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

HOLLY M. HACKETT RPR, CSR
Ph/Fax (808) 538-6458  EXHIBIT 2
APPEARANCES

COMMISSIONERS:
KYLE CHOCK, CHAIR
RONALD HELLER, VICE CHAIR
CHAD McDONALD, VICE CHAIR
SHELDON R. BIGA
THOMAS CONTRADES
LANCE M. INOYUE
ERNEST MATSUMURA
JAYE NAPUA MAKUA
NICHOLAS W. TEVES, JR.

EXECUTIVE OFFICER: DAN ORODENKER
CHIEF CLERK/STAFF PLANNER: RILEY HAKODA
STAFF PLANNER: BERT SARUWATARI
DEPUTY ATTORNEY GENERAL: SARAH HIRAKAMI, ESQ.
AUDIO TECHNICIAN: WALTER MENCHING

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

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

JONATHAN STEINER, ESQ.

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

For the Intervenors Maui Tomorrow Foundation, Inc., South Maui Citizens for Responsible Growth
Daniel Kanahele: TOM PIERCE, JR., ESQ.
MARK HYDE
IRENE BOWIE, Maui Tomorrow Foundation

For the County: MICHAEL HOPPER, ESQ.
Deputy Corporation Counsel
JANE LOVELL, ESQ.
Deputy Corporation Counsel

HOLLY M. HACKETT RPR, CSR
Ph/Fax (808) 538-6458
For the State: BRYAN YEE, ESQ.
Deputy Attorney General
JESSE SOUKI
Director Office of Planning
<table>
<thead>
<tr>
<th>PUBLIC WITNESSES</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regina Duncan</td>
<td>10</td>
</tr>
<tr>
<td>Joan Martin</td>
<td>12</td>
</tr>
<tr>
<td>Juno Comilang</td>
<td>14</td>
</tr>
<tr>
<td>Edgar Morton III</td>
<td>15</td>
</tr>
<tr>
<td>Thomas Cook</td>
<td>16</td>
</tr>
<tr>
<td>Carol Eiserloh</td>
<td>18</td>
</tr>
<tr>
<td>Kekoa Duarte</td>
<td>20</td>
</tr>
<tr>
<td>Sarah aka Sally Raisbeck</td>
<td>21</td>
</tr>
<tr>
<td>Leona Moore</td>
<td>23</td>
</tr>
<tr>
<td>Mark Sheehan</td>
<td>26</td>
</tr>
<tr>
<td>Kellie Pali Cruz</td>
<td>27</td>
</tr>
<tr>
<td>Desiree Hill</td>
<td>30</td>
</tr>
<tr>
<td>Randy Piltz</td>
<td>31</td>
</tr>
</tbody>
</table>
CHAIRMAN CHOCK: (gavel) Good morning. I'd like to call this meeting to order. This is a meeting of the State Land Use Commission. The first item on our agenda is the adoption of minutes. Do I have a motion to approve?

COMMISSIONER BIGA: So moved.

COMMISSIONER MCDONALD: Second.

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

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

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

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

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

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

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

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

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

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

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

MR. PIERCE: Good morning, Mr. Chair and Commissioners. This is Tom Pierce. I'm here on behalf of South Maui Citizens for Responsible Growth,
Maui Tomorrow and Daniel Kanahele. Mr. Kanahele is not with us today. Unfortunately, he had to go for a family emergency on the Mainland, but with me to my right is Irene Bowie. To my left is Mark Heide on behalf of South Maui.

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

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

Parties filed their respective proposed findings of fact, conclusions of law and decisions and orders on December 21st and 24th, 2012 and their respective comments, responses, joinders, objections and replies on January 3rd, 4th, 10th and 11th, 2013.
On January 2, 2013, the LUC mailed a Notice of Meeting Schedule Change to February 7, 2013 to all Parties.

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

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

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

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

At the conclusion of oral argument and after questions from the Commissioners and answers, the Commission will then conduct formal deliberation on this matter. Parties, any questions of our
procedures today?

VICE CHAIR HELLER: Mr. Chair?

