 of what they said. So, yes, I think there is a  
10 straightforward answer. But, two, the BLNR did look  
11 at the successive applications and what the impact of  
12 TMT would be given all the other telescopes that were  
13 present. So if you were to rule --

14 CHAIRPERSON SCHEUER: And you, in fact,  
15 concluded that because there was so much damage by  
16 previous management actions, the cumulative effect of  
17 TMT was not that significant; correct?

18 MR. YEE: Yes. And you may or may not  
19 agree with that, but my point is simply that was  
20 looked at by BLNR. And so for you to look at it  
21 again would be a review of BLNR's decision.

22 And I think we cite to you -- we go  
23 through, I think, some of the requirements in the  
24 rules and statutes for what BLNR has to look at. And  
25 as I said before, you might disagree with how they

1       applied their rules. You might think if you were in  
2       BLNR, you wouldn't have agreed with it. But,  
3       obviously, we can all agree that's not the issue  
4       before you.

5                   CHAIRPERSON SCHEUER: So another question  
6       I really wanted to ask, because I found your  
7       testimony very interesting, when you say the state  
8       land use districts are neither definitive nor  
9       mutually exclusive zones, in the agricultural  
10      district, there's a range of permissible uses,  
11      including farm dwellings, recreational facilities,  
12      wind and solar facilities. Then it talks about  
13      special use permits, and then it talks about that  
14      actually various urban-type uses can be allowed in  
15      the conservation district. When you combine that  
16      with your argument that the LUC has absolutely no  
17      jurisdiction to review anything that has a valid  
18      CDUP, I start to, like, scratch my head as to what  
19      the four districts are about and, hence, our rules.

20                   MR. YEE: So the point we're making is --

21                   I believe there was a comment made at one  
22      of the hearings in which someone said, you know, "I  
23      think of the four districts in ranges of intensity  
24      starting from conservation to agriculture to rural to  
25      urban, and it's an increasing level of intensity."

1 And I understand that viewpoint, but if you look at  
2 the statute, that is an incomplete view of those four  
3 districts. That the level of intensity is not  
4 different levels of intensity that is being -- that  
5 you're putting each of these lands into each of these  
6 districts. There's simply four different districts  
7 governed by different requirements. The conservation  
8 district has its requirements. The urban has its.  
9 Agriculture has its requirements, and you don't  
10 simply say, "Oh, well, if this is allowed in urban,  
11 it's not allowed in agriculture." Not true. "Or if  
12 it's allowed in agriculture or urban, it's not  
13 allowed in conservation." Not true. There's simply  
14 four different districts governed by different  
15 requirements, and you look at each of the  
16 requirements for each of those districts to determine  
17 the use for any particular property.

18 It is true that in aggregate, if you look  
19 at all the conservation lands, they will tend to be  
20 less intensively used than urban. That's obviously  
21 true. But it would be incorrect to look at any  
22 particular parcel and say because this parcel is  
23 compared to another parcel, that it necessarily means  
24 that one is more intensive than the other. That is  
25 incorrect.

1                   CHAIRPERSON SCHEUER: So can you point to  
2                   somewhere in the legislative history of the  
3                   development of the Land Use Commission statute that  
4                   supports that interpretation?

5                   MR. YEE: It's not a matter of the  
6                   history. It's a matter of the requirements and  
7                   statutory -- the statutory requirements that were set  
8                   up. So if you look at 205-4.5, you look at what do  
9                   you do for A-rated -- A- or B-rated agriculture land.  
10                  It has an entire list of things you can do. Clearly,  
11                  some of those uses are urban. They have allowed  
12                  urban uses in the agricultural district.

13                  And if you look at the conservation  
14                  district, the conservation district allows, we have,  
15                  as we quoted to you, schools and medical facilities  
16                  and other uses in conservation today that would also  
17                  be appropriate in urban. It is a misunderstanding,  
18                  we think, to say that no urban use can exist in  
19                  either agricultural, rural or certainly agricultural  
20                  or conservation because, as set out in the statute,  
21                  it allows for it.

