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LAND USE COMMISSION
STATE OF HAWAI'I

ORAL ARGUMENT AND DECISION-MAKING)
DOCKET NO. A94-706 KA'ONO'ULU RANCH)
_____)

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for Oral Argument and Decision Making at Courtyard Maui Kahului Airport, Haleakala Room, 532 Keolani Place, Kahului, Maui, Hawai'i, Hawai'i, commencing at 9:00 a.m. on February 7, 2013, pursuant to Notice.

REPORTED BY: HOLLY M. HACKETT, CSR #130, RPR
Certified Shorthand Reporter

1 A P P E A R A N C E S

2 COMMISSIONERS:

3 KYLE CHOCK, CHAIR
4 RONALD HELLER, VICE CHAIR
5 CHAD McDONALD, VICE CHAIR
6 SHELDON R. BIGA
7 THOMAS CONTRADES
8 LANCE M. INOUYE
9 ERNEST MATSUMURA
10 JAYE NAPUA MAKUA
11 NICHOLAS W. TEVES, JR.

12 EXECUTIVE OFFICER: DAN ORODENKER
13 CHIEF CLERK/STAFF PLANNER: RILEY HAKODA
14 STAFF PLANNER: BERT SARUWATARI

15 DEPUTY ATTORNEY GENERAL: SARAH HIRAKAMI, ESQ.

16 AUDIO TECHNICIAN: WALTER MENCHING

17 Docket No. A94-706 KA'ONO'ULU RANCH

18 For the Petitioner Pi'ilani Promenade North, LLC and
19 Pi'ilani Promenade South, LLC:

20 JONATHAN STEINER, ESQ.

21 For the Petitioner Honua'ula Partners: JOEL KAM, ESQ.

22

23 For the Intervenors Maui Tomorrow Foundation, Inc.,
24 South Maui Citizens for Responsible Growth

25 Daniel Kanahale: TOM PIERCE, JR., ESQ.

MARK HYDE
IRENE BOWIE, Maui Tomorrow Foundation

26 For the County: MICHAEL HOPPER, ESQ.
27 Deputy Corporation Counsel
28 JANE LOVELL, ESQ.
29 Deputy Corporation Counsel

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For the State:

BRYAN YEE, ESQ.
Deputy Attorney General
JESSE SOUKI
Director Office of Planning

I N D E X

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1 CHAIRMAN CHOCK: (gavel) Good morning. I'd
2 like to call this meeting to order. This is a meeting
3 of the State Land Use Commission. The first item on
4 our agenda is the adoption of minutes. Do I have a
5 motion to approve?

6 COMMISSIONER BIGA: So moved.

7 COMMISSIONER McDONALD: Second.

8 CHAIRMAN CHOCK: Made and seconded. Any
9 opposed? Minutes have been adopted.

10 Would our executive officer please update
11 us on the tentative meeting schedule.

12 MR. ORODENKER: Thank you, Mr. Chair.
13 Tomorrow we are on Kauai for an IAL Petition.
14 February 21st is the Waiko Industrial Investment, LLC
15 commencement of hearing here on Maui. And the 22nd is
16 currently scheduled for Waiko and West Maui Land
17 Motion for Reconsideration.

18 March 7th again here on Maui, Waiko
19 Industrial continued hearing.

20 And on March 8th on O'ahu Kunia Loa
21 Farmlands.

22 March 21st and 22nd back here on Maui if
23 necessary. And on the 22nd again, once again on
24 O'ahu.

25 XXX

1 CHAIRMAN CHOCK: Thank you, Dan. The next
2 item on our agenda is Oral Argument and
3 decision-making on A94-706 Ka'ono'ulu Ranch. This is
4 an Oral Argument on Phase 1 of the Order to Show
5 Cause - Petition of Ka'ono'ulu Ranch to amend the
6 Agricultural District Land Use District Boundary into
7 Urban Land Use of approximately 88 acres. Parties,
8 please identify yourselves for the record.

9 MR. STEINER: Good morning. Jonathan
10 Steiner for Pi'ilani Promenade North and Pi'ilani
11 Promenade South.

12 MR. KAM: Good morning, Chair Chock and
13 Commissioners. Joel Kam for Honua'ula Partners.

14 MR. HOPPER: Good morning, Mr. Chair,
15 Members of the Commission. Michael Hopper, deputy
16 corporation counsel representing the Maui County
17 Department of Planning. With me is Jane Lovell,
18 deputy corporation counsel.

19 MR. YEE: Good morning. Deputy Attorney
20 General Bryan Yee on behalf of the Office of Planning.
21 With me is Jesse Souki, director of the Office of
22 Planning.

23 MR. PIERCE: Good morning, Mr. Chair and
24 Commissioners. This is Tom Pierce. I'm here on
25 behalf of South Maui Citizens for Responsible Growth,

1 Maui Tomorrow and Daniel Kanahale. Mr. Kanahale is
2 not with us today. Unfortunately, he had to go for a
3 family emergency on the Mainland, but with me to my
4 right is Irene Bowie. To my left is Mark Heide on
5 behalf of South Maui.

6 CHAIRMAN CHOCK: Good morning, Parties.
7 Let me briefly update the record. The evidentiary
8 hearing portion of this docket was concluded on
9 November 16, 2012. On November 26, 2012 the
10 Commission received Maui County Planning Department's
11 Review of the 16th Annual Report for A94-706.

12 On November 27 the Commission received
13 copies of Maui County Planning Department's letter
14 regarding the 16th Annual Report of Pi'ilani Promenade
15 South, LLC's and Pi'ilani Promenade North, LLC's
16 Successor Petition to Ka'ono'ulu Ranch; and the 16th
17 Annual Report of Honua'ula Partner LLC's to Successor
18 Petitioner to Ka'ono'ulu Ranch; and the mailing from
19 the Petitioner containing approximately 250 signature
20 cards.

21 Parties filed their respective proposed
22 findings of fact, conclusions of law and decisions and
23 orders on December 21st and 24th, 2012 and their
24 respective comments, responses, joinders, objections
25 and replies on January 3rd, 4th, 10th and 11th, 2013.

1 On January 2, 2013, the LUC mailed a Notice
2 of Meeting Schedule Change to February 7, 2013 to all
3 Parties.

4 From November 23rd, 2012 to February 6th,
5 2013, the Commission received written correspondence
6 from six individuals whose names are on file.

7 On January 30, 2013, the Commission mailed
8 an Agenda Notice for the February 7th and 8th, 2013
9 LUC meetings to Parties and statewide, Kaua'i and Maui
10 mailing lists.

11 Let me briefly run over our procedure for
12 the today. First, I will call those desiring to
13 provide public testimony for this docket to identify
14 themselves. All such individuals will be called n
15 turn to our witness box where you will be sworn in
16 prior to providing testimony.

17 Secondly, the Chair will allow no more than
18 15 minutes to present oral argument in support of its
19 Proposed Decision and Order and/or its exceptions to
20 those proposed by the other parties. Petitioner may
21 reserve a portion of his time for rebuttal.

22 At the conclusion of oral argument and
23 after questions from the Commissioners and answers,
24 the Commission will then conduct formal deliberation
25 on this matter. Parties, any questions of our

1 procedures today?

2 VICE CHAIR HELLER: Mr. Chair?

3 CHAIRMAN CHOCK: Vice Chair Heller.

4 VICE CHAIR HELLER: Yes. I think I've
5 mentioned this before, but just to make sure it's on
6 the record before final decision-making. I represent
7 taxpayers in certain real property tax deals including
8 a couple of cases on Maui. So the adverse party would
9 be the county of Maui. I just want to make sure that's
10 disclosed. And if anybody has any problem with my
11 participating in the decision, they should speak up.

12 CHAIRMAN CHOCK: Parties, any objections?

13 MR. YEE: No objection.

14 CHAIRMAN CHOCK: Mr. Steiner, any
15 objections?

16 MR. STEINER: No objection.

17 CHAIRMAN CHOCK: Mr. Kam?

18 MR. KAM: No objection.

19 CHAIRMAN CHOCK: County?

20 MR. HOPPER: No objection.

21 CHAIRMAN CHOCK: State?

22 MR. YEE: No objection.

23 CHAIRMAN CHOCK: Intervenor?

24 MR. PIERCE: No objection.

25 CHAIRMAN CHOCK: Thank you for that

1 disclosure, Commissioner. Before I call public
2 witnesses, let me remind all of you that public
3 testimony from previous hearings has been transcribed
4 and is part of the record. For those testifying
5 again, the Commission would appreciate you confining
6 your testimony to any new information.

7 Because the Commission needs time to
8 conduct its deliberations this morning, a 2-minute
9 time limit will be enforced on testimony this morning.

10 Our executive officer will now call those
11 signed up for public testimony to come forward.

12 MR. ORODENKER: Thank you. Regina Duncan
13 followed by Joan Martin. If the testifier who is
14 following could come up and sit in the chair over her
15 so that we can go as quickly as possible. That would
16 be appreciated. Thank you.

17 CHAIRMAN CHOCK: Good morning. I need to
18 swear you in. Your name and address, please.

19 THE WITNESS: Regina Duncan. 3002 Ainalani
20 Drive, Makawao, Hawai'i.

21 CHAIRMAN CHOCK: Do you swear to tell the
22 truth in this matter?

23 THE WITNESS: Yes, I do.

24 CHAIRMAN CHOCK: Please proceed. Two
25 minutes.

1 THE WITNESS: Thank you. I am here as a
2 realtor-broker with Maui Real Estate Advisors and as
3 a mother and as a citizen. First, I wanted to state
4 that I'm not in favor of all development. This
5 development in particular I am in favor of. I work
6 with so many people on Maui that cannot afford a home.

7 Our starting home prices now have ticked up
8 again over \$400,000. And I have so many first-time
9 home buyers, people who work hard in this community
10 that this Project would -- it would really impact in a
11 positive way.

12 So I am here on that behalf as my
13 profession to say I'm in favor of the Project. And
14 also as a mother I have an 18 year-old University of
15 Hawai'i student at home who has applied for over 40
16 jobs and has not gotten a job. No one is hiring.
17 There needs to be jobs provided.

18 The high school next to the Promenade would
19 fill a very, very basic need for part-time high school
20 students as well as full-time professionals. So I'm
21 in favor of that aspect of the Project as well.

22 And as a consumer I feel that it would
23 bring a choice of products and services that we could
24 all benefit from. And the interconnector road as a
25 former Kihei resident I feel would be very, very

1 beneficial. When I lived in Kihei I was always having
2 to go into town for things. And in emergencies the
3 roadways are severely blocked as evidenced by the past
4 tsunami. So I'm in favor of the road continuation as
5 well. Thank you.

6 CHAIRMAN CHOCK: Thank you for your
7 testimony. Parties, any questions? Thank you.

8 MR. ORODENKER: Joan Martin followed by
9 Juno Komai.

10 JOAN MARTIN
11 being first duly sworn to tell the truth, was examined
12 and testified as follows:

13 THE WITNESS: I do.

14 CHAIRMAN CHOCK: Your name and address for
15 the record, please.

16 THE WITNESS: Joan Martin. 85 Mino Circle
17 No. 202 Kihei.

18 CHAIRMAN CHOCK: Proceed.

19 THE WITNESS: Good morning, Mr. Chairman
20 and Commissioners. My name is Joan Martin. I'm a
21 resident of Kihei. I live just off Pi'ilani Highway
22 about a mile from the proposed development. I'm
23 testifying on my own behalf.

24 I'm here to testify in strong support of
25 the Pi'ilani Promenade Project. This Project will

1 provide many community benefits including additional
2 shopping choices from retail businesses not now on
3 Maui, or for local businesses that have indicated they
4 want a second location reducing the need for residents
5 of South Maui to drive to Central Maui saving time and
6 expensive gasoline.

7 A 1 million gallon water tank paid for by
8 the developers at a cost of \$3 million and dedicated
9 to the county of Maui at no cost to the taxpayers to
10 serve North Kihei including the Kihei High School.

11 Building of the first increment of the
12 long-awaited Kihei Upcountry Highway, again, at no
13 cost to the taxpayers. Creating nearly 200
14 construction jobs, creating up to 1800 good retail
15 jobs from clerks to district managers.

16 Increased property tax revenues to fund our
17 vital county services and our critical non-profit
18 social and human services organizations. The Pi'ilani
19 Promenade includes all elements needed in Kihei:
20 Jobs, affordable rental housing, retail for both
21 residents and tourism industry and jobs that are vital
22 in our still struggling economy. Thank you for the
23 opportunity to testify.

24 CHAIRMAN CHOCK: Thank you. Parties, any
25 questions? Thank you for your testimony.

1 MR. ORODENKER: Juno Comilang followed by
2 Edgar Martin III.

3 CHAIRMAN CHOCK: Let me just remind the
4 members of the public who're here to testify this
5 morning that we're not deliberating on the merits or
6 lack of merits on the Project whether you're a
7 proponent or an opponent of this particular Project.

