

## **LANA'I PLANNING COMMISSION**

PURSUANT TO CHAPTER 92, PART I, OF THE HAWAII REVISED STATUTES AS AMENDED; NOTICE IS HEREBY GIVEN OF A REGULAR MEETING OF THE LANA'I PLANNING COMMISSION

### **AMENDED AGENDA**

**NOTE:** The Lana'i Planning Commission agenda filed on July 8, 2014 for a meeting on July 16, 2014 has been canceled. This new agenda filed on July 9, 2014 replaces the canceled agenda. New Item C-1 has been added to this agenda.

**DATE:** **JULY 16, 2014**

**TIME:** **5:30 P.M.**

**PLACE:** **Lana'i Senior Center  
309 Seventh Street  
Lana'i City, Lana'i, Hawaii 96763**

**Members:** John Ornellas (Chair), Stacie Lee Koanui Nefalar (Vice-Chair), Joelle Aoki, Shelly Barfield, Kelli Gima, Stuart Marlowe, Bradford Oshiro, Beverly Zigmond

**A. CALL TO ORDER**

**B. PUBLIC TESTIMONY** - At the discretion of the Chair, public testimony may also be taken when each agenda item is discussed, except for contested cases under Chapter 91, HRS. Individuals who cannot be present when the agenda item is discussed may testify at the beginning of the meeting instead and will not be allowed to testify again when the agenda item is discussed unless new or additional information will be offered.

**C. COMMUNICATIONS**

1. **MR. CRAIG NAKAMURA** of CARLSMITH BALL LLP, attorney for PULAMA LANAI, requesting by letter dated July 8, 2014 that the Lana'i Planning Commission amend its decision concerning condition no. 23 of the State Land Use Commission Special Use Permit approved by the Commission at its June 18, 2014 meeting regarding PULAMA Lana'i's Reverse Osmosis Desalination Facility and Distribution System including the development of reverse osmosis desalination plant facility, administration building, water generation facility, and related improvements within the Manele Project District at TMK: 4-9-002: 001 (por.), 4-9-017: 009 (por.) and 010 (por.), Manele, Island of Lana'i. (SUP2 2013/0028) (PH2 2013/0001) (B. Sticka)

AN EXECUTIVE SESSION MAY BE CALLED IN ORDER FOR THE COMMISSION TO CONSULT WITH ITS ATTORNEY ON QUESTIONS AND ISSUES PERTAINING TO THE COMMISSION'S POWERS, DUTIES, PRIVILEGES, IMMUNITIES AND LIABILITIES, PURSUANT TO SEC. 92-5(a)(4), HRS.

The Commission may consider a Motion to Rescind or a Motion to Amend the

above-referenced State Land Use Commission Special Use Permit approved by the Lana'i Planning Commission on June 18, 2014. If either motion is approved by majority vote, the Commission may take action related to the State Land Use Commission Special Use Permit.

D. PUBLIC HEARING (Action to be taken after public hearing.)

1. MR. WILLIAM SPENCE, Planning Director transmitting the Planning Department's Report with comments, recommendations, and proposed amendments to the planning commissions for review and transmittal to the Council relating to Chapter 19.65 of the Maui County Code relating to Short-Term Rental Homes. (G. Flammer)

The Report contains a Proposed Bill for an Ordinance containing the Planning Department's proposed amendments to the Short-Term Rental Home Ordinance No. 3941.

2. MR. WILLIAM SPENCE, Planning Director transmitting the Planning Department's Report with comments, recommendations, and proposed amendments to the planning commissions for review and transmittal to the Council relating to Chapter 19.64 of the Maui County Code relating to Bed and Breakfast Homes. (G. Flammer)

The Report contains a Proposed Bill for an Ordinance containing the Planning Department's proposed amendments to the Bed and Breakfast Home Ordinance No. 3611.

Both reports are available on the County website at: [www.mauicounty.gov](http://www.mauicounty.gov)  
( <http://www.mauicounty.gov/index.aspx?nid=121> )

E. DIRECTOR'S REPORT

1. Open Lana'i Applications Report as distributed by the Planning Department with the July 16, 2014 agenda
2. Agenda Items for the August 20, 2014 Lana'i Planning Commission meeting.
3. December meeting to be held at the Lana'i School Cafeteria as the Lana'i Senior Center is unavailable.

F. NEXT REGULAR MEETING DATE: AUGUST 20, 2014

G. ADJOURNMENT

AGENDA ITEMS ARE SUBJECT TO CANCELLATION.