CHAIRMAN CHOCK: Vice Chair Heller.

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

CHAIRMAN CHOCK: Parties, any objections?

MR. YEE: No objection.

CHAIRMAN CHOCK: Mr. Steiner, any objections?

MR. STEINER: No objection.

CHAIRMAN CHOCK: Mr. Kam?

MR. KAM: No objection.

CHAIRMAN CHOCK: County?

MR. HOPPER: No objection.

CHAIRMAN CHOCK: State?

MR. YEE: No objection.

CHAIRMAN CHOCK: Intervenor?

MR. PIERCE: No objection.

CHAIRMAN CHOCK: Thank you for that
disclosure, Commissioner. Before I call public
witnesses, let me remind all of you that public
testimony from previous hearings has been transcribed
and is part of the record. For those testifying
again, the Commission would appreciate you confining
your testimony to any new information.

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

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

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

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

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

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

THE WITNESS: Yes, I do.

CHAIRMAN CHOCK: Please proceed. Two
minutes.
THE WITNESS: Thank you. I am here as a realtor-broker with Maui Real Estate Advisors and as a mother and as a citizen. First, I wanted to state that I'm not in favor of all development. This development in particular I am in favor of. I work with so many people on Maui that cannot afford a home. Our starting home prices now have ticked up again over $400,000. And I have so many first-time home buyers, people who work hard in this community that this Project would -- it would really impact in a positive way.

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

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

And as a consumer I feel that it would bring a choice of products and services that we could all benefit from. And the interconnector road as a former Kihei resident I feel would be very, very
benificial. When I lived in Kihei I was always having
to go into town for things. And in emergencies the
roadways are severely blocked as evidenced by the past
tsunami. So I'm in favor of the road continuation as
well. Thank you.

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

MR. ORODENKER: Joan Martin followed by

Juno Komai.

JOAN MARTIN

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

THE WITNESS: I do.

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

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

CHAIRMAN CHOCK: Proceed.

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

I'm here to testify in strong support of
the Pi'ilani Promenade Project. This Project will
provide many community benefits including additional shopping choices from retail businesses not now on Maui, or for local businesses that have indicated they want a second location reducing the need for residents of South Maui to drive to Central Maui saving time and expensive gasoline.

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

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

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

CHAIRMAN CHOCK: Thank you. Parties, any questions? Thank you for your testimony.
MR. ORODENKER: Juno Comilang followed by Edgar Martin III.

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

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

THE WITNESS: Yes.

CHAIRMAN CHOCK: Thank you. Name and address.

THE WITNESS: Juno Comilang, 33 Kuakama, Kahului.

CHAIRMAN CHOCK: Thank you, Juno. Proceed.

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

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

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

THE WITNESS: Thank you.

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

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

THE WITNESS: I do.

CHAIRMAN CHOCK: Your name and address for the record.

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

And my grandfather, he built the highway
the one in the Pali. And my father built most of the
highways we travel on today. He managed to make a
plan to save the five jacaranda trees Upcountry.

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

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

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

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

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

THE WITNESS: I swear to tell the truth.
CHAIRMAN CHOCK: Your name and address.

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

CHAIRMAN CHOCK: Please proceed, Mr. Cook.

THE WITNESS: Good morning, Commissioners.
Thank you for the opportunity to give testimony. I'm speaking as an -- I actually live in the neighborhood on the south side of the future high school. So we'd be directly impacted by this construction.

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

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

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

And we need employment. The quote "low
paying jobs", I wish people would stop saying that about service industry jobs. Because to me all jobs are honorable jobs. Our community needs to work on a variety of levels. So I think the land use is appropriate. I think it's a benefit to the community. As a neighbor on the adjacent property I'm more than willing to accept the dust and the noise and the inconvenience. That's my testimony. Thank you.

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

THE WITNESS: Thank you for the opportunity.

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

CHAIRMAN CHOCK: Please come forward.

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

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

THE WITNESS: Yes.

CHAIRMAN CHOCK: Please proceed.