8 We're here to determine whether or not the
9 Project as currently proposed is consistent with the
10 D&O that was previously approved by this body. So
11 please try to keep that in mind when you provide
12 testimony this morning. Sir, do you swear to tell the
13 truth?

14 THE WITNESS: Yes.

15 CHAIRMAN CHOCK: Thank you. Name and
16 address.

17 THE WITNESS: Juno Comilang, 33 Kuakama,
18 Kahului.

19 CHAIRMAN CHOCK: Thank you, Juno. Proceed.

20 THE WITNESS: Thank you for considering
21 this Project, Pi'ilani Promenade. Maui's been through
22 some hard times the past few years. And this year it
23 doesn't look too good with the handful of projects.
24 Like to see, you know, we keep things going smoothly
25 until more projects come up. But this would pretty

1 much help out Maui tremendously if this Project is
2 passed.

3 You know, progress is imminent. We need
4 this Project today not in the -- later on. So I'm
5 asking all of you to be our heros and pass this
6 Project. Thank you.

7 CHAIRMAN CHOCK: Parties, any questions?
8 Thank you for your testimony.

9 THE WITNESS: Thank you.

10 MR. ORODENKER: Edgar Morton, III followed
11 by Thomas Cook.

12 EDGAR MORTON, III
13 being first duly sworn to tell the truth, was examined
14 and testified as follows:

15 THE WITNESS: I do.

16 CHAIRMAN CHOCK: Your name and address for
17 the record.

18 THE WITNESS: My name is Edgar Morton. I
19 come from Wailuku, Hawaiian Homes area. And I live --
20 well, I just told you the address. Again on behalf of
21 the Project for go through because, well, I come from
22 a long line of construction workers. My
23 great-grandfather, he built the harbor. He was one of
24 the dynamite mans.

25 And my grandfather, he built the highway

1 the one in the Pali. And my father built most of the
2 highways we travel on today. He managed to make a
3 plan to save the five jacaranda trees Upcountry.

4 And I built several communities, helped
5 build several communities that we have today like Maui
6 Lani, Kealani. I was part of that projects.

7 And I would like to be part of some more
8 projects if I can. 'Cause right now I'm out of work.
9 That's all I have to say.

10 CHAIRMAN CHOCK: Thank you for your
11 testimony, Edgar. Parties, any questions for this
12 witness? Commissioners? Thank you very much.

13 MR. ORODENKER: Thomas Cook followed by --
14 if you'll excuse me, some of the handwriting on this
15 is pretty bad. Kellie Pali, I have no idea what the
16 last three letters are.

17 THOMAS COOK
18 being first duly sworn to tell the truth, was examined
19 and testified as follows:

20 THE WITNESS: I swear to tell the truth.

21 CHAIRMAN CHOCK: Your name and address.

22 THE WITNESS: Thomas Cook, 1120 Hiimanu
23 Street in Kihei.

24 CHAIRMAN CHOCK: Please proceed, Mr. Cook.

25 THE WITNESS: Good morning, Commissioners.

1 Thank you for the opportunity to give testimony. I'm
2 speaking as an -- I actually live in the neighborhood
3 on the south side of the future high school. So we'd
4 be directly impacted by this construction.

5 I'm a past GPAC member of the General Plan
6 Community Maui General Plan. And for 3 and-a-half
7 years we worked on the General Plan. To me this
8 Project falls within everything that was planned for
9 Kihei. This is not a contrast. The light industrial
10 existing zoning on the property for use for the
11 Pi'ilani Promenade, my interpretation is from other
12 projects on the island: Maui Marketplace and other
13 areas are mixed use zoning.

14 I think that the Project makes a major
15 contribution to the community for the future Upcountry
16 intersection. It takes a piece of raw land that's a
17 potential fire hazard on the mauka side of the
18 Pi'ilani Highway and improves it. And is going to
19 significantly improve the tax base for the Kihei area.

20 It's basically as far as the types of
21 stores and shops that go into there, the marketplace
22 will dictate that. It's sort of stores that are put
23 in there that are needed will be successful and if
24 they're not other stores will take their place.

25 And we need employment. The quote "low

1 paying jobs", I wish people would stop saying that
2 about service industry jobs. Because to me all jobs
3 are honorable jobs. Our community needs to work on a
4 variety of levels. So I think the land use is
5 appropriate. I think it's a benefit to the community.

6 As a neighbor on the adjacent property I'm
7 more than willing to accept the dust and the noise and
8 the inconvenience. That's my testimony. Thank you.

9 CHAIRMAN CHOCK: Thank you very much.
10 Parties, any questions? Commissioners. Thank you for
11 your testimony.

12 THE WITNESS: Thank you for the
13 opportunity.

14 MR. ORODENKER: Kellie Pali Cruz followed
15 by Carol Eiserloh. After Carol Eiserloh, Kekoa
16 Duarte.

17 CHAIRMAN CHOCK: Please come forward.

18 THE WITNESS: Hi. My name's Carol Eiserloh
19 and I'm a resident of Kihei. 2495 South Kihei Road.

20 CAROL EISERLOH
21 being first duly sworn to tell the truth, was examined
22 and testified as follows:

23 THE WITNESS: Yes.

24 CHAIRMAN CHOCK: Please proceed.

25 THE WITNESS: First of all, I would like to

1 say for all the folks that are here, thank you for
2 letting me speak, that I came from a union family. My
3 father was a union organizer. So I really understand
4 the need for jobs.

5 But, however, my concern is that this does
6 not meet the criteria for the original plan for light
7 industrial, number one. No one returned to the
8 community to find out what the community needs were
9 when this Project was put together. There was no
10 input from anyone in the community about possible
11 changes or possible impact on the community.

12 One of the big concerns for people who live
13 in Kihei is the problem we have with storm gulches,
14 for example, that come running down. With
15 700,000 square feet of cement we are going to have a
16 huge impact on that part of Kihei where the water
17 goes.

18 The other thing is that we don't need more
19 shopping in Kihei, frankly, at this point. Right now
20 we have unemployment in Kihei partially because we
21 have closed stores. There's not enough stores open to
22 employ people that are there, adding to that with more
23 shops seems to be a bit of a problem.

24 Further, we have a huge shopping corridor
25 already that's been established in Kahului. We have

1 new areas developing by Home Depot. We have more
2 areas developing by Costco. It would seem that energy
3 saving alone people don't have to go all over town to
4 shop. They can come to one area to shop and it'd be a
5 lot easier for them as well.

6 I guess my biggest concern for everyone is
7 whether or not the storm abatement, the school next
8 door, for example, is there a consideration given for
9 those students who are going to be walking to the
10 shopping center every day?

11 Yes, there may be some part-time jobs for
12 them. But is there going to be roads put in for them
13 so they can walk sidewalks and all those other things?
14 And none of that has been brought forth in any of the
15 previous testimony. These are things that perhaps
16 Eclipse should have been concerned with and talked
17 with the community before they made their plans.
18 Thank you very much.

19 CHAIRMAN CHOCK: Parties, any questions for
20 this witness? Commissioners? Thank you for your
21 testimony.

22 MR. ORODENKER: Kekoa Duarte followed by
23 Sally Raisbeck.

24 KEKOA DUARTE
25 being first duly sworn to tell the truth, was examined

1 and testified as follows:

2 THE WITNESS: I do.

3 CHAIRMAN CHOCK: Name and address for the
4 record.

5 THE WITNESS: My name's Kekoa Duarte. I
6 come from 579 Pai'i Street in Paia. I feel that I'm
7 here to talk to you guys about the fact that majority
8 of us here are here because we're unemployed. We're
9 waiting for this job to pick up. We have families
10 that we have to feed, and sometimes unemployment just
11 doesn't kick it.

12 I feel that this job coming up, the
13 Promenade, will help us working class people with all
14 the jobs it's going to bring. It's going to also help
15 the community in Kihei. The shopping for them, they
16 don't have to drive all the way to town. I don't
17 really know much about Kihei, but I feel that it
18 really will help. That's about it. Thank you.

19 CHAIRMAN CHOCK: Thanks, Kekoa. Parties,
20 any questions for this witness? Commissioners?

21 MR. ORODENKER: Sally Raisbeck followed by
22 Leona Moore.

23 THE WITNESS: Good morning.

24 SALLY RAISBECK

25 being first duly sworn to tell the truth, was examined

1 and testified as follows:

2 THE WITNESS: Yes, I do.

3 CHAIRMAN CHOCK: Your name and address for
4 the record, please.

5 THE WITNESS: Sally -- it's Sarah Raisbeck.
6 427 Liho Street, Wailuku.

7 CHAIRMAN CHOCK: Sorry about that, Sarah.
8 It's listed as "Sally" on our signup sheet.

9 THE WITNESS: No, legally it's Sarah, but I
10 always go by "Sally".

11 CHAIRMAN CHOCK: Okay.

12 THE WITNESS: Okay. I want to thank Patrick
13 for giving up his seat so I could sit down. This is a
14 very crowded hearing. I live in Wailuku so I'm not
15 directly impacted by this project. I've been on Maui
16 30 years. And I've been through a lot of proceedings
17 here.

18 So I know that your task is to use your
19 interpretation of the law and your interpretation of
20 the facts to decide whether this Project meets the
21 plans that were, ah, that were given to the board back
22 in 1994. And you're not here to decide is it a good
23 Project, a bad Project. You just need to look at that
24 part of it.

25 And this is not the Project that was

1 approved in 1994. And if there's a deficiency in the
2 law that allows projects to go forward when it's been
3 almost 20 years since they were approved, and having
4 been on Maui for 30 years I know how much it's changed
5 in 20 years.

6 So the question is: Is this what was
7 approved in 1994? I must say I'm sort of ashamed of
8 the county and our corporation counsels for trying to
9 say that this *is* the same Project that was approved
10 back then when so much has changed.

11 So I urge you to decide the Project should
12 go through the full permitting process which is what
13 is needed in light of the changed circumstances.

14 Thank you.

15 CHAIRMAN CHOCK: Parties, any questions for
16 this witness? Commissioners? Thank you for your
17 testimony.

18 THE WITNESS: Thank you.

19 MR. ORODENKER: The final testifier on the
20 signup sheet is Leona Moore.

21 LEONA MOORE

22 being first duly sworn to tell the truth, was examined
23 and testified as follows:

24 THE WITNESS: Yes.

25 CHAIRMAN CHOCK: Your name and address,

1 please.

2 THE WITNESS: Leona Moore. Post Office Box
3 1873 Kihei.

4 CHAIRMAN CHOCK: Proceed.

5 THE WITNESS: I've lived in Maui, we've had
6 property in Maui since -- in Kihei, since '77. We
7 were here three months before it became a state. We
8 were guests. And what is happening, all of this was
9 stolen from the Hawaiian people. All right? And it's
10 the real estate. You talk about real estate taxes?
11 They're going -- the real estate, they have licenses.
12 They can do whatever they want.

13 They've gone into my taxes, condo. They
14 changed the address. They changed everything. And
15 these real estate people -- anyway, I'm getting
16 offtrack. But Mike Moran, I don't know who he is. I
17 don't know where he came from, but he's running the
18 show.

19 And there's somethin' wrong here when you
20 don't even know who Mike Moran is. All I know is what
21 he puts in the paper and that he came over here and we
22 were burning cane and he's coughing and carrying on.

23 We burn cane on Maui. Anybody that comes
24 here needs to know that. And it needs to be taken
25 carry of. Don't tell me. One day this lady wanted to

1 go to lunch with me. We were walking, she said,
2 "Golly!" Let me tell you we had a clerking teacher
3 that said, "If you don't like it go back to where you
4 came from." (audience applauding) Believe you me I've
5 said that many times to all of you.

6 Anyway it's real estate. And they got,
7 they got their land stolen. We don't even know who
8 this guy is except what he puts in letters to the
9 editor. I don't know who he is. I know he's from
10 California. But they're sending all their people over
11 here, one-way tickets.

12 You know, I don't understand. I'd like to
13 know who he is, what his occupation was before he came
14 here, what he did, his education. And he's president
15 of the (gesturing.) I'm very, very upset with this
16 Project. By the way, I have a post office box. The
17 reason I have a post office box --

18 MR. ORODENKER: Excuse me. 2 minutes.

19 THE WITNESS: -- is because -- let me
20 finish -- is because the head of this development
21 they're gonna do is charged with mail fraud. Rick
22 Stratton, charged with mail fraud. All of this is
23 with federal now. All of my dealings are federal and
24 also over at the state ledge. So Mr. Stratton,
25 three-year imprisonment, so go ahead.

1 CHAIRMAN CHOCK: Thank you for your
2 testimony. Parties, any questions? Commissioners?
3 That includes the list of testifiers who have signed
4 up. Is there anyone in the audience wishing to
5 provide public testimony at this time, please come
6 forward.

7 MARK SHEEHAN
8 being first duly sworn to tell the truth, was examined
9 and testified as follows:

10 THE WITNESS: Yes.

11 CHAIRMAN CHOCK: Your name and address,
12 please.

13 THE WITNESS: My name is Mark Sheehan. I
14 live at 630 East Kuia'a Road in Haiku.

15 CHAIRMAN CHOCK: Proceed.

16 THE WITNESS: I've been -- I'm employed as
17 a real estate broker, one of those people. And I've
18 been very concerned with how the laws are observed and
19 flouted. I urge the Members of this committee to
20 respect your own rulings in the past and not allow a
21 developer who has really ignored the ruling to make a
22 mockery of your own decisions in the past.