AN EXECUTIVE SESSION MAY BE CALLED IN ORDER FOR THE COMMISSION TO CONSULT WITH ITS ATTORNEY ON QUESTIONS AND ISSUES PERTAINING TO THE COMMISSION'S POWERS, DUTIES, PRIVILEGES, IMMUNITIES AND LIABILITIES, PURSUANT TO SEC. 92-5(a)(4), HRS.

DOCUMENTS ARE ON FILE WITH THE DEPARTMENT OF PLANNING. THE ADDRESS OF THE COMMISSION IS C/O DEPARTMENT OF PLANNING, ONE MAIN PLAZA, 2200 MAIN STREET, SUITE 619, WAILUKU, MAUI, HAWAII 96793.

UNLESS OTHERWISE SPECIFIED BY ANOTHER SPECIFIC PLANNING COMMISSION RULE, ANY PETITION TO INTERVENE AS A FORMAL PARTY IN THE PROCEEDINGS BEFORE THE COMMISSION MUST BE FILED WITH THE COMMISSION AND SERVED UPON THE APPLICANT NO LESS THAN TEN (10) DAYS BEFORE THE FIRST PUBLIC HEARING DATE. (Note: The calculation of time for deadlines ten days or less excludes weekends and State recognized holidays.) THE ADDRESS OF THE COMMISSION IS C/O the DEPARTMENT OF PLANNING, ONE MAIN PLAZA, 2200 MAIN STREET, SUITE 315, WAILUKU, MAUI, HAWAII 96793. The deadline for filing a timely Petition to Intervene for an item where the first public hearing date was on July 16, 2014 was on July 1, 2014.

ORAL OR WRITTEN TESTIMONY WILL BE RECEIVED ON EACH ANY AGENDA ITEM SUBJECT TO THE PROVISIONS OF CHAPTER 92, HAWAII REVISED STATUTES AND THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE.

WRITTEN TESTIMONY AND FAXES SHOULD BE RECEIVED AT LEAST TWO (2) BUSINESS DAYS BEFORE THE MEETING TO ENSURE DISTRIBUTION TO THE COMMISSION. FIFTEEN (15) COPIES OF WRITTEN TESTIMONY ARE REQUESTED IF TESTIMONY IS PRESENTED IMMEDIATELY PRIOR TO OR AT THE MEETING.

TESTIFIERS: Please be advised that applications for Community Plan Amendment, State District Boundary Reclassification, Change in Zoning, and Conditional Permit require the approval of the Maui County Council. In order to be notified of future agendas of the Maui County Council please notify the Office of Council Services at (808) 270-7838 or by mail to the Maui County Council, 200 S. High Street, Wailuku, Maui, Hawaii 96793.

THOSE PERSONS REQUESTING SPECIAL ACCOMMODATIONS DUE TO DISABILITIES, PLEASE CALL THE DEPARTMENT OF PLANNING AT 270-7735 (Maui) OR 1-800-272-0117 (Molokai) OR 1-800-272-0125 (Lana'i) OR NOTIFY THE DEPARTMENT OF PLANNING IN WRITING AT ONE MAIN PLAZA, 2200 MAIN STREET, SUITE 315, WAILUKU, MAUI, HAWAII 96793 OR FAX NUMBER 270-7634; AT LEAST SIX (6) BUSINESS DAYS BEFORE THE SCHEDULED MEETING.

PLEASE NOTE: If any member of the Commission is unable to attend the scheduled meeting, please contact the Department of Planning at least one day prior to the meeting date. Thank you for your cooperation.  
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**LANA'I PLANNING COMMISSION  
REGULAR MEETING  
JULY 16, 2014**

**APPROVED 08-20-2014**

**A. CALL TO ORDER**

The regular meeting of the Lana'i Planning Commission (Commission) was called to order by Chair John Ornellas at approximately 5:35 p.m., Wednesday, July 16, 2014, in the Lana'i Senior Center, Lana'i City, Hawaii.

A quorum of the Board was present (See Record of Attendance).

Mr. John Ornellas: Alright, the Lana'i Planning Commission come to order. This is the meeting of July 16<sup>th</sup>. We're a little bit late -- 7:35 p.m. 5:35 p.m. What did I say? I said seven? Time to leave. Alright, we have everyone here but Stuart, so we have quorum.

Alright, first up, Item B on our agenda, amended agenda, is public testimony. Anybody wanna come up and say a few words? We will have -- we'll have other opportunities for -- as we go through the agenda. So, if you don't -- if you don't have nothing to say now and you have something to say later. Dave's got --. You wanna come up now? Okay. You can use that mic right there. Sure.

