

Exhibit 5

**STATE OF HAWAII
LAND USE COMMISSION**

**Hearing held on September 8, 2021
Commencing at 9:00 a.m.**

Held via Zoom by Interactive Conference Technology

- I. Call to Order
- II. Adoption of Minutes
August 25, 2021 Minutes
- III. Tentative Meeting Schedule
- IV. ACTION-DR21-72 CHURCH (Hawaii)
To Consider Petitioner's Petition for a Declaratory Order requesting clarification and correction to the LUC, December 16, 1992 Boundary interpretation No. 92-48 and reimbursement of LUC and Court Reporter fees.
- V. ACTION-A11-794 STATE OF HAWAII, DEPT. OF EDUCATION - (Kihei High School) (Maui)
To Consider Petitioner's Emergency Motion for Recusal or Disqualification of LUC's Chair from Participation in any Proceeding related to DOE's Motion to Amend the Land Use Commission's Findings of Fact, Conclusions of Law and Decision and Order filed July 29, 2013.

To Consider Petitioner's Motion to Amend the LUC's Findings of Fact, Conclusions of Law and Decision and Order filed July 29, 2013.

To Consider Petitioner's Request for the Issuance of Written Findings as to its Aug 20, 2020 Motion to Amend the Land Use Commission's Findings of Fact, Conclusions of Law and Decision and Order filed July 29, 2021.
- VI. ADJOURNMENT



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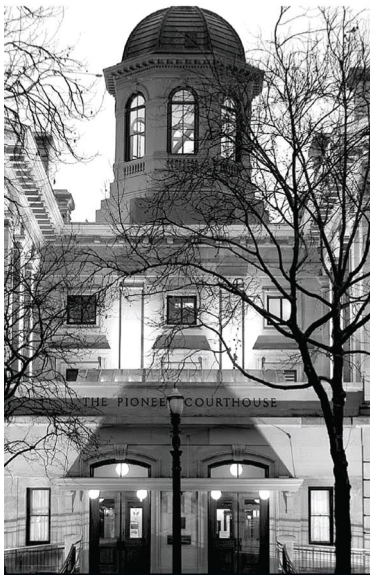
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APPEARANCES BY VIDEOCONFERENCE:

- Jonathan Scheuer, Chair (Oahu)
- Nancy Cabral, Vice Chair (Big Island)
- Edmund Aczon (Oahu)
- Gary Okuda (Oahu)
- Lee Ohigashi (Maui)
- Arnold Wong (excused) (Oahu)
- Dawn N.S. Chang (Oahu)
- Daniel Giovanni (Kauai)

STAFF PRESENT BY VIDEOCONFERENCE:

- Julie China, Esq.
- Deputy Attorney General
- Daniel Orodener, Executive Officer
- Riley Hakoda, Chief Clerk/Staff Planner
- Scott Derrickson, Chief Planner

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STATE OF HAWAII

LAND USE COMMISSION

Hearing held on September 8, 2021

Commencing at 9:00 a.m.

COMMISSIONER SCHEUER: Aloha mai kakou and

good morning. This is the September 8th, 2021, Land Use Commission meeting, which is being held using interactive conference technology linking videoconference participants and other interested individuals of the public via the Zoom Internet conferencing platform in order to comply with ongoing state and county official operational directives during the still ongoing COVID-19 pandemic.

Members of the public are able to view this meeting via the Zoom webinar platform. Whether you've been with us many times or this is your first time, I would like to urge all the participants the importance of if you are speaking, to speak slowly, clearly, and directly into your microphone. Before speaking, it is extremely helpful if you state your name and identify yourself for the record.

Also, please be aware for all meeting participants that this meeting is being recorded on

1 a digital record. Your continued participation is
2 your implied consent to be part of the record of
3 this event. If you do not wish to be part of the
4 public record, you should leave the meeting now.

5 This technology allows the parties and
6 each participating commissioner individual remote
7 access to the meeting via our own individual digital
8 devices. Because of that, and often due to matters
9 entirely outside of our control, occasional
10 disruptions to connectivity may occur for one or
11 more members at the meeting at any given time. If
12 such disruptions occur, please let us know, and
13 please be patient as we try to restore audiovisual
14 signals to conduct business effectively during the
15 pandemic.

16 For members of the public who may wish to
17 testify during any portion of this meeting where
18 public testimony is allowed and who are accessing
19 this via software, use the Raise Your Hand function
20 when you're an audience member. I will then call in,
21 or whoever's chairing the meeting will call in,
22 audience members, admit them in to be a panelist,
23 and then we'll swear you in, take your testimony.
24 You will stay to answer questions from any of the
25 parties and the commissioners and then be moved back

1 to being a panelist.

2 If you are accessing this meeting by
3 phone, you can raise your hand using *9, the
4 combination *9, as well as request to be unmuted,
5 *6. Right now, there's no public testimony, so
6 those who have your hand raised, you can lower your
7 hands using the same Lower Your Hand signal. From
8 time to time over the course of the meeting, we will
9 be taking breaks.

10 My name is Jonathan Likeke Scheuer. I
11 currently have the pleasure and honor of serving as
12 the Land Use Commission Chair. Along with me,
13 Commissioner Edmund Aczon, Dawn Chang, Gary Okuda,
14 our LUC Executive Officer Daniel Orodener, our
15 Chief Planner Scott Derrickson, our Chief Clerk
16 Riley Hakoda, our Program Specialist Natasha
17 Quinones, our Deputy Attorney General Julie China
18 are all on the island of O'ahu.

19 Commissioner Nancy Cabral is on Hawai'i
20 island. Commissioner Dan Giovanni is on Kaua'i.
21 Commissioner Lee Ohigashi is on Maui. We currently
22 have eight seated commissioners of a possible nine.

23 Court reporting transcriptions at this
24 time are being done from the Zoom recording itself.

25 I note in regards to attendance,

1 Commissioner Arnold Wong is excused for today's
2 meeting, and Commissioner Dan Giovanni will leave
3 the meeting shortly, between 11 and 11:30 a.m.

4 With all of that said, our first order of
5 business is the adoption of the August 25th, 2021,
6 minutes. Natasha, has there been any written
7 testimony submitted on this matter?

8 **MR. HAKODA:** This is Riley. No testimony
9 on the minutes.

10 **COMMISSIONER SCHEUER:** Okay. If there's
11 any members of the public who wish to testify on
12 adoption of the minutes, just of adoption of the
13 minutes from the August 25th meeting, please raise
14 your hand. Seeing none, are there any comments or
15 corrections, or is there a motion to approve?

16 **COMMISSIONER CABRAL:** My one good deed
17 always. I make a motion to approve the minutes as
18 presented of August 25th. Thank you.

19 **COMMISSIONER SCHEUER:** Is there a second?

20 **COMMISSIONER GIOVANNI:** I will second the
21 motion. Dan Giovanni.

22 **COMMISSIONER SCHEUER:** Thank you,
23 Commissioner Giovanni. A motion is made by
24 Commissioner Cabral and seconded by Commissioner
25 Giovanni. Any discussion? Seeing none, Mr.

1 Orodenker, would you please poll the commission?

2 **MR. ORODENKER:** Thank you, Mr. Chair. The
3 motion is to adopt the minutes. Commissioner
4 Cabral?

5 **COMMISSIONER CABRAL:** Yes.

6 **MR. ORODENKER:** Commissioner Giovanni?

7 **COMMISSIONER GIOVANNI:** Aye.

8 **MR. ORODENKER:** Commissioner Aczon?

9 **COMMISSIONER ACZON:** Yes.

10 **MR. ORODENKER:** Commissioner Chang?

11 **COMMISSIONER CHANG:** Aye.

12 **MR. ORODENKER:** Commissioner Okuda?

13 **COMMISSIONER OKUDA:** Yes.

14 **MR. ORODENKER:** Commissioner Ohigashi?

15 **COMMISSIONER OHIGASHI:** Yes.

16 **MR. ORODENKER:** Commissioner Wong is
17 excused. Commissioner Chair Scheuer?

18 **COMMISSIONER SCHEUER:** Aye.

19 **MR. ORODENKER:** Thank you, Mr. Chair. The
20 motion passes unanimously.

21 **COMMISSIONER SCHEUER:** Thank you very
22 much. With that, our next order of business is Mr.
23 Orodenker to go over our tentative meeting schedule.

24 **MR. ORODENKER:** Thank you, Mr. Chair.
25 Tomorrow we will be hearing the Mahi Solar matter

1 and any remaining agenda or any remaining argument
2 on Kihei High School, which is also scheduled for
3 today.

4 On September 22nd, we will be hearing
5 DR21-73, a ruling request by Honoipu Highway LLC,
6 and we'll also be getting a status report on A87-610
7 KSB. On September 17th, Mr. Chair, we will be having
8 an additional meeting to adopt the Mahi Solar order
9 as necessary.

10 On September 23rd, we'll be hearing A15-
11 798 Waikapu Properties. On October 13th and 14th, we
12 have set aside time for Important Agricultural Land
13 Designation matter that's pending a decision by the
14 attorney general. The same for October 27th and
15 28th.

16 On November 10th, we'll be hearing A21-810
17 Pulama solar. On November 24th, we will be adopting
18 an order in that matter. On December 8th and 9th,
19 we will be hearing A03-739, the airport hotel on
20 Maui. And that takes us through the end of the year.

21 **COMMISSIONER SCHEUER:** Thank you very
22 much. Commissioners, any questions for Mr.
23 Orodenker? Seeing none, no questions? Okay.

24 Our next agenda item is an action item
25 regarding Docket No. DR21-72 Church Hawai'i to

1 consider the petitioners' petition for a declaratory
2 order requesting clarification and correction to the
3 LUC December 16th, 1992, boundary interpretation No.
4 92-48 and the reimbursement of LUC and court
5 reporter fees.

6 I see Mr. Church is in the attendees. Can
7 he be admitted, please? And is there anybody else
8 who is to be admitted? Both, I don't have -- both of
9 the Churches are at the same --

10 Mr. Church, I can see you've been
11 admitted. Could you enable your audio and video,
12 please? Okay. I see that you're unmuted. Could you
13 try your audio, Mr. Church? I can hear you a little
14 bit. It's of poor quality.

15 **MS. HILDAL:** Can you hear us now?

16 **COMMISSIONER SCHEUER:** It is of -- it is
17 distorted. Okay. I can see you now. Nice to see you.
18 Can you try to say something?

19 **MR. CHURCH:** We have slow Internet
20 connection. I hope it works. It worked before when
21 we did something else with your (inaudible).

22 **COMMISSIONER SCHEUER:** Okay.

23 **MS. HILDAL:** Can you connect through the
24 audio?

25 **COMMISSIONER SCHEUER:** I couldn't actually

1 understand that last statement, so I'm going to --
2 I'm going to actually ask you to turn your video off
3 to see if the audio quality improves by conserving
4 bandwidth.

5 **MR. CHURCH:** Okay. Does that work better?

6 **COMMISSIONER SCHEUER:** I can hear you.

7 Oh, boy, they left. We seem to have closed that
8 connection. All right, Mr. Derrickson?

9 **MR. DERRICKSON:** Yes. I'm here. Until they
10 try to recontact us, I'm not quite sure what we can
11 do.

12 **COMMISSIONER SCHEUER:** And you have their
13 phone number. Can you at least call them and --?

14 **MR. DERRICKSON:** Yeah. Right. Trying to
15 contact them right now.

16 **COMMISSIONER SCHEUER:** Thank you. Thanks
17 to everyone for your patience. May I ask, do we
18 expect Hawai'i County Planning to attend?

19 **MR. DERRICKSON:** No. We don't expect
20 Hawai'i County to attend.

21 **COMMISSIONER SCHEUER:** Okay. The parties -
22 -

23 **MR. DERRICKSON:** For the Church matter.

24 **COMMISSIONER SCHEUER:** The parties will
25 just be the Churches, then.

1 **MR. DERRICKSON:** Correct.

2 **COMMISSIONER SCHEUER:** And OP, presumably.

3 **MR. DERRICKSON:** That's correct.

4 **COMMISSIONER SCHEUER:** Okay. Okay. So Mr.
5 Church coming on.

6 **MR. CHURCH:** Can you hear me now?

7 **COMMISSIONER SCHEUER:** I can hear you now.
8 It is actually much, much better. Thank you.

9 **MR. CHURCH:** I reconnected from scratch to
10 take me out of video. I turned it off, but that
11 didn't make any difference.

12 **COMMISSIONER SCHEUER:** Okay. We can hear
13 you now. And can we do an audio check with your wife
14 as well, please?

15 **MR. CHURCH:** Joanie? She'll be back in a
16 minute.

17 **COMMISSIONER SCHEUER:** Okay.

18 **MR. CHURCH:** She's trying to get the phone
19 to connect, just in case.

20 **COMMISSIONER SCHEUER:** Okay. So you
21 realize that our --

22 **MR. CHURCH:** She's 20 steps away.

23 **COMMISSIONER SCHEUER:** Okay.

24 **MR. CHURCH:** Okay. Here she is. Say
25 something.

1 **MS. HILDAL:** Good morning.

2 **COMMISSIONER SCHEUER:** Good morning.

3 Great. Okay. We've established audio contact. That's
4 better. So would you please identify yourselves for
5 the record?

6 **MR. CHURCH:** My name is Ken Church. I'm
7 the petitioner. I live at the island 14 miles north
8 of Hilo.

9 **COMMISSIONER SCHEUER:** Okay. And -- and
10 your wife is the co-petitioner?

11 **MR. CHURCH:** Yes.

12 **COMMISSIONER SCHEUER:** And she is with you
13 as well. And can you state your full name for the
14 record?

15 **MS. HILDAL:** Joan E. Hildal. Joan Evelyn
16 Hildal.

17 **COMMISSIONER SCHEUER:** Thank you very
18 much. Okay. Office of Planning? Are you going to
19 have a recording appearance on this or not? I know
20 you --

21 **MS. KATO:** Alison Kato, deputy attorney
22 general for the Office of Planning and Sustainable
23 Development. Also here are Rodney Funakoshi,
24 Lorraine Maki. I also see Aaron Setogawa and Mary
25 Alice Evans from the Office of Planning and

1 Sustainable Development as well.

2 **COMMISSIONER SCHEUER:** Thank you. Okay.

3 And the County of Hawai'i is not appearing. Before
4 we proceed further, let me update the record. On
5 June 17th, 2021, the commission received the
6 petitioners' filing and the cashier's check for
7 \$1,000.

8 On September 1st, 2021, the commission
9 mailed and emailed the meeting agenda for the
10 September 8th and 9th, 2021, meetings to the parties
11 in this docket and to the statewide and county
12 lists.

13 Also on that day, the Office of Planning
14 and Sustainable Development filed its position
15 statement, Exhibits 1 through 4, and a certificate
16 of service. The commission also received an email
17 from Deputy Corporation Counsel Jean K. Campbell
18 stating they were taking no position on the
19 petition.

20 Now for the parties, including Mr. Church,
21 I'll go over our proceedings for today. First, I
22 will give the opportunity for you to comment on the
23 commission's policy governing the reimbursement of
24 hearing expenses.

25 I next will recognize the written public

1 testimony that has been submitted in this matter, if
2 any. I will then call for anybody in the audience
3 wishing to give public testimony using the Raise
4 Hand function.

5 Following any public testimony in this
6 matter, I will call for the petitioner -- I will
7 call for the petitioner to make their presentation.
8 Following the petitioner presentation, we will hear
9 comments from the Office of Planning and Sustainable
10 Development.

11 And then we will have questions for both,
12 following their presentations, for both Mr. Church
13 and the Office of Planning. If there's time
14 available, I may ask commissioners for further
15 testimony from the state or the parties based on the
16 discussions to that point.

17 Based on the information I receive today,
18 the commission can determine further action.

19 Are there any questions for our procedures
20 for today, beginning with Mr. Church, yes or no?

21 **MR. CHURCH:** As I understand what you
22 said, you're going to first deal with the -- I guess
23 my supporting arguments regarding the reimbursement
24 of fees? Is that right?

25 **COMMISSIONER SCHEUER:** No. So -- and I

1 might -- I might ask for some clarification from our
2 -- or assistance from our staff in explaining this.

3 You've had a special -- you have part of
4 your motion in front of us, I understand, is for the
5 reimbursement of the filing fees that you've filed
6 to date on this petition as well as in regards to
7 your still pending petition for a district boundary
8 amendment. Is that -- do I understand correctly that
9 is what your -- your request for reimbursement
10 entails?

11 **MR. CHURCH:** That's correct. And you
12 mentioned that

13 **COMMISSIONER SCHEUER:** Okay. Also --

14 **MR. CHURCH:** You mentioned court reporter
15 fees, but apparently, that's no longer applicable.

16 **COMMISSIONER SCHEUER:** So -- so just hold
17 on. So in addition to those filing fees, there's
18 hearing expenses fees, and it is regular -- it is in
19 our administrative rules that for the cost of the
20 hearing, the petitioner covers a portion of those
21 fees.

22 Mr. Orodenger, can I ask you to explain
23 what that is and how this may relate to the -- one
24 of the pending motions of the petitioner?

25 **MR. ORODENKER:** Thank you, Mr. Chair. The

1 expenses related to hearings are usually limited to
2 fees associated with court reporters, and, as in the
3 past, we've had a physical court reporter present.
4 Currently, we have it being done remotely, but the
5 expenses still exist.

6 The parties will -- it is required to pay
7 a pro rata share of those expenses for each hearing
8 where there is more than one petition or matter
9 being heard by the commission. If there is no other
10 matter being heard by the commission, then the
11 petitioner in order to move on is required to pay
12 for the court reporter's fees in their entirety.

13 At this current time, we don't have any
14 further expenses. Under normal circumstances, there
15 may be expenses associated with a venue or such. In
16 this case, since we're appearing by Zoom, you don't
17 have those expenses.

18 **COMMISSIONER SCHEUER:** So normally, Mr.
19 Church, this portion -- so this portion occurs in
20 every docket, regardless of -- so we're not taking
21 up at the very first your request for reimbursement
22 of your filing expenses.

23 We're only taking up the standard
24 procedure that starts at the beginning of every
25 single hearing, which asks the petitioner whether or

1 not they're going to comply with the pro rata or
2 share of hearing expenses, which have been reduced
3 but not eliminated entirely by going to a virtual
4 format and having a transcription done via Zoom.

5 So do you understand that first matter
6 now, Mr. Church?

7 **MR. CHURCH:** So do I get a copy of the --
8 of that for the payment of the fees?

9 **COMMISSIONER SCHEUER:** You would be billed
10 for the payment of the fees.

11 **MR. CHURCH:** Okay.

12 **COMMISSIONER SCHEUER:** Okay. So anyway, so
13 -- but right now, we're not even discussing that.
14 We're just discussing our procedures. So we're just
15 going over that procedure. Then we'll go into public
16 testimony. Then we'll go into your presentation and
17 presentation from the state. That's our procedure
18 for today.

19 After that, we'll ask questions of you
20 after you present, the state after the state
21 presents. We might ask more questions of you or
22 other parties, and then we'll deliberate. That's our
23 procedures for today. Do you understand our
24 procedures for today, Mr. Church?

25 **MR. CHURCH:** I believe so. Am I allowed to

1 ask the state OP questions relating to whatever they
2 have to say?

3 **COMMISSIONER SCHEUER:** Let me ask Mr.
4 Orodanker and Ms. China. But I believe as a party,
5 that would be allowed.

6 **MR. ORODENKER:** Actually, Mr. Chair,
7 that's -- that's not quite correct. This is not an
8 evidentiary hearing. There are -- it's not an
9 opportunity for cross-examination, and there are no
10 witnesses.

11 The petitioner, or Mr. Church, can make
12 statements to controvert the OP's position, but
13 there -- since this is a declaratory ruling --

14 **COMMISSIONER SCHEUER:** Right.

15 **MR. ORODENKER:** -- it's -- you're not --
16 you can't -- you're really not -- it's not proper to
17 cross-examine counsel.

18 **COMMISSIONER SCHEUER:** Yeah. So, Mr.
19 Church.

20 **MR. CHURCH:** Understood.

21 **COMMISSIONER SCHEUER:** Understood? Okay.
22 Great. So do you understand our procedures for
23 today?