23 I think it's important what has been zoned
24 20 years ago as light industrial not be turned into a
25 completely different Project without a thorough review

1 of the project. Even the Transportation people
2 acknowledged this is a significantly different Project
3 with far greater impacts on the entire community, not
4 just Kihei, but all of South Maui.

5 So please send this back for a complete
6 review so that if they do want to change what the
7 Project was into a completely different thing, which
8 is a retail complex, that there be a complete review
9 of the impacts of what their Project would be. Thank
10 you.

11 CHAIRMAN CHOCK: Parties, any questions for
12 this testifier? Commissioners? Thank you for your
13 testimony.

14 KELLIE PALI CRUZ
15 being first duly sworn to tell the truth, was examined
16 and testified as follows:

17 THE WITNESS: I do.

18 CHAIRMAN CHOCK: Your name and address
19 please.

20 THE WITNESS: Well, I guess I'm the name
21 you could not read. I apologize. So I will work on
22 my handwriting. My name is Kellie Pali Cruz.

23 CHAIRMAN CHOCK: Thanks, Kellie. Your
24 address?

25 THE WITNESS: 320 Ahukai Road, Suite 413 in

1 Kihei.

2 CHAIRMAN CHOCK: Proceed.

3 THE WITNESS: First thing I'd like to
4 state that I am a business owner as well. And I own a
5 suite that will be right next to this new Project off
6 of Ahukai behind Tesoro Gas Express.

7 I also own a home which backs up to the
8 highway at Pi'ilani and Halepi'ilani. And I'd like to
9 say firstly that I understand and respect rules. And
10 I know the reason why they're there including many
11 safety features. But I also know the impact of this
12 Project that would have for me and my family.

13 And I think if there's a way there should
14 be able to be a compromise allowing this Project to
15 move forward without being stuck in the past and what
16 happened behind us.

17 I'd like to just note that my home does
18 back up to the highway. So I know that there could be
19 some concerns with other residents possibly with
20 traffic. And having a home that backs up to the
21 highway that's not been an issue for me and my family.

22 I also understand with a Kihei Mall
23 Promenade or whatever the name officially is, I
24 understand that that could also increase value to my
25 commercial property unit that I own adjacent, making

1 it more central for other customers.

2 So I personally believe my family would
3 value from this and also the jobs creating. I have a
4 19 year-old son which has a job, but I also have a
5 little 14 year-old and a 9 year-old and clearly one on
6 the way. So I'm a mother of four.

7 And the job situation, you know, there's
8 jobs that need to be available at all levels not just
9 at a higher level. And I think that that would
10 provide a huge impact in a positive way to our
11 personal community right in Kihei.

12 The last thing that I would like to mention
13 is that I'm many things in the community. But I'm
14 first and foremost a mother. And the convenience of
15 this Project would be hugely positive in my personal
16 life raising a family of soon to be four. So the
17 convenience, not to mention when you need things last
18 minute you have to go into Kahului to get things.

19 And, lastly, school shopping. I have to
20 fly to O'ahu every year, twice a year, to do my school
21 shopping at an outlet mall called Waikele. I would
22 love the fact that I could maybe possibly save that
23 expenditure and have it produce and support our local
24 economy through this Kihei Mall. Thank you.

25 CHAIRMAN CHOCK: Parties, any questions?

1 Commissioners? Thank you for your testimony. Anyone
2 else from the public wishing to provide public
3 testimony at this time? Please come forward.

4 DESIREE HILL

5 being first duly sworn to tell the truth, was examined
6 and testified as follows:

7 CHAIRMAN CHOCK: Could you let us know you
8 name and address, please.

9 THE WITNESS: My name is Desiree.

10 CHAIRMAN CHOCK: Hang on. (Audience having
11 loud conversations) Could we....(audience quiets
12 itself)...thank you. Go ahead.

13 THE WITNESS: My address is 553 Waikala
14 Street in Kahului. I've been following the Project,
15 reading the articles and researching the information.
16 I understand that you are here today to look if the
17 Project has met the conditions that are imposed on it.
18 And as I researched it I believe that they are.

19 And the way I look at it is sometimes when
20 you go in to, let's say, build your own house, you
21 have changes, you want to make some changes to it, but
22 you have to follow the conditions, the laws, the rules
23 that are put onto your Project.

24 And I believe that in looking at what they
25 did I believe they've met those conditions. And I ask

1 that you -- I support the Project. I ask that you
2 pass it.

3 CHAIRMAN CHOCK: Parties, any questions?
4 Commissioners? Thank you. Anyone else wishing to
5 provide testimony. Mr. Piltz.

6 RANDY PILTZ
7 being first duly sworn to tell the truth, was examined
8 and testified as follows:

9 THE WITNESS: I do.

10 CHAIRMAN CHOCK: Name and address, please.

11 THE WITNESS: My name is Randy Piltz. And
12 I live at 376 West Waiko Road. I was born and raised
13 here on Maui. I returned in 1973 to a construction
14 company and electrical contracting company that my
15 family owned. I've been very close to construction.

16 I was on -- and I'm concerned about the
17 land use that happens here on Maui. Because of my
18 concern I was appointed to the Planning Commission and
19 served the full term and its chairman.

20 Then I was appointed by the Governor to the
21 Land Use Commission and served five years, and also
22 finished up as the chairman for your Commission.

23 I've heard a lot of comments about, "We
24 don't need low-paying jobs." But let me reinforce
25 that. When this project is completed we'll have 1800

1 jobs. They will probably be low paying. But for
2 those people here on Maui that don't have a job, it's
3 great, it's good and it's something for them.

4 Your charge and the charge by the Land Use
5 Commission prior to you, was to convert Ag land to
6 Industrial or Urban. That was done. Today your job
7 is to consider Ag land to Urban.

8 The county of Maui will take on from there.
9 And it's their responsibility to consider what else
10 happens in that urban area. So this is what I am
11 concerned about. I feel that whatever happens today
12 should be in favor of the people that live here.

13 Noted there's going to be construction jobs
14 during the period. There's also going to be the
15 roadway that starts from Kihei to Upcountry and also a
16 school. I believe that the developers are very
17 concerned how they do things. So I ask that you
18 reconsider and pass this on.

19 CHAIRMAN CHOCK: Thank you. Parties, any
20 questions? Commissioners? Thank you for your
21 testimony, Mr. Piltz. Anyone else wishing to provide
22 testimony? (pause) That concludes the public
23 testimony portion of our meeting today.

24 We'll now proceed with oral arguments.
25 Parties, you have 15 minutes. Mr. Steiner, are you

1 prepared to proceed?

2 MR. STEINER: I am, thank you. Good
3 morning, Chair, Commissioners. I want to thank
4 everybody for appearing here today to decide this
5 important issue. I know that you don't get paid for
6 your work. And appreciate the service you guys are
7 doing.

8 Back in 1994 Ka'ono'ulu Ranch applied for
9 district boundary amendment to change the
10 classification of the lands at issue today from
11 Agriculture to Urban. In that application they
12 included a conceptual plan to develop a commercial *and*
13 a light industrial subdivision.

14 And after considering all the submissions
15 to the Commission including the Petition, all the
16 exhibits, the discussions, the representations and the
17 evidence presented to the Commission, the Commission
18 approved the boundary amendment subject to two
19 conditions that are relevant here today which are
20 Condition 15 and Condition 5. So I'm going to focus
21 on those two conditions.

22 I'm going to start first with Condition 15.
23 The relevant language that we're dealing with is that
24 it says, "Petitioner shall develop the property in
25 substantial compliance with the representations made

1 to the Commission."

2 Condition 15 focuses on the Project being
3 in substantial compliance *with* the representations
4 made to the Commission. Condition 15 doesn't require
5 the landowner to build a project which is the same or
6 substantially similar to that to the conceptual
7 Project that was presented to the Commission.

8 Intervenors have focused on the differences
9 between that conceptual project and what's being built
10 today. The problem that's not what we're looking at
11 today. The condition requires the Project to be in
12 compliance with the representations made to the
13 Commission.

14 So that's what we have to focus on today,
15 what representations were made to the Commission. So
16 that's what I've looked at.

17 First of all, one of the representations
18 was contained in the petition itself. Now, the
19 petition itself describes the construction of a
20 commercial and a light industrial subdivision.
21 Intervenors have argued that the emphasis was on light
22 industrial with ancillary commercial use. But if you
23 look at the petition and all the evidence, nowhere
24 does it state this. It's simply not there.

25 The Petition discusses everywhere both

1 commercial in light industrial. And it says in there
2 they'd "provide commercial and light industrial
3 business and employment opportunities." That's the
4 representation that was made to the Commission.

5 Also their exhibits that contained further
6 representations. One was the market feasibility
7 study. One major representation was what uses would
8 be permitted on the Project. And it specifically said
9 "Permitted uses: All those in the B-1, B-2 and B-3 as
10 well as M-1 zoning." And it attached a list.

11 And all those uses that are in that list
12 cover everything that the Pi'ilani Promenade *and*
13 Honua'ula is going to be doing. These were just a
14 list of possible zoning allowed uses. But the market
15 study goes on to describe some of the commercial uses
16 that are specifically intended for this Project.

17 I'm going to quote from it cause it's
18 important. Says, "The third category of occupants are
19 generally long-term lessees. These occupants require
20 the best possible visibility advantage from highways
21 and streets. The expectation is that other investors
22 will purchase the land, develop improvements for
23 multi-tenant use and have a long-term lease with
24 occupants.

25 Examples of these occupants are discount

1 retailers, auto part sales, furniture and appliance
2 stores, sportswear and equipment, wholesale food
3 distributors, fast food outlets, et cetera."

4 These aren't ancillary uses. These are
5 sportswear and equipment. That's Sports Authority.
6 Furniture store. CS Wo, Ashley Home Furnishing.
7 These are not ancillary uses to Light Industrial.
8 These are specific retail uses.

9 Now the market study goes on to make
10 further representations. It says, "The success of
11 marketing these parcels will depend on the success of
12 obtaining popular and internationally recognized
13 outlets to occupy the larger parcels.

14 Popular and internationally recognized
15 outlets are not light industrial. That's retail use.
16 That's what's being represented to the Commission
17 that's going to be done. Now, the market study does
18 talk about certain lot sizes and possible percentages
19 of different uses, but it specifically, again,
20 represented to the Commission "these estimates of lot
21 sizes, quantities and values are provided for planning
22 purposes only." It's only one conceptual alternative
23 that meets the current market conditions.

24 Goes on to say, "These estimates require a
25 reassessment from time to time." These are specific

1 representations made to the Commission. Then you got
2 the Project Assessment Report which another exhibit to
3 the Petition talks about what the Project's going to
4 be.

5 Again, it contains a lot of the same -- it
6 quotes out of the market study, contains some of the
7 same representations, particularly one about the need
8 to obtain popular and internationally recognized
9 outlets. Nowhere in the Petition or any exhibit was
10 it ever represented that the landowner would limit the
11 amount of commercial use or that the focus was
12 primarily light industrial, or that the landowner
13 would limit any of the permissible uses that were on
14 the list that was attached to the market report. So
15 that's what was represented with what was represented
16 to the Commission.

17 Then there's what happened at the
18 Commission itself. We heard testimony about the fact
19 that at the hearing itself when Mr. Sodetani, who did
20 the market report testified, he was asked by
21 Commissioner Kajioka about the possibility of there
22 being a predominance of retail.

23 And he said, "Well, the market's going to
24 dictate that. And it's a possibility." And
25 Mr. Kajioka said, "Well, there's no way you can

1 prevent that." He said, "Yes, there's no way that you
2 can prevent that." He agreed. So that was also
3 represented that it could be all retail.

4 He also represented the fact that
5 apartment houses were also a permitted use under the
6 M-1 zoning. Mr. Sodemani in response to that question
7 said, "Yes, that's a permitted use."

8 So based on these discussions, one, the
9 Commission was aware that significant retail and
10 apartment uses were permitted. And they were aware
11 that the market would ultimately determine what was
12 going to be developed.

13 Then further Mr. Miske, the planning
14 director at the time, got up and said, and addressed
15 to this concern about a predominance of retail said,
16 "Well, we're gonna address that at the county level
17 and we're gonna bring -- we're going to ask the county
18 restrict the amount of retail." And as we know they
19 did attempt to do that at the county level. But the
20 county in its wisdom decided not to put that
21 restriction on.

22 So the Commission, again, was aware of this
23 possibility of retail. It was also aware of the
24 possibility that it could have put a condition on to
25 restrict the amount of retail or to make it

1 predominantly light industrial. But nobody ever
2 suggested it.

3 The office of State Planning, the county of
4 Maui or the Commission ever proposed a condition
5 limiting the amount of retail.