**B. PUBLIC TESTIMONY - At the discretion of the Chair, public testimony may also be taken when each agenda item is discussed, except for contested cases under Chapter 91, HRS. Individuals who cannot be present when the agenda item is discussed may testify at the beginning of the meeting instead and will not be allowed to testify again when the agenda item is discussed unless new or additional information will be offered.**

Mr. Craig Nakamura: Actually, at your pleasure would you prefer to hear testimony on the matter now or would you prefer to wait on until it comes up on the -- on the agenda? I don't -- on Maui, sometimes they do the -- the public testimony first when people have to leave early or something so maybe not related to the specific item, but I'd be happy to either. Whatever you prefer.

Mr. Ornellas: Alright. And you're gonna -- you're gonna testify on behalf of -- yeah, this is his testimony. Alright, you can -- go ahead.

Mr. Nakamura: Thank you very much.

Mr. Ornellas: I'm sure you'll have a lot more to say as the meeting goes on.

Mr. Nakamura: Well, we'll try to limit -- limit that. But -- good evening Mr. Chair, members of the Commission, Lana'i Planning Commission. Aloha. Thank you for allowing me the opportunity to testify. My name is Craig Nakamura. I'm an attorney from Maui. I represent Pulama Lana'i, and I had previously submitted a letter to the Commission which is on the agenda. In addition to that we submitted a -- some written testimony today which is rather long. Really what it does

is it -- it provides a legal analysis as to why condition 23 should be deleted and that's what we're -- that's what my testimony is. But we're here to urge the Lana'i Planning Commission to eliminate proposed condition 23 from the subject Special Use Permit.

As I said, the written testimony has been provided. It is rather long and detailed. And rather than read it out, I'll just try to summarize a few points and we'll be happy to answer any questions that you may have as we go along.

The first point that we raised in our written testimony was that the -- the action of the Lana'i Planning Commission is -- is inappropriate because the State Land Use Commission has already exercised jurisdiction over Pulama Lana'i's use of the ground water. And I referred to a Findings of Fact, Conclusions of Law, Decision and Order issued by the State Land Use Commission on April 16, 1991, which imposed conditions when the land was being classified into the State Urban District. So that's been pending for quite some time as you can see. That -- one of the conditions that were imposed was -- was the -- regarding the use of the water from the high level aquifer. Because the Land Use Commission has already spoken to the issues of ground water management and control, our positions at the Lana'i Planning Commission does not have jurisdiction to impose conditions that relate to the same subject matter that's already been addressed by the Land Use Commission. In that situation -- excuse me -- in addition, the proposed condition 23 deals with an issue that's presently in litigation between Lana'i Resorts LLC, d.b.a. Pulama Lana'i, and the Land Use Commission and other parties. Therefore, because it is being currently -- those issues are currently being litigated, the Lana'i Planning Commission should abstain or should not be involved in imposing any conditions on the Special Use Permit that relate to the subject matter of the litigation.

In addition the State Commission on Water Resource Management has the authority and jurisdiction over water resources in the State of Hawaii. And I -- in our testimony we cite various different provisions from the Constitution and the State law to that effect. Therefore, although the Lana'i Planning Commission's role is very, very important, it does not extend to the regulation of water resources. The Lana'i Planning Commission is a land use authority and does not have jurisdiction or authority to impose conditions that over reach into the -- into the realm controlled by the Commission on Water Resource Management.

Also, the third issue relates to what we call the Nexus. That's kind of a detailed legal argument here, but really the -- when we deal with different types of legal issues we look to how the -- what we call precedence or prior judicial cases how the judges have ruled to see how they would rule if this case came before them again, or if this case was litigated. In -- in those cases that -- the previous cases -- and we site some cases from the United Supreme Court as well as the Hawaii Supreme Court -- the courts have found that you have to have a nexus or essential nexus between the condition and the application, basically. So the land use -- the land use permit conditions must be crafted to offset impacts of the proposed development. There has to be a definite relationship between the conditions and the impacts of the development. In the -- with respect to State Land Use Special Use Permits, the Hawaii Supreme Court has upheld conditions imposed on the permit when the conditions were, and I quote, "*undoubtedly intended to ameliorate deleterious effects of the special use on*

*neighboring agriculture.*" In other words, they have to be very closely related to the -- the conditions need to be closely related to the application at hand. In those instances, the -- the conditions on the Special Use Permit must be tied on the impacts of the proposed land use, and with respect to Chapter 205, must promote agriculture or rural activities. In our case, it's undisputed that the proposed desalination facility will not detract from the island's inventory of agricultural lands, and will not present any adverse effects on agricultural production and that's a direct quote from the Planning Department's report, so there's no relationship where -- the facility itself will not affect agricultural lands. Therefore, proposed condition 23 violates the language and policy underlying Chapter 205 and would be subject to challenge under HRS 91-14. The effect of condition 23 also essentially destroys the legal rights that have long been relied upon by Pulama Lana'i and its predecessors.