24 **MR. CHURCH:** I believe I do. Yes.

25 **COMMISSIONER SCHEUER:** Okay. A yes or no

1 would be great.

2 **MR. CHURCH:** Yes.

3 **COMMISSIONER SCHEUER:** Thank you. Ms.
4 Kato, any questions on the procedures?

5 **MS. KATO:** No questions. Thank you.

6 **COMMISSIONER SCHEUER:** Right. Okay. So,
7 Mr. Church, I will now ask you about your agreement
8 with the reimbursement of hearing expenses as we
9 discussed earlier. HAR, Hawai'i Administrative Rules
10 15-15-45.1 discusses the reimbursement of hearing
11 expenses. Can you tell me whether or not you have
12 reviewed that and whether you plan to comply with
13 that policy?

14 **MR. CHURCH:** I have reviewed, and I will
15 comply.

16 **COMMISSIONER SCHEUER:** Thank you very
17 much. Mr. Hakoda, now we move to public testimony.
18 Ms. Hakoda or Ms. Quinones, has there been any
19 written testimony submitted on this matter?

20 **MR. HAKODA:** Mr. Chair, this is Riley. No
21 public testimony on the Church matter has been
22 received.

23 **COMMISSIONER SCHEUER:** Okay. I will now
24 ask any members of the audience. So the Churches
25 will get to present themselves -- Ms. Hildal and Mr.

1 Church will get to present themselves as
2 petitioners. Are there any members of the audience
3 who wish to testify on this matter today? If so, use
4 the Raise Your Hand function.

5 I don't see anybody who is calling in, so
6 just use the software Raise Your Hand function if
7 you wish to testify in this matter. Going once,
8 going twice.

9 Seeing none, there's no public testimony
10 on this matter, and I'm going to close public
11 testimony on this matter. With that said, we can
12 now move to your presentation, Mr. Church.

13 **MR. CHURCH:** I have prepared a short
14 statement -- probably take five minutes,
15 thereabouts. My wife Joanie has also asked to give
16 her own statement following my remarks. We very much
17 appreciate your patience.

18 **COMMISSIONER SCHEUER:** Yes.

19 **MR. CHURCH:** We thank everyone at the LUC
20 and the state and county offices of planning for
21 their patience and for encouraging us to this point
22 of appearing before you. We also thank our neighbors
23 and friends that have encouraged us, also.

24 We recognize and sincerely appreciate the
25 substantial service to the community that the

1 volunteer commissioners patiently provide. My wife
2 Joanie and I purchased the property in 2014 that
3 laid along the Hamakua Coast and was comprised of a
4 former sugar cane field. We intended to build our
5 home there and develop the property for agricultural
6 uses.

7 After the DLNR strongly advised that we
8 hire a professional to develop and submit our
9 applications, we contacted five firms that provide
10 such a service. They all told us to expect the
11 process to be very expensive and that it would take
12 a lot of time with an uncertain outcome.

13 In the end, they all turned us down. They
14 generally said that successful permitting by the
15 DLNR had become so difficult that they were no
16 longer taking on new clients in this regard.
17 Therefore, we undertook to submit our own
18 applications.

19 This has also been to the frustration of
20 the commission staff, who regularly reminded us
21 throughout this process to hire a professional.
22 Going the professional route is a simply too
23 expensive process for us to use. In 2018, the --

24 **COMMISSIONER SCHEUER:** Mr. Church?

25 **MR. CHURCH:** Yes?

1 **COMMISSIONER SCHEUER:** One second. Sorry,
2 one second. I'm perceiving that you might be varying
3 your distance to the microphone. It's fading a
4 little bit. We got everything you said, but try to
5 be consistent, please.

6 **MR. CHURCH:** Okay.

7 **COMMISSIONER SCHEUER:** Thank you very
8 much. Sorry to interrupt you.

9 **MR. CHURCH:** That's fine. In 2018
10 (inaudible).

11 **COMMISSIONER SCHEUER:** We cannot hear you.

12 **MR. CHURCH:** In 2018 --

13 **COMMISSIONER SCHEUER:** Better.

14 **MR. CHURCH:** -- we determined to file a
15 petition with this commission to rezone our property
16 into the ag district, as its zoning simply seemed
17 wrong, and we remained in fear of the DLNR.

18 We were also concerned that our
19 investments in our property were diminished by its
20 apparent conservation zoning. While waiting for over
21 three years now for our petition to be heard, it
22 became increasingly clear to us that our property
23 was never rezoned into the conservation district.

24 Regarding our subsequent petition to the
25 commission today, we had to do an inordinate amount

1 of sleuthing to find LUC evidentiary records, which
2 were not easily available through channels
3 administered by the LUC's office and its website.
4 This resulted in further delays and a repeat of
5 expensive filing fees.

6 Our petition today references the LUC's
7 record of its five-year boundary review in 1969. It
8 is found in a book which I will refer to as the
9 report. Report not only documented its
10 recommendations to the commission, but it also
11 served as the commission's official record of its
12 action in rezoning land.

13 At a cursory read level, it is easy to
14 become confused and misapply the report's
15 recommendations versus actions that the commission
16 approved. The OP's statement of position to this
17 petition also describes that it also has found the
18 report to be confusing.

19 While we very much appreciate that the
20 state Office of Planning issued a statement of
21 position that supports our petition, we disagree
22 that its analysis of the report is so narrowly
23 focused to the unique characteristics of our
24 property.

25 If the commission agrees to such a narrow

1 focus, it will result that other similar coastal
2 property owners will continue to be improperly
3 impacted. This will result in repeated, needless
4 wasting of scarce government resources, a waste of
5 the commissioners' volunteer time, and an
6 unnecessary, burdensome, continuing cost and
7 inconvenience to property owners.

8 Our petition references the commission's
9 DR99-21, which is for very similar land to ours.
10 Like our land, it also lays along the Hamakua Coast.
11 In that case, the commission corrected all of Map H-
12 59, which comprised about 20 percent of the area
13 from East Kohala to Hilo.

14 We believe that the commission should have
15 corrected the five maps that cover this coastal area
16 over 20 years ago. We believe that the remaining
17 four maps should be corrected by the commission now
18 to reflect the report's description of the
19 commission's 1969 approved rezoning of coastal land.

20 In DR99-21, the commission quoted the
21 report's record of the commission's 1969 rezoning
22 action and its stated applicable legal authority
23 sections, Items 1 and 2. These two sections refer to
24 the coastal area that is shown on all five of the
25 maps. Unfortunately, the commission's resulting

1 order only required that Map H-59 be changed, even
2 though the quoted reference on the report describes
3 the five coastal map areas.

4 The report is not an easily found record
5 of the commission. Recently, we first uncovered a
6 reference to it in an old Office of Planning
7 document or we would never have known it existed.
8 Then, after an exhaustive search online for the
9 report, instead we found a reference to the
10 commission's DR99-21.

11 These were the first clues that caused us
12 to believe that our property may have never been
13 rezoned. Even then, we could not find DR99-21 in the
14 LUC's records other than a reference to its docket
15 number on Map H-59. And the report was even harder
16 to find. Since we made the LUC's administrative
17 office aware of that error in June, that order now
18 appears in the LUC's online files.

19 The report describes that it never
20 intended that its recommended maps were to be the
21 only reference for district boundaries as the
22 official record. It seems to us, when combined,
23 DR99-21 and the report point that the LUC's
24 administrative office, state Office of Planning, and
25 even the County of Hawai'i were aware, or should

1 have been aware, that the LUC's official district
2 maps could not be relied upon in the way they have
3 been in determining coastal district boundaries
4 since 1999.

5 We cannot understand why these two records
6 were so hard to, first, identify that they even
7 existed, and then were so equally hard to find.
8 This petition is about errors which we feel have
9 been made by the LUC. That is why our petition has
10 also requested the refund of filing fees.

11 We respectfully ask that the commissioners
12 grant our petition. We hope that this brief
13 introduction explains why we are appearing before
14 the commission today, and we look forward to our
15 exchange of information with the commissioners with
16 enthusiasm. And I guess now my wife will make her
17 presentation. Hers is shorter.

18 **COMMISSIONER SCHEUER:** That would be
19 great.

20 **MS. HILDAL:** (Inaudible).

21 **COMMISSIONER SCHEUER:** It is hard to hear
22 you, Ms. Hildal.

23 **MS. HILDAL:** Okay. I'll get closer. In our
24 search for our place to retire, Big Island won out
25 over all, and we're so very happy to be here.

1 We were warned about buying conservation
2 property, so before we bought, we researched the law
3 and felt confident that the law had not only
4 supported but encouraged self-sufficient ag, and
5 what we wanted to do was live here and simply grow
6 food.

7 Little did we know how hard that was to
8 be. Ken has been struggling through all the legal
9 channels we are aware of since buying the property
10 in 2014. They told us to get a pro. We tried, but
11 all the planners and lawyers we contacted -- hello?
12 Can you still hear me?

13 **COMMISSIONER SCHEUER:** We hear you.

14 **MS. HILDAL:** Okay. We tried, but all the
15 pros and lawyers we contacted didn't want to take us
16 on, mostly after speaking with OCCL. Couldn't
17 understand, but anyhow, it was really curious, and
18 it was the reason Ken took this all on himself.

19 After four years of dealing with OCCL,
20 gratefully with some successes, but they didn't want
21 to give us the right to use for ag use without
22 endless approvals and constant ratifying.

23 After a couple of years of this, we began
24 to feel like we were fighting, but more than just
25 us, as how many folks here who've inherited -- or

1 however it came -- properties have the freedom,
2 funds, and time to go through this?

3 How many have just given up the dream when
4 they were simply wanting to grow food, have a few
5 cows, horses, or simply put up a fence without the
6 threat of fines? How many don't have the thousands,
7 five thousands, or the time it would take? How many
8 uses are then just unpermitted?

9 In the meantime, sadly, how many
10 conservation properties are overrun with fire ants,
11 invasives, pigs, et cetera, when the owners could
12 have been simply caring for them?

13 It's not that we are opposed to
14 regulations. We are not. We love our island and
15 respect and appreciate the efforts to protect it and
16 feel our government here does, too.

17 It wasn't until just this year, after
18 seven years of struggle, that Ken finally discovered
19 the actual 1969 report that documented the
20 commission's process and actions to establish
21 conservation district boundaries. Here is some of
22 what it said.

23 In cases where the shoreline is bounded by
24 steep cliffs or a pali, the top of the ridge was
25 supposed to be used, and steep pali coast of East

1 Kohala extending all the way to the pali lands of
2 the Hamakua Coast shall be conservation with the
3 ridge top as the boundary line.

4 And one more thing. Ag land was supposed
5 to be excluded from the conservation district. The
6 undefined lines, incorrect in some places -- cases
7 on the maps, were never meant to be used solely for
8 determining zoning. Unlucky for us, none of the
9 planners, lawyers, or agencies had ever volunteered
10 or suggested research on this document.

11 Anyhow, at this point, I humbly ask that
12 you try to understand our frustration overall and
13 now please grant our petition and, ultimately, the
14 freedom for us to finally use our property for
15 agricultural use, grow food freely without endless
16 permitting and the constant fear of fines. Thank you
17 for listening.

18 **COMMISSIONER SCHEUER:** Thank you very
19 much, Ms. Hildal. I'm going to note for the record
20 that at 9:37, a minute ago, we were joined by
21 Commissioner Wong. Quick audio check, Commissioner
22 Wong.

23 **COMMISSIONER WONG:** I am here.

24 **COMMISSIONER SCHEUER:** Okay. Okay. So if
25 I understand correctly, Mr. Church, you don't have

1 anything further at this time, but you're available
2 right now to ask -- answer questions from the
3 commission?

4 **MR. CHURCH:** That's correct.

5 **COMMISSIONER SCHEUER:** Okay.

6 Commissioners, are there any questions for Mr.
7 Church at this time? Commissioner Cabral?

8 **COMMISSIONER CABRAL:** Yes. Thank you,
9 Chair. I guess this could be either Mr. or Mrs.
10 Church. I've been confused over some of the
11 statements, so -- but yet, what you've just stated
12 clarified that. I want clarification.

13 So when you purchased the property -- I
14 think that was in 2014 or so -- from Jim McCully,
15 you were aware that a part of the land -- because
16 you have several parcels -- but that one portion of
17 the land was in conservation.

18 You were aware of that at that time, and
19 you were aware -- or were you aware that there were
20 restrictions on what that usage would allow?

21 **MR. CHURCH:** We were aware that it
22 appeared to be in conservation, and in fact, that's
23 what we believed it to be. And for clarification,
24 there -- when we first bought the land, McCully
25 required that all three of the oceanside lots be

1 purchased as a single purchase, and we really didn't
2 have enough money -- well, we had enough to do it,
3 but it would cramp our ability to build.

4 So we agreed to buy them all, and then we
5 first went through a process -- I'll go back a
6 little. There was a railroad crossing the property,
7 or a former one, and that comprised three lots. And
8 then there were three oceanside lots. So we applied
9 to the DLNR to combine, and then re-subdivide and
10 eliminate the railroad lots.

11 Then once that was done, we sold what I
12 refer to as the south lot to another party, who I
13 believe is even in the audience today. Does that
14 answer your question?

15 **COMMISSIONER CABRAL:** Yes. So when you
16 reference the fact that you purchased this land with
17 the dream of building your home on the property and
18 raising vegetables or fruits to -- for your self-
19 use, you are referring, then, to the idea that you
20 were going to build your house on the conservation
21 land or on the other parcels, or was that just part
22 of the unknown dream of just building your land on
23 that oceanfront area? I want to just get
24 clarification as to your expectations and your
25 knowledge at the time of purchase.

1 **MR. CHURCH:** Okay. All three of the TMK
2 lots, which comprise two legal lots of record each,
3 were in the were shown on the map to be in the
4 conservation district, and that's what we understood
5 them to be, all three lots. And my wife wants to
6 add something. Just hang on.

7 **MS. HILDAL:** Yes. We were aware that the -
8 - it appeared that it was conservation land because
9 of some of pali's boundary interpretation of 1992.
10 We also researched the laws, and everything that we
11 understood stated that we could do agricultural use.
12 We could use the land for agriculture.

13 **COMMISSIONER CABRAL:** Okay. So -- so
14 you're saying that you thought you could use
15 agriculture use, but then after you got it, you're
16 saying DLNR restricted you, and you were not allowed
17 to have agricultural use on the conservation land?

18 **MS. HILDAL:** We're allowed to have
19 (inaudible) permitted every single little thing. For
20 example, when we first applied for (inaudible), it
21 took an inordinate amount of time, as we were in New
22 Zealand at the time, and they insisted on us using
23 the mail.

24 And then they -- they held out, and they
25 finally asked, what are you going to do with each

1 shovelful of dirt that you are going to plant, the
2 dirt that you take out for each hole on the
3 property's trees? So anyway, and it's been an
4 uphill climb about the agricultural use ever since.

5 **COMMISSIONER CABRAL:** Okay. My next
6 question is, and this is somewhat just in general in
7 real estate, typically, when I have been involved
8 with sales, do you think that you purchased that
9 property at a market -- the value of your property
10 was less because of the restrictions on the use of
11 that or --?

12 I mean, that's typically what I see
13 happen. When you can't use land, it sells for a
14 lesser price. And I'm not -- I'm not familiar with
15 your purchase agreement with Mr. McCully, but was
16 there any kind of discount? Did you think you got a
17 discount on your purchase for those restrictions?

18 **MR. CHURCH:** Actually, no. It's a little
19 more complicated. Because the land had been used for
20 sugar cane from the 1850s on, and when McCully
21 purchased it, the last crop had just been harvested
22 -- that was in '92 -- we read the DLNR's rules, and
23 unlike -- unlike your rules, or the state Office of
24 Planning rules, nonconforming use land can be
25 resumed at any time.

1 Your rules (inaudible) conservation land,
2 the rules are that it can be resumed at any time in
3 the future. It took a long time for us to sort that
4 out with the DLNR, and even then, yeah, they would
5 never formally tell us that we could do it. They
6 gave vague answers, and it just went on and on and
7 on. We're talking about years of exchanged letters
8 and information.

9 **COMMISSIONER CABRAL:** Okay. Thank you very
10 much for that continued information. Thank you.

11 **COMMISSIONER SCHEUER:** Commissioners,
12 further questions for the Churches at this time --
13 or Church and Hildal at this time? Commissioner
14 Okuda?

15 **COMMISSIONER OKUDA:** Thank you very much,
16 Mr. Chair. And thank you very much for the
17 petitioners for making their presentation. Let me
18 just ask some preliminary questions. Mr. Church, Ms.
19 Hildal, you understand that the Land Use Commission
20 is a quasi-judicial body, meaning we have to follow
21 the law whether or not we like the law. Do you
22 understand that?

23 **MR. CHURCH:** Yes.

24 **COMMISSIONER OKUDA:** And you understand
25 that because the Land Use Commission is a quasi-

1 judicial body, we're not like the county counsel or
2 the state legislature, where we can make decisions
3 and unilaterally change the law just because we want
4 to see a certain outcome. Do you understand that?

5 **MR. CHURCH:** Yes.

6 **COMMISSIONER OKUDA:** You mentioned you had
7 difficulty getting professionals such as attorneys
8 to represent you in this matter. But do you
9 understand that whether a party or person or entity
10 is represented by an attorney or not represented by
11 an attorney, the Land Use Commission must apply the
12 law without favoritism or without fear, irrespective
13 of whether or not a party has an attorney or doesn't
14 have an attorney? Do you understand that?

15 **MR. CHURCH:** Yes.

16 **MS. HILDAL:** Yes.

17 **COMMISSIONER OKUDA:** Do you understand
18 that because of that, and I don't mean to be rude in
19 any of my subsequent questions, but if you continue
20 without an attorney, you'll be subject to the same
21 standards that we would apply to an attorney? Do you
22 understand that?

23 **MR. CHURCH:** Yes.

24 **MS. HILDAL:** Yes.

25 **COMMISSIONER OKUDA:** And are either of you

1 an attorney?

2 **MR. CHURCH:** No.

3 **COMMISSIONER OKUDA:** So you understand
4 that if you proceed without an attorney or the
5 advice of any type of professional, you may be
6 putting yourself at risk moving forward? And the
7 risk might include the fact you might say something
8 or do something which may negatively impact your
9 request for relief or other things from the Land Use
10 Commission or any other body. Do you understand
11 that?

12 **MR. CHURCH:** Yes. And we humbly put
13 ourselves before the commission, who are real people
14 just like us.

15 **COMMISSIONER OKUDA:** Okay. And -- and I
16 assure you myself and other members on the
17 commission and including the staff, we neither favor
18 or disfavor anyone because they have or they don't
19 have an attorney or because who they are or who they
20 are not. We really try to just look at the law that
21 we are -- have taken an oath to apply. So I assure
22 you that.

23 Let me ask you this. I'm going to ask some
24 questions which may or may not be related to
25 statements you've made here, which seem to be

1 consistent with your argument and filing, which is
2 Docket No. A18-805.

3 If you object to any of my questions, tell
4 me you object, and we can deal with it at that point
5 in time, because it's not my intention to sandbag
6 you, set you up, or anything like that. I'm asking
7 these questions because we need a full record before
8 we make a decision. Do you understand that?

9 **MR. CHURCH:** Now, the petition you
10 reference is the first petition we filed, not the
11 one that's before you today.

12 **COMMISSIONER OKUDA:** That's correct. But
13 let me ask these questions, and you can stop me.

14 **COMMISSIONER SCHEUER:** Let me, if I may,
15 Commissioner Okuda?

16 **COMMISSIONER OKUDA:** Yes.

17 **COMMISSIONER SCHEUER:** Do you have a sense
18 of how long your questioning of -- for Mr. Church
19 and Ms. Hildal might be right now? We're running up
20 the tab and have gone on 15 minutes, and I just want
21 to be aware of the need to take breaks and have you
22 have an uninterrupted --

23 **COMMISSIONER OKUDA:** Yes. Thank you. I
24 believe 10 minutes. But this would be an appropriate
25 time to take a break, if you want to.