THE WITNESS: First of all, I would like to
say for all the folks that are here, thank you for
letting me speak, that I came from a union family. My
father was a union organizer. So I really understand
the need for jobs.

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

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

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

Further, we have a huge shopping corridor
already that's been established in Kahului. We have
new areas developing by Home Depot. We have more
areas developing by Costco. It would seem that energy
saving alone people don't have to go all over town to
shop. They can come to one area to shop and it'd be a
lot easier for them as well.

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

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

Thank you very much.

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

MR. ORODENKER: Kekoa Duarte followed by
Sally Raisbeck.

KEKOA DUARTE

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

THE WITNESS: I do.

CHAIRMAN CHOCK: Name and address for the record.

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

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

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

MR. ORODENKER: Sally Raisbeck followed by Leona Moore.

THE WITNESS: Good morning.

SALLY RAISBECK

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

THE WITNESS:  Yes, I do.

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

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

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

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

CHAIRMAN CHOCK:  Okay.

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

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

And this is not the Project that was
approved in 1994. And if there's a deficiency in the law that allows projects to go forward when it's been almost 20 years since they were approved, and having been on Maui for 30 years I know how much it's changed in 20 years.

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

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

Thank you.

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

THE WITNESS: Thank you.

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

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

THE WITNESS: Yes.

CHAIRMAN CHOCK: Your name and address,
please.


CHAIRMAN CHOCK: Proceed.

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

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

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

We burn cane on Maui. Anybody that comes here needs to know that. And it needs to be taken carry of. Don't tell me. One day this lady wanted to
go to lunch with me. We were walking, she said, "Golly!" Let me tell you we had a clerking teacher that said, "If you don't like it go back to where you came from." (audience applauding) Believe you me I've said that many times to all of you.

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

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

MR. ORODENKER: Excuse me. 2 minutes.

THE WITNESS: -- is because -- let me finish -- is because the head of this development they're gonna do is charged with mail fraud. Rick Stratton, charged with mail fraud. All of this is with federal now. All of my dealings are federal and also over at the state ledge. So Mr. Stratton, three-year imprisonment, so go ahead.
CHAIRMAN CHOCK: Thank you for your testimony. Parties, any questions? Commissioners? That includes the list of testifiers who have signed up. Is there anyone in the audience wishing to provide public testimony at this time, please come forward.

MARK SHEEHAN

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

THE WITNESS: Yes.
CHAIRMAN CHOCK: Your name and address, please.
THE WITNESS: My name is Mark Sheehan. I live at 630 East Kuia'a Road in Haiku.
CHAIRMAN CHOCK: Proceed.
THE WITNESS: I've been -- I'm employed as a real estate broker, one of those people. And I've been very concerned with how the laws are observed and flouted. I urge the Members of this committee to respect your own rulings in the past and not allow a developer who has really ignored the ruling to make a mockery of your own decisions in the past.

I think it's important what has been zoned 20 years ago as light industrial not be turned into a completely different Project without a thorough review.
of the project. Even the Transportation people acknowledged this is a significantly different Project with far greater impacts on the entire community, not just Kihei, but all of South Maui.

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

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

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

THE WITNESS: I do.

CHAIRMAN CHOCK: Your name and address please.

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

CHAIRMAN CHOCK: Thanks, Kellie. Your address?

THE WITNESS: 320 Ahukai Road, Suite 413 in
Kihei.

CHAIRMAN CHOCK: Proceed.

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

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

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

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

I also understand with a Kihei Mall Promenade or whatever the name officially is, I understand that that could also increase value to my commercial property unit that I own adjacent, making
it more central for other customers.

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

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

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

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

    CHAIRMAN CHOCK: Parties, any questions?
Commissioners? Thank you for your testimony. Anyone else from the public wishing to provide public testimony at this time? Please come forward.

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

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

THE WITNESS: My name is Desiree.


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

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

And I believe that in looking at what they did I believe they've met those conditions. And I ask
that you -- I support the Project. I ask that you pass it.

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

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

THE WITNESS: I do.

CHAIRMAN CHOCK: Name and address, please.