Finally, condition 23 is not supported by the record. We are concerned that there are procedural defects associated with condition 23 which provide another basis for our court to reverse the Lana'i Planning Commission's decision. These concerns are based on the fact that condition 23 is not supported by evidence that's on the record. It wasn't included -- for example -- it wasn't included in the Planning Department's report or the addendum. It's clearly adverse to Pulama Lana'i, but we were not given the opportunity to file any types of exceptions in response to the proposed conditions. And we believe that there is not supporting evidence in the record to substantiate condition 23. All of these reasons provide justification for the court to reverse the decision of the Lana'i Planning Commission on condition 23. Thank you.

Mr. Ornellas: Thank you. Members, any questions for the testifier? Hearing none, thank you very much.

Mr. Nakamura: Thank you.

Mr. Ornellas: Members, anyone -- anybody wanna make a motion to --. Okay. So let's -- anybody else have testimony -- make testimony?

Mr. Ron McOmer: . . . (Inaudible) . . .

Mr. Ornellas: We -- we can, but we will take testimony --. Okay, you want --. You want -- come up front. You want to say something Ron?

Mr. McOmer: . . . (Inaudible) . . .

Mr. Ornellas: Yes. Anybody else wanna testify on any of the agenda items? Ron, you're up.

Mr. McOmer: I won't faint, I'll just stand here. You know this is -- to me this is manini. Here we go again. Nothing in this 23 that says that we're taking a poke at Pulama or anything else. This was put in there in case the desal doesn't work, you're not going to use water from our high level aquifer. It's just exactly what it's stated in all of our text. I sit on LWAC. I was at that Land Use Commission hearings in 91, 95, 98, all of those. We're trying to protect our aquifer here. If that desal plant does not work -- and that's all this is about -- or if it has a catastrophic

breakdown. Then the whole island is gonna suffer anyway. Because if that has a catastrophic down there, can you imagine what our city is gonna look like? I'm concerned that this manini little argument over 23 is stupid. This was put in there by our residents because they're concerned about what's gonna happen when there is a catastrophic breakdown. And if those wording's not put in there, somebody doesn't understand that. Because 1991 one doesn't say anything about a desal plant folks. The attorneys failed to say, well, there was no desal plant in 91. We were fighting Castle & Cooke for every bit of water we could get, and we're still doing it today.

You know, I was stopped by five different people today saying, "what's going on with the desal plant, Ron?" Somebody in Pulama is going around and spreading words that if this desal doesn't work the town's going down the toilet. I don't appreciate that kind of stuff. A lot of local people stopping me today, and said, there must have been some meetings last night somewhere that a bunch of local guys are now stopping me and asking me, "what do you think about the desal?" I tell them the same as everybody else, we need to have that if the project is gonna go forward. Pulama cannot do what they gotta do without that desal. And all this thing says is if a catastrophic break down. And we discussed that before with Pulama at the LWAC meetings, what happens if it breaks down? You'll be giving a certain amount of time to get it back on line and get going, and there's water available. But you cannot take our water from the high level aquifer for other than human consumption except for wells 1, 9, and 14. Those are the wells that are still in play. They're in play today. So we're not stopping them from using water if they need to water their stupid golf course. And human consumption for the hotels and the luxury homes and condos at Manele, take it right out of the high level aquifer just like it is today. So if we can't to do this legally that's too bad. That's shame on Pulama, and shame on the attorneys to come up with this crap. Sorry.

Mr. Ornellas: Thank you Ron. Anybody else wanna? Yes sir, Mr. Richardson, come forward.

Mr. Christopher Richardson: Aloha. Good evening. Thank you. My name is Christopher Richardson, Lana'i resident. So there's been a lot of science talk, jargon terms, previously, on this topic. Now we have legal terms, legal jargon, on this topic. To keep it simple, it doesn't matter if it's a high level aquifer, fresh water basal lens, brine, saltwater, sea level, we're talking about the aquifer. Water contained within the boundaries of the island. It's all the aquifer. It's precious, and it's not -- it doesn't occur on every island. This island has a very special aquifer. We're taking a natural resource. This island, in particular, has been subject to the taking of natural resources for more than 200 years. About 1790, sandalwood started to get taken out of all of Hawaii, and that last to the mid-18 -- 1843. We know cattle ranching, farming, and other things have taken natural resources from this island. This plan is to take a natural resource from the island without any idea of how to deal with that. The water is going to come out of the aquifer. And there's a lot of talk about how it's going to magically heal itself. But all you would need is to just think about that for a moment and realize that's not going to work. We're fighting about the reason to do this. We need -- we need to develop. We could discuss the methodology. But this is not the place for it. The developer has proposed a specific plan, and so this board is to vote on this specific plan. As presented, does it follow true sustainability? Whether it affects agriculture, whether affects development, whether affects people in the

community -- we have to make sure that the ecology and the environment are maintained. As proposed, there are many negative effects that will come from this, and we should discuss those negative effects. We should know those negative effects and we should plan and amend the proposed plan to deal with it. Thank you for your time.