1 **COMMISSIONER SCHEUER:** Okay. Okay. It's
2 9:50 a.m. Let's take a break, a 10-minute recess
3 until 10 a.m., and we will continue with the
4 questioning by Commissioner Okuda for Mr. Church and
5 Ms. Hildal. We're going to recess for the next 10
6 minutes.

7 **(Recess taken from 9:50-10:00 a.m.)**

8 **COMMISSIONER SCHEUER:** Okay. It's 10 a.m.
9 We're back in session. And before Commissioner Okuda
10 continues with his questioning, Commissioner Wong,
11 you had something to raise?

12 **COMMISSIONER WONG:** Yes, Chair. I just
13 wanted to say I read the written testimony of the
14 Churches, and I came in when Mrs. Church, she came
15 on board to do her testimony. So I just wanted to
16 say that on the record.

17 **COMMISSIONER SCHEUER:** So you're familiar
18 with all of the proceedings in this to the present
19 moment.

20 **COMMISSIONER WONG:** Yes, Chair.

21 **COMMISSIONER SCHEUER:** Thank you.

22 **COMMISSIONER WONG:** Thank you.

23 **COMMISSIONER SCHEUER:** Okay. Commissioner
24 Okuda?

25 **COMMISSIONER OKUDA:** Thank you very much,

1 Mr. Chair. And either of the petitioners at any time
2 can answer this question. Okay.

3 So going back to my line of questioning, I
4 heard and listened very carefully and took to heart
5 the statements about -- from you, Mr. Church and Ms.
6 Hildal, as far as having to deal with the government
7 agencies and your frustration. But do you understand
8 that the Hawai'i constitution places certain
9 important obligations to protect conservation land
10 and agricultural land?

11 **MR. CHURCH:** Yes. I -- I think today's
12 petition is not about whether this is conservation
13 land or not. It's about whether it was put in
14 conservation in 1969. And that's where we want to go
15 in this report. The report is your own record.
16 That's what it says. And I could read you

17 **COMMISSIONER OKUDA:** No, you don't --
18 yeah. If I don't -- pardon me, if I can interrupt.
19 Let me tell you why I'm asking these questions. I am
20 asking these questions to determine whether or not
21 what you have presented at this point in time, okay,
22 just at this point in time, whether you -- whether
23 you satisfied the burdens set forth by HRS Section
24 91-1(5), which basically provides that a -- and let
25 me quote this.

1 Quote, except as otherwise provided by
2 law, the party initiating the proceeding shall have
3 the burden of proof, including the burden of
4 producing evidence as well as the burden of
5 persuasion. The degree or quantum of proof shall be
6 a preponderance of the evidence.

7 So the question I'm asking -- and these
8 series of questions are simply to determine whether
9 or not you have met the initial burden before we can
10 even consider the relief that you're asking for or
11 the specific arguments that -- that you are making;
12 okay? So that's the reason why I'm asking these
13 questions. I'm well aware of what you're asking for.

14 So my initial question is here. And this
15 is with respect to your complaints or your
16 commentary about your interactions with the
17 government agencies that you described. You are
18 aware that the constitution specifically mandates
19 certain protections that have to be given to
20 Hawai'i's resources. You understand that.

21 **MR. CHURCH:** Yes.

22 **COMMISSIONER OKUDA:** Okay. And just so
23 that we're clear, I'm talking, for example, about
24 Article 11, Section 1, of the constitution which
25 states, and I quote, "For the benefit of present and

1 future generations, the state and its political
2 subdivisions shall conserve and protect Hawai'i's
3 natural beauty and all natural resources, including
4 land, water, air, minerals, and energy sources, and
5 shall promote the development and utilization of
6 these resources in a manner consistent with their
7 conservation and in furtherance of the self-
8 sufficiency of the state."

9 You understand that we as a government
10 agency, even though we might be volunteers, we are
11 bound to carry out that admonition or command of the
12 Hawai'i constitution. You understand that?

13 **MR. CHURCH:** Yes.

14 **COMMISSIONER OKUDA:** Okay. Now, I'm asking
15 these questions now to determine whether or not we
16 have a sufficient basis to give you a relief on your
17 declaratory relief petition, and I'm specifically
18 looking at Administrative Rules Section 15-15-100,
19 to determine whether or not there's a basis here, or
20 whether or not this petition should be denied, or
21 whether or not, perhaps, the petition should be
22 continued or rescheduled for a hearing, and possibly
23 consolidated with your -- your other petition; okay?

24 And one of the things I'm looking at is to
25 determine whether or not we actually have a non-

1 speculative question here or whether we're basically
2 dealing with something speculative or -- or does not
3 involve an existing situation. You stated that you
4 intend to have agricultural use; is that correct?

5 **MR. CHURCH:** Yes.

6 **COMMISSIONER OKUDA:** Okay. When I looked -
7 - oh, well, what in the record that you have
8 presented here indicates what type of agricultural
9 use is intended?

10 **MR. CHURCH:** We intend to grow
11 agricultural crops, resale in the local farmers'
12 market, and also for our own use.

13 **COMMISSIONER OKUDA:** Okay. But where is
14 there a specific description -- or is there a
15 specific description of the crop or crops that you
16 intend to grow?

17 And the reason why I'm asking this
18 question is when I looked, for example, at the
19 environmental assessment that had been filed in the
20 related docket, there's just a description of the
21 residence that you intend to build, and there's no
22 discussion about the environmental impacts, if any,
23 or the lack of environmental impacts occurring or
24 arising from agricultural activity.

25 **MR. CHURCH:** So --

1 **COMMISSIONER OKUDA:** In other words, let
2 me tell you where I'm going with this, and my
3 concern, and maybe you can address it. This appears
4 to be an attempt to place mainly a single-family
5 residence on agricultural land if you get the relief
6 you're seeking from us either through this
7 interpretation or declaratory ruling or otherwise.

8 **MR. CHURCH:** As I said before, we're using
9 the -- the DLNR, who administers your own rules, has
10 already acknowledged, vaguely -- it's, I believe,
11 Exhibit 72 in that docket that you're looking at --
12 they said that they have allowed us to continue, to
13 resume the nonconforming agricultural use of the
14 property, which is already defined.

15 And he says it in either that letter --
16 three or four lines in a row -- Mr. Lamel (phonetic)
17 came back and said including the cultivation of the
18 land right up to the top of the pali as an allowed
19 nonconforming use. In other words, didn't need a
20 permit for it. He acknowledged that -- seemingly, he
21 acknowledged that I had that right.

22 So that original petition said we're doing
23 this. It's already being done, so we aren't
24 anticipating a change. We're doing ag on the land.
25 However, because he wouldn't make it clear, he

1 wouldn't -- I mean, we could get into the textural
2 language here in those letters, if you want to
3 examine that -- and I didn't prepare myself today to
4 talk about that, as I don't see it as relevant to
5 the current petition. And that's my answer, I guess.

6 **COMMISSIONER OKUDA:** Okay. Well, I'm only
7 speaking for myself, and I only have one vote, and I
8 don't necessarily contend that, you know, I'm never
9 wrong. So, you know, I'm only speaking for myself as
10 far as these questions.

11 But you are aware, are you not, that very
12 recently, in a petition or cross-petitions brought
13 by the County of Hawai'i and by a number of
14 petitioners, including Rosehill, R-o-s-e-h-i-l-l --
15 these were DR 20-69 and DR 20-70 -- the Land Use
16 Commission reaffirmed the fact that if it's
17 agriculturally designated land, only a lawful farm
18 dwelling is allowed. Are -- are you aware of that?

19 **MR. CHURCH:** Yes. It's rather interesting.
20 Mr. Lamel testified at McCully's hearing before not
21 these same commissioners, but before this
22 commission. And he told them that Mr. McCully could
23 build a farm dwelling. That was an allowed use.

24 So subsequently, when we came along, we
25 applied to build a farm dwelling. And I think there

1 was about 20 pounds of documents submitted in
2 multiple copies. And the chair came back and said
3 there's no provision in the land use -- or in the
4 conservation district for a farm dwelling. You
5 should rewrite this entire thing and resubmit it and
6 take the word "farm dwelling" out and put residence,
7 single-family residence, in. So we did.

8 **COMMISSIONER OKUDA:** Okay.

9 **MR. CHURCH:** So Mr. Lamel told you that we
10 can have a farm dwelling, and the chair of the DLNR
11 said we couldn't.

12 **COMMISSIONER OKUDA:** Okay. Well, let me
13 ask you whether you're aware that not only in the DR
14 orders or matters that I just referenced, but in at
15 least two prior Land Use Commission rulings dating
16 back several decades, it's been made clear, has it
17 not, that a farm dwelling defined under HRS 205-
18 4.5(a)(4) is either a single-family dwelling that
19 either must be located on and used in connection
20 with a farm or where agricultural activity provides
21 income for the family occupying the dwelling.

22 In other words, residential use of a farm
23 dwelling without any connection to agricultural use
24 is not an allowable farm dwelling, and the
25 agricultural use must provide income to the -- to

1 either or from that actual parcel where the farm
2 dwelling is located or to the family occupying the
3 farm dwelling from some other agricultural parcel.

4 In other words, simply growing a papaya on
5 a lot for one's personal consumption does not make
6 the dwelling a farm dwelling. Do you understand
7 that?

8 **MR. CHURCH:** Yes.

9 **COMMISSIONER OKUDA:** In other words, even
10 though we might know from common knowledge that
11 people put residences -- sometimes big houses, what
12 you might even describe as a mansion -- on
13 agricultural land, and there's no income-producing
14 crops taking place there, even though that might be
15 taking place, the fact that something is taking
16 place which violates the law doesn't make it right.
17 Do you agree with that?

18 **MR. CHURCH:** Yes. The problem I'm hearing,
19 it seems to me we're going back and forth between
20 DLNR rules and Land Use Commission rules. DLNR rules
21 are different.

22 And so everything we applied for was
23 according to DLNR rules until we came with this
24 petition and said, you know what? You never put it
25 in conservation district in the first place.

1 **COMMISSIONER OKUDA:** Well, again, this
2 goes to whether or not -- and this is going to be my
3 final couple of questions. And it goes to whether or
4 not you're meeting your burden of proof to show that
5 we have something which is more than a speculative
6 or theoretical question which would allow the
7 granting of a declaratory ruling.

8 So my final set of questions, basically
9 this, deal with the intent to have a farm dwelling
10 which complies with the requirements of the law.
11 Have you ever filed a Hawai'i general excise tax
12 return where you reported to the Hawai'i taxing
13 officials income from farming or agricultural
14 production?

15 **MR. CHURCH:** We have never filed. I think
16 we're coming back (inaudible) and I don't mean to
17 say (inaudible)

18 **COMMISSIONER OKUDA:** I'm sorry. Mr.
19 Church, I can't -- I can't hear you.

20 **COMMISSIONER SCHEUER:** You're fading out,
21 Mr. Church.

22 **MR. CHURCH:** Okay. The current petition is
23 not asking you to rezone. The current petition is to
24 issue a declaratory order that it was never zoned in
25 conservation in the first place.

1 **COMMISSIONER OKUDA:** Yeah. Mr. Church --

2 **MR. CHURCH:** Yeah?

3 **COMMISSIONER OKUDA:** Mr. Church, I'm sorry
4 to interrupt. I'm -- I'm again just trying to
5 determine in my own mind -- and by the way, I
6 haven't made up my mind at all in any of this. I'm
7 just trying to find out whether or not there is a
8 sufficient controversy which meets the burden to
9 allow a declaratory ruling. That's all.

10 And so please don't read anything into --
11 into my questions. And my questions, I believe, are
12 basically yes or no questions. So the question is
13 have you ever filed a Hawai'i general tax return --
14 a Hawai'i GE tax return where you reported income
15 from agricultural or farm activity?

16 **MS. HILDAL:** No, we haven't. This is
17 Joanie.

18 **COMMISSIONER OKUDA:** Okay.

19 **MS. HILDAL:** And I wanted to answer your
20 previous question also. At the point at which we put
21 in our CDUA for a single-family residence --

22 **COMMISSIONER SCHEUER:** All right. One
23 moment. One moment, Ms. Hildal. Do you have the
24 audio playing in the background? Are you watching
25 this via another device?

1 **MS. HILDAL:** Oh, that's not us.

2 **COMMISSIONER SCHEUER:** Oh. Somebody. Okay.

3 All right. Thank you. Mr. Sitagawa, can you mute?

4 Okay. It was Mr. Sitagawa. I just muted him. I

5 apologize. Please continue with your response, Ms.

6 Hildal.

7 **MS. HILDAL:** Okay. I wanted to answer.

8 Well, the first question was about the tax. And the

9 reason that we hadn't was because we had no -- the

10 trees were small when we planted them, and there was

11 no -- there was no crop to sell or anything at that

12 point.

13 And also, when we did apply for our farm

14 dwelling first, and then our single-family

15 residence, we had already gotten permits for 13

16 orchard trees, which were also still very small, and

17 we had every intention of selling them, if we could,

18 at the point at which they had fruit on them.

19 **MR. CHURCH:** We also had about 300

20 pineapples growing, and, in fact, they've been

21 cultivated under now because you get three years of

22 use of them and then don't get good production.

23 What happened here that confuses this is

24 we could not get a straight up and down letter, it

25 was clear, from Conservation that we're allowed to

1 do nonconforming use on the property.

2 And because the DLNR had visited the
3 property one time when we weren't here -- they went
4 all over it, and my neighbor said one of the
5 representatives even had a gun -- we began to think
6 why are these guys -- are they out to get us?

7 So the Conservation ruled that commercial
8 use of conservation lot or ground is strictly
9 prohibited. And here we were commercially using it.
10 So we stopped going to the farmers' market, and we
11 harvested our last pineapples and said we better
12 quit until this is sorted out.

13 **COMMISSIONER OKUDA:** Okay. My final
14 question, then, is that if you intended actual
15 agricultural uses, why wasn't there a detailed
16 description of the potential environment impacts, if
17 any, of the intended agricultural uses presented in
18 your environmental assessment?

19 **MR. CHURCH:** Well, it sort of is there. We
20 referenced our permit for a house and the EA for
21 that, and it was all revealed in there that we had
22 lately converted the property into an ag use
23 property.

24 Just -- just as a sidebar, we have a large
25 Kubota farm tractor, a little rototiller. It's

1 stored in our ag use storage and processing
2 structure, where we -- there's this, you know,
3 there's a full washroom facility there. There's a
4 sink and a countertop to process stuff. We were all
5 set up to get going. And then, we'd be --

6 I mean, in the end, they gave us the
7 permit to build a house, but they would not clearly
8 say whether we could do ag use. So -- and we were
9 wary of them, because they fine people all around us
10 upwards of \$15,000 for every single violation. So we
11 stopped. And if we don't have a license today,
12 that's why. The tax license.

13 **COMMISSIONER OKUDA:** Okay. Thank you very
14 much for your answers. They have been very helpful.
15 Thank you, Mr. Chair. No further questions.

16 **COMMISSIONER SCHEUER:** Okay, Commissioner.

17 **MS. HILDAL:** May I say one further
18 statement, Commissioner Okuda?

19 **COMMISSIONER SCHEUER:** Ms. Hildal, you may
20 respond, but you need to get a little closer to the
21 mic.

22 **MS. HILDAL:** Okay. It seems to me that the
23 whole question here is do you consider the 1969
24 report, which contained recommendations (inaudible)
25 to be the law, or do you consider the map the law?

1 (Inaudible).

2 In the statutes, the Hawai'i HAR and our
3 statutes, it says the highest protection was to be
4 given to ag land, which our property was intensively
5 being used for ag land in 1969.

6 **COMMISSIONER SCHEUER:** Your -- your
7 response is finished, Ms. Hildal?

8 **MS. HILDAL:** Yes. Thank you.

9 **COMMISSIONER SCHEUER:** Anything further,
10 Mr. Okuda?

11 **MR. CHURCH:** Your own rules and the
12 statute refer to the fact that the land has to have
13 the capacity for production of agricultural crops.
14 It does not say that it has to be used for that.

15 **COMMISSIONER SCHEUER:** Anything further,
16 Commissioner Okuda?

17 **COMMISSIONER OKUDA:** Mr. Chair, nothing
18 further. Thank you very much.

19 **COMMISSIONER SCHEUER:** Okay. Thank you.
20 Commissioner Chang? Thank you for your patience.

21 **COMMISSIONER CHANG:** Thank you very much.
22 And thank you very much, Mr. Church and Ms. Hilda.
23 Appreciate all the research that you've done. I just
24 have a couple of clarifying questions I want to ask
25 you so that I'm very clear on what the record is.

1 In both your -- your opening statements
2 and your files, you referenced that DLNR recommended
3 getting a professional. Was that for purposes of
4 getting a conservation district use permit, or was
5 that for getting a district boundary amendment?

6 **MR. CHURCH:** It was for getting several
7 ongoing CDUPs.

8 **COMMISSIONER CHANG:** CDUPs. Okay. So --
9 and it appears as if in your own testimony today was
10 that when you bought the property, you knew that it
11 was zoned conservation; is that correct?

12 **MR. CHURCH:** We knew that it appeared to
13 be zoned conservation.

14 **COMMISSIONER CHANG:** Well, is the
15 different -- well, let me ask you this. You also
16 filed a district boundary amendment, is that
17 correct, to change this from conservation to
18 agriculture. Is that correct?

19 **MR. CHURCH:** At that particular time, we
20 believed it to be in conservation.

21 **COMMISSIONER CHANG:** Okay. And prior to
22 that, my understanding is that Mr. McCully, who
23 previously owned the property, also filed a district
24 boundary amendment in 2005 and 2009.

25 **MR. CHURCH:** Correct.

1 **COMMISSIONER CHANG:** Were you aware of
2 that?

3 **MR. CHURCH:** Correct.

4 **COMMISSIONER CHANG:** Okay. So you knew
5 that.

6 **MR. CHURCH:** That's correct.

7 **COMMISSIONER CHANG:** Okay. So everyone,
8 including yourself, when you purchased the property,
9 when you filed your DBA, when the McCullys also
10 filed their DBAs, understood or believed that this
11 property was conservation; is that correct?

12 **MR. CHURCH:** Correct.

13 **COMMISSIONER CHANG:** Okay. Very good. Very
14 good. So -- and you went so far as to prepare a
15 FONSI in your DBA; is that right?

16 **MR. CHURCH:** Yeah. We provided NEA, and
17 then you made a FONSI. We provided a draft FONSI.

18 **COMMISSIONER CHANG:** Okay. So you -- you,
19 I mean, Mr. Church and Ms. Hildal, you actually
20 spent a tremendous amount of time, it appears,
21 working on that document as well as all of these
22 different actions that you filed.

23 So you've done -- I mean, you both seem to
24 be extremely bright people who have the ability to
25 utilize these resources, and you've presented your

1 case before us.

2 And I understand that the question that
3 you have in this particular declaratory action is
4 whether this is -- whether the Land Use Commission,
5 based upon the information you provided, should now
6 -- and you believe that there was an error -- should
7 now transfer -- should now change the zoning on this
8 property from conservation to agriculture. Is that
9 what I understand your -- your action to be?

10 **MR. CHURCH:** Sort of. My wife also wants
11 to say something.

12 **COMMISSIONER CHANG:** Okay. Go ahead.

13 **MR. CHURCH:** We're talking about whether -
14 - you're implying in your question, it would seem,
15 that you believe that your district map is final.
16 And I'm saying DR 99-21 and your report itself
17 describe that the maps are not the final authority.

18 **COMMISSIONER CHANG:** Okay.

19 **MR. CHURCH:** It's very well described in
20 the report. And let me just -- I want to read a
21 sentence from that, because we're going back and
22 forth on my original petition.

23 It's not -- it's not unusual that someone
24 files a petition, and then new information comes
25 available, and they say -- in this case, we say

1 that's not even in conservation, because the
2 official record of the report -- I want to just,
3 with your permission, read the preface page of the
4 report.

5 **COMMISSIONER CHANG:** Mm-hmm.

6 **MR. CHURCH:** It says, Chapters 4 through 7
7 are a summary of the recommended changes to the
8 district boundaries in the four counties. Now with
9 emphasis. Since these were acted upon by the Land
10 Use Commission -- I'm adding that -- during the
11 preparation of this report, we are able to provide
12 the commissioners' decisions with respect to them.
13 In this way, the text becomes not just a report to
14 the commissioners, but a record of its actions as
15 well.