22                  CHAIRPERSON SCHEUER: So what's the  
23                  purpose of the DBA?

24                  MR. YEE: The DBA changes the method and  
25                  the criteria by which you allow the uses. So the

1 criteria for allowing a more intensified use in  
2 conservation is much harder than it is in urban. So  
3 in aggregate, as I said, you will certainly find much  
4 more intensive uses in urban than conservation  
5 because it is so much more difficult and the  
6 requirements are so much harder, the standard is so  
7 much higher to get an urban-type use in a  
8 conservation district. That doesn't mean in one  
9 particular parcel, though, you can absolutely say  
10 no -- there is not a use which would be allowed in  
11 urban -- I'm sorry. You cannot say that no uses  
12 allowed in urban are allowed in conservation.

13 CHAIRPERSON SCHEUER: Can you repeat  
14 that?

15 MR. YEE: So you cannot say there's no  
16 use allowed in urban that would not also be allowed  
17 in conservation. It is possible. It is a harder job  
18 to do it, but you can have those uses. You can have  
19 agricultural uses --

20 CHAIRPERSON SCHEUER: So if I understood  
21 what you said before in response to a question, I  
22 believe, that was from Commissioner Wong, you believe  
23 that somebody could build a high-rise on the summit  
24 of the Ko'olaus on Oahu in the conservation district  
25 and not have it be in violation of Chapter 205?



1           MR. YEE: Chapter 205 is irrelevant to  
2 that question. Chapter 205 is --

3           CHAIRPERSON SCHEUER: So the BLNR has  
4 exclusive and sole jurisdiction for implementation of  
5 205 as it pertains to the conservation district?

6           MR. YEE: Right. And I don't think a  
7 high-rise would meet -- well, in answer --

8           CHAIRPERSON SCHEUER: But as long as --

9           MR. YEE: -- to your question, I don't --

10          CHAIRPERSON SCHEUER: -- there a CDUP?

11          MR. YEE: Right. And so you assume they  
12 met the requirements for -- as set out in 183C and  
13 its rules. If you think that they violated it, then  
14 you appeal to the Supreme Court. But -- and so I  
15 don't think a high-rise could get a CDUP. I think it  
16 would be denied.

17          CHAIRPERSON SCHEUER: So by the very  
18 nature of the CDUP process, looking at individual  
19 projects versus a DBA that looks at a broader, sort  
20 of comprehensive-step transformation of land use, you  
21 think all these issues can be addressed?

22          MR. YEE: First of all, land use -- DBAs  
23 are case-by-case reviews. You look at a particular  
24 piece of property. You only look at the larger  
25 picture for transformation when you look at the

1 community district plan or the community development  
2 plan or whatever that particular county calls it.  
3 But you don't -- and those can be fairly broad in its  
4 descriptions. The Land Use Commission does not  
5 engage in that large, regional review in granting a  
6 particular DBA.

7 Having said that, the BLNR -- the BLNR  
8 did look at the master plan, and that informed their  
9 decision as to whether or not this particular project  
10 should move forward like the LUC would look at a  
11 community development plan in deciding whether any  
12 other particular project should move forward.

13 CHAIRPERSON SCHEUER: But the CDUPs are  
14 step by step?

15 MR. YEE: Well, you mean case by case?

16 CHAIRPERSON SCHEUER: Case by case.

17 MR. YEE: It is necessarily a  
18 case-by-case analysis like your district boundary  
19 amendments are necessarily a case-by-case analysis.

20 CHAIRPERSON SCHEUER: But district  
21 boundary amendments, typically at least, are for much  
22 larger areas.

23 MR. YEE: Well, because it's much harder  
24 to get a conservation district use permit. So they  
25 tend to be smaller. You will not see -- you know,

1       like, you will not see a Ho'opili in the  
2       conservation. It will never get approved. So no one  
3       ever asks. So their permits tend to be much smaller.