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

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

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

I've heard a lot of comments about, "We don't need low-paying jobs." But let me reinforce that. When this project is completed we'll have 1800
jobs. They will probably be low paying. But for those people here on Maui that don't have a job, it's great, it's good and it's something for them.

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

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

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

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

We'll now proceed with oral arguments. Parties, you have 15 minutes. Mr. Steiner, are you
prepared to proceed?

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

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

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

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

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

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

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

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

The Petition discusses everywhere both
commercial in light industrial. And it says in there they'd "provide commercial and light industrial business and employment opportunities." That's the representation that was made to the Commission.

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

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

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

Examples of these occupants are discount
retailers, auto part sales, furniture and appliance stores, sportswear and equipment, wholesale food distributors, fast food outlets, et cetera."

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

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

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

Goes on to say, "These estimates require a reassessment from time to time." These are specific
representations made to the Commission. Then you got
the Project Assessment Report which another exhibit to
the Petition talks about what the Project's going to
be.

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

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

And he said, "Well, the market's going to
dictate that. And it's a possibility." And
Mr. Kajioka said, "Well, there's no way you can
prevent that." He said, "Yes, there's no way that you can prevent that." He agreed. So that was also represented that it could be all retail.

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

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

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

So the Commission, again, was aware of this possibility of retail. It was also aware of the possibility that it could have put a condition on to restrict the amount of retail or to make it
predominantly light industrial. But nobody ever suggested it.

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

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

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

Based on all the foregoing, the fact that it was specifically represented to the Commission that retail was a permitted use, and the fact that the Commission actually asked about this and was aware of it, the Commission must find that there's been no violation of Condition 15 because the development is in substantial compliance with the representations made to the Commission.
Now, the other condition that I need to address is Condition 5. This is about the frontage road. The applicable language says, I quote, "Petitioner shall provide for a frontage road parallel to Pi'ilani Highway and other connector roads within the Petition Area in coordination with other developments in the area with the review and approval of the state Department of Transportation and the county of Maui."

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

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

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

And one of those ways, one of those rules is that if an interpretation that leads to an
absurdity, must be rejected. In Hawai'i there's even
a law on the books that says in statutes, "If you
can't interpret a statute it leads to an absurdity."
And Hawai'i courts consistently apply this rule
against this hyper-literal construction of contracts
and statutes that leads to an absurdity.

Applying the interpretation of Intervenors
of Condition 5 leads to an absurdity. Without the
approval of the state Department of Transportation no
landowner could possibly build a frontage road. You
have to have the approval of the state Department of
Transportation.

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

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

In fact this even was brought up by Martin
Luna. When he was before the Commission talking about
this condition he said, "Well, my interpretation of
this law," he said, "we also understand that the
condition would be with the approval of the
Department of Transportation Highways and the county
of Maui so that if this type of roadway that's being
proposed to limit the access on Pi'ilani Highway is
approved by both agencies, then certainly we would be
required to put it in.

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

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

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

So because the condition -- the only way to
properly interpret the condition is that it requires a
frontage road if approved by the state Department of
Transportation means that since they're not going to
approve it it's not required, therefore Condition 5
hasn't been violated.

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

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

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

Back then you were deciding whether to
reclassify the land from Ag to Urban. Today you're
being asked to determine whether what's being built is
consistent with the representations made.

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

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

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

Not only that, when you look at the whole record there's very little to support that condition 15's been violated. Specifically there's no representation in the record that this would be limited to strictly light industrial or even a percentage of light industrial. Res judicata simply doesn't apply.
So based on all the evidence that's been presented, Pi'ilani would urge the Commission to take the following action: We're asking the Commission to do three things: Number 1. Pass a motion finding that the proposed developments of Pi'ilani and Honua'ula do not violate the Decision and Order.

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

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

CHAIRMAN CHOCK: Thank you, Mr. Steiner.

Mr. Kam, 15 minutes.

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

Throughout the course of the proceeding and also in their proposed findings of fact, conclusions of law the Intervenors have emphasized the differences between the Pi'ilani Promenade and the Honua'ula affordable housing project on the one hand, and the
original Project that was described in the Petition on the other hand. Their singular focus is in comparing the two projects. We believe this approach is incorrect for a couple of reasons.