Mr. Ornellas: Thank you. Anyone else want to come forward? Yes, sir, Mr. Reilly.

Mr. Pat "Fairfax" Reilly: Thanks guys. Pat Reilly. 35 year resident. Been through it. My concern for you as planner commissioners, and I would highly recommend that you meet with your attorney and have this discussion so you fully understand. Having been in this situation myself -- not in this body, but in other bodies -- the question before is, "do you want to get sued?" I mean, the attorney here has said that they can take you to court. Before you make a decision, meet with your legal counsel. Understand what that means to you personally. Personally. To me you've already passed the permit except -- I don't quite understand that and maybe counsel can explain to the public how this comes backs up -- back up. But that maybe -- that maybe something I don't understand with Robert's Rules and other kinds of things, but the question for us is -- us, being the whole community -- if there's a legal basis for this presentation and your attorney is telling you that, that act on condition 23 only -- the rest of it has already been passed, right? I mean, there may be other portions but that's not for debate tonight. The permit's been passed except for -- well even condition 23 has been passed. Now it's up for reconsideration or maybe that's not the correct word. But if you haven't had an opportunity to meet with your attorney you should understand that if this goes to court it's a big deal, takes a lot of time, a lot of money, and it impacts you personally. And it will impact the whole community. So, I would say, you need to meet with your attorney. Thank you.

Mr. Ornellas: Thank you Pat. Gerry?

Mr. Gerald Rabaino: Gerald Rabaino, Lana'i City. Been a resident from 1971. When I first moved here -- yeah, when pineapple was still around -- water was very good to the aquifers, but we do have leakage from our aquifers. We gotta take care that aquifer. The desalination plant is an added commodity to help the growth of Lana'i. I'm for that. But don't touch the water at the high level, where the aquifer are because it takes time to recharge. I used to take rain gage -- 75 all the up to the 80s. We don't have enough rain to replenish our aquifers. Much of you folks here, may be young, but when I came here, I when learn a lot of stuff from Dwayne. Excuse me, from Sweet Deshay, Bob Kushni -- all these -- them was the one that help educated me to understand about the rain gage and recharging our aquifers. As this letter says over here, under A, we gotta take care of our aquifers. But with that added desalination it would be a plus. But we need to make sure that all of you folks on that board there set some kind of condition as like Ron says if it breaks down where is the water they gonna use? Is the last resort the aquifers? You guys know that Manele is the dry side of Lana'i. We have 18 water wells that supplies this island. Pineapple days was only three. The other water wells may not be active because of their salt contents. You gotta malama the aina, take care the keiki o ka aina. This is our community. You sit up there. All that young generation there, you guys gotta make that wise decision. Either set a condition and pass the desalination, but protect our aquifers. Mahalo.



Mr. Ornellas: Thank you Gerry. Anyone else would like to come up and testify? Yes Gail.

Ms. Gail Riener: I just have a question. Gail Riener. I've been a resident on Lana'i for 10 years. If this, no. 23, is held up and taken to court will that prohibit or prolong the start of a desalination plant?

Mr. Ornellas: As far as the Lana'i Planning Commission, we don't know that. You'd have to ask Pulama that question.

Ms. Riener: Could I ask them that? Would they –

Mr. Ornellas: Not at this time.

Ms. Riener: Okay.

Mr. Ornellas: Not at this time.

Ms. Riener: Okay.

Mr. Ornellas: We're just listening for public testimony.

Ms. Riener: Okay. Thank you.

Mr. Ornellas: Alright. If you stick around, they might have -- they might go into a little bit more. Anybody else? Yes, sir?

Mr. Bradley Bunn: Yes, my name is Bradley Bunn. I'm a resident here on Lana'i. I respect both sides here. I respect everybody's dedication to Lana'i and to its future to taking care of the land and the children. I would echo what Pat had said, seek advice from your counsel and understand these issues because they're complicated. The legal issues are complicated. The intent of what we're wanting to do is pretty simple, and sometimes it gets boiled up into legalese, and we've got to get out the sword and cut Gordian's knot. Understand that what you're willing to accomplish may have already been accomplished by other regulatory bodies and rules that have been agreed to, so there may not be a need to double dip sort of speak. Meet with legal counsel and understand those issues, and, hopefully, you guys can come to an agreement here because I think that all sides here want to do the right thing and move forward for Lana'i. Thank you.