16 **COMMISSIONER CHANG:** Okay. Thank you. I
17 appreciate that, Mr. Church. I think that there are
18 also other legal principles that guide us,
19 principles like reliance, like estoppel, which
20 essentially means that for probably the last 50 or
21 so years that -- is that correct -- everyone has
22 relied upon the information, the long line of
23 information related to this property, that the
24 property is zoned conservation.

25 Even you -- even you relied upon that when

1 you purchased the property, when you went to see
2 DLNR, even the McCullys. Everyone relied upon that
3 information.

4 In my view, you haven't provided us new
5 information to reconsider this. You've provided us a
6 new interpretation of information that had
7 previously been considered when the property was
8 originally zoned.

9 So I think that that's -- that's a
10 difficulty I'm having, is that you relied upon
11 certain documentation and information. The McCullys
12 relied upon certain documents and information. And
13 as Commissioner Cabral said, the price was -- may
14 have been based upon that particular zoning being
15 conservation.

16 So you -- I'm not -- I am troubled that I
17 don't see new evidence. What I see is -- is your
18 interpretation of information that had been
19 previously been the basis for the zoning in this
20 property.

21 So that's -- that's sort of my struggle
22 with this current petition, or this current
23 declaratory action that you're presenting to us, is
24 that you're not providing us anything new for a
25 declaratory action, but you're asking us to reopen a

1 matter that had previously been -- been resolved,
2 settled, and relied upon by all the owners.

3 Do you understand some of the challenges
4 that I'm having here?

5 **MS. HILDAL:** Yes. I do. And Mr. Church
6 also wants to answer this question. But I want to
7 say that in 1992, Mr. McCully was given a boundary
8 interpretation. It wasn't a final law. He was given
9 a boundary interpretation, which is there's allowed
10 to be a few.

11 Anyways, Mr. McCully had uncertainty;
12 otherwise, he wouldn't have gone through the motions
13 that he went through. And also, we've had
14 uncertainty ever since, because you've gone through
15 all these motions to try to understand what's really
16 going on.

17 And when we finally found the law written
18 in black and white clearly, to me it seems that that
19 may be new information pertaining to our property
20 individually that shows that it should never have
21 been put into conservation, if it had been.

22 I don't think there is any documentation
23 that says our property was put into conservation. If
24 it had been put into conservation, where are the --
25 the supporting documents?

1 **COMMISSIONER CHANG:** On my -- the
2 supporting documents are the zoning maps, all of the
3 -- the fact that several DBAs have been filed to
4 change the zoning from conservation to agriculture.
5 And I do appreciate that both of you recognize that
6 there are different purposes for conservation lands.

7 So I understand DLNR's questioning about,
8 you know, what type of agricultural uses were you --
9 were you proposing versus if it was agriculturally
10 zoned lands. Yes, a farm dwelling versus a
11 residence. There's very -- there's distinctions.

12 So you seem to be very akamai, or you
13 understand that there is a difference between
14 conservation and agricultural uses. But go ahead,
15 Mr. Church. Did you want to answer or clarify?

16 **MR. CHURCH:** Yes. I want to answer one
17 part of your question. I'll respond to it. You
18 referred to estoppel. I don't know if I can
19 (inaudible), but I think I understand what it means.

20 In 1999, 30 years after these maps were
21 drawn and after boundary interpretations -- two
22 successive ones -- were issued to them, along comes
23 Mr. Stengel in DR 99-21. And just like us, he said,
24 you know what? Uncertainty remains; this land was
25 never put into conservation. And he made his case

1 before an earlier commission.

2 And in their conclusions of law, the
3 commission made a statement in -- in -- under the
4 applicable legal authorities there -- and I could
5 read it to you if it would be helpful, but I'll say
6 they said, no, no, those two boundary
7 interpretations that were issued are incorrect.

8 You have provided evidence in this report
9 that says the top of the cliff was all that was ever
10 approved to be the boundary line, irrespective of
11 what the maps say.

12 So I don't know whether McCully or us are
13 at fault here for filing petitions to rezone it. The
14 problem here -- these records were buried. DR 99-21,
15 which changed Map H59, is not available on your
16 website. It wasn't available no matter where we
17 looked. We couldn't find it.

18 And after a lot of sleuthing, we uncovered
19 that piece of evidence which points to the
20 commission's decision in 1999 that the maps were
21 wrong. And that's where we are today with this
22 petition.

23 **COMMISSIONER CHANG:** Okay. Thank you for
24 the explanation. So, Mr. Church, DR 99, are you
25 saying that that's this property or that's another

1 property?

2 **CHURCH:** It's five miles north of here.

3 **COMMISSIONER CHANG:** Okay. And that's --
4 that's a difficulty. The only matter that in the
5 record we're reviewing is the one -- is your
6 property. I don't know the -- I don't know the facts
7 of Mr. Stengel's case, his property, whether indeed
8 it is the same as yours or whether it's different
9 from yours.

10 So for me, at least, as the commissioner
11 here, I can only evaluate the facts that have been
12 presented on your case and cannot use Mr. Stengel's
13 property as any kind of a precedent to making a
14 determination in this matter. So I hope you can
15 understand, in my view, the limitations.

16 So while you believe that the Stengel
17 matter may be precedent and the basis for your
18 property, for me, I don't know what the facts in
19 that case were, but I can only evaluate your case
20 based upon your facts.

21 And what I've seen is that everyone who --
22 who is involved with this property not only believed
23 in -- I mean, they treated it like it was
24 conservation.

25 You went and got a Cдуа. You went to DLNR

1 for a CDUA. So did Mr. McCully. So while there may
2 have been uncertainty about the zoning, all of you
3 acted on the basis that it was conservation land.

4 So I understand the position that you
5 have, and I appreciate the work that you've done on
6 this matter, but that's -- I don't know if you've
7 got anything more to add, but those are -- I think
8 you've answered all the questions. Well, let me ask
9 you one more question, Mr. Church.

10 **CHURCH:** If I may come back first, though.

11 **COMMISSIONER CHANG:** Okay.

12 **CHURCH:** Your rules -- I would have put
13 the Stengel decision in here as an evidentiary
14 document exhibit. Your rules say I don't have to if
15 it's an official Land Use Commission record. So I
16 have referred to it, and it's supposed to be
17 available to you, and I've only followed your rules
18 that I didn't. I referred to it, I'm not required to
19 exhibit it, but it is a precedential document of
20 sorts.

21 If you look, if it's made available to you
22 and you look at it under applicable legal
23 authorities, there the commission virtually took a
24 quote out of the report, and it said in a case where
25 the shoreline is bounded by (inaudible).

1 **COMMISSIONER CHANG:** I think I'm losing
2 you, Mr. Church.

3 **COMMISSIONER SCHEUER:** Yeah. Mr. Church,
4 you've faded away.

5 **MR. CHURCH:** The -- I'm going to try to
6 put my thought back together. The DR 99-21, we have
7 cited that. We intend that it be included in the
8 record here for your consideration. And the only
9 reason it's not in our exhibits, it says clearly in
10 our petition that it's not required to be exhibited
11 if it's one of your official records.

12 **COMMISSIONER CHANG:** Okay. I appreciate
13 that. I think I would nonetheless would have liked
14 to have -- I don't know whether their facts are
15 totally the same as yours. I know we can rely upon
16 other cases for if there's a legal precedent, but
17 one that's factually based? It would be very helpful
18 to see the facts in that case.

19 So at this point in time, I can only
20 evaluate your declaratory action based upon the
21 facts of your case. And let me just ask you one
22 final question, both Mr. Church and Ms. Hildal. If
23 your motion is -- if your declaratory action is
24 denied, will you proceed forward on filing a
25 district boundary amendment?

1 **CHURCH:** Yes.

2 **COMMISSIONER CHANG:** All right.

3 **CHURCH:** However, we may first choose
4 other legal avenues to explore the petition for a
5 declaratory order.

6 **COMMISSIONER CHANG:** All right. Fair
7 enough. I have no further questions, Mr. Chair.
8 Thank you, Mr. Church and Ms. Hildal.

9 **COMMISSIONER SCHEUER:** Thank you,
10 Commissioner Chang. Commissioners, further
11 questions for Mr. Church or Ms. Hildal at this time?

12 **MS. HILDAL:** Am I able to ask Ms. Chang a
13 question, please?

14 **COMMISSIONER SCHEUER:** No. It doesn't work
15 that way in these kinds of proceedings. The
16 commissioners get to ask questions. You can raise a
17 point, if you wish to.

18 **MS. HILDAL:** Can I raise a point, please?

19 **COMMISSIONER SCHEUER:** Yes.

20 **MS. HILDAL:** I think what -- the new thing
21 that Ms. Chang is trying to understand from us is
22 that do you consider the 1969 report which contained
23 the action taken by the LUC in determining
24 conservation values to be the law, or do you intend
25 the maps to be the law, even though there's been

1 cases that have shown that the maps were incorrect?

2 That's my statement. I'm sorry.

3 **COMMISSIONER SCHEUER:** Thank you very
4 much.

5 **CHURCH:** There are other examples where the maps

6 **COMMISSIONER SCHEUER:** Sorry. Mr. Church,
7 I'd ask you to at least, like, say you'd like to add
8 something.

9 **CHURCH:** Okay.

10 **COMMISSIONER SCHEUER:** It's hard,
11 especially when I cannot see you, to manage the
12 proceedings well.

13 **CHURCH:** May I add something?

14 **COMMISSIONER SCHEUER:** Yes.

15 **CHURCH:** I'm aware of two other cases that
16 have come before this commission. One was Stengel.
17 One was on O'ahu. And there the map was found to not
18 be right. And in both cases, the commission said
19 that the words of the proceedings in those days had
20 at least equal if not more meaning than the maps.

21 So in two cases I've found so far where
22 the maps were found to not be the final document.
23 I'd be happy to cite the other one if you want me to
24 look it up.

25 **COMMISSIONER SCHEUER:** You may raise it

1 further. Let me check in with the commission.
2 Commissioners, do you have further questions for Mr.
3 Church or Ms. Hildal at this time? Commissioners? I
4 have one question at this time.

5 And it has to do -- so it's looking at
6 this from a very different angle, Mr. Church and Ms.
7 Hildal, more from the angle of the way we process
8 declaratory rule in petitions. And the Land Use
9 Commission, the Hawai'i Administrative Rules
10 describe how we can consider and when we can
11 consider or deny declaratory rule in petitions.

12 And one of the considerations that we have
13 in front of us is whether the action -- and give me
14 one second while I pull up the exact language. So
15 under HAR 15-15-100(a), the commission for good
16 cause can deny a petition and refuse to issue a
17 declaratory order under four circumstances.

18 And one of those circumstances is the
19 issuance of a declaratory order may affect the
20 interests of the commission in litigation that is
21 pending or may reasonably be expected to arise.

22 So one question I have regarding this is
23 whether or not the situation you find yourselves in
24 in your property is unique to your particular area,
25 or indeed are there a large number of other parcels

1 on the coastline between Hilo and Hamakua that are
2 currently in the conservation district that, if the
3 commission chose to rule and grant the ruling that
4 you're seeking, would suddenly be considered to
5 either be now an agricultural district or possibly
6 have been previously restricted from uses by being
7 determined to be in the conservation district?

8 **CHURCH:** So we don't know --

9 **COMMISSIONER SCHEUER:** Do you understand
10 my question?

11 **CHURCH:** Yeah. I would point that so far,
12 we're only the second party in 60 -- 50 years since
13 this first boundary amendment went through. It's
14 been 20 years since the last party came before you
15 in this. So it's not for us to decide.

16 And I don't know that you would be
17 litigated. There might be other people that, you
18 know, are asking for their -- their own boundary
19 interpretation based on this same practice. We don't
20 know.

21 **COMMISSIONER SCHEUER:** Thank you for your
22 response. I don't have anything further at this
23 time. Commissioners, anything further? Ms. Kato,
24 may I check in with you? How long do you think your
25 presentation will be?

1 **MS. KATO:** About five minutes.

2 **COMMISSIONER SCHEUER:** Okay. Why don't we
3 roll into your presentation? And then we'll take a
4 recess, and then we'll come back for questions.

5 **MS. KATO:** Okay. Thank you, Chair. The
6 Office of Planning and Sustainable Development would
7 have no objection to Land Use Commission's granting
8 of petitioners' request of declaratory order
9 interpreting the boundary to be located at the top
10 of the sea pali.

11 And the question here is where the
12 conservation district boundary was intended to be
13 drawn at the time it was established. And the first
14 state land use district boundary review was
15 completed in 1969, and it designated a band of
16 coastal lands around the island in a conservation
17 district.

18 The report, however, did not clearly state
19 or map out in detail where the boundary was for any
20 particular land. It did so just in broad scopes and
21 on conditions. As such, the location of the boundary
22 has to be identified by applying the guidelines in
23 the 1969 report.

24 The 1969 report discusses the intent of
25 where that conservation district was intended to be.

1 And the report states generally that the pali lands
2 of the Hamakua Coast are included in the
3 conservation district using the ridge top as the
4 boundary and that land in agricultural use were
5 excluded.

6 There were, however, many deviations from
7 the general standard for various reasons, including
8 specific features such as a road or, you know, other
9 physical features. And the report on page 86 lists
10 out four specific conditions to be used in
11 determining the conservation boundaries in shoreline
12 areas. And I believe two of those conditions are
13 relevant.

14 One of the conditions states that where
15 the shoreline is bounded by steep cliffs or a pali,
16 the top of the ridge is used as the boundary.

17 Another condition states that where
18 there's an access way, like a road, at the edge of
19 agricultural use within reasonable proximity to the
20 shoreline, then that access way is used as the
21 boundary.

22 For the petition area, there's both cliffs
23 and a railroad right-of-way, meaning that both
24 conditions could apply, the two conditions that I
25 mentioned.

1 Regarding the railroad right-of-way,
2 however, the condition states that the access way is
3 used when it is at the edge of agricultural use. And
4 petitioner has indicated that at the time of the
5 1969 report, the petition area makai of the railway
6 was in agricultural use.

7 And petitioner's exhibits also show that
8 the land was owned by Mauna Kea Agribusiness and
9 Seed Growing Company, and there's a statement from
10 the sugar cane land manager about the agricultural
11 use on the property.

12 And if this is correct, then the railway
13 does not necessarily match the condition for use as
14 the boundary, so it's less likely that it would have
15 been used.

16 But as I said before, there isn't anything
17 that specifically shows or states what this
18 particular property, where the boundary should be.
19 So it's unclear. And I think it could, based on the
20 facts, go both ways.

21 And over the years, many similar
22 properties, similar coastal properties, have come
23 before the LUC to determine that the boundary is or
24 should be located at the top of the sea pali. And I
25 think due to a lack of clarity stemming from the

1 1969 report, it's possible to interpret the boundary
2 in different locations. And the LUC and LUC staff
3 have previously determined that the location of the
4 boundary can be at the top of the sea pali for some
5 of the coastal properties.

6 Commissioner Chang mentioned wanting to
7 know about any similar situations. As noted in our
8 written submission, there was a boundary
9 interpretation No. 09-19 Merrigan (phonetic).

10 It's a boundary interpretation for a
11 coastal property in North Hilo, and that
12 interpretation found that the boundary was at the
13 top of the sea pali. And in that property, a portion
14 of the railroad right-of-way was also there, which
15 is similar to the petition area.

16 For these reasons, OPSD would not object
17 to the LUC's issuance of a declaratory order
18 interpreting the boundary to be located at the top
19 of the sea pali. Thank you.

20 **COMMISSIONER SCHEUER:** Okay. Thank you
21 very much, Ms. Kato. We will recess. It's 10:51. We
22 will recess until 11:01. I will note for the record
23 and any members of the audience who are interested,
24 the single declaratory ruling which was referenced
25 earlier by Mr. Church is available on the LUC

1 website under Declaratory Rules. With that said,
2 it's 10:51. We will recess until 11:01.

3 **(Recess taken from 10:51-11:01 a.m.)**

4 **COMMISSIONER SCHEUER:** The time is 11:01.
5 We are back on the record. We have just heard from
6 Ms. Kato. If you're picking up leaf blowers in the
7 background on my audio, I apologize. I have this
8 among the matters outside my control.

9 But we have heard from the Office of
10 Planning, and now they are available for questions
11 from the commissioners. Commissioners, questions
12 for the Office of Planning? Commissioner Okuda,
13 followed by Commissioner Chang.

14 **COMMISSIONER OKUDA:** Thank you, Mr. Chair.
15 Questions for the Office of Planning, and anyone
16 from the Office of Planning can answer this
17 question. What is the standard of review that would
18 be applied to our decision if we granted the
19 petition or denied the petition? What would be the
20 standard of review on appeal?

21 **MS. KATO:** On appeal to the court?

22 **COMMISSIONER OKUDA:** Yes. Let's say if
23 somebody, an aggrieved party, decided to appeal the
24 decision that we make today, either granting the
25 petition or denying the petition, what would be the

1 standard of review that the appellant court would
2 apply?

3 **MS. KATO:** Offhand, I'm not sure what the
4 standard of review is. I believe, generally,
5 deference is given to the LUC's decision, but I
6 would need to look up the specific standard of
7 review. I've not been involved in an appeal yet.

8 **COMMISSIONER OKUDA:** If -- is this a case
9 where it's clear that we would be reversed on appeal
10 if we made a decision one way or the other?

11 I mean, there are some cases where you
12 look at the **factual record** and the **evidentiary**
13 **record** and the pleadings, and, you know, even though
14 nothing is guaranteed in the legal system, you
15 pretty much can predict, hey, if the decision went
16 this way, odds are the appellant court would
17 reverse.

18 Is this the type of case where, when you
19 look at the record that's being presented, we are
20 compelled to rule one way or the other based on the
21 penalty of we're going to be reversed?

22 **MS. KATO:** Well, as I mentioned in my
23 testimony, **the Office of Planning and Sustainable**
24 **Development does not believe that the answer is**
25 **clear. We don't think that the 1969 report is clear**

1 as to where this boundary is located.

2 So I think it is up to the LUC's best
3 determination as to where the boundary of the
4 conservation district was intended to be, based on
5 the information before you. So, no, I don't think
6 it's clear.

7 **COMMISSIONER OKUDA:** Okay. And so we have
8 the discretion or deference to make the decision; is
9 that correct?

10 **MS. KATO:** I believe that's correct. Yes.

11 **COMMISSIONER OKUDA:** Now, the Office of
12 Planning and Sustainability -- you're basically like
13 the community watchdog. And, you know, just to use
14 layperson's description, I mean, is that a fair
15 statement?

16 **MS. KATO:** I'm not sure.

17 **COMMISSIONER OKUDA:** Oh, okay. Well, let
18 me ask the public policy question, then, just to
19 help inform my decision-making a little bit.

20 You know, from a statewide public policy
21 issue -- and to some extent this is somewhat a
22 follow-up on Commissioner Cabral's initial line of
23 question -- is it a matter of concern to the Office
24 of Planning that some people -- and I'm not accusing
25 the Churches of this at all, but, you know, from an

1 overall public policy situation, that there are
2 situations where people buy conservation-designated
3 property because it's cheap or priced lower than
4 urban or rural designated property, and it's the
5 intention that, hey, I'm just going to do urban or
6 rural activity on that property, but I got it on the
7 cheap, and more likely than not, the government --
8 and many times these are the county entities --
9 aren't really going to enforce the restrictions?

10 I mean, isn't it true that's really a
11 public policy concern among many of public policy
12 concerns we have? In other words, people don't
13 really deep down respect the agricultural or -- or
14 conservation designation, that it's not -- it's,
15 like, something that maybe we can get around later
16 on down the road?

17 **MS. KATO:** I understand that concern and
18 the discussion that happened on it today. At the
19 same time, I don't think it's my place to comment on
20 policy matters. And I think that the immediate
21 question before the LUC on this declaratory order is
22 a legal one. It's a legal interpretation of where
23 that conservation district boundary should be, and I
24 don't think it's a question of policy.

25 **COMMISSIONER OKUDA:** Well, in making a

1 legal determination, is the LUC precluded from
2 taking into account what might be the underlying
3 factual situation?