4               CHAIRPERSON SCHEUER: Okay. So just --  
5       I'll let you go in a second, but just to really  
6       understand, you're just really the -- the  
7       agricultural-rural district, for instance, doesn't  
8       mean it's for actually agriculture, you're saying.  
9       It just means it has a separate set of permitting  
10      requirements?

11             MR. YEE: Yes. If you look through 205,  
12      the list of allowable uses in the agricultural  
13      district is very broad. It allows --

14             CHAIRPERSON SCHEUER: Like a special use  
15      permit?

16             MR. YEE: No, no. These are allowable  
17      uses. The expansion of uses in the agricultural  
18      district by the legislature has been very clear for  
19      years. So I don't think that's -- I don't think  
20      that's news.

21             CHAIRPERSON SCHEUER: Is there anything  
22      further?

23             Thank you.

24             MR. YEE: Thank you.

25             CHAIRPERSON SCHEUER: Commissioners, it

1 is 4:47 p.m. I'm inclined to ask if there's any  
2 people who desire to give public testimony who are  
3 not planning to be here tomorrow and provide for  
4 them, and if that is done, my inclination is, but I'm  
5 open to suggestion, is to then adjourn for the day  
6 and then reconvene tomorrow morning. What's your  
7 pleasure?

8 Okay. Are there any individuals  
9 particularly who were not planning to be here  
10 tomorrow who are wishing to give public testimony who  
11 have not already?

12 Okay. So please come up. You're subject  
13 to the same procedures and time limits that we've  
14 imposed on all the other public witnesses.

15 COMMISSIONER CABRAL: I'd like to make  
16 sure that they sign in in the same manner because I  
17 think there's been clarification of us not trying to  
18 interpret doctor's handwriting for every person  
19 testifying. Thank you.

20 CHAIRPERSON SCHEUER: After filling that  
21 out, I will swear you in.

22 (Brief pause.)

23 Aloha. Do you swear or affirm the  
24 testimony you're about to give is the truth?

25 MR. SINKIN: I do.

1                   CHAIRPERSON SCHEUER: Okay. Please state  
2 your name for the record and proceed.

3  
4                   LANNY SINKIN, ESQ.,  
5 was duly sworn to tell the truth,  
6 testified as follows:

7                   MR. SINKIN: I'm Lanny Sinkin. I'm an  
8 attorney in federal practice here in Hawai'i, and I  
9 participated in the contested case, which is the  
10 contested case for the permit for the 30-meter  
11 telescope. I was representing the Temple of Lono in  
12 that proceeding. And I really hadn't intended to  
13 talk today. I was more here to listen, but some of  
14 the things I heard said about the contested case  
15 didn't sound right to me.

16                   First of all, in terms of issues heard in  
17 the contested case, the hearing officer made a  
18 determination on what issues would be heard and what  
19 issues would not be heard. There were probably 50  
20 issues submitted by the various parties. The hearing  
21 officer selected a small group of those issues, all  
22 from one party, and threw out all of the other issues  
23 raised by other parties.

24                   The issue of this commission and its  
25 authority or its practices or its impact to TMT never

1        arose at all in the proceeding and was not part of  
2        the issues that were allowed to be litigated in the  
3        proceeding. So all of this testimony about we had 44  
4        days of hearings, excruciatingly in this room, no  
5        question about it, is really irrelevant to your  
6        considerations.

7                I also want to deal with that issue of  
8        who owns the land, and let's be real clear that the  
9        state does not own the land. The state is the  
10       trustee of lands that were placed in trust when they  
11       were transferred -- stolen from the kingdom and  
12       transferred to the State of Hawai'i as the trustee  
13       for those lands. And, therefore, the state has a  
14       fiduciary duty to protect those lands in addition to  
15       any other duties that might be found in the  
16       Constitution or elsewhere.