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

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

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

Instead, the Commission decides only whether the reclassification sought is appropriate. In recognition of that fact the Commission's own rules focus on the reclassification. In our case it was Ag to Urban.
The LUC Rule 77 says, "The Commission shall specifically consider the extent to which the proposed reclassification conforms to the applicable goals, objectives and policies of the Hawai'i State Plan; the extent to which the proposed reclassification conforms to the applicable district standards; the impact of the proposed reclassification on areas of statewide concern."

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

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

And we submit that in deciding what the representations are, the Commission must look beyond merely the description of the proposed use contained in the original Petition. They must also look to the totality of all the evidence that was submitted to the
Commission. In other words, the representations are no just the description but all of the testimony by the Petitioner and its representatives, the exhibits and other information submitted on its behalf.

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

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

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

In addition to the Intervenors' approach being incorrect, we believe that the Intervenors are asking the Commission to do something that the Commission should refrain from doing based on current law.
The Intervenors are asking the Commission to impose a condition that restricts apartment and retail use which is nowhere stated in the 1995 Order. This is something that the Commission simply may not do based on the Hawai'i Supreme Court's decision in the Lanai Case.

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

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

Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires to ensure that the parties are entitled to fair notice in dealing with
the government and its agencies. In this light the
1991 Order cannot be construed to mean what the LUC
may have intended but did not express."

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

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

In the context of this Show Cause
proceeding, what that means is that the prohibition on
apartment and retail use that the Intervenors seek to
impose, must derive from the conditions of the Order
with ascertainable certainty.

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

But even leaving that aside, even Planning
Director Spence, who is charged with the
responsibility to enforce the LUC's Orders and is a
planning expert himself, he testified that he did not believe that a prohibition against retail and apartment use was ascertainable in the absence of a specific condition.

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

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

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

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

1. Find that Pi'ilani and Honua'ula and the projects proposed by them are not in violation of the conditions of the 1995 Order, or the representations or commitments of the original Petitioner.
2. To adopt Pi'ilani's proposed Findings of Fact which Honua'ula has joined in.

And 3. To vacate the Order to Show Cause.

Thank you very much.

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

(Recess was held)

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

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

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

The central issue in this case is whether a proposed commercial and light industrial project, including 250 affordable apartment units, is in substantial compliance with the LUC's conditions. As required by the Supreme Court any condition imposed by this Commission must state with ascertainable
certainty the conduct the Commission seeks to prohibit or require.

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

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

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

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

"The M-1 zoning would be most appropriate
for the area with regard to uses, minimum lot size, height limitations and yard requirements contiguously having similar uses and improvements of the adjacent Kihei commercial center development."

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

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

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

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

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

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

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

For this Project, though, no such expressed conditions were imposed by either the county council or the Land Use Commission. While the planning department advocated for a condition limiting the commercial use of the property before the county council, it would it improbable for such a condition
to now be added by implication for not even the
Commission nor the council expressly imposed one.

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

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

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

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

He gave examples of the Maui Mall, Queen
Ka'ahumanu Center, and the Lahaina Gateway as major
retail projects with light industrial zoning. And I'ao Parkside and Opukea as two major apartment projects in light industrial zoning.

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

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

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

The conditions don't say anything about the permitted uses on the property or the Project site plan. Nonetheless, the Intervenors and the Office of Planning argue that the original petitioner made representations that now require a limitation on retail business.
In the record before the Commission, however, there are no such representations. During the original hearing on the Project Commissioner Kajioka questioned Mr. Sodetani, the developer's marketing expert, regarding the broad range of uses allowed by the zoning including commercial and apartment uses.

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

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

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

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

21 Where could he look in the 1995 Decision
22 and Order to tell the developer "here is the limit on
23 retail uses"? Is 50 percent too much? Is 60 percent
24 too much? There's no reference to retail uses being
25 accessory or otherwise limited in the Decision and
Order.
Regarding the affordable housing. The Department does not believe that the construction of 250 apartment units, all of which will meet county affordability standards, constitutes non-compliance with the Order.