4 And the reason why I raise that is, you
5 know, just a while ago, as you're probably aware, we
6 were faced with what I would describe as a somewhat
7 technical argument being made to allow short-term
8 vacation rentals on agriculturally districted land -
9 - you know, very cogent technical argument. But, you
10 know, it -- it, in my view, required looking at what
11 is really the reality of going on.

12 In making our legal determination, are we
13 supposed to shut our eyes to the reality of what
14 might be going on?

15 **MS. KATO:** I'm not too sure how to answer
16 that question.

17 **COMMISSIONER OKUDA:** No, no, that's fair.

18 **MS. KATO:** I understand that you're just
19 going to consider what you -- what you're aware of
20 and what you hear, but in terms of this legal
21 question, it is really a legal question as opposed
22 to, like, a DBA, which is a policy matter.

23 **COMMISSIONER OKUDA:** Well, if we have --
24 and I'm just speaking for myself. If I were to have
25 a concern that this legal question might have

1 factual implications -- or to put it in plain
2 English, there might be a lot more going on than
3 simply a legal question, would I be erroneous to the
4 point where I get reversed on appeal if we said
5 maybe the record's got to be fleshed out more in
6 detail either by scheduling the matter for a hearing
7 or maybe taking it up on some other matter that's
8 already pending?

9 I mean, would -- would I be totally crazy
10 to come to that kind of conclusion that, hey, when
11 we're dealing with important lands like conservation
12 or we're dealing with agricultural lands, something
13 that the constitution has, you know, given special
14 protection and recognition, maybe we better to make
15 sure we have a complete factual record so that, you
16 know, there's no question what's really going on?

17 In other words, maybe you don't flesh the
18 record out. Would I be totally wrong to the point
19 where I get reversed by the Hawai'i Supreme Court?

20 **MS. KATO:** Commissioner Okuda, I
21 apologize. I don't think that I can necessarily
22 answer that.

23 **COMMISSIONER OKUDA:** Okay. No, no, that's
24 fair enough, fair enough. Okay. Thank you, Mr.
25 Chair. I have no further questions.

1 **COMMISSIONER SCHEUER:** Mahalo,
2 Commissioner Okuda. Commissioner Chang, followed by
3 Commissioner Ohigashi.

4 **COMMISSIONER CHANG:** Thank you, Mr. Chair.
5 And thank you, Ms. Kato. I just have a couple of
6 questions. Is the Office of Planning's position that
7 you support the Churches' declaratory -- motion for
8 declaratory action? Or are you, you know, we would
9 call, like, sort of in Hawaiian kanalua? Are you --
10 you know, you could go either way?

11 **MS. KATO:** It would be either way.

12 **COMMISSIONER CHANG:** Okay. Okay.

13 **MS. KATO:** I think that's unclear, so we
14 think that it's up to the LUC's discretion.

15 **COMMISSIONER CHANG:** Okay. That's helpful.
16 So even -- okay, that's --that's helpful. So --
17 because I want to follow up with the line of
18 questioning by the chair. If -- if the LUC acts on
19 the Churches' petition, because the Churches are
20 essentially saying an error was made on the map.

21 **MS. KATO:** Mm-hmm.

22 **COMMISSIONER CHANG:** And so if an error
23 was made on the map for the Churches' property, then
24 an error was made on the map for all of the
25 properties along this strip -- or for who knows how

1 far. But whatever the maps that were made at that
2 time point in time, an error was made. Do you know
3 how many properties where this -- this same
4 situation applies to?

5 **MS. KATO:** I do not know that, but also,
6 each property is different, so, you know, I would
7 not be aware of how many properties are exactly the
8 same. And as I mentioned before, there's general
9 standards, but there are also many deviations from
10 that general standard.

11 So, you know, some properties may have had
12 a road, or some properties were in agricultural use,
13 some were not.

14 **COMMISSIONER CHANG:** Okay. But wouldn't
15 you agree that if we accept Mr. Church's argument
16 that a mistake was made and that we go back and we
17 change it to -- to grant -- to agree to grant the
18 declaratory action, that there could be other
19 properties along this area who'll also come back and
20 say, well, a mistake was made, or it affects their
21 property in one way or the other?

22 **MS. KATO:** Yes. But at the same time, this
23 is not the first case where a similar property has
24 had this determination.

25 **COMMISSIONER CHANG:** Okay. And are you

1 referring to the Stengel property?

2 **MS. KATO:** There's the Stengel. There's
3 the boundary interpretation that I mentioned,
4 Merrigan. They also -- they also determined that the
5 boundary was at the top of the sea pali.

6 **COMMISSIONER CHANG:** Okay.

7 **MS. KATO:** And we don't know if there are
8 others.

9 **COMMISSIONER CHANG:** And I guess that's my
10 -- that's my point. You are all relying upon, you
11 know, setting as precedent a few cases, but yet
12 there hasn't been an exhaustive review of other
13 properties which may have taken a totally opposite
14 interpretation, notwithstanding the top of the pali.
15 It may still be zoned agriculture.

16 Have you surveyed other properties that
17 have had the same issue related to top of the pali,
18 where all properties where the boundary is top of
19 the pali, that's all -- that's the line between
20 conservation and agriculture?

21 **MS. KATO:** I'm not aware of this.

22 **COMMISSIONER CHANG:** So that's -- that's
23 the issue that I'm having with sort of this picking
24 of these cases. Because you're asking us to rely
25 upon them as some precedent, but there hasn't been

1 an exhaustive research of other properties where
2 they may have had a different interpretation or
3 different result.

4 Because in looking at the Stengel case,
5 the facts seem to be different here. The facts seem
6 to be different. There was no reliance. There was no
7 previously -- of these three DBAs that were filed in
8 the Stengel case, theirs was purely an
9 interpretation of top of the pali.

10 And I don't know what all the other facts
11 are in the Stengel case, but just from reading that,
12 it seems to be -- I question the reliance on that to
13 in some ways suggest that that -- that that's
14 precedent for the Churches' case, the Churches'
15 situation.

16 **MS. KATO:** Well, we have not said that
17 that's precedent for this situation.

18 **COMMISSIONER CHANG:** Well, you said that
19 that's an example where we've done the same thing.

20 **MS. KATO:** I'm saying that those are
21 examples saying that the matter is unclear and that
22 the LUC has gone both ways from where this
23 determination of the boundary is for similar
24 properties.

25 **COMMISSIONER CHANG:** And have you -- I'm

1 sorry, have you -- have you submitted any other
2 properties where the LUC has gone the other way?

3 **MS. KATO:** Well, for example, the Barry
4 Trust, that was a DBA, so in the DBA, the boundary
5 was interpreted to be -- or not interpreted, but
6 automatically assumed to be more inland. And in that
7 case, for policy reasons, it was changed. Because it
8 was a DBA, that was done based on policy reasons.

9 It's not saying that there was a mistake.
10 It's saying that we're moving the boundary line. So
11 that one in that property, which is a similar
12 coastal property, the boundary was inland.

13 **COMMISSIONER CHANG:** Yeah. I think that
14 was actually very different. I mean, they filed a
15 DBA because it was in conservation, and they wanted
16 it to be moved to to ag. So there was not a question
17 -- and you're right. I mean, I think that whole
18 subdivision, most of the properties weren't ag. But
19 I don't know if I would rely upon that Barry case as
20 being similar to this Churches' case.

21 But I was assuming that you cited those
22 cases for purposes of saying that they're in some
23 way similarly situated to the Church case, and we
24 should look at those cases as -- in some kind of a -
25 - that they set some -- I interpreted your reliance

1 on those cases, or listing those cases, as
2 suggesting that Land Use Commission should use those
3 as examples for similarly situated cases. Is that
4 correct? Is that what you were using them for?

5 **MS. KATO:** That is not correct, entirely.

6 **COMMISSIONER CHANG:** Okay. Tell me. I'm
7 sorry I interrupted you. Go ahead. Explain to me.

8 **MS. KATO:** Sorry. OPSD's position is based
9 on the 1969 report, and based on our review of the
10 1969 report, it just -- we don't think that it's the
11 boundary is clearly at the top of the pali or
12 clearly at the railway or any other particular
13 location. And we just included those cases to show
14 that it is unclear and to give you some examples of
15 similar coastal properties and indicate, you know,
16 the history of the area.

17 But if you're asking about individual
18 properties, that is really a case-by-case basis,
19 because properties have different characteristics.
20 I'm not sure what it would take to actually go
21 through all that.

22 And also, things like the -- like the
23 boundary interpretation that we included, the
24 Merrigan one. That is not available on the LUC
25 website, so I don't think boundary interpretations

1 are necessarily even available or readily found.

2 I think the Stengel case, even though that
3 was -- that was a DR, I don't believe that was also
4 either available or easily found.

5 **COMMISSIONER CHANG:** Okay. And -- all
6 right, I'm sorry. I guess that in my questioning
7 with the Churches, you know, for me as a
8 commissioner, I have to look at it, okay, factually
9 specific. So that's why when -- when I read your
10 okay statement and your reference to some of these
11 other cases, I perhaps misinterpreted your intention
12 for using those cases.

13 But you would agree that it's factually
14 based. It's what's -- what's presented to us by the
15 Churches in their particular matter. All right.
16 Thank you. Thank you, Ms. Kato. I have no further
17 questions.

18 **COMMISSIONER SCHEUER:** Okay, Commissioner
19 Chang. Commissioner Ohigashi?

20 **COMMISSIONER OHIGASHI:** I have a few
21 questions. I'm not clear, Ms. Kato, about what you
22 just relayed to Ms. Chang, Commissioner Chang. If we
23 grant this interpretation by the Churches, does this
24 declaratory ruling affect any additional boundaries
25 in that particular area?

1 **MS. KATO:** I do not think so. I think it's
2 an individual property-by-property determination.

3 **COMMISSIONER OHIGASHI:** So if we do that,
4 that would mean that we would be redrawing in that
5 particular area sort of like a bump; is that right?
6 That would create a hump or a bump there.

7 **MS. KATO:** I have not looked specifically
8 at it, but I believe that the line is already, you
9 know, back and forth, depending on the property.

10 **COMMISSIONER OHIGASHI:** In other words --
11 in other words, you would be creating an additional
12 area that is under agricultural zone; is that right?

13 **MS. KATO:** If you were to grant this
14 declaratory order, that you would be deciding that
15 in 1969, it was determined that this was supposed to
16 be agricultural and not conservation.

17 **COMMISSIONER OHIGASHI:** Would it have any
18 effect, then, for again on the adjacent properties
19 in that area?

20 **MS. KATO:** I don't believe that it would.

21 **COMMISSIONER OHIGASHI:** So our declaration
22 is purely for that particular property. It cannot be
23 used by any other property; is that right?

24 **MS. KATO:** Like the other cases that I
25 mentioned, too, it's just an example or something to

1 consider. I don't think that it would automatically
2 change anything with respect to neighboring
3 properties.

4 **COMMISSIONER OHIGASHI:** Do you -- do you
5 know what permits that the DLNR has given or denied
6 on that particular -- in that particular area for
7 the Church property?

8 **MS. KATO:** I have generally read about it,
9 but I am not that familiar with it.

10 **COMMISSIONER OHIGASHI:** If we were to make
11 this declaratory ruling, would that affect any of
12 the DLNR permits that have been issued? Do you know?

13 **MS. KATO:** I'm not sure. I'm not familiar
14 with the DLNR permits or that process.

15 **COMMISSIONER OHIGASHI:** One of the things
16 that I was curious about is that -- in your review
17 is that the boundary interpretation done by the LUC
18 staff in 1992, is that -- do you believe was not
19 clear? Is that -- is that what -- is that what your
20 belief is?

21 **MS. KATO:** What are you referring to?

22 **COMMISSIONER OHIGASHI:** I'm referring to -
23 - in his petition, I think he refers to a 1992
24 boundary interpretation done by the -- 1992 boundary
25 interpretation done by the commission (inaudible).

1 Do you recall that being mentioned?

2 **MS. KATO:** Are you -- are you referring to
3 the specific property that --

4 **COMMISSIONER OHIGASHI:** Yes.

5 **MS. KATO:** -- the previous owner McCully?

6 **COMMISSIONER OHIGASHI:** Yes.

7 **MS. KATO:** Okay.

8 **COMMISSIONER OHIGASHI:** And he received
9 that; correct?

10 **MS. KATO:** Yes.

11 **COMMISSIONER OHIGASHI:** That
12 interpretation, boundary interpretation.

13 **MS. KATO:** Yes.

14 **COMMISSIONER OHIGASHI:** Has the Office of
15 Planning determined what factors went into the
16 boundary interpretation done in 1992 for Mr.
17 McCully?

18 **MS. KATO:** Our interpretation appears to
19 be based on the assumption that the railroad right-
20 of-way is the correct boundary.

21 **COMMISSIONER OHIGASHI:** Would it -- would
22 it matter in OP's review whether or not that the --
23 that the boundary interpretation was done by using
24 an official Land Use quadrangle map H65? Would that
25 matter?

1 **MS. KATO:** I'm sorry. Would that matter in
2 --?

3 **COMMISSIONER OHIGASHI:** That it came from
4 the official quadrangle map for that area.

5 **MS. KATO:** I understand that there is --
6 that there is a map that was used. But whether that
7 map is correct or not, I don't know.

8 **COMMISSIONER OHIGASHI:** Well, that was the
9 official Land Use Commission map that was adopted by
10 the Land Use Commission.

11 **MS. KATO:** I understand that the map is
12 not entirely clear, and it's a very general line-
13 drawn --

14 **COMMISSIONER OHIGASHI:** That's not my
15 question. My question is was it adopted by the Land
16 Use Commission?

17 **MS. KATO:** I believe so. But I don't think
18 the map is clear.

19 **COMMISSIONER OHIGASHI:** And also, as part
20 of the interpretation, didn't Mr. McCully submit
21 metes and bounds survey of the property in district
22 boundaries?

23 **MS. KATO:** I don't recall exactly. Perhaps
24 someone from OP could answer.

25 **COMMISSIONER OHIGASHI:** Is -- is that part

1 of -- would that be part of Office of Planning's
2 review in this matter to determine what exactly led
3 you to that determination? Or did you just look at
4 the map and say, oh, it's (inaudible).

5 **MS. KATO:** I'm sorry. Could you repeat the
6 question?

7 **COMMISSIONER OHIGASHI:** My question is --
8 my question is very -- maybe it's a compound
9 question. It started off at the beginning as what
10 did you guys review and whether or not you took that
11 into consideration.

12 One of the -- one of the things that I was
13 concerned about was that the landowner at that time
14 in 1992 would have to have provided information
15 concerning metes and bounds and a survey and
16 district boundaries in it. And they would provide
17 that for -- for a commission staff to review.

18 And if -- and according -- would that
19 information factor into your question as to whether
20 or not that determination in 1992 was unclear or
21 needed clarification?

22 **MS. KATO:** I understand that that
23 information is provided to the LUC and the LUC
24 staff.

25 **COMMISSIONER SCHEUER:** Ms. Kato, I'm going

1 to -- Ms. Kato, I'm going to recognize that your
2 client has raised their hand and might wish to
3 respond to this line of questioning.

4 Let me swear you in, Mr. Funakoshi. Do you
5 swear or affirm the testimony you're about to give
6 is the truth?

7 **MR. FUNAKOSHI:** Yes.

8 **COMMISSIONER SCHEUER:** Okay. Do you wish
9 to respond to the question from Commissioner
10 Ohigashi?

11 **MR. FUNAKOSHI:** Yes. The Office of
12 Planning does not review boundary interpretations as
13 a matter of course. This is the role of the Land Use
14 Commission's administrative staff.

15 So we do not review those, only -- only
16 very -- we review, of course, boundary amendment
17 petitions and other matters that come before the
18 commission, such as this one. But typically, we do
19 not review boundary interpretations.

20 **COMMISSIONER SCHEUER:** Please continue,
21 Commissioner Ohigashi.

22 **COMMISSIONER OHIGASHI:** I'm not sure, Mr.
23 Funakoshi, if that answers my question. My question
24 is really is that you came up with a conclusion that
25 there is -- there is -- it's unclear, given the maps

1 and status of the particular line.

2 The question that I really have is that in
3 1992 there was a determination of a boundary, where
4 the boundary was, an interpretation of a boundary.

5 And I'm asking did your finding about the
6 unclarity or -- of unclarity in this situation have
7 -- did you review any of that, of the documents or
8 process that the Land Use Commission executive
9 director in 1992 went through in order to determine
10 where that line is and make a determination whether
11 or not his determination is unclear, needs
12 clarification?

13 **MR. FUNAKOSHI:** I don't think we reviewed.
14 We did review whatever correspondence was provided
15 by the executive director relative to the boundary
16 interpretation. But we did not examine in detail the
17 process that they used to arrive at that.

18 **COMMISSIONER OHIGASHI:** That's important.
19 Thank you.

20 **COMMISSIONER SCHEUER:** Anything further,
21 Commissioner Ohigashi?

22 **COMMISSIONER OHIGASHI:** Yeah. I just have
23 just a few. Ms. Kato, was there a difference
24 between the McCully metes and bounds locations of
25 the railroad right-of-way and the metes and bounds

1 description provided by the Churches, if you know?

2 **MS. KATO:** If there's a difference in
3 where the railroad is located?

4 **COMMISSIONER OHIGASHI:** No. I'm talking
5 about in order for -- the question is, the question
6 that I have. In 1992, Mr. McCully submitted metes
7 and bounds and descriptions showing where everything
8 is and where it's supposed to be, and boundary --
9 and boundary areas and things like that.

10 And later on, the Churches provided some
11 metes and bounds descriptions. Do you know if they
12 match or if there's any discrepancy in them?

13 **MS. KATO:** I have not compared them. No.

14 **COMMISSIONER OHIGASHI:** Would that be
15 important in determining whether or not this
16 petition should go forward or not?

17 **MS. KATO:** It depends on if that's
18 relevant to the -- the conditions that are referred
19 to in the 1969 report, what is the -- I guess, what
20 is the actual thing that you are trying to get out
21 of that metes and bounds description.

22 **COMMISSIONER OHIGASHI:** If there is a --
23 if there's a discrepancy as to where the railroad --
24 former railroad right-of-way was and where the other
25 items were in terms of the -- of the McCully metes

1 and bounds versus the Churches' metes and bounds,
2 that would depend upon how it relates to the 1969?

3 **MS. KATO:** So you're saying if there is a
4 discrepancy in -- or disagreement over the location
5 of the railroad right-of-way?

6 **COMMISSIONER OHIGASHI:** Yes.

7 **MS. KATO:** I mean, I'm not sure if there
8 is a discrepancy or if that would be applicable.

9 **COMMISSIONER OHIGASHI:** I'm just asking if
10 there was. If -- if there was, would that be
11 relevant?

12 **MS. KATO:** I'm not aware of any
13 disagreement as to where the railroad is.

14 **COMMISSIONER OHIGASHI:** That's all the
15 questions I have. Thank you.

16 **COMMISSIONER SCHEUER:** Thank you very
17 much, Commissioner Ohigashi. You know, Mr. Church,
18 I'm going to note procedurally I see your hand
19 raised, and I see you were trying to interject into
20 the conversation.

21 So we're still the Land Use Commission is
22 questioning the Office of Planning. You will have a
23 chance to respond to statements by the Office of
24 Planning after we're done with the Office of
25 Planning and we turn to you for any concluding

1 statements and questions from the commissioners.

2 Is that understood, Mr. Church? You are
3 muted, so if you understand, don't need to indicate,
4 so. Or don't understand by unmuting. Mr. Church?

5 **MR. CHURCH:** Yes. Thank you very much.

6 **COMMISSIONER SCHEUER:** Okay. Thank you. Do
7 you want to lower your hand, then? I want to see you
8 do it first. And, commissioners, are there further
9 questions for Ms. Kato or Mr. Funakoshi at this
10 time? If I see none, I have a couple. And I will
11 leave it to you, Ms. Kato, to direct whether you
12 will answer them or Mr. Funakoshi will answer them.

13 The first question is I've noticed in
14 these proceedings that the reference to Hamakua is
15 perhaps used in a couple of different ways.

16 Some referring -- saying the Hamakua Coast
17 might be referring to the entirety of the coastline
18 between Hilo and Waipio, and others referring to
19 strictly the Hamakua Moku versus the North Hilo
20 district. In which district does the property lie?