17               Let's see if there's anything else that's  
18       really important.

19               On what I just talked about goes very  
20       much to the res judicata issue that's been discussed.

21               COMMISSIONER CABRAL: I'm sorry. What  
22       was that?

23               MR. SINKIN: The res judicata issue that  
24       was discussed. This was not litigated in any way,  
25       shape or form, the transformation of this district on

1 the mountain into an industrial zone. And I think  
2 what you're hearing is there was consideration of the  
3 cumulative impact of development on the mountain, and  
4 there was a finding which had been made in an earlier  
5 case that was mentioned, the Keck case, case of NASA,  
6 that there's been significant adverse and substantial  
7 impacts on the mountain by astronomers to date to the  
8 extent that the Supreme Court said this new TMT will  
9 only do little more damage to something that's  
10 already been severely damaged, so it would not be a  
11 big deal to allow it, I think, was a terrible  
12 decision by the Supreme Court and is going to have  
13 long-term consequences for conservation districts.

14 But, basically, we're now in a position  
15 where someone that can get past you by simply  
16 ignoring you, which is what this university has done  
17 for years --

18 (Timer ringing.)

19 -- someone that can get past you and into  
20 the conservation district and start doing development  
21 along the lines that happened on the mountain can  
22 basically urbanize or industrialize the entire  
23 mountaintop, and no one has any authority to stop  
24 them as long as BLNR goes along with it. And that  
25 can't be right. You can't have so little authority

1 in designating something as a conservation district  
2 and then have no authority to protect it once you've  
3 designated it.

4 So I just offer those as additional  
5 thoughts. Thank you.

6 CHAIRPERSON SCHEUER: Mahalo.

7 Are there questions for the witness?

8 MS. ISAKI: No questions. Thank you.

9 CHAIRPERSON SCHEUER: Commissioners?  
10 Commissioner Okuda.

11 COMMISSIONER OKUDA: Thank you very much  
12 for your testimony. Do you read what we've been  
13 calling the Mauna Kea 2 case? And just so we're  
14 clear, the citation of that case is in the matter of  
15 "Contested Case Hearing Re: Conservation District Use  
16 Application," paren, "CDUA," close paren, "HA-3568,"  
17 and the citation is 143 Hawai'i 379, also found at  
18 431 Pacific 3rd at page 752. Did you read that  
19 decision by the Hawai'i Supreme Court?

20 MR. SINKIN: I was part of the appellate  
21 process that led to that decision. So I've read it.  
22 It's been a while since I read it, but I'd be happy  
23 to try and answer your question.

24 COMMISSIONER OKUDA: No, no. I just want  
25 to make sure first that you read it.



1           Okay. I understand your testimony about  
2   no res judicata effect. Let me ask you this: Do you  
3   have any legal authority that indicates that the Land  
4   Use Commission has subject-matter jurisdiction to  
5   give the relief that the petitioners are asking for?

6           MR. SINKIN: I have not addressed that  
7   question, and I like it.

8           COMMISSIONER OKUDA: Because let me tell  
9   you, and, again, please don't take this question as  
10   meaning I've prejudged anything here, but, you know,  
11   just for whoever might be left in the audience at  
12   this late hour or coming late hour, subject-matter  
13   jurisdiction basically means that if an adjudicative  
14   body, whether it's a court or agency, has  
15   subject-matter jurisdiction, then that group or body  
16   can make a decision regarding the issue, but if it  
17   has no subject-matter jurisdiction, it doesn't matter  
18   what everybody agrees that the body can make a  
19   decision. It just can't make a decision. Is that a  
20   fair statement?

21           MR. SINKIN: That's a fair statement,  
22   sure.

23           COMMISSIONER OKUDA: Okay. See, this is  
24   my concern about subject-matter jurisdiction, and let  
25   me just ask this one additional preliminary question.