Mr. Ornellas: Thank you Brad. Anybody else would like to testify? Okay, hearing none, we'll close public testimony at this time. I may open it up later on in the evening when we get to the other things on the agenda with the housing. Okay, so we'll go to communications, C, no. 1 (*Chair Ornellas read the project description, agenda Item C1, into the record.*) It also states here an Executive Session may be called in order to -- in order for the commission to consult with its attorney on conditions -- on questions and issues pertaining to the commission's power, duties, privileges, immunities, and liabilities pursuant to Section 92-5(a)-4, HRS. So, do you

wanna say something? Okay, do you guys want to hop to the mic and add anything to this?

### C. COMMUNICATIONS

1. **MR. CRAIG NAKAMURA of CARLSMITH BALL LLP, attorney for PULAMA Lana'i, requesting by letter dated July 8, 2014 that the Lana'i Planning Commission amend its decision concerning condition no. 23 of the State Land Use Commission Special Use Permit approved by the Commission at its June 18, 2014 meeting regarding PULAMA Lana'i's Reverse Osmosis Desalination Facility and Distribution System including the development of reverse osmosis desalination plant facility, administration building, water generation facility, and related improvements within the Manele Project District at TMK: 4-9-002: 001 (por.), 4-9-017: 009 (por.) and 010 (por.), Manele, Island of Lana'i. (SUP2 2013/0028) (PH2 2013/0001) (B. Sticka)**

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**The Commission may consider a Motion to Rescind or a Motion to Amend the above-referenced State Land Use Commission Special Use Permit approved by the Lana'i Planning Commission on June 18, 2014. If either motion is approved by majority vote, the Commission may take action related to the State Land Use Commission Special Use Permit.**

Mr. Nakamura: Thank you for the opportunity again, Mr. Chair. Craig Nakamura on behalf of Pulama Lana'i. But, I don't think we have anything else to add at this point unless you have any questions.

Mr. Ornellas: Okay. Great. Thank you.

Mr. Nakamura: Thank you.

Mr. Ornellas: Members, do -- somebody wants to make a motion to go into Executive Session? Nobody. Alright, so let's not -- so let's just give the mic straight over to the -- to the lawyer and Corp Counsel and have her tell us what -- what we're missing.

Ms. Richelle Thomson: Okay, so you have -- you have before you a request from the applicant regarding a Special Use Permit that has been approved at the last meeting. The question is as to condition no. 23 which was included in that approval. They've requested that you remove that condition in its entirety. So the -- there are questions that pertain to your legal rights, obligations and potential liabilities that we need to discuss in Executive Session. It's not the

kind of thing that I can address in open forum. As far as the actions that you could potentially take -- what's been agendized is the possibility that someone could offer a motion to amend your prior decision either by -- it would be up to the maker of that motion to -- it could be amended in part, removal of the condition or something other related to condition no. 23. So an amendment would need to relate to that condition because that's what's been agendized. If something else was amended, it would need to be done at a subsequent meeting.

This -- there was a question from one of the testifiers as far as what rule does this fall under? So this is under Robert's Rules of Order, and it's -- the procedure is a motion to amend an action previously taken or a motion to rescind. They're handled the same as a regular motion. Someone would make a motion, second, discussion and then action on that. So procedurally that's what's happening today. There's been a request, and you can choose to take action on it or not. But as far as this commission's potential liabilities or the issues related to that condition and to this request, we would need to discuss those in Executive Session.

Mr. Ornellas: Okay, so then I'll call for an Executive Session again -- a motion to go into Executive Session. Hearing none. Let's --

Ms. Thomson: The second part of this agenda item is whether the Commission wishes to make a motion to amend this condition no. 23 on this Special Use Permit. So you have the options since that is agendized. If you don't feel that you need the advice of legal counsel in Executive Session, you're not obligated to seek it.

Mr. Ornellas: Joelle, you want to make a -- you wanna say something? Go ahead.

Ms. Joelle Aoki: So let me get this clear, if we do not request for an Executive Session, you are not at liberty to discuss with us our options in open forum? Is that correct?

Ms. Thomson: I can discuss some of them, but I can't get into the nitty gritty of potential liability or the ramifications of that condition as relating to the Commission or individual members. I can't discuss that in open session.

Ms. Aoki: Can you give us a minute Mr. Chair?

Mr. Ornellas: Sure. Go ahead. Let's take a short little five minute recess. Thank you.