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

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

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

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

Next I'd like to say a few words about traffic. The county is surprised that the Intervenors are still arguing that there's been a breach because
there's no planned frontage road based on Condition 5.

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

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

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

    As a result there's no testimony anywhere
in the record that the proposed Project will produce
anything like 30,000 trips per day. The statements
such as these have led to many misconceptions
surrounding this Project. However, you as Commissioners have heard the evidence in this case and examined the record.

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

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

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

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

The issue today is we want to emphasize that the reliability of a petitioner's representations to you is of fundamental importance. LUC rules require a petitioner to specifically describe the proposed use and the number of lots, the lot size, the
number of units, density, selling price and intended market, and the impacts from that proposed use.

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

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

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

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

HOLLY M. HACKETT RPR, CSR
Ph/Fax (808) 538-6458
represented would be done in this Petition Area.

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

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

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

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

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

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

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

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

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

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

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

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

The LUC made that determination based upon the representations made by the Petitioner. To ensure
the statutory criteria were met, that the impacts were correctly analyzed and consistent with HRS Section 205-4G Condition 15 requires the Petitioner to substantially comply with their representations.

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

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

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

If you look at the market demand analysis, they did not look at the market demand for residential. The TIAR in 1994 did not look at the impacts to traffic from residential. Consequently,
the LUC did not analyze the impacts from a residential use of the Petition Area. It did not apply the statutory criteria to a residential project.

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

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

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

The market analysis did note that based upon approximately 20 percent of the parcels would be in large lots. Some of those large lots would include commercial uses. But in evaluating the market demand,
the analysis looked at the demand for light industrial subdivisions.

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

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

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

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

    But if you sell them a piece of property then a light industrial business would be more likely to thrive. So this would tend to then -- just the way
that they structured the proposed Project -- light industrial would occur.

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

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

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

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

But retailers like Home Depot are not part
of the light industrial subdivision as proposed by Petitioners in 1994. An electrical substation is a common accessory which this Commission has seen in many projects, including residential projects.

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

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

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

The Home Depot-like retail store and the electrical substation does not change this conclusion. But even if one store, an electrical substation, could be construed as a light industrial use, the 1994 proposal was primarily for light industrial with some commercial.
We won't quibble about percentages, but if you look at the record, if you look at the analyses that were conducted, if you look at the impacts that the LUC looked at, it's clear that at the very least a reasonable Commissioner would believe that at least more than 50 percent of the Project would be light industrial.

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

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

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

If properly followed, Hawaii's land use and
planning process ensures that economic development
such as jobs, cultural, community issues and the
environment are considered and addressed. Based on
the record Petitioner's own experts have said the
Project proposed today is not the same project that
was proposed in 1994. We agree.

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

CHAIRMAN CHOCK: Thank you, OP.

Intervenor, Mr. Pierce: 15 minutes.

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

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

(Pause)

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

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

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

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

So the developers say, "Well, that's conceptual." Okay. Let's accept that that's conceptual. But what we have proposed and what we have in the findings of fact is a 123-lot industrial park that's going to have fairly small lot sizes so
that they can be sold to a number of individuals, or
leased to them to start small businesses.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I want to just briefly talk about the res judicata issue that got raised. We've argued on several occasions before this Commission that it is sufficient and it's actually the law, that the Land
Use Commission need look no further than those 104 findings of fact to make its decision.

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

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

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

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

The next one to get out of the way quickly is Condition 17 which required annual statements. Those annual statements are no small thing. They're there to provide notice to the Commission. They're
also there to provide notice to the public. It's the only way that we can keep track of what landowners who are changing over a period of time and are making new proposals or possibly change proposals, it's the only way for us to be able to know what's going on.

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

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

The other thing, going back to the representations that were made in 1994-95 the County mentioned that I got the traffic numbers wrong. But what the County didn't remind you of is what the State testimony was on this and the other traffic experts. And those, it's undisputed that it's going to be five
times greater. The reason it's going to be five times
greater is for the reasons that OP stated earlier is
that we no longer have a service industry opportunity
here. We now have a retail opportunity. Two very
different things.