1 To determine subject-matter jurisdiction of a body,  
2 one place you look at is the statute; correct?

3 MR. SINKIN: Correct.

4 COMMISSIONER OKUDA: Because the  
5 legislature is the one who decides, okay, these  
6 bodies or even these courts will have subject-matter  
7 jurisdiction over certain things, and these bodies or  
8 courts will not have subject-matter jurisdiction over  
9 certain issues; correct?

10 MR. SINKIN: Yes.

11 COMMISSIONER OKUDA: Okay. So when we  
12 look at HRS section 205-5, paren, small (a), close  
13 paren, it says, "Except as herein provided, the  
14 powers granted to counties under section 46-4 shall  
15 govern the zoning within the districts other than in  
16 conservation districts," period. "Conservation  
17 districts shall be governed by the Department of Land  
18 and Natural Resources pursuant to Chapter 183C,"  
19 close quote at this point in time. Is that a fair  
20 reading of HRS section 205-5, paren (a)?

21 MR. SINKIN: That's what it says.

22 COMMISSIONER OKUDA: So doesn't that  
23 statute suggest that Department of Land and Natural  
24 Resources has exclusive subject-matter jurisdiction  
25 over conservation districts as far as governance of

1       what takes place within those districts?

2               MR. SINKIN: I think you're having to  
3 deal with a question that never has really been well  
4 addressed, which is cumulative effects. That, yes,  
5 DLNR has exclusive jurisdiction within the  
6 conservation district to make a permit decision and  
7 grant a permit. But do they have exclusive  
8 jurisdiction if they are allowing activities that are  
9 beyond what should be allowed in the kind of district  
10 they've been designated? So I think you have the  
11 state having given the authority to designate those  
12 districts to you, not to DLNR. And once you've  
13 designated those districts, there must be some  
14 enforcement authority on your part for what you  
15 designated, or your acts are meaningless.

16              COMMISSIONER OKUDA: Yeah. And that  
17 actually has been, you know, issues at the  
18 legislature because there was a case called DW Aina  
19 Le'a versus Bridge Aina Le'a, and I can't give you  
20 the citation right off the top of my head, where the  
21 Land Use Commission attempted to take certain actions  
22 with the developer that did not live up to their  
23 promises. And believe me, this commission, you know,  
24 has and intends to enforce conditions placed on  
25 developers. I'm not saying we don't care what prior

1 commissions have avoided, but we actually enforce  
2 these conditions, and the Supreme Court basically  
3 batted us down saying if it's not authorized in the  
4 statute, the Land Use Commission doesn't have those  
5 enforcement powers.

6 So my question is really when you look at  
7 a statute, isn't it true that the -- one of the first  
8 rules of statutory construction is we look at what  
9 the plain language of the statute says.

10 MR. SINKIN: Yes, that's correct. And  
11 we're also looking at what was the intent of the  
12 legislature.

13 COMMISSIONER OKUDA: Okay. And can you  
14 point to any legal authority that states that the  
15 legislature intended concurrent jurisdiction with the  
16 Land Use Commission to govern what takes place within  
17 conservation districts as the word "govern" is used  
18 in the context of HRS section 205-5, paren, small  
19 (a), close paren?

20 MR. SINKIN: I think what you're dealing  
21 with is an abdication of that responsibility; that  
22 you have a situation where a state agency has  
23 bypassed your authority, has not come to you and  
24 requested any kind of change in boundary or a  
25 designation of this district, bypassed your

1 authority, proceeded to full-scale industrialization,  
2 and now left you with a mess and that you have to  
3 clean up in whatever way you can. I'm not very  
4 familiar with your agency. I haven't dealt with it  
5 before. But the idea that you would be given the  
6 power by the legislature to designate a district as a  
7 conservation district for purposes of protecting that  
8 district from damage, harm, and a district that also  
9 falls under the public trust that you have, the  
10 trustee relationship that you have, when you have all  
11 of that given to you and you turn around and  
12 designate an area as a protected area, and then some  
13 agency comes in and bypasses you and starts  
14 industrializing the area, this is a process that's  
15 gone off the rails from the very beginning.