6 The Pi'ilani Promenade. What are they
7 gonna develop? They're going to develop a retail
8 outlet shopping complex. And through the further
9 process, the zoning and subdivision, they're going to
10 provide significant infrastructure which alleviates a
11 lot of the concerns that were raised today.

12 And I won't go over again the 20 million in
13 improvements with the highway and the water tank and
14 all that. I think we heard public testimony about
15 that. But all these permitted uses are within that
16 which Pi'ilani expressly represented to the
17 Commission.

18 Based on all the foregoing, the fact that
19 it was specifically represented to the Commission that
20 retail was a permitted use, and the fact that the
21 Commission actually asked about this and was aware of
22 it, the Commission must find that there's been no
23 violation of Condition 15 because the development is
24 in substantial compliance with the representations
25 made to the Commission.

1 Now, the other condition that I need to
2 address is Condition 5. This is about the frontage
3 road. The applicable language says, I quote,
4 "Petitioner shall provide for a frontage road parallel
5 to Pi'ilani Highway and other connector roads within
6 the Petition Area in coordination with other
7 developments in the area with the review and approval
8 of the state Department of Transportation and the
9 county of Maui."

10 Now there's two possible ways to interpret
11 this. One is that a frontage road must be provided
12 regardless of whether the state Department of
13 Transportation approves it.

14 The other way to interpret it is that a
15 frontage road is required only if the Department of
16 Transportation approves it. Capable of either of
17 those two meanings.

18 Now, there's only one, though, that makes
19 sense which is that it requires a frontage road *if*
20 approved by the Department of Transportation. There
21 is a well accepted rule of law, when you've got
22 something in either contract or statute that's subject
23 to two interpretations.

24 And one of those ways, one of those rules
25 is that if an interpretation that leads to an

1 absurdity, must be rejected. In Hawai'i there's even
2 a law on the books that says in statutes, "If you
3 can't interpret a statute it leads to an absurdity."
4 And Hawai'i courts consistently apply this rule
5 against this hyper-literal construction of contracts
6 and statutes that leads to an absurdity.

7 Applying the interpretation of Intervenor's
8 of Condition 5 leads to an absurdity. Without the
9 approval of the state Department of Transportation no
10 landowner could possibly build a frontage road. You
11 have to have the approval of the state Department of
12 Transportation.

13 So interpreting Condition 5 to require a
14 road even if the Department of Transportation won't
15 let you, leads to an impossibility. You couldn't
16 build it. That's an absurd result.

17 Now, clearly the Commission didn't intend
18 to mandate an action which a government agency refused
19 to allow rendering compliance impossible. The only
20 sensible interpretation is that it only requires the
21 provision of a frontage road if it's approved by the
22 state Department of Transportation.

23 In fact this even was brought up by Martin
24 Luna. When he was before the Commission talking about
25 this condition he said, "Well, my interpretation of

1 this law," he said, "we also understand that the
2 condition would be with the approval of the
3 Department of Transportation Highways and the county
4 of Maui so that if this type of roadway that's being
5 proposed to limit the access on Pi'ilani Highway is
6 approved by both agencies, then certainly we would be
7 required to put it in.

8 "If it's not approved by the agencies then
9 the reverse would apply which would be we'd be able to
10 plan the subdivision in the manner we had presented."

11 Now, nobody at that time ever stood up and
12 said, "Wait a minute. That's not our interpretation."
13 Nobody contradicted this otherwise common sense
14 interpretation. In fact it would have been absurd for
15 the Commission to say to Mr. Luna, "No, Mr. Luna,
16 you're wrong. Even if the state Department of
17 Transportation won't let you build this road, you've
18 got to build it anyway." That just wouldn't make
19 sense.

20 So it's undisputed in this case that the
21 state Department of Transportation won't allow or
22 approve a frontage road. It would cause safety
23 hazard, traffic problems. It's not going to happen.

24 So because the condition -- the only way to
25 properly interpret the condition is that it requires a

1 frontage road *if* approved by the state Department of
2 Transportation means that since they're not going to
3 approve it it's not required, therefore Condition 5
4 hasn't been violated.

5 I want to just briefly touch on *res*
6 *judicata*. Intervenors have argued that the 1995
7 Decision and Order is *res judicata*, is the issues in
8 this case. Some of you may be wondering: What the
9 hell is *res judicata*? It's a legal concept that
10 essentially requires -- it precludes a party from
11 re-litigating something they've already litigated. It
12 has lot of technical, legal requirements that have to
13 be applied.

14 Intervenors in this case, they misapplied
15 that doctrine. Make no mistake. Pi'ilani's not
16 arguing that it's not bound by the Decision and Order
17 or that it's not in privity with the original owners
18 or anything like that.

19 The reason in this case the *res judicata*
20 doesn't apply is simple. The issue to be decided in
21 the Decision and Order is different from the issue
22 being presented to you today.

23 Back then you were deciding whether to
24 reclassify the land from Ag to Urban. Today you're
25 being asked to determine whether what's being built is

1 consistent with the representations made.

2 Now, Intervenors want to limit it just to
3 the scope of the Decision and Order and have you not
4 look at any of the other representations that were
5 made to the Commission.

6 But not every representation that was made
7 to the Commission got into the Decision and Order.
8 The Petition itself isn't in the Decision and Order.
9 It contains representations. The exhibits contains
10 representations. The testimony contained
11 representations.

12 Pi'ilani submits that the Commission should
13 consider all these representations. There are all
14 those that I've already discussed today that show that
15 the Project is consistent with those representations.
16 Intervenors don't want you to look at those because
17 they understand that those prove there's been no
18 violation of condition 15.

19 Not only that, when you look at the whole
20 record there's very little to support that condition
21 15's been violated. Specifically there's no
22 representation in the record that this would be
23 limited to strictly light industrial or even a
24 percentage of light industrial. *Res judicata* simply
25 doesn't apply.

1 So based on all the evidence that's been
2 presented, Pi'ilani would urge the Commission to take
3 the following action: We're asking the Commission to
4 do three things: Number 1. Pass a motion finding
5 that the proposed developments of Pi'ilani and
6 Honua'ula do not violate the Decision and Order.

7 Number 2. Adopt Pi'ilani's proposed
8 findings of fact and conclusions of law.

9 And, finally, pass a motion vacating the
10 Order to Show Cause which is entered by the Commission
11 so this Project can go forward. Thank you.

12 CHAIRMAN CHOCK: Thank you, Mr. Steiner.
13 Mr. Kam, 15 minutes.

14 MR. KAM: Thank you, Chair Chock. First of
15 all, on behalf of Honua'ula Partners I'd like to thank
16 the Commissioners for their attention throughout the
17 lengthy hearings that we've endured. I also want to
18 thank the Commission staff. We recognize that you all
19 have a hard job. We certainly appreciate your
20 efforts.

21 Throughout the course of the proceeding and
22 also in their proposed findings of fact, conclusions
23 of law the Intervenors have emphasized the differences
24 between the Pi'ilani Promenade and the Honua'ula
25 affordable housing project on the one hand, and the

1 original Project that was described in the Petition on
2 the other hand. Their singular focus is in comparing
3 the two projects. We believe this approach is
4 incorrect for a couple of reasons.

5 First, by focusing so heavily on the
6 differences between the prior Project and the current
7 projects the Intervenors are implying -- and there's
8 actually been public testimony this morning -- that
9 it's the Commission's function to approve a specific
10 project. Of course, we know that is not correct.

11 Under Chapter 205 the Commission's sole
12 function is to approve the land use classification
13 Urban, Rural, Agricultural or Conservation. It is not
14 to approve a specific project in the way that the
15 county would in issuing, for example, a use permit.

16 It is true that in applying for a boundary
17 amendment the Petitioner must provide information
18 about the proposed use for the Petition Area. But the
19 specific project itself is not what the Commission is
20 approving.

21 Instead, the Commission decides only
22 whether the reclassification sought is appropriate.
23 In recognition of that fact the Commission's own rules
24 focus on the reclassification. In our case it was Ag
25 to Urban.

1 The LUC Rule 77 says, "The Commission shall
2 specifically consider the extent to which the proposed
3 reclassification conforms to the applicable goals,
4 objectives and policies of the Hawai'i State Plan; the
5 extent to which the proposed reclassification conforms
6 to the applicable district standards; the impact of
7 the proposed reclassification on areas of statewide
8 concern."

9 So we would ask that the Commission just
10 keep this in mind as you conduct your deliberations.
11 It brings me to the second reason why we think the
12 Intervenors' approach is incorrect.

13 Since the Commission doesn't approve
14 specific projects it makes perfect sense that
15 Condition 15 doesn't require the current Project to be
16 substantially the same as the original project.
17 Instead, as Mr. Steiner said, Condition 15 only
18 requires the current Project to be in substantial
19 compliance with the representations that were made by
20 the original petitioner.

21 And we submit that in deciding what the
22 representations are, the Commission must look beyond
23 merely the description of the proposed use contained
24 in the original Petition. They must also look to the
25 totality of all the evidence that was submitted to the

1 Commission. In other words, the representations are
2 no just the description but all of the testimony by
3 the Petitioner and its representatives, the exhibits
4 and other information submitted on its behalf.

5 When you consider all of those
6 representations, it's undeniable that the possibility
7 of apartment use was represented. It was known. It
8 was understood. And it was appreciated by the
9 Commission.

10 Now, to this point the Intervenors claim
11 that the original project was revised to remove
12 residential. And they've cited to a section of the
13 transcript from 1994. But if you examine the
14 transcript carefully it's clear that the residential
15 component that was removed was single-family
16 residential, not apartment.

17 So there is nothing in the record that
18 indicates an intent by the original petitioner to
19 foreclose apartment use. Single-family, perhaps, but
20 not apartment.

21 In addition to the Intervenors' approach
22 being incorrect, we believe that the Intervenors are
23 asking the Commission to do something that the
24 Commission should refrain from doing based on current
25 law.

1 The Intervenors are asking the Commission
2 to impose a condition that restricts apartment and
3 retail use which is nowhere stated in the 1995 Order.
4 This is something that the Commission simply may not
5 do based on the Hawai'i Supreme Court's decision in
6 the Lanai Case.

7 Now, we've discussed Lanai Case at length
8 in our briefs. And I don't want to rehash the whole
9 thing. But there are two take-aways that bear
10 repeating. First, in Lanai the LUC's Order contained
11 the same general condition at issue here, which
12 requires substantial compliance with the
13 representations. And in that case the petitioner
14 specifically represented in the hearing that they
15 would not use water from the high-level aquifer.

16 But because there was no specific
17 prohibition in the Order, the Hawai'i Supreme Court
18 said that the LUC may not enforce that restriction.
19 The Court stated, "The LUC cannot now enforce a
20 construction of Condition 10 that was not expressly
21 adopted.

22 Parties subject to an administrative
23 decision must have fair warning of the conduct the
24 government prohibits or requires to ensure that the
25 parties are entitled to fair notice in dealing with

1 the government and its agencies. In this light the
2 1991 Order cannot be construed to mean what the LUC
3 may have intended but did not express."

4 So the circumstances of Lanai are very
5 similar to the circumstances here because both involve
6 the question of whether the general condition
7 requiring compliance with representations can prohibit
8 an activity that is not expressed in the Order. And
9 the Hawai'i Supreme Court answered that question with
10 a resounding "No." The Commission may not do that.

11 The second take-away is that the Hawai'i
12 Supreme Court said, "The LUC must state with
13 ascertainable certainty what is meant by the
14 conditions it has imposed."

15 In the context of this Show Cause
16 proceeding, what that means is that the prohibition on
17 apartment and retail use that the Intervenor's seek to
18 impose, must derive from the conditions of the Order
19 with ascertainable certainty.

20 Not only is this impossible, it's incorrect
21 because there are representations about apartment and
22 retail use that were made by the original petitioner.

23 But even leaving that aside, even Planning
24 Director Spence, who is charged with the
25 responsibility to enforce the LUC's Orders and is a

1 planning expert himself, he testified that he did not
2 believe that a prohibition against retail and
3 apartment use was ascertainable in the absence of a
4 specific condition.

5 Also, Rodney Funakoshi, the planning expert
6 from the Office of Planning, he testified that he
7 could not determine the scope of the restriction
8 against retail resulting from Condition 15.

9 We submit that if those planning experts
10 cannot say with certainty what Condition 15 prohibits,
11 then how are Honua'ula and Pi'ilani supposed to
12 figure it out themselves?

13 As a matter of law the restrictions imposed
14 by the Intervenors are not ascertainable from the 1995
15 Order. And under Lana'i they may not be imposed
16 against Honua'ula and Pi'ilani.

17 In conclusion, based on all of the evidence
18 heard and received by the Commission in this matter,
19 and the arguments made by, and on behalf of Honua'ula,
20 we respectfully urge the Commission to:

21 1. Find that Pi'ilani and Honua'ula and
22 the projects proposed by them are not in violation of
23 the conditions of the 1995 Order, or the
24 representations or commitments of the original
25 Petitioner.

1 2. To adopt Pi'ilani's proposed Findings of
2 Fact which Honua'ula has joined in.