21 **MS. KATO:** To be honest, this is a
22 question that I have tried to figure out, and -- but
23 for our purposes, we are considering this property
24 to lie along the Hamakua Coast.

25 But regardless of whether it does or not,

1 if you push that aside, there are those four
2 conditions that I mentioned that are supposed to
3 guide where the boundary is supposed to be located.

4 And if you look just at that, then that
5 one says -- oh, I notice, I think, from Hilo to
6 another location in the general overall segments, it
7 mentions the 300 line, but in the considerations,
8 the 300 mark is only considered if there are no
9 other physical features that are applicable. But in
10 the case of this property, there's the pali and
11 there's the railway. **the railway is 430 ft. inland in one location**

12 **COMMISSIONER SCHEUER:** Okay.

13 **MS. KATO:** So I think those physical
14 features have to be considered first.

15 **COMMISSIONER SCHEUER:** But you're not
16 suggesting that in this case, there is -- or other
17 than the railway line, there is not a physical
18 feature that should be considered?

19 **MS. KATO:** No. **incorrect - there is a "ridge top and**
pali"

20 **COMMISSIONER SCHEUER:** Okay.

21 **MS. KATO:** Not that I'm aware of.

22 **COMMISSIONER SCHEUER:** Okay. You stated
23 earlier in response to a commissioner's question
24 that the maps are unclear. And I would suppose,
25 specifically, you mean Map H65 is unclear. In which

1 way do you believe Map H65 is unclear?

2 Because it's posted to the LUC's website,
3 and I'm looking at it, and I realize that if you are
4 trying to perhaps determine the specific location of
5 the railway that, you know, you might want to drill
6 down to a location.

7 But the line on Map H65 does not,
8 generally speaking, stick to the clifftop, which you
9 can see by the contra lines, but rather as inland,
10 apparently running along the railway line for the
11 entirety, or nearly the entirety, of this map. So
12 I'm not sure in what degree or in what way you're
13 saying that H65 is an unclear map.

14 **MS. KATO:** I think it's a very small map,
15 so it's a little hard to tell exactly where that
16 line is drawn, but I also believe that if you
17 determine that it wasn't the intent to draw the
18 boundary there, then the map could be wrong.

19 And that has been found in other cases
20 where they've determined that the map was drawn
21 incorrectly in relation to the intent.

22 **COMMISSIONER SCHEUER:** But was that only
23 in relationship to the location of the pali rather
24 than the location of the interior road or railway
25 line?

1 **MS. KATO:** You mean --?

2 **COMMISSIONER SCHEUER:** When you say that
3 the LUC has determined that the map is not
4 conclusive and a further determination needed to be
5 made, was that not only in cases where the boundary
6 in question was clearly set on the map, intended to
7 be set on the map at the top of the pali?

8 Whereas on this map, from my just plain
9 reading of the map -- or rather, the digital
10 reproduction of the map on the LUC's website -- if
11 the line was to drawn at the top of the pali in all
12 cases, it wouldn't be significantly inland
13 throughout most of this section of coastline.

14 **MS. KATO:** My understanding is that these
15 maps are based on the 1969 report.

16 **COMMISSIONER SCHEUER:** I'm going to -- I'm
17 going to politely try to push a little bit more so
18 that you answer my question.

19 **MS. KATO:** I think I'm --

20 **COMMISSIONER SCHEUER:** I'm feeling like
21 you're not answering my question. And if I've been
22 unclear, I will try to restate.

23 You said -- correct me if I'm wrong -- the
24 LUC has previously reinterpreted the boundary
25 because the maps have been unclear. Is that correct?

1 MS. KATO: I believe they've reinterpreted
2 the map where they believe it to be incorrect.

3 COMMISSIONER SCHEUER: Okay. And in those
4 cases, was the location of the line in question on
5 those maps solely intended to locate the top of the
6 pali?

7 MS. KATO: You're asking if the line was
8 at the top of the pali.

9 COMMISSIONER SCHEUER: In the cases where
10 the LUC chose to essentially reread the map, in
11 those cases where the LUC was rereading, was the
12 line in question at the top of the pali, at the top
13 of the cliffs, rather than at, for instance, a
14 railway line?

15 MS. KATO: If the line was already there
16 before the -- or it was determined to be at the top
17 of the pali?

18 COMMISSIONER SCHEUER: I will go all day
19 to help you understand my question.

20 MS. KATO: I have not -- I'm sorry. Please
21 go ahead.

22 COMMISSIONER SCHEUER: You -- you were
23 citing to previous cases where the Land Use
24 Commission has said the boundary line was
25 incorrectly drawn on the map, and we are now -- we

1 are reinterpreting it based on a more detailed look
2 at topographical features. Is that correct?

3 **MS. KATO:** I think so.

4 **COMMISSIONER SCHEUER:** Yes or no would be
5 great.

6 **MS. KATO:** Yes.

7 **COMMISSIONER SCHEUER:** So in those cases
8 where the LUC has taken that action, was the line on
9 the map trying to indicate the location of the top
10 of the pali?

11 What I'm trying to get to, Ms. Kato, is
12 that in this case, it appears to me visually that
13 the line on the map clearly indicates over most of
14 this coastline a desire to place the boundary at the
15 railway line. So I can understand on a -- on a map
16 where things become close together --

17 Mr. Church, will you please mute yourself?
18 Where lines are close together that, like, oh, yeah,
19 I can understand on a map of this scale exactly
20 where the top of the cliff is is questionable. But
21 in this case, the line is well inland from the
22 cliff.

23 And I'm not sure that any of the cases
24 that you suggest are comparable are cases where the
25 line was well inland from the cliff.

1 **MS. KATO:** Okay. Someone from -- Lorraine
2 from OPSD would like to respond.

3 **COMMISSIONER SCHEUER:** Yes. Can you turn
4 your camera, if possible, Ms. Maki? Hi. Aloha. Do
5 you swear or affirm the testimony you're about to
6 give is the truth?

7 **MS. MAKI:** I do. Okay. I don't know if I
8 have what you're looking for, but if you look on our
9 -- one of our exhibits -- I think it's OP Exhibit 4
10 -- that was a boundary interpretation, not a
11 reinterpretation, which is pretty similar to the
12 original '92 McCully interpretation. But it does
13 indicate that the top of the pali was used as the
14 boundary. Did you have anything else?

15 **COMMISSIONER SCHEUER:** So but my question
16 is here the question is not -- if I understood the
17 Office of Planning's argument correctly as
18 represented by your counsel, it was, hey, you've
19 done this before. And what I'm trying to say is I
20 think I see a difference. When we've done it before,
21 it's been about where the top of the pali is, not
22 where the railway line is.

23 **MS. MAKI:** I disagree with that.

24 **COMMISSIONER SCHEUER:** Okay.

25 **MS. MAKI:** But we have cited those two

1 cases, which are similar and -- but Stengel is --
2 okay. So Stengel was a boundary interpretation
3 first, and then they filed a DR.

4 **COMMISSIONER SCHEUER:** Yeah.

5 **MS. MAKI:** Okay? I don't think it was a
6 railroad right-of-way, but it was determined to be
7 inland of the top of the pali at first in a boundary
8 interpretation. And then during a DR petition, they
9 -- the Stengel one -- they indicated that there was
10 agriculture being done in that area, and so it was
11 reinterpreted to be the pali.

12 **COMMISSIONER SCHEUER:** I -- I understand
13 that.

14 **MS. MAKI:** Okay.

15 **COMMISSIONER SCHEUER:** But I agree with
16 you. In the Stengel case, there's no mention of a
17 railway line as being potentially the location of
18 the boundary.

19 **MS. MAKI:** Okay.

20 **COMMISSIONER SCHEUER:** Which is the point
21 I'm trying to get to.

22 **MS. KATO:** Are you asking if there's a
23 case that's exactly the same as this one?

24 **COMMISSIONER SCHEUER:** Yes. If you're
25 going to make the argument that the issue revolves

1 around the map being drawn wrong.

2 **MS. KATO:** I don't believe there is a case
3 that is exactly like this one that we're aware of
4 that the LUC has determined where the -- where the
5 line was drawn inland and they decided to draw the
6 line -- that the line should have been drawn at the
7 top of the sea pali that has a railroad.

8 **COMMISSIONER SCHEUER:** Awesome. Thank you
9 so much. That's good clarification.

10 **MS. KATO:** I hope that was accurate.

11 **COMMISSIONER SCHEUER:** Okay. Next, and
12 sorry to be labor this, but what would the --
13 Commissioner Giovanni?

14 **COMMISSIONER GIOVANNI:** I think that was a
15 very important point. And unfortunately, Ms. Kato's
16 remarks were not clearly heard by me. Could she
17 repeat them?

18 **MS. KATO:** We are mentioning these cases
19 just to present examples of possibly similar
20 properties or similar situations as best we can to
21 help you in deciding this particular situation, but
22 we are not aware of another property that is exactly
23 the same as this, where there was a boundary
24 interpretation that said that this boundary is drawn
25 wrong and it's supposed to be at the top of the

1 pali.

2 I think in the case of the Merrigan one,
3 possibly the line was already drawn at the top of
4 the pali and they wanted a boundary interpretation,
5 but I'm not -- to clarify this, but I'm not sure.
6 I'm sorry. I'm not sure if that was clear.

7 **COMMISSIONER SCHEUER:** Commissioner
8 Giovanni, did you get that?

9 **COMMISSIONER GIOVANNI:** I just want to be
10 sure. So, Ms. Kato, you're saying you are not aware
11 of a reference or a prior case where the boundary
12 was drawn at the equivalent of a mauka -- equivalent
13 of a railroad and the interpretation was adjusted to
14 the top of the pali.

15 **MS. KATO:** I am not aware of a specific
16 case like that.

17 **COMMISSIONER GIOVANNI:** So there is no
18 reference. Thank you.

19 **MS. KATO:** But I'm not -- I also don't
20 have access to all the boundary interpretations, and
21 I have not gone through them, so I don't know if
22 there is or not.

23 **COMMISSIONER GIOVANNI:** Okay. So you're
24 not aware of any that are on the record in this
25 matter.

1 MS. KATO: I am not.

2 COMMISSIONER GIOVANNI: Thank you.

3 COMMISSIONER SCHEUER: Ms. Kato, if you're
4 not aware, you can answer you're not aware. Is
5 there an appeal process available for boundary
6 interpretations?

7 MS. KATO: Yes. Or not -- not -- boundary
8 interpretations or declaratory order?

9 COMMISSIONER SCHEUER: Boundary
10 interpretation.

11 MS. KATO: I'm not sure. I think there may
12 be.

13 COMMISSIONER SCHEUER: Would there be a
14 deadline associated with an appeal of a boundary
15 interpretation?

16 MS. KATO: I would need to look at -- look
17 up the rules on boundary interpretations.

18 COMMISSIONER SCHEUER: Is there -- I mean,
19 in some ways, would you agree that the motion before
20 us could be read to be a late appeal of the McCully
21 interpretation?

22 MS. KATO: I'm not sure on this. I've not
23 -- OPSD is not involved in boundary interpretations,
24 so I'm not really that familiar with the exact
25 process of it. I would have to look this up.

1 **COMMISSIONER SCHEUER:** Okay. Thank you,
2 Ms. Kato. I guess I have one last question. If --
3 if -- and -- and hearing the way you responded to
4 Commissioner Chang in saying basically it's a
5 kanalua kind of situation -- we could go either way,
6 right?

7 What compelling facts are presented in
8 this case that would cause us to interpret what the
9 boundary should properly have been, that -- that
10 this -- well, to -- actually, to trying, if I can,
11 state the Churches' case that the boundary has
12 always been mauka of the pali rather than mauka of
13 the railroad line, what compelling information or
14 facts do we have here that indicate that is the
15 case?

16 **MS. KATO:** Well, I don't believe that
17 we're saying that there are compelling facts because
18 we're saying that if we're -- we're not clear on
19 which -- which is the correct boundary location, so
20 --

21 **COMMISSIONER SCHEUER:** So wouldn't you
22 turn to the map?

23 **MS. KATO:** So it's -- it's on a set --
24 well, our position --

25 **COMMISSIONER SCHEUER:** As part of the

1 record?

2 **MS. KATO:** Our position in saying that
3 it's unclear is based on the possibility of which
4 conditions likely apply, and in some cases, it's
5 been assumed that the railroad right-of-way is the
6 correct location.

7 But the petitioner has provided evidence
8 that the properties past the railroad right-of-way
9 were used in agricultural use. And according to the
10 condition in the 1969 report, access ways like the
11 railroad right-of-way are used where it's at the
12 edge of the agricultural use.

13 But the records indicate that that was not
14 the edge of the agricultural use. So it makes it
15 less likely that that railway was used or should
16 have been used, based on the boundary review report,
17 in which case there's another --

18 **COMMISSIONER SCHEUER:** But "was used" or
19 "should have been used" are two really, really
20 different things; right? "Was used" means we're
21 saying they used the railroad.

22 "Should have been used" is saying they
23 used the railroad boundary, but they shouldn't have
24 done it, so we're going back in and we're
25 questioning what they -- what they did.

1 But that's, I think, different than what
2 the Churches have argued, which is they actually
3 used the -- they used the cliff boundary here, and
4 past interpretations have been incorrect.

5 **MS. KATO:** I'm not sure what they used in
6 1969. I understand that the -- I believe the maps
7 were from a later time.

8 **COMMISSIONER SCHEUER:** Okay.

9 **MS. KATO:** The maps that were later drawn
10 based on the report.

11 **COMMISSIONER SCHEUER:** Yeah. You're
12 correct. I have nothing further.

13 **MS. KATO:** So I'm not --

14 **COMMISSIONER SCHEUER:** Thank you. I have
15 nothing further at this time. Commissioners,
16 anything further? It is 11:52. We have been going
17 for another 51 minutes. What we have left is any
18 final statements from the Churches, any final
19 questions from the commissioners, and then
20 deliberation.

21 We could take a break now or 30 to 45
22 minutes for lunch and proceed with this, or we could
23 try and power through before lunch to close this
24 matter and move on to the Kihei High School matter.
25 What is the commission's pleasure? Commissioner

1 Okuda?

2 **COMMISSIONER OKUDA:** Thank you, Mr. Chair.

3 I was trying to indicate my recommendation we power
4 through.

5 **COMMISSIONER SCHEUER:** Commissioner
6 Giovanni is thumbs up.

7 **COMMISSIONER CHANG:** Yup. Chang, too.

8 **COMMISSIONER SCHEUER:** Commissioner Chang.
9 Anyone seriously concerned with that? If we go past
10 a half hour more, I will stop it, and we'll take a
11 break no matter what. Okay. Let's continue, then.

12 No further questions for Office of
13 Planning at this time? If not, Mr. Church, you may
14 proceed with your final statements.

15 **MR. CHURCH:** Well, there is a useful piece
16 of information that could have been inserted
17 earlier, and it would have saved us the last hour of
18 discussion.

19 If you look at the 99-21 decision and
20 order, the commission ordered that the entire map be
21 changed, the entire map (inaudible).

22 **COMMISSIONER SCHEUER:** Whoa. I'm not sure
23 what happened there, but you got to go back. We got
24 a very loud sound across the mic from you.

25 **MR. CHURCH:** Okay. In -- in the Stengel

1 case, the commission didn't just rule his property.
2 They ruled that the entire Map H59 be changed. And
3 it was.

4 And then come along the 90, I believe,
5 group in 2008. And they lived down the coast closer
6 to me, and the commission cited in their boundary
7 determination, interpretation, that prior ruling and
8 said that Map H59, the Papaaloa Quadrangle, the
9 whole thing is to the top of the cliff.

10 And if you look at H59, you will see that
11 the boundary pretty much follows the top of the
12 cliff now. In other words, the map is changed.

13 And one other thing. During 2005 -- '06,
14 actually -- Laura Thielen in the -- I want to call
15 her the director of the Office of Planning --
16 testified --

17 **COMMISSIONER SCHEUER:** That is correct.

18 **MR. CHURCH:** Yeah. Testified during the
19 McCully's petition, and she said -- and I can find
20 the exact reference and page number, given a few
21 minutes.

22 But in so many words, she said, look, to
23 the commission. She said, you didn't go out and
24 inspect anything. Not only didn't we. The fact is
25 all up and down that coast, the lands weren't

1 inspected.

2 And my -- my petition here says, in other
3 words, the commission accepted that and changed the
4 Stengel map in its entirety. They just didn't change
5 the other maps. And the report clearly -- you know,
6 I can take you through the pages on the report and
7 what they say.

8 Those four conditions for determining
9 where the boundary should be is their recommendation
10 to the commission before that meeting in the County
11 of Hawai'i on July 14th of 1969, where it was
12 examined at the community meeting, and the
13 resolution was the top of the cliff was to be it
14 from that point forward.

15 In other words, they looked at the
16 recommended map. It was the final recommended map.
17 The report refers to a whole bunch of maps that were
18 going back and forth, and OP even showed three of
19 those maps in their testimony during McCully's 2009
20 petition. There were more than one map.

21 But the final map went to the community
22 meeting, and that's what is described in the report.
23 And then the earlier section I read to you said --
24 basically, the text of the report is to carry the
25 same weight as the maps.

1 I will read the order that the commission
2 -- at least part of it -- for Stengel. Accordingly -
3 -

4 **COMMISSIONER SCHEUER:** That just -- Mr.
5 Church, Mr. Church, other than responding to any
6 questions that we may have, this is your chance to
7 say anything else that you want to say on -- on your
8 petition in front of us. This is your chance, so
9 please don't -- don't hold back, if there's
10 something you wanted to include.

11 **MR. CHURCH:** Okay.

12 **COMMISSIONER SCHEUER:** So please continue.

13 **MR. CHURCH:** That decision and orders --
14 I'm not just telling you they changed the entire
15 map. Their order says that.

16 "Accordingly, this commission determines
17 that the state land use district's map H59 be
18 amended to reflect that the property mauka of the
19 top of the ridge or pali is designated within the
20 state land use agricultural district."

21 And -- and the whole map was changed.
22 There's a reference to it in the bottom left-hand
23 corner of the map, the decision and order. And --
24 and along came Merrigan, and the Land Use Commission
25 looked at the map, and then they looked at the

1 bottom corner and said, oh, the top of the pali is
2 it.

3 Again, I point to Thielen's testimony.
4 Yeah, I for -- state OP has tried hard to explain
5 how these maps don't seem to agree with what
6 happened at these meetings. And they list these four
7 conditions, but those were the conditions that the
8 Land Use Commission, or the reporter's authors,
9 explained to the meeting how they came up with these
10 lines on the map.

11 And -- and the public, a man reading
12 between the lines, somebody raised hell and said all
13 of that land is being cultivated for sugar cane
14 right up to the top of the cliff. So the commission
15 approved that the top of the pali be the line.

16 And less than a few weeks later, the maps
17 were approved as final, and the minutes of the
18 meetings were approved as final. And they're in
19 contradiction.

20 And my only explanation is they never
21 intended that the map be final. They intended that
22 the record of the report be final. In other words,
23 the record of the meeting, Hawai'i County, on July
24 14th, 1969, was to be the final record of where the
25 line was supposed to be, and no one bothered to

1 change the map, because they assumed the report
2 would be the official record.

3 That's most of what I want to say right
4 now. There is one other thing. If you look at the
5 map on H65, which is where we are, there is a bold
6 line on the top of the map, or on the top of the
7 pali, all along there. And that USGS map dated back,
8 I think, to 1948, if I recall correctly. On the
9 bottom, it says something like that.

10 In other words, the top of the pali has
11 been available right from the beginning for the
12 people to have drawn their lines on the map. It just
13 simply wasn't changed because, you know, they were
14 dealing with all of Hawai'i. In a matter of a few
15 weeks, they were dealing with all the coastlines of
16 all of Hawai'i.

17 Going back and redrawing the maps, I don't
18 think, and going out and actually seeing if the land
19 was in ag or that land, I don't think that was a
20 practical option, so they relied on the report.

21 And, you know, if you go through the
22 report, you can see in various places where the --
23 whatever the recommendation was, it was partially
24 approved, denied, et cetera, in those chapters 4
25 through 7, which is the official record of the

1 meetings.