16 COMMISSIONER OKUDA: Yeah. And I'm not  
17 disagreeing with the fact that the process may have  
18 gone off the rails. Okay? But what I'm trying to  
19 focus in on is, you know, the initial question about  
20 subject-matter jurisdiction. You know, we can agree  
21 or we might all believe that there is a reasonable  
22 basis to conclude that something has gone off the  
23 rails and something should be done, but, you know, us  
24 as lawyers, I don't think it's being too picky to ask  
25 the initial question does the tribunal that we're

1 ending up in front of, whether it's a court or  
2 administrative agency, does that agency have  
3 subject-matter jurisdiction? Because if the agency  
4 doesn't have subject-matter jurisdiction, even if  
5 everybody agrees, "Hey, let's go to Land Use  
6 Commission because we think they're not as dumb as  
7 everybody else," you know, the general rule, right,  
8 is that parties cannot even confer subject-matter  
9 jurisdiction by agreement or stipulation on a body  
10 that doesn't have subject-matter jurisdiction.

11 And so -- so would you agree that you  
12 can't point to any statute or a case that holds or  
13 says that the Land Use Commission has subject-matter  
14 jurisdiction to govern what takes place within  
15 conservation districts as that word "govern" is used  
16 within the context or same meaning as HRS section  
17 205-5, paren, small (a), close paren?

18 MR. SINKIN: I guess the problem I'm  
19 having is that the -- if they had come to you  
20 originally and said, "We want to change this district  
21 from a conservation district to an urban district  
22 because we want to build 14 telescopes and another 10  
23 additional buildings there," you would have had the  
24 opportunity to look at what they were proposing, and  
25 if you were going to grant it, you had the

1 opportunity to put conditions on it that would meet  
2 your obligations to protect that area as being in a  
3 conservation district and being under your authority.  
4 You were denied that opportunity. You never had the  
5 chance to set those conditions. So now we're in a  
6 situation that they have created that's not your  
7 responsibility, but you're being left to try and  
8 correct it.

9 I would say you do have subject-matter  
10 jurisdiction because you were given the original  
11 authority to create that district in the first place.  
12 So that was your subject-matter jurisdiction was the  
13 creation of these districts to meet the goals of the  
14 legislature that were set out in the statute.

15 COMMISSIONER OKUDA: But you can't point  
16 to any specific statute or specific case which so  
17 states the role; correct?

18 MR. SINKIN: I don't think the situation's  
19 ever come up. No, I can't.

20 COMMISSIONER OKUDA: Okay. Thank you.

21 Mr. Chair, no further questions.

22 CHAIRPERSON SCHEUER: Thank you,  
23 Commissioner Okuda.

24 Commissioner Cabral.

25 COMMISSIONER CABRAL: I'm sorry. I know

1       it's getting late in the day, but you brought up  
2       again the question I asked previously of Attorney  
3       Yee. The question is who owns the land.

4               MR. SINKIN: Yes.

5               COMMISSIONER CABRAL: And so you  
6       referenced the fact that, in fact, the State of  
7       Hawai'i really doesn't own it. They are just the  
8       trustees --

9               MR. SINKIN: Yes.

10              COMMISSIONER CABRAL: -- for the people  
11       of Hawai'i. Do you then -- is there any thought,  
12       since you are an attorney, where any group within the  
13       people have a majority or minority group within the  
14       people as such an entity of a state have a superior  
15       or overriding right to control a land that's owned by  
16       everyone in large or -- I'm trying to find out are  
17       you able to -- is the state or is an entity able to  
18       restrict the use or control of a piece of land to one  
19       group based on their race, creed, color, national  
20       origin, et cetera? I know in housing, age, you have  
21       special services, but we'll stay out of that detail.  
22       Okay?