3 And 3. To vacate the Order to Show Cause.
4 Thank you very much.

5 CHAIRMAN CHOCK: Thank you, Mr. Kam. For
6 the benefit of our court reporter and our
7 Commissioners we're going to be taking a ten minute
8 recess and reconvene at approximately 10:46.

9 (Recess was held)

10 CHAIRMAN CHOCK: We're back on the record.
11 County, 15 minutes.

12 MR. HOPPER: Thank you, Mr. Chair, I'd also
13 like to join others in thanking the Commission and its
14 staff for the amount of time it's put in for these
15 hearings.

16 In our opening statement we told you that
17 the evidence would not show a violation of the Project
18 conditions imposed by the Commission. Now that the
19 evidence is in no violations have been shown.

20 The central issue in this case is whether a
21 proposed commercial and light industrial project,
22 including 250 affordable apartment units, is in
23 substantial compliance with the LUC's conditions. As
24 required by the Supreme Court any condition imposed by
25 this Commission must state with ascertainable

1 certainty the conduct the Commission seeks to prohibit
2 or require.

3 It is this requirement of ascertainable
4 certainty that is the key issue for the county in this
5 case. Whether the conditions as written provide the
6 landowner and the county with the ability to determine
7 what uses are allowed or restricted.

8 At this juncture when the Project is
9 prepared to request building permits it is critical
10 that the Commission's decisions allow the landowner
11 and the county planning director to determine
12 precisely what uses are allowed in the Project Area.

13 There's something other than the property
14 zoning which dictates permitted uses. The director
15 needs to know exactly what uses are prohibited despite
16 being allowed by the zoning.

17 The original petition contained a marketing
18 study listing the uses that would be permitted in the
19 Petition Area. It stated in the 'permitted uses'
20 section quote, "The permitted uses of M-1 Light
21 Industrial zoning provided by the existing County of
22 Maui codes allow for services or supplying communities
23 producing or manufacturing goods as provided under
24 B-1, B-2, B-3 and M-1 zoning.

25 "The M-1 zoning would be most appropriate

1 for the area with regard to uses, minimum lot size,
2 height limitations and yard requirements contiguously
3 having similar uses and improvements of the adjacent
4 Kihei commercial center development."

5 A copy of the M-1 and business districts
6 and zoning ordinances were attached to the study as an
7 exhibit.

8 The marketing study contained a specific
9 list of the permitted uses for the project including
10 retail and apartment uses. At the original hearing
11 the Commission asked questions of the landowner and
12 the planning department regarding the permitted uses
13 based on the zoning ordinances provided.

14 Whether all of the uses listed in the
15 attached ordinances is not an issue. However, based
16 on the record commercial and apartment uses were
17 referenced as allowed uses.

18 I would now like to turn your attention to
19 what Planning Director Will Spence presented in this
20 case. In reviewing this proceeding Director Spence
21 testified that none of the conditions in the 1995
22 Decision and Order contained a specific limitation by
23 percentage or otherwise, on the amount of retail use
24 allowed on the property.

25 He noted that the Commission asked

1 questions of the landowner regarding the fact that the
2 commercial and apartment uses were allowed in M-1
3 zoning without restriction. He also testified the
4 planning director at the time, Brian Miskae, stated
5 that the planning department would request the county
6 council at the zoning level impose a specific
7 condition limiting the commercial use of the Project
8 by percentage.

9 This was common practice for M-1 zoned
10 projects. And sometimes the council would impose
11 limitations and sometimes it wouldn't. Director
12 Spence even testified that the Land Use Commission had
13 imposed a limitation on commercial use at the district
14 boundary amendment level in Maui Business Park Phase 2
15 Project, also a project with Light Industrial zoning.

16 That condition required that no more than
17 50 percent of the project be developed as retail and
18 provides: The director with a basis to determine if a
19 proposed project contains too much retail.

20 For this Project, though, no such expressed
21 conditions were imposed by either the county council
22 or the Land Use Commission. While the planning
23 department advocated for a condition limiting the
24 commercial use of the property before the county
25 council, it would it improbable for such a condition

1 to now be added by implication for not even the
2 Commission nor the council expressly imposed one.

3 Director Spence also testified that the
4 site plan provided with the Petition was described as
5 a conceptual site plan. It was presented very early
6 in the development process. And the conceptual plans
7 oftentimes go through substantial changes over time
8 based on a variety of factors.

9 If the Commission wanted to require that
10 the Project be developed for a specific site plan, it
11 could have attached the plan as an exhibit and
12 referenced it in a condition but did not.

13 The County's not saying that this current
14 Project is the exact same as the conceptual site plan
15 that was provided, but that based on the Decision and
16 Order and the representations made, that it does fall
17 within the scope of what is allowed by that Decision
18 and Order.

19 Finally, Director Spence also testified
20 that throughout Maui County it's common for both
21 retail businesses and apartments to be located in
22 light and heavy industrial zoned districts since they
23 are permitted uses.

24 He gave examples of the Maui Mall, Queen
25 Ka'ahumanu Center, and the Lahaina Gateway as major

1 retail projects with light industrial zoning. And
2 I'ao Parkside and Opukea as two major apartment
3 projects in light industrial zoning.

4 For the Commission to restrict these uses
5 that were listed as potential permitted uses and that
6 are commonly located in the same district as this
7 Project, an express condition is required.

8 To briefly address the arguments of the
9 Intervenors in this case. They have contended that
10 Condition 15 has been breached. Condition 15 states
11 in pertinent part: "Petitioner shall develop the
12 property in substantial compliance with the
13 representations made to the Commission."

14 Intervenors contend that this language
15 limits the area of the property that may be used for
16 retail business and prohibits apartment houses. On
17 its face this condition does nothing to prohibit uses
18 allowed by zoning and represented to Commission as
19 permitted land uses.

20 The conditions don't say anything about the
21 permitted uses on the property or the Project site
22 plan. Nonetheless, the Intervenors and the Office of
23 Planning argue that the original petitioner made
24 representations that now require a limitation on
25 retail business.

1 In the record before the Commission,
2 however, there are no such representations. During
3 the original hearing on the Project Commissioner
4 Kajiooka questioned Mr. Sodetani, the developer's
5 marketing expert, regarding the broad range of uses
6 allowed by the zoning including commercial and
7 apartment uses.

8 Mr. Sodetani acknowledged that both types
9 of uses were allowed, that a preponderance of
10 commercial uses was a possibility, but that the market
11 would ultimately dictate what is developed on the
12 property.

13 While Mr. Sodetani said he thought it was
14 more likely that there would be light industrial
15 rather than commercial business developed, he
16 repeatedly emphasized that the market would ultimately
17 dictate what would be developed.

18 Statements that a given use is more likely
19 to be developed than another based on market
20 projections are not representations that uses will be
21 restricted. They do not provide a sufficient basis to
22 establish a limitation on expressly permitted uses
23 especially where there's no specific limit set forth
24 in any condition.

25 Mr. Funakoshi, the Office of Planning's

1 expert, testified that he could not ascertain what
2 percentage of light industrial use would be required
3 to comply with the Decision and Order. He suggested a
4 majority may be sufficient.

5 Intervenors argue for a 50 percent
6 limitation but without basis. The difficulty in
7 determining the allowed percentage of retail is
8 understandable given that it is never stated anywhere
9 in the Decision and Order or on the record.

10 To impose a 50 percent or similar
11 limitation on retail use at this stage would
12 constitute imposing conditions like those placed on
13 the Maui Business Park Phase 2 project after the fact.

14 The Department of Planning must have clear
15 standards to apply to this Project to know whether
16 building permits can be issued based on the plans that
17 are submitted. If the planning director were to
18 impose a limitation on retail businesses on this
19 property, where would he begin?

20 Where could he look in the 1995 Decision
21 and Order to tell the developer "here is the limit on
22 retail uses"? Is 50 percent too much? Is 60 percent
23 too much? There's no reference to retail uses being
24 accessory or otherwise limited in the Decision and
25 Order.

1 Regarding the affordable housing. The
2 Department does not believe that the construction of
3 250 apartment units, *all* of which will meet county
4 affordability standards, constitutes non-compliance
5 with the Order.

6 Apartment uses were acknowledged by the
7 landowner as permitted uses in the Project Area. And
8 apartments are routinely located in light industrial
9 zoned areas in Maui as Director Spence testified
10 because they're permitted uses in those areas.

11 Briefly turning to Condition No. 1. This
12 condition requires that, quote, "The Petitioner shall
13 obtain a Community Plan Amendment and change in zoning
14 from the county of Maui."

15 The condition in the County's view does not
16 grant the Commission the authority to oversee ongoing
17 compliance with the County Community Plan which is
18 beyond the scope of the Commission's authority based
19 on recent case law.

20 It requires that zoning and community plan
21 changed be obtained. The evidence shows that they
22 were obtained.

23 Next I'd like to say a few words about
24 traffic. The county is surprised that the Intervenors
25 are still arguing that there's been a breach because

1 there's no planned frontage road based on Condition 5.

2 The State Department of Transportation's
3 expert, Mr. Tatsuguchi, testified that, quote, "Based
4 on the testimony a frontage road does not seem prudent
5 for this Pi'ilani Shopping Center that abuts our
6 highway."

7 In addition, the DOT made clear that the
8 frontage road condition was not requested by the DOT
9 and could potentially be dangerous. It also is
10 unclear at best whether the DOT would even approve
11 construction of a frontage road. At this stage, based
12 on the DOT's testimony, requiring a frontage road
13 based on Condition 5 would be inappropriate.

14 One final clarification. Intervenors'
15 counsel stated in his opening statement that it was,
16 quote, "Undisputed that the Pi'ilani Project would
17 produce over 30,000 trips per day." However,
18 Intervenors later withdrew their traffic expert and
19 her written testimony, which was Exhibit I-36 after
20 Pi'ilani's expert had rebutted the testimony in
21 advance.

22 As a result there's no testimony anywhere
23 in the record that the proposed Project will produce
24 anything like 30,000 trips per day. The statements
25 such as these have led to many misconceptions

1 surrounding this Project. However, you as
2 Commissioners have heard the evidence in this case and
3 examined the record.

4 Based on the evidence submitted the county
5 respectfully requests that you adopt Pi'ilani's
6 Proposed Decision and Order and dissolve the Order to
7 Show Cause. Thank you.

8 CHAIRMAN CHOCK: Thank you, County. OP, 15
9 minutes.

10 MR. YEE: Thank you. And thank all the
11 Commissioners for their work and patience in this
12 case. The question before you is not whether this is
13 a good or bad Project, but rather whether the
14 Petitioner has substantially complied with the
15 conditions of the 1995 Decision and Order.

16 And pursuant to the bifurcation order OP
17 wants to make clear that we are not expressing an
18 opinion at this time as to whether the Petition Area
19 should be reverted. That would be an issue for the
20 second phase.

21 The issue today is we want to emphasize
22 that the reliability of a petitioner's representations
23 to you is of fundamental importance. LUC rules
24 require a petitioner to specifically describe the
25 proposed use and the number of lots, the lot size, the

1 number of units, density, selling price and intended
2 market, and the impacts from that proposed use.

3 Petitioners may try to characterize the
4 123-lot Light Industrial subdivision as an initial
5 concept or conceptual use. But this was *the* essential
6 fact by which the LUC was able to evaluate the
7 impacts, determine the appropriate conditions, and
8 decide whether this met the criteria set out in HRS
9 section 205-16 and 205-17.

10 Petitioners cannot avoid the requirement to
11 substantially comply with the representations merely
12 by characterizing the proposed use as conceptual.

13 Petitioners argue that they're not required
14 to comply with their proposed use, but only to comply
15 with their representations. But the LUC rules require
16 that they represent what the proposed use was going to
17 be. And that these mandatory representations provide
18 the ascertainable certainty by which you can enforce
19 this condition.

20 Furthermore, the description of
21 hypothetical uses under the Light Industrial Zoning is
22 not a substitute for an analysis of the impacts of the
23 proposed use in the Petition Area. There's a big
24 difference between what *can* be done in Maui County's
25 Light Industrial Zoning, and what Petitioner

1 represented *would* be done in this Petition Area.

2 The LUC's knowledge about the possible land
3 uses allowed in Light Industrial Zoning differs from
4 their representations as to the actual proposed uses.
5 In this case Petitioner's representations excluded
6 residential use and *included* light industrial uses as
7 the primary activity. At no time did Petitioners
8 state the Petition Area would be used for any purpose
9 allowed under the Light Industrial Zoning.

10 At no time did Petitioners analyze the
11 impacts from all uses allowed near Maui County's Light
12 Industrial Zoning. If mere knowledge of that
13 apartment use was allowed in Light Industrial Zoning
14 is enough to allow for inclusion of apartments, and if
15 a representation that some portion of the Petition
16 Area would be used for commercial use was enough to
17 justify the elimination of substantive light
18 industrial uses, then the petition was in violation of
19 HAR sections 15-15-70(c), 6, 7 and 10 for failing to
20 analyze all the impacts of the Project.