*(The Lana'i Planning Commission recessed at 6:05 p.m., and reconvened at 6:08 p.m.)*

Mr. Ornellas: Get back to business here. So, do -- what did you guys decide?

Ms. Shelly Barfield: I make a motion to hear what -- to go into Executive Session and hear what legal counsel has to say.

Mr. Ornellas: Can I have a second?

Ms. Aoki: I second the motion.

Mr. Ornellas: Okay. Any discussion, members? All in favor of going in to Executive Session please raise your hand? It doesn't pass.

**It was moved by Commissioner Shelly Barfield, seconded by Commissioner Joelle Aoki, then**

**VOTED: To enter into Executive Session. -- MOTION FAILED**  
**Assenting: J. Aoki, S. Barfield**  
**Dissenting: K. Gima, S. Koanui Nefalar, J. Ornellas, B. Oshiro,**  
**B. Zigmund**  
**Excuse: S. Marlowe**

Mr. Ornellas: Okay, so let's move on to the --. You go ahead and say what you can say in open session.

Ms. Thomson: If you don't feel that you have sufficient information to take any action on this, you could consider deferring it. Otherwise, the communication would be filed without action. Those are your choices at this point unless someone wants to offer a motion to amend the Special Use Permit, and then we can discuss -- we can discuss that further. But, right now, I don't have anything further to add.

Mr. Ornellas: Members, any questions?

Ms. Aoki: I believe today is 30 days since the last meeting, why are there no minutes from the last meeting? I was not present at the last meeting.

Mr. Ornellas: That's --

Mr. Clayton Yoshida: The minutes from the last meeting. Yeah, I guess they haven't been completed for distribution to the Commission. Under Chapter 92, they're required to be produced within 30 days after the meeting. We're still within that 30 day time frame.

Ms. Aoki: Isn't today 30 days?

Mr. Yoshida: 30 days from the June 18<sup>th</sup> meeting.

Mr. Ornellas: Let me ask Corp Counsel. Anybody else has any questions? Let me -- hang on here. I'm looking through our rules here. I saw something that I wanna ask her. Okay, it's 12-401-84, Reconsideration. Now, in his letter, it doesn't give anything about reconsideration or to change anything except for -- I mean, he doesn't use the words in our -- that are in our rules. But the closest thing that I could see was the 401-84, Reconsideration, and it says that -- let me read it first and then you can --. It says:

*"Any person admitted to the proceedings as a party may file a written petition with the commission requesting reconsideration of the commission's final decision and order or ruling. Such petition for reconsideration must be filed within ten days after service of said final order or ruling. Within thirty days of receipt of a timely filed petition the matter shall be scheduled for hearing, and the notice of the hearing shall be sent to all parties."*

Okay, so just that one -- that one paragraph says that it must be -- it must be a timely filed petition and ten days after our decision of June 18<sup>th</sup>. This -- the letter that we got from Carl Ball -- hang on let me finish -- the letter that we got from Carlsmith Ball was stamped July 8<sup>th</sup>, so that's over ten days. And I don't think -- I'm not a lawyer but I'm gonna have to depend on you -- I don't think this is the correct -- the correct avenue or the way to do a reconsideration by sending us a letter saying us to change 23. So, anyways, go ahead.

Ms. Thomson: That portion of your rules is -- it falls under Chapter -- hang on one second. So this is -- it's under Subchapter 5 of your rules, Post Hearing Procedures Where Intervention is Granted. There was no intervention in this application so that -- these chapters don't apply to the circumstance because intervention wasn't a part of this application or procedure. So what you're left with is the -- when you have, you know, one party it was not opposed of -- there's no formal intervention. You're left with falling back to Robert's Rules of Order which do allow a motion to be amended or rescinded at a subsequent meeting, not indefinitely. The applicant, if they receive a decision that's adverse, and if they want to take this action they can appeal it to Circuit Court. I believe they're appealing to you. Not appealing in that legal sense, but they're requesting of you to reconsider this permit condition and then -- you know, based on your action or if there's no action, they'll need to consider what their next steps are.

Ms. Beverly Zigmond: Could you please repeat that on the intervention piece? I don't see that being intervention.

Ms. Thomson: There was no intervention. No parties sought to intervene as a party in this application so there was no intervention. And if -- if someone did intervene, then the rules that the Chair cited would apply. So you do have this procedure for reconsideration and appeal, if intervention is granted. If it's not granted, if it's not part of the formal proceedings, then that part of your admin rules does not apply. It's something that -- this is a separate topic -- but it's something that you might consider changing your admin rules if you feel like it would be an appropriate path for both applications like this that don't have formal intervention as well as those that do.