23              MR. SINKIN: Okay.

24              COMMISSIONER CABRAL: Okay. And just  
25       looking through some --



1           MR. SINKIN: Here's what's underneath all  
2 of this. You go to the Admissions Act, and the  
3 Admissions Act talked about how the lands that were  
4 taken from the kingdom would be put into a trust, and  
5 the trust would benefit Native Hawaiians and the  
6 general public. It specified Native Hawaiians. So  
7 then you move forward in time. The land is in trust.  
8 So any decision being made about those lands must  
9 take into account the trust relationship of fiduciary  
10 duty that the state has to Native Hawaiians and the  
11 general public not to have the land misused or abused  
12 or left with an unfinished telescope. That's where  
13 some of this comes from.

14           So in that sense, there is a special  
15 relationship with Native Hawaiians that are  
16 specifically protected in the Admissions Act  
17 transmission of that land. I don't know if I  
18 directly addressed your question.

19           COMMISSIONER CABRAL: Thank you very much  
20 for that reference point. Thank you. Yes.

21           CHAIRPERSON SCHEUER: Commissioners,  
22 anything further?

23           Thank you very much.

24           MR. SINKIN: My pleasure. Thank you.

25           CHAIRPERSON SCHEUER: Is there any

1 further members of the public wishing to give  
2 testimony on this matter?

3 Okay. So the petitioner, I would note  
4 this is not a contested case hearing. You don't get  
5 to call witnesses. So I don't know if either of your  
6 clients are planning to present testimony.

7 MS. ISAKI: Chair, can I clarify? Are  
8 you asking for any witnesses who want to go to our  
9 meet or anybody who won't be here tomorrow?

10 CHAIRPERSON SCHEUER: We'll start with  
11 anybody who won't be here tomorrow. Is there anybody  
12 who won't be here tomorrow?

13 Okay. Let me just -- to be totally  
14 honest, I'm starting to reach the limits of my  
15 ability to very thoughtfully and actively listen. So  
16 you're available in --

17 MS. ISAKI: Yes, we're available, and  
18 there's other people.

19 CHAIRPERSON SCHEUER: Was there anybody  
20 else who was planning to be here tomorrow who also  
21 wants to testify?

22 COMMISSIONER CABRAL: Can we get  
23 clarification too? People should have signed up  
24 today; correct? Are we opening things up again  
25 tomorrow or we don't know that?

1                   CHAIRPERSON SCHEUER: Well, I think it's  
2 not a question of opening things up. It's whether  
3 we're closing tonight. So -- okay. So take a  
4 couple-minute recess. Okay?

5                   (A recess was taken from 5:07 p.m.  
6 until 5:15 p.m.)

7                   CHAIRPERSON SCHEUER: Okay. I'm advised  
8 we can start, and this is the part of the record that  
9 Gary can review and will not be present. Hopefully,  
10 he'll come in while we're discussing it.

11                   My inclination is to ask for any further  
12 people who wish to testify in this matter.

13                   COMMISSIONER CABRAL: Gary's here.

14                   CHAIRPERSON SCHEUER: Great.

15                   My inclination is to have any further  
16 people who want to testify to sign up today. But  
17 because of -- I mean, just speaking for myself, my  
18 energy, my ability to thoughtfully, thoroughly listen  
19 and engage with any further witnesses is limited at  
20 this hour of the day. So we will allow those people  
21 to testify tomorrow. But if you have not signed up  
22 by today, we're going to otherwise close the public  
23 testimony of this proceeding. That's my proposal.  
24 I'd like some thoughts from the commission.

25                   COMMISSIONER WONG: I agree.

1 COMMISSIONER GIOVANNI: I agree.

2 CHAIRPERSON SCHEUER: Okay. So if  
3 there's anybody else who wishes to testify on this  
4 matter before public testimony is closed --

5 This is Ariana here. Wave your hand.

6 -- get to her, sign up. If you're not  
7 signed up, then everybody from that will start off  
8 tomorrow morning, but testimony will only go on until  
9 the commissioners are in agreement, and then we will  
10 confer on matters. Any further questions?