21 And the LUC's determination under HRS
22 sections 205-16 and 17 were fatally flawed. The
23 Office of Planning and the Land Use Commission expend
24 a great amount of time, effort and resources in
25 analyzing the impacts of a project based upon a

1 proposed use.

2 One cannot minimize or trivialize the
3 necessity for relying upon a petitioner's
4 representation.

5 More specifically, there are two relevant
6 conditions we've looked at: Condition 5 and Condition
7 15. Condition 5 says in relevant part, "Petitioner
8 shall provide for a frontage road." Again,
9 "Petitioner shall provide for a frontage road parallel
10 to Pi'ilani Highway and other connector roads within
11 the Petition Area in coordination with other
12 developments in the area and *with* the review and
13 approval of the state Department of Transportation and
14 the county of Maui."

15 There's no dispute the fact the Petitioners
16 are not building a frontage road. Although OP also
17 agrees that in light of the improvements to Pi'ilani
18 Highway, a frontage road is no longer appropriate for
19 this Petition Area.

20 The dispute arises because Petitioners read
21 Condition 5 as requiring a frontage road *only* if
22 reviewed and approved by State DOT and the County.
23 But Condition 5 doesn't say "only if". It says "with
24 the review and approval of the State DOT and County".

25 A straight forward and simple reading of

1 Condition 5 requires the Petitioner to provide a
2 frontage road, and requires that the road must be
3 reviewed and approved by State DOT and County. And
4 the change in circumstances from 1994 does not change
5 the condition. A Motion to Amend is required to do
6 so.

7 There's nothing absurd about requiring
8 petitioner who wait 18 years before they begin
9 construction, to come back to you with a Motion to
10 Amend in order to resolve any new issues that have
11 arisen over the wisdom of a particular condition.

12 Consequently, Petitioner *is* violating
13 Condition 5 even though an amendment to Condition 5
14 would be appropriate.

15 With respect to Condition 15. Condition 15
16 says, "Petitioner shall develop the property in
17 substantial compliance with the representations made
18 to the Commission."

19 In approving the reclassification request
20 the LUC was required to apply the criteria set out in
21 HRS Sections 205-16 and 17 to determine the impacts of
22 the proposed project, and to impose conditions, if
23 appropriate, to mitigate those impacts.

24 The LUC made that determination based upon
25 the representations made by the Petitioner. To ensure

1 the statutory criteria were met, that the impacts were
2 correctly analyzed and consistent with HRS Section
3 205-4G Condition 15 requires the Petitioner to
4 substantially comply with their representations.

5 In this case there are two major issues
6 involving Condition 15. First, the 250 residential
7 units, and second the lack of a light industrial
8 subdivision.

9 With respect to the residential units the
10 record shows that Petitioners removed the residential
11 component from the proposed Project in 1994.
12 Furthermore, DOE testified that if there was a
13 proposed residential unit they would have submitted a
14 request and asked for a condition. DOE did not submit
15 a testimony and there was no condition regarding a DOE
16 contribution imposed.

17 Although an LUC commissioner noted that
18 apartment use was allowed under county zoning for
19 light industrial, county zoning is not the issue at
20 this time. Petitioners never represented that there
21 *would* be any residential uses in the Petition Area.

22 If you look at the market demand analysis,
23 they did not look at the market demand for
24 residential. The TIAR in 1994 did not look at the
25 impacts to traffic from residential. Consequently,

1 the LUC did not analyze the impacts from a residential
2 use of the Petition Area. It did not apply the
3 statutory criteria to a residential project.

4 In 2013 residential use is clearly
5 contemplated, and there's no further discretionary
6 permits to be obtained for the construction of
7 apartments as called for by Maui County Ordinance
8 3554.

9 Petitioner's current plans to construct
10 apartments, therefore, are not in substantial
11 compliance with the 1994 representations which did not
12 include residential use.

13 The second, of course, is the light
14 industrial subdivision. And Petitioners represented
15 that they would build a commercial and light
16 industrial subdivision. There were no specific
17 percentages between commercial and light industrial
18 businesses. But we note that the Traffic Impact
19 Analysis Report in 1994 used traffic counts based upon
20 the construction of a 100 percent light industrial
21 subdivision.

22 The market analysis did note that based
23 upon approximately 20 percent of the parcels would be
24 in large lots. Some of those large lots would include
25 commercial uses. But in evaluating the market demand,

1 the analysis looked at the demand for light industrial
2 subdivisions.

3 And in addition, the question, as we've
4 pointed out, is not what zoning allows, but what was
5 represented to the Commission in 1994 for this
6 Petition Area.

7 And in 1994 oral testimony shows that the
8 Petitioner represented that there would be some
9 commercial uses; that the commercial uses would be
10 naturally limited to hair dressers, restaurants,
11 okazuyas, or banks, which are accessory to the Light
12 Industrial subdivision.

13 That this would be -- they did note that
14 there would be an impact from the market, but they
15 indicated that because you would be selling this
16 property in fee simple, that you'd be selling 123 lots
17 in fee simple.

18 This would then tend to allow for light
19 industrial uses rather than commercial creep, because
20 they noted that light industrial uses don't like to
21 lease property because then they're next to some other
22 retail outlet, they don't get along.

23 But if you *sell* them a piece of property
24 then a light industrial business would be more likely
25 to thrive. So this would tend to then -- just the way

1 that they structured the proposed Project -- light
2 industrial would occur.

3 And at no time in 1994-95 did Petitioners
4 ever represent this Project might be primarily or
5 solely retail. If they did, the LUC may have required
6 additional and different analyses and conditions.

7 In 2003 Petitioners are proposing to build
8 two retail outlets. There are no substantive light
9 industrial uses proposed. OP's position, and
10 argument, is that Petitioner's failure to comply is
11 not the fact that there *is* commercial use. It's the
12 fact that there are no substantive light industrial
13 uses.

14 During the hearings Petitioners proposed to
15 build a home improvement center in a size typical of a
16 big box retail outlet like Home Depot. And they
17 stated that there would be an electrical substation on
18 site.

19 Retailers like Home Depot do many things
20 including things like selling lumber to contractors.
21 And OP's testimony is that establishments like Home
22 Depot are essentially retail in nature. They may be
23 allowed into the light industrial zoning because
24 retail is allowed under light industrial zoning.

25 But retailers like Home Depot are not part

1 of the light industrial subdivision as proposed by
2 Petitioners in 1994. An electrical substation is a
3 common accessory which this Commission has seen in
4 many projects, including residential projects.

5 The electrical substation may serve areas
6 outside the Petition Area, but it is a small accessory
7 component to the proposed commercial activities and is
8 not part of the light industrial subdivision proposed
9 by Petitioners in 1994.

10 The proposed Project in 2013 does not sell
11 123 lots in fee simple, which is consistent with their
12 1994 proposed light industrial subdivision. Rather,
13 they're leasing out space within three major lots
14 consistent with a retail outlet.

15 The most recent TIAR establishes a traffic
16 count which is not based on any light industrial use.
17 Consequently there are no substantive light industrial
18 uses proposed by Petitioner in 2013 contrary to the
19 representations in 1994.

20 The Home Depot-like retail store and the
21 electrical substation does not change this conclusion.
22 But even if one store, an electrical substation, could
23 be construed as a light industrial use, the 1994
24 proposal was primarily for light industrial with some
25 commercial.

1 We won't quibble about percentages, but if
2 you look at the record, if you look at the analyses
3 that were conducted, if you look at the impacts that
4 the LUC looked at, it's clear that at the very least a
5 reasonable Commissioner would believe that at least
6 more than 50 percent of the Project would be light
7 industrial.

8 The argument that Petitioner's
9 representations in 1994 are consistent with the
10 current Project is also questionable, given the
11 testimony of Tom Holiday who said on
12 cross-examination that, "When this Project was
13 considered in 1994 there were no outlet malls in
14 existence in Maui County."

15 It's a little unfortunate that everyone --
16 for everyone that we're here today. The question for
17 the Commission is whether the proposed Project is
18 consistent with the project that was proposed and
19 approved by the Commission in 1994 and 1995.

20 This new Project may be consistent with
21 HRS Sections 205-16 and 17. Or maybe it's not. We
22 don't know because the Petitioner's not seeking an
23 amendment to the D&O, which is the process that other
24 landowners have followed.

25 If properly followed, Hawaii's land use and

1 planning process ensures that economic development
2 such as jobs, cultural, community issues and the
3 environment are considered and addressed. Based on
4 the record Petitioner's own experts have said the
5 Project proposed today is not the same project that
6 was proposed in 1994. We agree.

7 For that reason the Commission should now
8 consider the next phase of this Order to Show Cause.
9 Thank you.

10 CHAIRMAN CHOCK: Thank you, OP.
11 Intervenor, Mr. Pierce: 15 minutes.

12 MR. PIERCE: Thank you, Mr. Chair and
13 Commissioners. If I may we're going to put up the two
14 exhibits that were presented earlier. And it'll give
15 the court reporter a moment to take a break.

16 CHAIRMAN CHOCK: When he's done we'll start
17 the clock.

18 (Pause)

19 MR. PIERCE: Mr. Chair and, Commissioners,
20 first I want to thank all of you, as the others have
21 before, for the great care and patience that you've
22 had through these proceedings. We thank you very
23 much. I'm going to begin and I want to end with
24 talking about the facts in this case.

25 I'm going to first read from page 6 of the

1 1995 Decision and Order. If you'll recall that
2 Decision and Order includes 104 findings of fact
3 relating to what was proposed by Ka'ono'ulu Ranch back
4 in 1994. On page 6, Finding of Fact No. 21, which in
5 the beginning of that page says "Proposal for
6 reclassification".

7 No. 21 says, "Petitioner proposes to
8 develop the property as the Ka'ono'ulu Industrial
9 Park, 123-lot commercial and light industrial
10 subdivision. Improved lots are proposed to be sold in
11 fee simple or leased on a long-term basis. The size
12 of the lots will range from approximately
13 14,000 square feet to 54,000 square feet."

14 Now, with the exhibits that you have there
15 you have at the top what the Petitioners call a
16 "*conceptual* drawing". And I will actually be calling
17 the Petitioners today -- to make sure there's no
18 misunderstanding I'll be calling them the "developers"
19 today. I'm referring to the Pi'ilani Promenade South
20 and North and the Honua'ula Partners.

21 So the developers say, "Well, that's
22 conceptual." Okay. Let's accept that that's
23 conceptual. But what we have proposed and what we
24 have in the findings of fact is a 123-lot industrial
25 park that's going to have fairly small lot sizes so

1 that they can be sold to a number of individuals, or
2 leased to them to start small businesses.

3 The developers are saying that -- and I
4 think it's also important to remember that the people
5 that are before you today as Petitioners are not the
6 same people. It's not Ka'ono'ulu Ranch. The property
7 has exchanged hands twice since then. And we have a
8 new set of developers.

9 They say: What we are presenting to you
10 below, in that exhibit below, is the same as
11 representations that were made in 1995.

12 Now, they don't get there to that kind of a
13 -- we can just look at that and we can say, "Are they
14 the same or not"? Everyone in this room who's a
15 reasonable person can say those are not nearly the
16 same. The Office of Planning, I won't go into the
17 details, but the Office of Planning has identified
18 many of the differences between them. So we won't go
19 back over that.

20 But the only way that the developers get at
21 their end result is through some great mental
22 gymnastics. We contend as Intervenors here today, and
23 we're asking the Commission to do what any reasonable
24 person would have done in this situation, is to say,
25 "This is not what was originally proposed. And it's

1 certainly not what was represented."

2 I want to spend a moment mentioning the
3 Lanai Company Case which was been discussed by the
4 developers and the by the county. They mentioned
5 that, and they warned the Commission that they should
6 be very careful about how they rule today because
7 unless there's an ascertainable certainty of what a
8 condition is the Supreme Court will essentially look
9 at it with disfavor.

10 Now, we -- I won't go into the details --
11 but we have briefed this issue and we disagree with
12 how the county and the developers have presented that
13 case. That's a very unique set of facts for that
14 case. But what I would offer as a corollary, which is
15 another Supreme Court case which Intervenors cited
16 early on in this matter, and that's the Sandstrom
17 Case.

18 In that case you had another creative
19 landowner who had land that was encumbered by a
20 declaration just like here. This 1995 Order has been
21 encumbering that property for the last 18 years.

22 The landowner in that case had a creative
23 idea for what they could do on the property. The
24 court disagreed. And what they said was, they said,
25 "We will not protect landowners who take risks with

1 how they look at declarations."

2 And we would submit that, in fact, what
3 these business owners, and they're business owners,
4 and they get paid to take risks, what they're doing
5 here today is they've been taking a risk that this
6 would work out in their favor by pushing a set of
7 facts and a set of legal conclusions upon you.

8 We would submit that that should not be
9 permitted. And we'd like to talk about a few reasons
10 why. Since 1961 -- the Land Use Law and the Land Use
11 Commission has been in existence since 1961. It was
12 the first comprehensive state land use program in the
13 United States. It was a leader. Hawai'i was a leader
14 in this.