2 This is -- I'm sure everyone's confused,
3 but after I've read this thing, like, a hundred
4 times, that's what it says. And I think that's sort
5 of what Alison was saying. She's referring to those
6 four conditions.

7 But if you go to the chapter where those
8 four conditions are listed, at the beginning of that
9 section -- I think it was Section 4 -- it describes
10 their recommendations. Doesn't describe what
11 happened at the final meeting.

12 So I'm open to your questions.

13 **COMMISSIONER SCHEUER:** Thank you, Mr.
14 Church.

15 Questions, commissioners? Any questions
16 for Mr. Church? Seeing none, am I correct? I'm
17 seeing no further questions for the petitioner.

18 I indicated I would provide an opportunity
19 to ask additional questions of the Office of
20 Planning as well. Are there any other additional
21 questions for the Office of Planning?

22 **MS. HILDAL:** I'd like to make a statement,
23 if possible, petitioner?

24 **COMMISSIONER SCHEUER:** I'll allow it.
25 Please go ahead.

1 **MS. HILDAL:** Thank you very much. I think
2 we're disregarding Ms. Maki's testimony that if --
3 if the road or the railroad was makai -- was at the
4 makai end of the ag use, conservation was used. But
5 if it was (inaudible).

6 **COMMISSIONER SCHEUER:** You faded out, Ms.
7 Hildal, all of a sudden.

8 **MS. HILDAL:** Sorry. Ms. Maki was --

9 **COMMISSIONER SCHEUER:** There you go.

10 **MS. HILDAL:** Ms. Maki was interrupted when
11 she was trying to describe that if the -- if there
12 was ag use all the way up to the top of the pali,
13 that the top of the pali should have been the
14 boundary between the ag and the conservation
15 district. I think this is one thing that we need to
16 pay attention to.

17 And also, the whole question here is if
18 you consider the 1969 report, which contained the
19 actions taken by the LUC for determining
20 conservation boundaries, should that be the law?

21 Or should the map be the law, which had
22 already -- there's been several cases which
23 determined that the map was incorrect. That's all.
24 Thank you very much.

25 **COMMISSIONER SCHEUER:** Any further

1 questions for Mr. Church, Ms. Hildal, or any of the
2 parties? Going once

3 **MR. CHURCH:** If I may.

4 **COMMISSIONER SCHEUER:** Okay, you know, you
5 concluded. I'm going to -- this is it.

6 **MR. CHURCH:** Okay.

7 **COMMISSIONER SCHEUER:** You can give one
8 last statement, and then I -- I -- it's especially
9 hard when I can't see you due to your limited
10 Internet access to know that you're going to keep
11 jumping in. So you may make a final statement.

12 **MR. CHURCH:** I can call up my exhibits on
13 the screen for you to look at. I'm sure someone on
14 your end can. Exhibit 9 is the field map that
15 actually shows how much of the field was on one side
16 of the railroad and how much was on the other. So if
17 that's useful, you can refer to that. Exhibit 9.

18 **COMMISSIONER SCHEUER:** Okay. There being
19 nothing further from the petitioner, we will -- and
20 no further comments. Any final comments from OP?

21 **MS. KATO:** No, Chair. Thank you.

22 **COMMISSIONER SCHEUER:** Okay. So we're
23 going to proceed to decision-making, or deliberation
24 at least. So I'll remind everyone here --
25 petitioner, OP, as well as members of the audience -

1 - this is a hearing on a request for a declaratory
2 ruling.

3 As such, the commission will -- the
4 decision of the commission will be made on the
5 written base on file and posted to our website. It's
6 not an evidentiary hearing, but any oral
7 presentation made today and any public testimony
8 will be considered by the commission in our
9 decision-making process.

10 According to the commission's
11 administrative rules, Section 15-15-100, within 90
12 days after receipt of a petition for declaratory
13 order, the commission shall either deny the petition
14 in writing, stating the reasons for the denial,
15 issue a declaratory order, or set the matter for
16 hearing as provided in Section 15-15-103 of the
17 commission rules.

18 In addition, Section 15-15-102 of the
19 commission rules provides that the commission for
20 good cause may refuse to issue a declaratory order
21 by giving specific reasons. The commission may so
22 refuse under the following circumstances.

23 One, where the question is speculative or
24 purely hypothetical and does not involve the
25 existing facts or facts which could be expected to

1 exist in the near future.

2 Two, the petitioner's interest is not of
3 the type that would give the petitioner standing to
4 maintain an action if the petitioner were to seek
5 judicial relief.

6 Three, the issuance of the declaratory
7 order may affect the interest of the commission in a
8 litigation that is pending or may reasonably be
9 expected to arise.

10 Or, four, the matter is not within the
11 jurisdiction of the commission.

12 The commission will now conduct formal
13 deliberations on this matter, and I would note for
14 the parties and the public that during our
15 deliberations, I will not entertain any additional
16 input from the parties or the public unless those
17 individuals are specifically requested to do so by
18 the chair. And if called upon, I would require that
19 all comments be limited to the question at hand.

20 Commissioners, let me confirm that each of
21 you are fully familiar with the record, you have
22 reviewed the record, and are prepared to deliberate
23 on the subject docket. After I call your name,
24 please signify orally with either an aye or any that
25 you are prepared to deliberate on this matter.

1 Commissioner Aczon?

2 **COMMISSIONER ACZON:** Aye.

3 **COMMISSIONER SCHEUER:** Commissioner

4 Cabral?

5 **COMMISSIONER CABRAL:** Aye.

6 **COMMISSIONER SCHEUER:** Commissioner Chang?

7 **COMMISSIONER CHANG:** Aye.

8 **COMMISSIONER SCHEUER:** Commissioner

9 Giovanni?

10 **COMMISSIONER GIOVANNI:** Aye.

11 **COMMISSIONER SCHEUER:** Commissioner Okuda?

12 **COMMISSIONER OKUDA:** Yes.

13 **COMMISSIONER SCHEUER:** Commissioner Wong?

14 **COMMISSIONER WONG:** Aye.

15 **COMMISSIONER SCHEUER:** The chair is also
16 prepared to deliberate on this matter.

17 **COMMISSIONER WONG:** Chair, this is

18 Commissioner Wong.

19 **COMMISSIONER SCHEUER:** Commissioner Wong?

20 **COMMISSIONER WONG:** You forgot

21 Commissioner Ohigashi.

22 **COMMISSIONER SCHEUER:** Excuse me. I
23 apologize. Thank you for that correction.

24 Commissioner Ohigashi?

25 **COMMISSIONER OHIGASHI:** I'm thinking.

1 Yeah, aye.

2 **COMMISSIONER SCHEUER:** Did I miss anybody
3 else? Commissioner Okuda, I got you. Okay. Thank
4 you for that clarification. With that, we are
5 prepared to deliberate. Commissioners, what is your
6 pleasure? Commissioner Cabral?

7 **COMMISSIONER CABRAL:** Thank you, Chair.
8 I'm not elegant enough to put together the right
9 motion, but I do want to voice my opinion that I'm -
10 - I'm a layman, I'm not one of these elegant
11 attorneys like so many on our commission, that I
12 appreciate their ability to say it in the right way.

13 But I'm extremely uncomfortable over the
14 thought that we can, should, or even have the right
15 to be changing property lines, as well as I'm
16 uncomfortable with the idea that we would change
17 history.

18 On our island here, there are a number of
19 times where, in fact, the pali does move. I hate to
20 tell that, to add that to the mix. We -- we drop off
21 land with erosion on a large number of times. I've
22 sold land that 20 feet of it is out in the air,
23 because the land apparently used to be there,
24 because it was at one point surveyed, but it's no
25 longer there.

1 And I've had to even on title clearances
2 go back and have documents interpreted in Hawaiian
3 that are extremely old. So -- so this idea that we
4 would go back and change history makes me very
5 uncomfortable. And I'm not saying that legally
6 that's the correct thing, except that I don't feel
7 that we have that right or ability.

8 And I'm also, I guess, confused, too,
9 first, when the Churches came to us, which I was on
10 this commission for probably three years ago.
11 Because it was pre-COVID, we met in person. Their
12 idea was to take their conservation land and get it
13 into agriculture.

14 Now with this hearing, that has shifted.
15 And, you know, I was more ready to go with that
16 decision, but now that's not the question. So I
17 would -- if one of -- if someone's ready, I would
18 like to in some proper motion deny the current
19 request in front of us to go back and change
20 history. Thank you. Help.

21 **COMMISSIONER SCHEUER:** Thank you,
22 Commissioner Cabral. I'm going to frame that as a
23 discussion point rather than a motion per se, but
24 you certainly indicated where you're -- where you're
25 leaning.

1 **COMMISSIONER CABRAL:** Yes. Thank you.

2 **COMMISSIONER SCHEUER:** I was going to say
3 before you jumped in. We've had the opportunity, and
4 to be honest now, it's been longer than we've had
5 the times to -- to interact with Mr. Church and Ms.
6 Hildal for a number of meetings over a number of
7 years.

8 I have great -- I've grown to deeply
9 appreciate their determination in putting their
10 property to productive agricultural use, to try and
11 make a government process work in a way that they
12 want it to work.

13 And if it is not today, I am hopeful that
14 we will get to consider matters, including their
15 other pending petition, in a way that we can,
16 hopefully, within our bounds and rules, achieve what
17 they seek to achieve ultimately, which is the
18 productive agricultural use of their land.
19 Commissioner Okuda?

20 **COMMISSIONER OKUDA:** Mr. Chair, I make a
21 motion to deny the petition.

22 **COMMISSIONER SCHEUER:** Would you please
23 detail that motion, Commissioner?

24 **COMMISSIONER OKUDA:** Mr. Chair, you want
25 me to state the reasons for that?

1 **COMMISSIONER SCHEUER:** Please.

2 **COMMISSIONER CABRAL:** Can I second that
3 first before he goes on, because I could have been
4 that eloquent. Thank you. Thank you, Mr. Okuda. I
5 second that motion.

6 **COMMISSIONER SCHEUER:** Okay. We have a
7 motion made by Commissioner Okuda and seconded by
8 Nancy -- Commissioner Cabral. Commissioner Okuda,
9 would you please speak to the motion?

10 **COMMISSIONER OKUDA:** Yes. Thank you, Mr.
11 Chair. The law, HRS Section 91-1(5) either itself
12 or by implication indicates that the party
13 initiating the proceeding shall have the burden of
14 proof, including the burden (inaudible).

15 **COMMISSIONER SCHEUER:** Sorry. Is that on
16 my side? Commissioner Okuda, at least on my side,
17 you totally froze at --

18 **COMMISSIONER OKUDA:** Oh, okay.

19 **COMMISSIONER SCHEUER:** -- party has the
20 burden of proof.

21 **COMMISSIONER OKUDA:** Yeah. Okay. The party
22 has the burden of proof, including the burden of
23 producing evidence as well as the burden of
24 persuasion and the degree or quantum of proof shall
25 be the preponderance of the evidence. Okay. Either

1 (inaudible).

2 **COMMISSIONER SCHEUER:** Oh, you've frozen
3 again, Commissioner. And I'm seeing the other
4 commissioners' movements, so I think that it is just
5 -- okay. Try again. Sorry, Commissioner Okuda.

6 **COMMISSIONER OKUDA:** Okay. Can -- can you
7 hear me? I'm sorry. Okay. HR Section 91-1 either
8 itself or by implication makes it clear that the
9 party that's initiating the proceeding has the
10 burden of proof, including the burden of producing
11 evidence as well as the burden of persuasion. Okay?

12 And the burden of -- of proof, according
13 to the statute or by implication, is the
14 preponderance of the evidence.

15 In this case, I believe the record that
16 has been presented to us, it indicates that the
17 petitioners have not met the burden of proof. That
18 is demonstrated by the statement by the Office of
19 Planning itself that this could go either way.

20 And because of the fact that reasonable
21 people like the Office of Planning, which has the
22 charge of protecting the public interest and the
23 public trust, itself has made the statements that
24 it's made (inaudible).

25 **COMMISSIONER SCHEUER:** We lost you at "the

1 statements that it has made".

2 **COMMISSIONER OKUDA:** The statements it has
3 made, although I understand and recognize the other
4 arguments or statements the Office of Planning have
5 made, is indication that the burden of proof has not
6 been met here.

7 There's also a question in my mind about
8 whether or not this issue is speculative in the
9 sense or because of the fact that there is not, in
10 my mind, by a preponderance of the evidence,
11 indication that there will be bona fide agriculture
12 that would really take place.

13 If there is no bona fide agriculture that,
14 in fact, will take place -- and by the word "bona
15 fide agriculture", I mean agriculture that under the
16 statute and the LUC decisions will show that the
17 dwellings are, in fact, a farm dwelling producing
18 income, not simply personal consumption of
19 agricultural products -- if we don't have bona fide
20 agriculture, then it's a speculative, theoretical
21 discussion here.

22 I join in Commissioner Cabral's
23 description of the fact that granting the petition
24 now would bring actually uncertainty onto maps that
25 have been relied on. I believe that there is a

1 serious issue where parties have entered into a
2 transaction, believing and understanding they were
3 buying conservation districted property with all the
4 burdens that come along with such property, and then
5 for whatever reason attempt to do something else.

6 So for those reasons and the other reasons
7 that were brought out in the questioning, I would
8 ask that my motion to deny the petition would be
9 granted. It, of course, does not preclude the
10 petitioners from moving forward with their district
11 boundary amendment, provided they meet the burden of
12 proof on that petition. Thank you.

13 **COMMISSIONER SCHEUER:** Commissioners
14 Ohigashi, Chang, then Aczon.

15 **COMMISSIONER OHIGASHI:** I'll be supporting
16 the motion to deny, and one of the reasons why is I
17 think that petitioner had to provide evidence that
18 the Land Use Commission Map H65 was erroneous or
19 clearly got wrong or that the interpretations that
20 were done was clearly done incorrectly. And I'm not
21 convinced that it was.

22 Second thing is that I want to include in
23 that is that an affirmative denial of the petition
24 to recover appropriate hearing costs and fees. I --
25 I don't think that he established any basis for

1 that, nor is there any reason to believe that they
2 should be entitled to such fees. I don't believe
3 that there's been presented any evidence of that
4 request.

5 So it's -- my understanding if Mr. Okuda's
6 motion would include that, I'm going to have to make
7 a separate amendment to it. That's all I have.

8 **COMMISSIONER SCHEUER:** Commissioners
9 Chang, followed by Aczon.

10 **COMMISSIONER CHANG:** Thank you, Mr. Chair.
11 I am going to be voting in favor of the motion for
12 several reasons. One, I, too, am not convinced that
13 there was a mistake made in the map. I believe both
14 Office of Planning concurs that it is a -- that
15 there is no -- while she's raised some other
16 examples, there is no situation she is aware of that
17 is factually the same as this one.

18 Three, in my view, based upon the
19 Churches' testimony -- and, you know, they have been
20 extremely committed, and they've done a lot of work
21 -- but this appears to be essentially a DBA. And if
22 it was a DBA, there would be notice provided to all
23 of other interested parties.

24 And in my view, the results of what
25 they're asking is to change this, their property,

1 from conservation to agriculture, to me has
2 potentially far-reaching effects, farther, well
3 beyond their own property. And none of the adjacent
4 landowners have been given the opportunity as would
5 have been provided in a district boundary amendment.

6 Four, the McCullys as well as the Churches
7 in the past have relied upon the existing zoning as
8 being conservation, and they've individually sought
9 DBAs. So there's been a reliance on these previous
10 landowners, including the Churches, that the
11 property is conservation.

12 And I also recognize, five, that a lot of
13 this -- you know, this is not the first case where
14 there have been concerns regarding DLNR's -- of
15 conservation lands being too restrictive. But I
16 think DLNR is acting appropriately, because
17 conservation district is a very different mission
18 than agriculture.

19 So if you are truly interested in doing
20 agriculture, then I think a district boundary
21 amendment is the much more appropriate action than
22 to try to use this -- then to take action in a
23 declaratory action. So I will be voting in support
24 of a motion to deny the request.

25 And likewise, as Commissioner Ohigashi, if

1 there is a friendly amendment to including the
2 denial of the waiver of -- the petitioner's other
3 request for the waiver of fees, I'd have no
4 objection to that. Thank you, Mr. Chair.

5 **COMMISSIONER SCHEUER:** Thank you,
6 Commissioner Chang. Commissioner Aczon, followed by
7 Commissioner Okuda.

8 **COMMISSIONER ACZON:** Thank you, Mr. Chair.
9 I'll be voting in favor of the motion, but I'm just
10 wondering, like Commissioner Chang mentioned, that
11 if Commissioner Okuda would consider incorporating
12 in his motion the denial or accepting the waiver of
13 the fees in one motion.

14 **COMMISSIONER SCHEUER:** Commissioner Okuda?

15 **COMMISSIONER OKUDA:** Yes. This is Gary
16 Okuda. I do agree to what Commissioner Aczon is
17 suggesting and the friendly amendment as described
18 by Commissioner Chang and Ohigashi.

19 **COMMISSIONER SCHEUER:** Thanks. So you are
20 saying the motion is to both deny both portions of
21 the declaratory ruling sought by the Churches both
22 regarding the boundary location as well as regarding
23 fees.

24 **COMMISSIONER OKUDA:** That is correct.

25 **COMMISSIONER SCHEUER:** All right. Do you

1 agree, seconder Commissioner Cabral?

2 **COMMISSIONER CABRAL:** Yes. I will agree
3 with that amendment to the motion. Thank you.

4 **COMMISSIONER SCHEUER:** Commissioner
5 Giovanni?

6 **COMMISSIONER ACZON:** Can I say something?

7 **COMMISSIONER SCHEUER:** Sorry. I apologize,
8 Commissioner Aczon.

9 **COMMISSIONER ACZON:** It's all right. Okay.
10 Thank you, Commissioner Okuda. You know, I can -- I
11 can feel the uneasiness among the commissioners
12 regarding this petition. Me, myself, too, is kind of
13 uneasy or uncomfortable to the fact that, you know,
14 it will set a dangerous precedent on many of the
15 decisions made by the prior commissioners.

16 And I'm not really convinced to the Church
17 petitioner's arguments, and I kind of go back to
18 that the official LUC Map H65 of Papaikou accurately
19 reflects the commission's intent in the 1969
20 boundary review for properties locating -- located
21 along the Hilo Papaikou coastline.

22 So I'll -- I'll be voting for, in favor of
23 the motion, Mr. Chair.

24 **COMMISSIONER SCHEUER:** Thank you very
25 much, Commissioner Aczon. Anything further? I don't

1 want to cut you off. Commissioner Giovanni?

2 **COMMISSIONER GIOVANNI:** Thank you, Chair.

3 I will also be joining my fellow commissioners
4 who've already spoken in support of the motion as
5 amended for many of the same reasons that have been
6 given.

7 I just want to add to that, however, that
8 I was a resident of the beautiful Hamakua Coast for
9 five years during the period when many of these
10 parcels of land came up for sale. It was like a land
11 rush, and there was a lot of confusion by the
12 parties involved in terms of representations by
13 realtors, in terms of interpretations that were
14 bandied about.

15 It was generally known to the residents of
16 the area that there was uncertainty, and it seems to
17 me personally that the Churches entered into their
18 real estate purchase with their eyes wide open,
19 quote-unquote, meaning they knew it was conservation
20 land and districted as such. And they expected --
21 they must have expected that there were some
22 complications or burdens to fulfill their dream.

23 They probably had no real appreciation for
24 how burdensome or complicated it could be.
25 Nonetheless, I am sympathetic to their efforts,

1 having to have gone through what they've gone
2 through, but that's the reality of purchasing
3 conservation districted land on the coast in
4 Hawai'i.

5 So eyes wide open, it's unfortunate. I
6 think this -- this matter, if they want to pursue
7 it, is far more suited for a petition as a district
8 boundary amendment. I will support the motion for
9 denial. Thank you.

10 **COMMISSIONER SCHEUER:** Thank you,
11 Commissioner Giovanni. Commissioners, anything
12 further? Commissioner Wong?

13 **COMMISSIONER WONG:** No, Chair. Other
14 commissioners were eloquent enough. I'll just say
15 I'm going to support the motion.