Mr. Ornellas: So this is a proper way of letting us know that -- so this is just a letter asking us to do this. Members --

Ms. Thomson: Before we move on from this item, you know, I did want to stress that I think an Executive Session is proper here. As your legal advisor, I would really like you to have the best information that -- that I can give you so that you can make a decision well informed. I don't have to agree with your decision -- you know, like it, not like it -- that's not my role in your

proceeding. My role in your proceeding is to provide you legal advice and to help you apply the law to the circumstances of your applications, and to, to see where you are in relation to the law and the application, conditions. So that's my role here, and I can explain a great deal more in Executive Session regarding this request, regarding condition 23, and if you would like to hear that information I cannot provide it in open session. And your choices now would be to, you know, file, file the communication and take no action, or if you'd like to reconsider and somebody offer another motion for Executive Session you could try that route.

Ms. Zigmond: Mr. Chair?

Mr. Ornellas: Go ahead Bev.

Ms. Zigmond: We have twice failed in that motion to have an Executive Session. And with all due respect to our Corp Counsel, I believe it's our kuleana to call for that Executive Session which, twice, we have decided not to do. So, we appreciate your concern, but I remember that in the June meeting we did have that discussion with you. And so I don't see why we have to have a third time, when we already, twice, said we don't want it.

Mr. Ornellas: Bev, I'm not asking for Executive Session, so we're not having one. We've already done it twice. Alright, so, can I have a motion to -- to file this with no action? Because we've -- as far as I'm concerned, we made that our decision back on the 18<sup>th</sup>, and 23 was part of our decision, so can I have a motion to -- to -- to file this with no -- with no action?

Ms. Kelli Gima: I make the motion to file this, as is, with no action.

Mr. Ornellas: Second please?

Ms. Zigmond: Second.

Mr. Ornellas: Any more discussion? Seeing none, all those in favor -- wait a minute, go ahead.

Ms. Aoki: I still want to know what she has to say. I just want it on record. Joelle Aoki.

Mr. Ornellas: She's not going to -- she is not going to say.

Ms. Aoki: Right. I understand that, but I still feel that there is a lack of information in all avenues -- just to get the information.

Mr. Ornellas: Alrighty. We have a motion on the floor and it has been seconded. So if it doesn't pass, then maybe you can ask for a deferral maybe. And so we can defer until -- until next meeting. Okay, so let's -- let's take care of business at hand. Go ahead, discussion.

Ms. Aoki: Okay, so if there's no deferral, and there's no approval to -- to approve as is or no action, then what happens? Can you please tell us what --

Mr. Ornellas: No, we can -- we can -- let's -- we'll get there when we get there. Let's take care -- right now, there's a motion, we're discussing this motion about filing it with no action. No, we're gonna stick with this. Okay.

Ms. Aoki: But you asked for question, so I'm giving you a question.

Mr. Ornellas: You're too -- let's get through this motion, and then we'll go to the next one.

Ms. Aoki: Okay.

Mr. Ornellas: Okay. Then you can ask more questions about deferrals, and what's next after that. We go to jail I guess, so --. Alright, so, any more discussion on this issue? So the motion is to file as is, no action. All those in favor, raise your hand. Four. We need one more? So it passes. Okay, so next on our agenda --. Leilani, did you get that vote? Okay, you had Joelle, Shelly, myself. Oh, you're looking for the nays. Okay, I called for ayes, that's right. And so the nays are Joelle and Shelly. Okay. Sorry. So we're on to --

**It was moved by Commissioner Kelli Gima, seconded by Commissioner Beverly Zigmond, then**

**VOTED: To file, as is, with no action.**  
**(Assenting: K. Gima, S. Koanui Nefalar, J. Ornellas, B. Oshiro, B. Zigmond**  
**Dissenting: J. Aoki, S. Barfield**  
**Excused: S. Marlowe)**

Ms. Aoki: So Mr. Chair?

Mr. Ornellas: Yes, ma'am?

Ms. Aoki: Are you going to answer my question now? Could Corporation Counsel please respond what happens with no action? Please, could you answer that question? I'm sorry, but I wasn't at the last meeting, there's no minutes. I -- I'm blind, so I'd like to know more information please.

Ms. Thomson: As it is currently, the Special Use Permit was approved as of June 18<sup>th</sup> with several standard conditions and several add on conditions including this condition 23, so that's the -- that's kind of the state -- the state of it. It has been passed, and now the applicant has the option of appealing to court.

Mr. Ornellas: She answered your question? Alright. Great. Okay, so let's move onto Item D, public hearing, action to be taken after the public hearing. No. 1, *(Chair Ornellas read the following project description into the record).*