15 And in fact if you look at the Land Use
16 Commission's own website they said the reason it went
17 into effect was to check essentially unmanaged
18 development.

19 And we would submit, once again, that what
20 is happening here is that after the careful
21 deliberations of the Land Use Commission back in 1994,
22 which provided a set of conditions and evaluated a
23 specific project, that now what is being asked of you
24 to do is to throw that to the wind and permit
25 something that has a tremendously different set of

1 impacts.

2 The District Boundary Amendment Rules that
3 govern this organization, govern anyone who comes
4 before you, has very specific requirements for what is
5 submitted. That's not for just a *pro forma*. It has a
6 basis behind it.

7 Office of Planning talked about some of
8 those. But the purpose of those is very clear. It's
9 to give the Land Use Commission an idea of what they
10 need to evaluate in terms of the mitigating factors
11 that they will want to consider. In this case what
12 was presented to them, once again, was a 123-lot
13 industrial park. And they placed conditions upon it.

14 There's a second reason why those DBA
15 amendment rules are very important. That's what is
16 given note in terms of notice to the public. Here
17 back in 1994 the public heard that the Petitioner
18 planned to do a 123-lot light industrial park. And
19 the public was okay with that. And today the
20 Intervenors are still okay with that. But that's not
21 what's been represented.

22 I want to just briefly talk about the *res*
23 *judicata* issue that got raised. We've argued on
24 several occasions before this Commission that it is
25 sufficient and it's actually the law, that the Land

1 Use Commission need look no further than those 104
2 findings of fact to make its decision.

3 But for the sake of argument it does not
4 matter. For the sake of argument we're going to talk
5 about what happens if you look beyond those findings
6 of fact and you go back and look at the record which
7 was what the developers have asked you to do.

8 Before I get there I want to mention two
9 things so that we can deal with them very quickly.
10 There are three conditions that are in contention here
11 today where Intervenors allege or have argued that
12 there has been violations. I'd just like to deal with
13 two of them very quickly.

14 One is Condition 5, which you've heard
15 arguments about today. And on that one if you go back
16 and look at the record it's very clear, as Office of
17 Planning stated, that the developers have said, "We're
18 not going to do Condition 5."

19 So we would submit that they have, in fact,
20 admitted that there's a violation of Condition 5
21 irrespective of their legal arguments today.

22 The next one to get out of the way quickly
23 is Condition 17 which required annual statements.
24 Those annual statements are no small thing. They're
25 there to provide notice to the Commission. They're

1 also there to provide notice to the public. It's the
2 only way that we can keep track of what landowners who
3 are changing over a period of time and are making new
4 proposals or possibly change proposals, it's the only
5 way for us to be able to know what's going on.

6 And here we have a grave misstatement, and
7 that's putting it lightly, of some of the submissions
8 that were made by the developers. And in some cases
9 we also know from the record, in fact the Land Use
10 Commission cannot even find annual reports were filed.
11 So we would state that there's also been a violation
12 there.

13 I'll spend the rest of the time on the
14 Condition 15. Question is: What were those
15 representations? First, we would, once again, point
16 you to the exhibits. What do the exhibits tell us
17 between these two? We would argue that you don't have
18 to get complex about this. Any reasonable person can
19 see the difference between those two.

20 The other thing, going back to the
21 representations that were made in 1994-95 the County
22 mentioned that I got the traffic numbers wrong. But
23 what the County didn't remind you of is what the State
24 testimony was on this and the other traffic experts.
25 And those, it's undisputed that it's going to be five

1 times greater. The reason it's going to be five times
2 greater is for the reasons that OP stated earlier is
3 that we no longer have a service industry opportunity
4 here. We now have a retail opportunity. Two very
5 different things.

6 So those representations that were made
7 become very important in terms of the impacts. So if
8 we put ourselves back in the feet of the Commission in
9 1995, we're saying what do we need to do as
10 Commissioners to make the right decision with respect
11 to this.

12 The only thing that we have to look at is
13 what the representations were made. And all of the
14 record is, and the findings of fact is about a 123-lot
15 subdivision. However, the developers say you have to
16 look at the market study. I would call this the fine
17 print argument. Everyone knows about contracts and
18 the fine print. "Read the fine print".

19 So essentially what the developers are
20 arguing is that you and the public had an obligation
21 to look at this market study and read it in its
22 broadest possible terms. And that, therefore, they
23 are entitled because of what was in that market study
24 going forward.

25 I want to spend just a few minutes to talk

1 about why that argument fails. First of all, their
2 argument is, "Well, we attached the M-1 Light
3 Industrial Zoning inside that market study." Let me
4 actually step back for a second.

5 The first thing we have to talk about is
6 what was the purpose of the market study. The purpose
7 is not to set forth the Petitioner's representations.
8 That's not the purpose of a market study. The purpose
9 of the market study is to show the Commissioners the
10 consistency with the Project with a whole host of
11 different issues.

12 So they're asking you -- they're using now
13 that market study as a representation of the
14 Petitioner. But that's not what it was presented by.

15 The second thing is let's just look at the
16 logic behind the arguments. They're saying: Because
17 we attached the M-1 zoning, anything that's permitted
18 in the M-1 zoning is fair game.

19 And what we know from the testimony that we
20 heard was that that leads to a lot of ludicrous
21 situations where potentially the developers could come
22 back to you and change their plans and do an
23 auditorium with a whole host of different kinds of
24 impacts.

25 Or they can do a school with a whole host

1 of different impacts. And also different market
2 impacts as well, not just traffic impacts and those
3 kinds of things, those negative ones, but positive or
4 negative market impacts. None of those were evaluated
5 back then.

6 So let's take it to the next conclusion.
7 What they're arguing is that every time a petitioner
8 comes before you and presents a market study with a
9 host of documents attached to it, you're now required
10 to evaluate all those and evaluate the impacts that
11 are going to be associated with all of those.

12 And in addition the public has to be on
13 notice that because there's this broad market study
14 attached, that they have to go in and essentially
15 challenge or question all those parts. It just
16 doesn't make sense. It doesn't, it doesn't pan out in
17 terms of math.

18 So we would argue that the market study is
19 a very creative way for the developers to be here
20 today and tell you why they should be entitled to take
21 a risk.

22 And for the same reason that the other
23 parties had talked about the binding law, here what is
24 also true is that the Supreme Court frowns upon those
25 who take risks on declarations that have been

1 submitted.

2 I'm going to close there by going back once
3 again to the facts. Mr. Luna, who was the attorney
4 for the Petitioner, and who was brought in because of
5 his recollection, was asked a series of questions
6 about the findings of fact on cross-examination by me.

7 "Question: Okay. Ka'ono'ulu Ranch was the
8 Petitioner for a district boundary amendment back in
9 1994, right?"

10 "Answer: Yes."

11 "Question: When they decided to petition
12 the Land Use Commission they had a choice as to what
13 kind of plans they would put before the Commission.
14 Is that a fair statement?"

15 "Answer: Yes."

16 I'm sorry. The answer is actually, "Sure."

17 "Question: So in this case they didn't
18 choose to put before them as significant retail
19 shopping center use, did they?"

20 "Answer: No."

21 "Question: They didn't choose to put
22 before them an apartment housing complex proposal,
23 right?"

24 "Answer: Right."

25 "Question: But what they did put before

1 them is what we see represented in Exhibit 1, a
2 123-lot light industrial -- commercial and light
3 industrial use. Right?"

4 "Answer: Correct."

5 "Question: As part of the process of
6 petitioning the Land Use Commission would you agree
7 that it's a requirement of the Petitioner to identify
8 the impacts that would be related to the proposed use?"

9 "Answer: Yes."

10 "Question: So in this case what the
11 Ka'ono'ulu Ranch did was once they represented that
12 they were going to do a 123-lot commercial and light
13 industrial park, they presented evidence to the
14 Commission related only to that 123-lot commercial and
15 light industrial park. Correct?"

16 "Answer: Yes."

17 "Question: So, for example, there was a
18 traffic study that was submitted into evidence in
19 1994, is that right?"

20 "Answer: Yes."

21 "Question: And that traffic study has the
22 impacts related to the 123-lot commercial and light
23 industrial park, right?"

24 "Answer: Right."

25 MR. ORODENKER: Excuse me. 15 minutes.

1 MR. PIERCE: I'm almost done, thank you.

2 "Question: It doesn't discuss impacts for
3 residential uses at all, does it?"

4 "Answer: No."

5 "Question: And it doesn't discuss retail
6 shopping uses except those that might be permitted
7 within the market assessment report, right?"

8 "Answer: That's correct, yeah."

9 "Question: It certainly didn't assess a
10 700,000 square foot retail shopping center, right?
11 That wasn't a proposal that was before the
12 Commission?"

13 "Answer: That wasn't before the
14 Commission."

15 It wasn't before the Commission in 1994
16 according to the Petitioner's attorney. We're asking
17 you today to find that there's been a clear violation
18 of Conditions 5, 15 and 17. Thank you.

19 CHAIRMAN CHOCK: Thank you, Intervenor.
20 Thank you, Mr. Pierce. Mr. Steiner, Mr. Kam any
21 rebuttal?

22 MR. KAM: I have just very brief rebuttal.

23 CHAIRMAN CHOCK: How about you,
24 Mr. Steiner?

25 MR. STEINER: I'm going to defer to

1 Mr. Kam.

2 CHAIRMAN CHOCK: Okay, Mr. Kam, five
3 minutes on rebuttal.

4 MR. KAM: Thank you, Chair. I want to
5 respond to three things that Office of Planning said.
6 One of the first things that the Office of Planning
7 said was that we, that is Honua'ula and Pi'ilani, are
8 trying to characterize the project as -- or the
9 original plan as a conceptual plan in order to avoid a
10 violation.

11 We are not characterizing the original
12 project described in the Petition as a conceptual
13 plan. The original *petitioner* described it as a
14 conceptual plan. So I just want to state that for the
15 record.

16 Second. Office of Planning said that
17 because the project has changed since the original
18 Petition, therefore the Petition is fatally flawed
19 because it doesn't address or provide the information
20 that was required by those specific rules.

21 We disagree with that characterization and
22 interpretation of the rules. Carried to the logical
23 extreme Office of Planning's position would mean that
24 every single time there's the smallest change in a
25 project the petition all of a sudden is fatally

1 flawed.

2 And that's absurd. And it ignores the fact
3 that what the Commission decided was that the property
4 was appropriate for urban use. And it imposed both
5 general and specific conditions.

6 The purpose of the general and the specific
7 conditions is to mitigate the impacts of the use going
8 forward. And the purpose is to make sure that it's
9 not a free for all going forward after that.

10 Finally, Office of Planning said that the
11 "Proposed projects may comply with HRS 205-16 and 17
12 but we don't know." I invite the Commissioners to
13 look at HRS sections 205, 16 and 17. Those sections
14 do not focus the Commission's attention on the
15 proposed Project. The focus of the decision-making
16 criteria is on the reclassification that was sought.

17 The extent to which the proposed
18 reclassification conforms to applicable goals, the
19 extent to which the reclassification conforms to the
20 applicable district standards.

21 The impact of the proposed reclassification
22 on the following areas of state concern: 205-16. "No
23 amendment to the land use district boundary shall be
24 adopted unless such *amendment* conforms to the Hawai'i
25 State Plan."

1 We submit that there's enough evidence
2 before the Commission to find that those requirements
3 are satisfied as to the current proposed Project.

4 Thank you very much.

5 CHAIRMAN CHOCK: Okay. Thank you, Mr. Kam.
6 Thank you, Parties, very much for your time on this
7 matter. Before we go into formal deliberations I'd
8 like to ask the Commissioners if you have any
9 questions for any of the parties. Once we get through
10 that, Chair is going to call for an executive session
11 to consult with our attorney on our privileges and
12 rules related to this matter.

13 So, Commissioners, any questions for any of
14 the parties at this time? Vice Chair Heller.

15 VICE CHAIR HELLER: Thank you. Question
16 for the Petitioner. Looking at the proposed site plan
17 for the Project as currently envisioned, I'm not sure
18 exactly what would constitute streets on that site
19 plan. Are there internal streets within the Project
20 as proposed?

21 MR. STEINER: I think that would, and to a
22 certain extent, depend on your definition of
23 "streets". But there is within the Project proposed a
24 dedication as well as all the money to construct, the
25 first stage of the Pi'ilani Highway -- or the Kihei

1 Upcountry Highway. So that's one street that comes
2 off Pi'ilani, goes straight up.

3 There are a number of different access
4 turnoffs from that highway into essentially the
5 parking lots and the service entrance to the Project.

6 So they're not dedicated streets but there
7 are places for cars to egress and ingress and to get
8 around the Project. But they're not dedicated streets
9 that would be dedicated to the city -- or the county.
10 Does that answer your question?

11 VICE CHAIR HELLER: I'm not sure. So there
12 are going to be internal streets but they're not going
13 to be official streets? Is that sort of what you're
14 saying?

15 MR. STEINER: There will be one official
16 street, the future Kihei Upcountry Highway. And then
17 there will be parking lots with cars going in and out
18 as in any other -- as in a lot of other shopping
19 complexes. But as far as I know they're not -- they
20 would remain private property, is that correct
21 Mr. Jencks?