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

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

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

I want to spend just a few minutes to talk
about why that argument fails. First of all, their argument is, "Well, we attached the M-1 Light Industrial Zoning inside that market study." Let me actually step back for a second.

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

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

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

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

Or they can do a school with a whole host
of different impacts. And also different market impacts as well, not just traffic impacts and those kinds of things, those negative ones, but positive or negative market impacts. None of those were evaluated back then.

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

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

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

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

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

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

"Answer: Yes."

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

"Answer: Yes."

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

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

"Answer: No."

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

"Answer: Right."

"Question: But what they did put before
them is what we see represented in Exhibit 1, a 123-lot light industrial -- commercial and light industrial use. Right?"

"Answer: Correct."

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

"Answer: Yes."

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

"Answer: Yes."

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

"Answer: Yes."

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

"Answer: Right."

MR. ORODENKER: Excuse me. 15 minutes.
MR. PIERCE: I'm almost done, thank you.

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

"Answer: No."

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

"Answer: That's correct, yeah."

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

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

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

CHAIRMAN CHOCK: Thank you, Intervenor.

Thank you, Mr. Pierce. Mr. Steiner, Mr. Kam any rebuttal?

MR. KAM: I have just very brief rebuttal.

CHAIRMAN CHOCK: How about you, Mr. Steiner?

MR. STEINER: I'm going to defer to
Mr. Kam.

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

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

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

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

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

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

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

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

The extent to which the proposed reclassification conforms to applicable goals, the extent to which the reclassification conforms to the applicable district standards.

The impact of the proposed reclassification on the following areas of state concern: 205-16. "No amendment to the land use district boundary shall be adopted unless such amendment conforms to the Hawai'i State Plan."
We submit that there's enough evidence before the Commission to find that those requirements are satisfied as to the current proposed Project. Thank you very much.

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

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

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

MR. STEINER: I think that would, and to a certain extent, depend on your definition of "streets". But there is within the Project proposed a dedication as well as all the money to construct, the first stage of the Pi'ilani Highway -- or the Kihei
Upcountry Highway. So that's one street that comes off Pi'ilani, goes straight up.

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

So they're not dedicated streets but there are places for cars to egress and ingress and to get around the Project. But they're not dedicated streets that would be dedicated to the city -- or the county.

Does that answer your question?

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

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

MR. JENCKS: Yes.

VICE CHAIR HELLER: Okay. Let me make the question more specific. Finding of fact No. 74 in the 1995 Decision and Order states that "Petitioner has
represented that it will construct all streets within
the industrial park to county standards in compliance
with the comment by DPWWM that streets include
cement curbs and gutters, 6-foot sidewalks and
4-feet wide planting strips which improvements would
be dedicated to the county upon completion."

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

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

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

MR. JENCKS: Commissioner Heller, there are
streets that will be developed within the Project to
provide access in the intersections that are not too
dissimilar from what you see on that concept plan.
The roads will remain private but the roads
will be improved to county standards because we have
to meet their standards for access. We'll have curb, gutter and sidewalk as we showed on the exhibit showing the circulation system within the project at one of the Commission meetings here.

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

MR. JENCKS: That's correct.

VICE CHAIR HELLER: Thank you.

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

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

MR. JENCKS: May I? Certainly.

Commissioner McDonald, the original 4-lot large lot subdivision filed by Ka'ono'ulu Ranch, which is the basis for the current plan, was received -- preliminary received in 2003. We took that map, that preliminary and modified it slightly. I received a final bonded subdivision approval in August of 2009.

COMMISSIONER MCDONALD: So as far as the proposed plan between 2003 and 2009, when did this conceptual plan arise during that period of time?
MR. JENCKS: I would say the basics of the plan you're looking at today actually came out of some site planning work that was started in 2005. Ka'ono'ulu Ranch sold the land to Maui Industrial Partners. We picked up Mr. Rice's large lot subdivision map and used that as a basis for the next iteration of planning and design.