11 COMMISSIONER GIOVANNI: Yeah, I have a  
12 question.

13 CHAIRPERSON SCHEUER: Commissioner  
14 Giovanni.

15 COMMISSIONER GIOVANNI: It's only because  
16 I'm confused. I see four people here, and we  
17 referred to them as the petitioners. Are they all  
18 part -- are they four petitioners or are the three --  
19 how are they configured is my question?

20 CHAIRPERSON SCHEUER: Ms. -- Dr. Isaki.

21 MS. ISAKI: Thank you for the question.  
22 Actually, I'm the attorney, Bianca, and then we have  
23 two petitioners, Ku'u lei Higashi Kanahele and Ahiena  
24 Kanahele. And Lance is actually representing or here  
25 for West Maui Preservation Association, which is not

1 a petitioner. He's just a member of the public.

2 COMMISSIONER GIOVANNI: So we'll hear  
3 from each of the four of you?

4 CHAIRPERSON SCHEUER: I think it's  
5 confusing because you're sitting at the table. That  
6 is part of the confusion.

7 MR. COLLINS: Sorry. I had asked if I  
8 could sit here because it's hard for me to see  
9 sometimes with the bright lights farther back. So  
10 the tables were farther back.

11 CHAIRPERSON SCHEUER: I think if you sit  
12 in the booth in this room, there's a two-drink  
13 minimum.

14 Yes. Is there anything further?

15 Does that respond to your question,  
16 Commissioner Giovanni?

17 COMMISSIONER GIOVANNI: I think so, yes.

18 CHAIRPERSON SCHEUER: So there's two  
19 petitioners and their counsel.

20 COMMISSIONER GIOVANNI: One public and  
21 three representatives for the petitioner?

22 CHAIRPERSON SCHEUER: Yes.

23 COMMISSIONER GIOVANNI: We'll hear from  
24 all four of them?

25 CHAIRPERSON SCHEUER: So we will hear

1 from the petitioners themselves as well as  
2 Mr. Collins as public witnesses as everybody else has  
3 been, and then counsel for the petitioner actually  
4 has a separate ability to present argument on this  
5 matter.

6 COMMISSIONER GIOVANNI: And she's not  
7 limited to three minutes?

8 CHAIRPERSON SCHEUER: That's correct.

9 COMMISSIONER GIOVANNI: Thank you.

10 CHAIRPERSON SCHEUER: Commissioner Aczon.

11 COMMISSIONER ACZON: So those people that  
12 come in tomorrow and they didn't sign up today --

13 CHAIRPERSON SCHEUER: They will not have  
14 the ability to offer public testimony at this time.

15 COMMISSIONER ACZON: So those people that  
16 signed --

17 CHAIRPERSON SCHEUER: Public testimony  
18 will be closed.

19 COMMISSIONER ACZON: Thank you.

20 CHAIRPERSON SCHEUER: Is that clear? If  
21 not, then we are in recess till 9:30 a.m. tomorrow  
22 morning. 9:00 a.m. Excuse me. 9:00 a.m.

23 (The hearing adjourned at 5:19 p.m.)  
24  
25

## C E R T I F I C A T E

STATE OF HAWAII )  
 ) ss.  
CITY AND COUNTY OF HONOLULU )

I, LAURA SAVO, a Certified Shorthand Reporter in and for the State of Hawai'i, do hereby certify:

That the foregoing proceedings were taken down by me in machine shorthand at the time and place herein stated, and was thereafter reduced to typewriting under my supervision;

That the foregoing is a full, true and correct transcript of said proceedings;

I further certify that I am not of counsel or attorney for any of the parties to this case, nor in any way interested in the outcome hereof, and that I am not related to any of the parties hereto.

Dated this 4th day of November 2019 in Honolulu, Hawai'i.

s/s Laura Savo  
LAURA SAVO, RPR, CSR NO. 347