22 MR. JENCKS: Yes.

23 VICE CHAIR HELLER: Okay. Let me make the
24 question more specific. Finding of fact No. 74 in the
25 1995 Decision and Order states that "Petitioner has

1 represented that it will construct all streets within
2 the industrial park to county standards in compliance
3 with the comment by DPWWM that streets include
4 concrete curbs and gutters, 6-foot sidewalks and
5 4-foot wide planting strips which improvements would
6 be dedicated to the county upon completion."

7 MR. STEINER: That has, in fact, been
8 complied with. And there's exhibits that talk about
9 that. The Kihei Upcountry Highway, which is the only
10 street that will bisect the property, it does have
11 those curbs. It's got a dedicated bike lane and a
12 dedicated pedestrian lane. On both sides it's got a
13 median strip that conforms with those requirements.

14 VICE CHAIR HELLER: Okay. And as far as
15 the other internal pathways for cars you're basically
16 saying those are not considered to be streets within
17 the meaning of this.

18 MR. STEINER: May Mr. Jencks address that?
19 I think he'd know the answer better than I would.

20 MR. JENCKS: Commissioner Heller, there are
21 streets that will be developed within the Project to
22 provide access in the intersections that are not too
23 dissimilar from what you see on that concept plan.

24 The roads will remain private but the roads
25 *will* be improved to county standards because we have

1 to meet their standards for access. We'll have curb,
2 gutter and sidewalk as we showed on the exhibit
3 showing the circulation system within the project at
4 one of the Commission meetings here.

5 VICE CHAIR HELLER: So if I understand
6 correctly you're saying there will be streets which,
7 under the current plan, would not be dedicated to the
8 county upon completion.

9 MR. JENCKS: That's correct.

10 VICE CHAIR HELLER: Thank you.

11 CHAIRMAN CHOCK: Commissioners, any other
12 questions for the parties? Commissioner McDonald.

13 COMMISSIONER McDONALD: Can you refresh my
14 memory as far as when you folks received subdivision
15 approval, maybe preliminary and the final?

16 MR. JENCKS: May I? Certainly.
17 Commissioner McDonald, the original 4-lot large lot
18 subdivision filed by Ka'ono'ulu Ranch, which is the
19 basis for the current plan, was received --
20 preliminary received in 2003. We took that map, that
21 preliminary and modified it slightly. I received a
22 final bonded subdivision approval in August of 2009.

23 COMMISSIONER McDONALD: So as far as the
24 proposed plan between 2003 and 2009, when did this
25 conceptual plan arise during that period of time?

1 MR. JENCKS: I would say the basics of the
2 plan you're looking at today actually came out of some
3 site planning work that was started in 2005.
4 Ka'ono'ulu Ranch sold the land to Maui Industrial
5 Partners. We picked up Mr. Rice's large lot
6 subdivision map and used that as a basis for the next
7 iteration of planning and design.

8 So we started that work in 2005. And then,
9 as I said previously, modified the map slightly to
10 conform with the design efforts. But the basic
11 subdivision is the same as what was done by Mr. Rice
12 in 2003 in its preliminary.

13 COMMISSIONER McDONALD: So in 2005 based on
14 your planned development for the property, the
15 developer didn't feel that, I guess, because of the
16 type of project being proposed, it didn't feel that it
17 was necessary to come back to the Land Use Commission
18 as far as -- as to get some type of cursory review
19 from staff or the Commission regarding the development
20 in 2005?

21 MR. JENCKS: I did the due diligence for
22 the acquisition in 2005. My review at the time of the
23 D&O and the record that existed at the time, led me to
24 believe and the future owners, that based upon the
25 zoning and the D&O in the file that the uses we were

1 proposing would be approvable by the county of Maui
2 and would be consistent with the D&O.

3 COMMISSIONER McDONALD: Thank you.

4 COMMISSIONER INOUYE: Chair, just a quick
5 follow up to those questions by Commissioner McDonald.
6 When you did provide a plan that looks like the one
7 above there, that was somewhere in 2003, 2005 is my
8 understanding of what you're saying.

9 MR. JENCKS: Actually, Commissioner, if
10 you're referring to the upper map?

11 COMMISSIONER INOUYE: Yeah. I'm sorry.
12 The bottom map, the bottom part of it.

13 MR. JENCKS: The conceptual plan you see on
14 the bottom basically follows the existing large lot
15 subdivision map that was given preliminary approval by
16 the county of Maui in 2003 when the land was under the
17 ownership of the Ka'ono'ulu Ranch.

18 COMMISSIONER INOUYE: Was that represented
19 in any of the annual reports between 2003?

20 MR. JENCKS: I believe -- I can't speak to
21 what Mr. Rice represented to the Commission in 2003
22 because I was not a part of the Project at the time.
23 But I do believe that in our reports we did represent
24 that we had finally achieved final subdivision
25 approval in 2009 for the Project.

1 COMMISSIONER INOUYE: But in the annual
2 reports was that shown, the bottom part?

3 MR. JENCKS: We did not include a map.

4 COMMISSIONER INOUYE: Thank you.

5 CHAIRMAN CHOCK: Commissioners, any further
6 questions for any of the parties? Before we go into
7 formal deliberations Chair would like to move to go
8 into executive session. Is there a second?

9 COMMISSIONER TEVES: Second.

10 CHAIRMAN CHOCK: Moved and seconded. Dan,
11 will you poll the Commission.

12 MR. ORODENKER: We are going to go into
13 executive session. We'd like to ask the public to
14 stay in the room. We will go outside and consult with
15 our attorney and then come back when we're done.

16 (Recess. 11:52-12:01.)

17 CHAIRMAN CHOCK: (Gavel) We're back on the
18 record. The Commission will now conduct formal
19 deliberations concerning whether there has been a
20 violation of the Decision and Order and whether or not
21 to continue on to Phase 2 of this proceeding.

22 Deliberations are limited to this issue and
23 not the issue of reversion or appropriateness of the
24 Project. I would note for the parties and the public
25 that during the Commission's deliberations I will not

1 entertain additional input from the parties or the
2 public unless those individuals or entities are
3 specifically requested to do so by myself or the
4 Commission.

5 The Commission held hearings on the merits
6 of the Petition on November 1st, 2nd, 15 and 16 of
7 2012. And oral argument was concluded today.

8 Commissioners, let me confirm that each of
9 you have reviewed the record, read the transcripts for
10 any meeting that you may have missed and are prepared
11 to deliberate on the subject docket. After I call
12 your name will you please signify with either aye or
13 nay that you're prepared to deliberate on this matter.
14 Commissioner Biga?

15 COMMISSIONER BIGA: Aye.

16 CHAIRMAN CHOCK: Commissioner Contrades?

17 COMMISSIONER CONTRADES: Aye.

18 CHAIRMAN CHOCK: Commissioner Heller?

19 VICE CHAIR HELLER: Aye.

20 CHAIRMAN CHOCK: Commissioner Makua?

21 COMMISSIONER MAKUA: Aye.

22 CHAIRMAN CHOCK: Commissioner Matsumura?

23 COMMISSIONER MATSUMURA: Aye.

24 CHAIRMAN CHOCK: Commissioner McDonald?

25 COMMISSIONER McDONALD: Aye.

1 CHAIRMAN CHOCK: Commissioner Teves?

2 COMMISSIONER TEVES: Aye.

3 CHAIRMAN CHOCK: Commissioner Inouye?

4 COMMISSIONER INOUE: Aye.

5 CHAIRMAN CHOCK: Chair is also prepared to
6 deliberate on this matter. The goal today is to
7 determine by way of motion the Commission's decision
8 on whether or not there's been a violation of the
9 Decision and Order, whether or not to continue to
10 Phase 2 of this matter. Commissioners, what is your
11 pleasure?

12 COMMISSIONER McDONALD: Thank you, Chair.
13 As we noted today we're not here to decide or to take
14 action on any merits of the proposed Project. Based
15 on the evidence and testimony provided to us I believe
16 a violation has occurred regarding the conditions set
17 forth in the previous Decision and Order.

18 Therefore, Chair, I'd like to make a motion
19 that this Commission find that the Petitioner did
20 violate the previous Decision and Order, specifically
21 Condition 15 and Condition 5.

22 CHAIRMAN CHOCK: Thank you, Commissioner
23 McDonald. Is there a second?

24 COMMISSIONER TEVES: Mr. Chair, I'm going
25 to second Commissioner McDonald's motion and make a

1 friendly amendment. Petitioner also violated Condition
2 17 by not stating in annual reports the exact changes
3 that was occurring.

4 COMMISSIONER McDONALD: So noted and agreed
5 to.

6 CHAIRMAN CHOCK: Any discussion,
7 Commissioners? Vice Chair Heller.

8 VICE CHAIR HELLER: I just want to
9 reiterate again that we are not making any judgments
10 about whether this is a good Project or bad Project or
11 whether the Project, you know, makes more sense at
12 this time than what was originally envisioned. Those
13 are not questions that are before us today.

14 What I think is important is that when we
15 as a Commission, look at a proposed project we have to
16 look at the impacts of that project from a wide
17 variety of angles including everything from
18 educational impacts and effects on schools to surfaces
19 water runoff, traffic, wastewater problems, water
20 usage, cultural and archaeological impacts, et cetera.

21 And we can't do that in a vacuum. We have
22 to do that based on some understanding of what the
23 proposed project is.

24 And if the proposed project is described in
25 a way that: Well, it could be anything from an

1 apartment complex to a shopping mall, and we don't
2 know where it's going to end up, then I think it's
3 pretty hard for us to analyze those impacts in any
4 meaningful way, which at least, as I understand our
5 job, we're supposed to do. That's my comment.

6 CHAIRMAN CHOCK: Thank you, Commissioner
7 Heller. Commissioners, any other comments?
8 Commissioner Inouye.

9 COMMISSIONER INOUE: Chair, yeah, I wanted
10 to reiterate that it's a difficult decision because I
11 understand all the public testimony and wanting to
12 move this Project forward. It really hurts 'cause I
13 think we need to get things going.

14 However, if we -- we have a charge, as
15 Commissioner Heller indicated. If we were to carry as
16 if anything within a particular zoning is fair game,
17 I'm afraid that our job is going to be not only harder
18 but it's going to be more denial of everything.
19 There's just too many things involved. So we need to
20 look at specifics.

21 It's been said by many, many of the parties
22 here "impacts". What drives me is if there's a
23 question that there's an impact of what we had looked
24 at ten, 15 years ago, then there should be something
25 that's brought forward on how that's gonna change.

1 The effects of all of the things that we have to
2 consider basically.

3 So as I had stated several months ago when
4 this first came up, I wanted to have this Project move
5 forward, but we have to follow steps. We have to make
6 sure that we're doing the right thing for everybody.
7 So for that reason I would have to support the motion.

8 CHAIRMAN CHOCK: Commissioners, any other
9 comments? Okay. I'd like to ask our executive
10 officer to restate the amended motion and then poll
11 the Commission.

12 MR. ORODENKER: Mr. Chair, the motion
13 before the Commission is that the Petitioner violated
14 Conditions 15 and 5 of the Decision and Order. And a
15 friendly amendment that there was also a violation of
16 Condition 17, which has been accepted.

17 Commissioner McDonald?

18 COMMISSIONER McDONALD: Yes.

19 MR. ORODENKER: Commissioner Teves?

20 COMMISSIONER TEVES: Yes.

21 MR. ORODENKER: Commissioner Biga?

22 COMMISSIONER BIGA: No.

23 MR. ORODENKER: Commissioner Matsumura?

24 COMMISSIONER MATSUMURA: Yes.

25 MR. ORODENKER: Commissioner Contrades?

1 COMMISSIONER CONTRADES: No.

2 MR. ORODENKER: Commissioner Makua?

3 COMMISSIONER MAKUA: Aye.

4 MR. ORODENKER: Commissioner Heller?

5 VICE CHAIR HELLER: Yes.

6 MR. ORODENKER: Commissioner Inouye?

7 COMMISSIONER INOUYE: Yes.

8 MR. ORODENKER: Chair Chock?

9 CHAIRMAN CHOCK: No.

10 MR. ORODENKER: Mr. Chair, the motion
11 carries 6 votes to 3.

12 CHAIRMAN CHOCK: Thank you very much,
13 Parties. I believe that concludes our business for
14 today. We stand adjourned.

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17 (The proceedings were adjourned at 12:15 p.m.)

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C E R T I F I C A T E

I, HOLLY HACKETT, CSR, RPR, in and for the State of Hawai'i, do hereby certify;

That I was acting as court reporter in the foregoing LUC matter on the 7th day of February 2013;

That the proceedings were taken down in computerized machine shorthand by me and were thereafter reduced to print by me;

That the foregoing represents, to the best of my ability, a true and correct transcript of the proceedings had in the foregoing matter.

DATED: This _____ day of _____ 2013

HOLLY M. HACKETT, HI CSR #130, RPR
Certified Shorthand Reporter