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

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

MR. JENCKS: I did the due diligence for the acquisition in 2005. My review at the time of the D&O and the record that existed at the time, led me to believe and the future owners, that based upon the zoning and the D&O in the file that the uses we were
proposing would be approvable by the county of Maui and would be consistent with the D&O.

COMMISSIONER McDONALD: Thank you.

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

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

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

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

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

MR. JENCKS: I believe -- I can't speak to what Mr. Rice represented to the Commission in 2003 because I was not a part of the Project at the time. But I do believe that in our reports we did represent that we had finally achieved final subdivision approval in 2009 for the Project.
COMMISSIONER INOUYE: But in the annual reports was that shown, the bottom part?

MR. JENCKS: We did not include a map.

COMMISSIONER INOUYE: Thank you.

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

COMMISSIONER TEVES: Second.

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

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

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

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

Deliberations are limited to this issue and not the issue of reversion or appropriateness of the Project. I would note for the parties and the public that during the Commission's deliberations I will not
entertain additional input from the parties or the public unless those individuals or entities are specifically requested to do so by myself or the Commission.

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

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

COMMISSIONER BIGA: Aye.

CHAIRMAN CHOCK: Commissioner Contrades?

COMMISSIONER CONTRADES: Aye.

CHAIRMAN CHOCK: Commissioner Heller?

VICE CHAIR HELLER: Aye.

CHAIRMAN CHOCK: Commissioner Makua?

COMMISSIONER MAKUA: Aye.

CHAIRMAN CHOCK: Commissioner Matsumura?

COMMISSIONER MATSUMURA: Aye.

CHAIRMAN CHOCK: Commissioner McDonald?

COMMISSIONER MCDONALD: Aye.
CHAIRMAN CHOCK: Commissioner Teves?
COMMISSIONER TEVES: Aye.
CHAIRMAN CHOCK: Commissioner Inouye?
COMMISSIONER INOUYE: Aye.
CHAIRMAN CHOCK: Chair is also prepared to deliberate on this matter. The goal today is to determine by way of motion the Commission's decision on whether or not there's been a violation of the Decision and Order, whether or not to continue to Phase 2 of this matter. Commissioners, what is your pleasure?

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

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

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

COMMISSIONER TEVES: Mr. Chair, I'm going to second Commissioner McDonald's motion and make a
friendly amendment. Petitioner also violated Condition 17 by not stating in annual reports the exact changes that was occurring.

COMMISSIONER McDONALD: So noted and agreed to.

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

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

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

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

And if the proposed project is described in a way that: Well, it could be anything from an
apartment complex to a shopping mall, and we don't know where it's going to end up, then I think it's pretty hard for us to analyze those impacts in any meaningful way, which at least, as I understand our job, we're supposed to do. That's my comment.

CHAIRMAN CHOCK: Thank you, Commissioner Heller. Commissioners, any other comments?

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

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

It's been said by many, many of the parties here "impacts". What drives me is if there's a question that there's an impact of what we had looked at ten, 15 years ago, then there should be something that's brought forward on how that's gonna change.
The effects of all of the things that we have to consider basically.

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

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

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

Commissioner McDonald?

COMMISSIONER MCDONALD: Yes.

MR. ORODENKER: Commissioner Teves?

COMMISSIONER TEVES: Yes.

MR. ORODENKER: Commissioner Biga?

COMMISSIONER BIGA: No.

MR. ORODENKER: Commissioner Matsumura?

COMMISSIONER MATSUMURA: Yes.

MR. ORODENKER: Commissioner Contrades?
COMMISSIONER CONTRADES: No.

MR. ORODENKER: Commissioner Makua?

COMMISSIONER MAKUA: Aye.

MR. ORODENKER: Commissioner Heller?

VICE CHAIR HELLER: Yes.

MR. ORODENKER: Commissioner Inouye?

COMMISSIONER INOYUE: Yes.

MR. ORODENKER: Chair Chock?

CHAIRMAN CHOCK: No.

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

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

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

--oo00oo--
CERTIFICATE

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