16 **COMMISSIONER SCHEUER:** Seeing no further
17 statements from the commissioners, I will add to my
18 original comments.

19 I'm going to vote in favor of the motion
20 as well. I agree with Commissioner Okuda's statement
21 regarding the applicable standard that there has to
22 be a preponderance of the evidence.

23 And while Mr. Church and Ms. Hildal have
24 certainly laid out some very interesting points, I
25 believe in his oral presentation, towards the end of

1 it, Mr. Church stated that he was forced to
2 interpret based on the absence of certain
3 information that this is what the commission had
4 done in the past.

5 That doesn't rise to the standard, I
6 believe, that we need to follow in this case. And
7 then the second reason, just to explain a little bit
8 more which came up during our deliberations, I'm
9 actually fairly confident that if we ruled in favor
10 in this case, we would end up in litigation. We
11 would be dramatically affecting the location of the
12 conservation district versus agricultural district
13 boundary line along this section of coast.

14 I believe there would be a rush of people
15 who would come to us seeking reinterpretations.
16 There could be theoretically -- well, people could
17 potentially be taking these arguments against former
18 -- the commission based on former actions as a
19 commission, were we to rule in favor of the
20 Churches' motion. I'm not saying those would
21 prevail, but the standard that we have to look at on
22 DRs is there a likelihood of litigation.

23 And knowing the County of Hawai'i's
24 sometimes very relaxed allowance of the building of
25 homes and residences in an agricultural district, we

1 could see this coastal portion of the state have a
2 lot more residential use on it, which would go to
3 the fundamental purposes that we are charged with
4 protection -- protecting in our actions.

5 That said, I'd just highlight, like, I am
6 looking forward to, if the Churches are so inclined,
7 them bringing back their district boundary amendment
8 petition. I don't know if they're on the 10-yard
9 line or the 1-yard line on it, but I know that they
10 are definitely, like, on the home half of the field
11 and close to being able to bring that in front of
12 us.

13 So with that said, is there anything
14 further? If not, Mr. Orodenger, will you please
15 poll the commission?

16 **MR. ORODENKER:** Thank you, Mr. Chair. The
17 motion is to deny the petition, including the
18 request for waiver of fees. Commissioner Okuda?

19 **COMMISSIONER OKUDA:** Yes.

20 **MR. ORODENKER:** Commissioner Cabral?

21 **COMMISSIONER CABRAL:** Yes.

22 **MR. ORODENKER:** Commissioner Aczon?

23 **COMMISSIONER ACZON:** Aye.

24 **MR. ORODENKER:** Commissioner Giovanni?

25 **COMMISSIONER GIOVANNI:** Aye.

1 **MR. ORODENKER:** Commissioner Chang?

2 **COMMISSIONER CHANG:** Aye.

3 **MR. ORODENKER:** Commissioner Ohigashi?

4 **COMMISSIONER OHIGASHI:** Aye.

5 **MR. ORODENKER:** Commissioner Wong?

6 **COMMISSIONER WONG:** Aye.

7 **MR. ORODENKER:** Chair Scheuer?

8 **COMMISSIONER SCHEUER:** Aye.

9 **MR. ORODENKER:** Thank you, Mr. Chair. The
10 motion passes with eight votes, unanimously.

11 **COMMISSIONER SCHEUER:** Thank you very
12 much. With that, it is 12:31. Our next agenda item
13 is the Kihei High School matter, but we need to take
14 a break for lunch.

15 My indication is to go on the shorter side
16 of things for 30 minutes. I know that might be too
17 little for certain people, but I'd prefer to meet at
18 1:05 to take up the Kihei High School matter, which
19 has considerable things. Commissioner Aczon?

20 **COMMISSIONER ACZON:** Just a reminder that
21 I will have to leave by 2:30.

22 **COMMISSIONER SCHEUER:** Thank you. And
23 Commissioner Wong has to leave by 3, I believe.

24 **COMMISSIONER WONG:** Yes, Chair. Thank you.

25 **COMMISSIONER SCHEUER:** Okay. We're going

1 to go into recess and reconvene at 1:05 to take up
2 the next agenda item.

3 **(Recess taken from 12:31-1:06 p.m.)**

4 **COMMISSIONER SCHEUER:** It is 1:06 p.m.

5 We're back on the record.

6 All I'm going to say at this point is that
7 I have filed a voluntary recusal on the next agenda
8 item regarding Kihei School. I'm going to read my
9 recusal into the record, an email I sent to, among
10 others, Vice Chair Giovanni on the 3rd.

11 As you're all aware, on August 19th, 2021,
12 the State Department of Education filed a motion,
13 quote, for recusal or disqualification of Land Use
14 Commission Chair Jonathan Scheuer from participation
15 in any proceedings related to the Department of
16 Education's motion to amend the Land Use
17 Commission's Findings of Fact, Conclusions of Law,
18 and Decision and Order filed July 29th, 2013.

19 Because the motion was filed after the
20 August 25th agenda for their main motion to amend
21 was proposed, and hence, this later motion was not
22 able to properly placed on the agenda, I deferred
23 both of these matters at our August 25th, 2021,
24 meeting.

25 After thoughtful consideration, I have

1 decided to recuse myself from any further
2 deliberations on this petition and the motions
3 associated with this petition.

4 I do not agree that the petitioner DOE
5 with regard to their assertions that my recusal or
6 disqualification was required under the law.

7 However, I do believe their motion for recusal or
8 disqualification is itself a distraction.

9 Because of this, I further believe my
10 withdrawal from deliberations will eliminate the
11 distraction and allow the remaining commissioners to
12 focus on the substantive matters before the Land Use
13 Commission, which most importantly, is concerned
14 with the safety of students and other pedestrians
15 related to this docket.

16 So from here, First Vice Chair Giovanni
17 will chair the meeting, and I will excuse myself.
18 Mahalo nui.

19 **COMMISSIONER GIOVANNI:** Thank you, Chair
20 Scheuer, for your careful consideration and
21 thoughts. We will miss you.

22 But we will proceed with the next agenda
23 item. I am in absence of a gavel that Chair Scheuer
24 has, so I will probably be making different noises
25 along the way.

1 The next matter is item A11794, Department
2 of Education Kihei School, Maui, to consider
3 petitioner's emergency motion for disqualification
4 of LUC chair from participation in any proceeding
5 related to the DOE motion to amend the Land Use
6 Commission Findings of Fact, Conclusions of Law, and
7 Decision and Order filed July 29th.

8 This motion is now rendered as moot due to
9 the Chair Scheuer's voluntary recusal. We will
10 therefore move on to the next agenda item relating
11 to Kihei High School.

12 We will now consider the petitioner
13 Department of Education Kihei High School motion to
14 amend the LUC's finding of fact, conclusions of law,
15 and decision and order that was filed July 29th,
16 2013.

17 Can I ask the parties please identify
18 themselves in this petition, starting with
19 petitioner?

20 **MR. FUJIOKA:** My name is Stuart Fujioka,
21 Deputy Attorney General appearing on behalf of the
22 petitioners.

23 **COMMISSIONER GIOVANNI:** Is there anybody
24 with you, or are you just the sole representative
25 for DOE?

1 **MR. FUJIOKA:** On the panel, it's just me.
2 There are two deputies listening -- from my office
3 listening in, and I do have some -- I'm hoping that
4 Randall Tanaka will be joining us. He's been in and
5 out.

6 **COMMISSIONER GIOVANNI:** Okay. Thank you.
7 From OPSD?

8 **MS. KATO:** Alison Kato, Deputy Attorney
9 General for the Office of Planning and Sustainable
10 Development. Also here are Rodney Funakoshi,
11 Lorraine Maki, and Mary Alice Evans from OPSD. Thank
12 you.

13 **COMMISSIONER GIOVANNI:** Thank you.
14 County of Maui?

15 **MR. HOPPER:** Thank you, Mr. Chair. Michael
16 Hopper, Deputy Corporation Counsel representing the
17 Maui County Department of Planning. With me is
18 Deputy Planning Director Jordan Hart.

19 **COMMISSIONER GIOVANNI:** Thank you. Okay.
20 Before we begin, I'd like to update the record. On
21 November 2nd, 2020, the commission received
22 petitioner's update regarding the motion to amend
23 the Land Use Commission's Finding of Facts,
24 Conclusions of Law, Decision and Order filed July
25 29th, 2013, and Exhibits 10 through 18 and the

1 accompanying certificate of service.

2 From November 2nd to 4th, the commission
3 received testimony from Andrew Beerer, Mike Moran,
4 Libby and Terry Fulton, Patricia Stillwell,
5 Representative Tina Wildberger.

6 November 4th, 2020, the commission met via
7 Zoom virtual conferencing to hear this matter. On
8 November 10th, the commission mailed LUC questions
9 for DOE and DOT.

10 On February 1st, 2021, petitioner filed
11 its response to LUC's letter dated November 10th,
12 2020, with respect to the petitioner's motion to
13 amend the LUC's Findings of Fact, Conclusions of
14 Law, and Decision and Order filed July 29th, 2013,
15 Exhibits 19 to 30.

16 On May 4th, 2021, the commission received
17 petitioner's request for hearing in reference to the
18 motion to amend. On July 29th, petitioner filed its
19 request for the issuance of written findings on its
20 August 20, 2020, motion to amend the Land Use
21 Commission's Findings of Fact, et cetera, a
22 declaration of Stuart Fujioka and Exhibits 31 to 37.

23 On August 2nd, 2021, the commission
24 received DOE's 2021 annual report from the
25 petitioner. On August 12th, 2021, LUC emailed and

1 mailed out LUC's meeting agenda for the August 25th,
2 2021, meeting to the parties in this docket and to
3 the statewide and county lists.

4 On August 17th, 2021, OPSD filed its
5 response to the petitioner's request and for the
6 issuance of written findings. Also on that day, the
7 commission received public testimony from Michelle
8 Muir White. On August 19th, 2021, the commission
9 received DOE's emergency motion for recusal or
10 disqualification of LUC's chair.

11 On August 24th, the commission received
12 Maui County's petition of statement as to the DOE's
13 request for issuance of its written findings of
14 fact.

15 On August 25th, 2021, the commission met
16 via Zoom to hear this matter, but due to the
17 emergency motion filed by the petitioner, decided to
18 defer this matter for today to properly agendize it.

19 On August 31st, 2021, petitioner filed
20 supplemental exhibits to its motion, Exhibits 38,
21 39, 40, 41, and 42.

22 Between August 17th and September 7th --
23 that's yesterday -- the commission has received 327
24 public written testimonies in this -- in this
25 petition. Those will not be identified, but they are

1 posted on our website due to the lengthy amount of
2 them.

3 On September 1st, 2021, LUC mailed and
4 emailed an agenda for the September 8th and 9th
5 meetings to the parties in this docket and the
6 statewide and county lists. On September 3rd, 2021,
7 the commission received testimony from the Wailea
8 Community Association. Also on that day, the
9 commission received OPSD's response to DOE's
10 emergency motion for recusal.

11 On September 3rd, 2021, the commission
12 received an email communication from Chair Jonathan
13 Scheuer formally recusing himself from further
14 participation in this matter, and this morning Chair
15 Scheuer voluntarily recused himself from the
16 proceedings.

17 We also had two late filings of public
18 testimony that were also posted received yesterday.
19 One were Exhibits 43 to 44 from the petitioner and
20 their certificates of service, both of which have
21 been posted.

22 So let me run over our procedure for this
23 docket. First, I will recognize any written public
24 testimony that has been submitted in this matter.

25 Next, I will call on individuals who want

1 to provide public testimony in this docket. All such
2 individuals will identify themselves using their
3 Raise Hand webinar function on their device screens
4 or by pressing *9 if accessing by telephone.

5 Let me say that I do not have the same
6 functionality and visibility as Chair Scheuer did
7 from his location, so I will be relying on Mr.
8 Derrickson, who is a member of the LUC staff, to
9 work with me online to recognize and call into the
10 Zoom room for testimony, for public testimony, for
11 those. So it may be a little bit cumbersome compared
12 to what you've been used to, but we're going to have
13 to work through that.

14 But once you get in there, you'll be
15 called into our virtual witness box. You'll be able
16 to and will be asked to turn on your audio and video
17 and will be sworn in by me. You'll be asked to keep
18 your testimony to two minutes each and will also
19 remain available after the testimony to respond to
20 any questions the parties or commissioners may have.

21 When all questions have been completed, I
22 will excuse the witness, put them back into the
23 viewing audience. Again, I will ask Mr. Derrickson
24 to assist me in doing this maneuver, and we will
25 call the next witness into the virtual witness box.

1 The commission will then begin proceeding
2 on the motion to amend starting with the
3 petitioner's presentation followed by questions and
4 answers from the commissioners.

5 Next, the County of Planning -- County of
6 Maui Planning Department will make its presentations
7 and receive questions. Finally, I will call on the
8 state's Office of Planning and Sustainable
9 Development to make its presentations and receive
10 questions and comments.

11 Petitioner will then be given the
12 opportunity to provide any rebuttal it wishes to put
13 on the record. The commission will then hear the
14 request of issuance of written findings.

15 Finally, after all parties have presented
16 their arguments on the petitioner's motion to amend
17 and the request for the issuance of written
18 findings, the commission will conduct deliberations
19 and issue a decision on this motion.

20 I will also note for the parties and the
21 public and from time to time, I will be calling for
22 short breaks of approximately 10 minutes. Let me
23 note that the intent as of this time is that due to
24 having two members of the commission -- two
25 commissioners will be leaving, one at 2:30 today and

1 one at 3:00, I intend to adjourn this meeting at
2 3:00 today and therefore will only plan to call one
3 10-minute recess at approximately 2:00.

4 Are there any questions with our
5 procedures today on the matter? First, from the
6 petitioner.

7 **MR. FUJIOKA:** I don't have a question on
8 the procedure, but I did want to say that when the
9 filings were being decided, there was one that was
10 made early this morning. We submitted an Exhibit 45.
11 I think the list only went up to 44.

12 **COMMISSIONER GIOVANNI:** Yeah. I will be
13 asking next to the staff, LUC staff, about any
14 filings, so we'll catch that at the time.

15 **MR. FUJIOKA:** Thank you. Other than that,
16 nothing on the procedure.

17 **COMMISSIONER GIOVANNI:** Thank you.
18 County?

19 **MR. HOPPER:** No, Chair -- I mean Vice
20 Chair. We also had a late filing, so hopefully, that
21 will be addressed in the same manner. Thank you.

22 **COMMISSIONER GIOVANNI:** Thank you. OPSD?

23 **MS. KATO:** No questions. Thanks.

24 **COMMISSIONER GIOVANNI:** Okay. So now, Mr.
25 Hakoda, have there been any written testimony

1 submitted on this matter or any late filings?

2 **MR. HAKODA:** Yes, Mr. Vice Chair. As Mr.
3 Fujioka mentioned, there were two late filings, one
4 as late as this morning about 8:30. It was the
5 Exhibit 45 and the earlier one that you mentioned,
6 the recap of the record.

7 County of Maui also submitted a
8 supplemental update to their position statement with
9 a couple of exhibits that Commission Okuda had
10 requested in regards to the pedestrian separation
11 traffic and pedestrian crosswalks.

12 **COMMISSIONER GIOVANNI:** Okay. Thank you
13 for that clarification. So now we'll proceed to
14 public testimony. Mr. Derrickson, are you ready to
15 work with me on this?

16 **MR. DERRICKSON:** I am.

17 **COMMISSIONER GIOVANNI:** So let me first --
18 I know we've had a request from somebody who has to
19 leave early. Would it be possible to bring Ms. -- I
20 believe it's -- let me just doublecheck.

21 Yeah. I think Kelly is in the waiting
22 room. Can you see Kelly in the waiting room?

23 **MR. DERRICKSON:** Kelly King?

24 **COMMISSIONER GIOVANNI:** Kelly King. Yes.

25 **MR. DERRICKSON:** Yes.

1 **COMMISSIONER GIOVANNI:** Since she has to
2 leave early for another matter, I would like to move
3 forward and bring her in first.

4 **MR. DERRICKSON:** Yes. So I'll bring in
5 Kelly King first, with Mike Moran on deck.

6 **COMMISSIONER GIOVANNI:** Aloha, Kelly.

7 **MS. KING:** Aloha, commissioners.

8 **COMMISSIONER GIOVANNI:** Guys, can you
9 please say your name and address for the record, and
10 may I swear you in?

11 **MS. KING:** Okay. My name is Kelly Takaya
12 King. I live at 72 Kalola Place, Kihei, Hawai'i
13 96753.

14 **COMMISSIONER GIOVANNI:** Do you swear or
15 affirm the testimony that you're about to give will
16 be the truth?

17 **MS. KING:** I do.

18 **COMMISSIONER GIOVANNI:** Please proceed.
19 You have two minutes.

20 **MS. KING:** Okay. Thank you so much,
21 Commissioner Giovanni. I'm really happy to be here.
22 I have my -- I had submitted written testimony
23 yesterday, so I stand on that testimony.

24 But I want to -- I want to impress that
25 I'm speaking as a longtime Kihei resident, 40 years

1 as a councilmember for the South Maui District, as a
2 former Board of Education representative for Maui
3 District, and most importantly, as a parent who has
4 raised two children in Kihei who are now out of
5 college.

6 I thought a long time ago when I joined
7 the group that was working for this high school that
8 was trying to get the Kihei High School built, that
9 my kids would actually be able to go there, but that
10 -- that has long passed.

11 But I still have concerns for my community
12 and the safety of our students and our children. And
13 as you have seen in my written testimony, the
14 underpass is vitally important for this community.

15 You'll hear a lot of other testimony in
16 regards to the report that was done for the South
17 Maui community in connection with pedestrian and
18 bicycle paths called "The Safe Routes to Kihei High
19 School Pedestrian Route Safety Study" in 2014, and
20 you'll note in that study that it recommends
21 Waipuilani Gulch as the best site for the underpass.
22 And the reasons, I'm sure, will come up in other
23 people's testimonies.

24 I want to talk about safe routes and
25 pedestrian safety because our council just passed a

1 resolution recognizing August 2021 as Pedestrian
2 Safety Month.

3 And I have to tell you it makes me really
4 sad that the Department of Education is setting
5 aside the safety of our students and our high school
6 children in this area, asking them to walk across a
7 four-lane highway to just to get to school.

8 But safety is a primary component of
9 County of Maui's Vision Zero Maui Action Plan. And
10 to me, this does not fit in with -- with Vision
11 Zero. We've already had, just in the recent couple
12 of years, one young lady who was killed in an auto
13 accident on that highway in that same area.

14 Another goal of our Vision Plan is to
15 institute Vision's -- institutionalize Vision Zero.
16 That requires agencies, organizations, and
17 jurisdictions across Maui to collaborate and build a
18 broad coalition of support for Vision Zero so that
19 our principles can be imbedded in the planning,
20 design, prioritization, funding, and implementation.

21 And then lastly, I didn't have this in my
22 testimony, but I wanted to point out, as others may
23 as well, that our Kihei Makena Community Plan
24 actually states upon adoption of this plan, allow no
25 further development unless infrastructure, public

1 facilities, and services needed to service new
2 development are available prior to or concurrent
3 with the impacts of new development, and under the
4 physical and social infrastructure goal, allow no
5 development where its infrastructure may not be
6 available concurrent with the development's impacts.

7 The crossing of a highway is a huge
8 impact, and we -- I think the community, from the
9 people that I've talked to, there's nobody who has
10 said we're so ready to open this school that we're
11 willing to let our children cross that crowded
12 highway in that -- that dangerous intersection, and
13 on a highway that was meant to expedite traffic as
14 well.

15 So I just hope you pay attention to what
16 we have as a community decided. And we are in the
17 review period right now, but right now this is the
18 language from our existing community plan.

19 So thank you very much for the opportunity
20 to testify in opposition to the petition being
21 proposed today. And I am ready to answer questions,
22 if you have them. Thank you.

23 **COMMISSIONER GIOVANNI:** Thank you, Ms.
24 King. Petitioner, do you have any questions for Ms.
25 King?

1 **MR. FUJIOKA:** No, thank you.

2 **COMMISSIONER GIOVANNI:** County, any
3 questions?

4 **MR. HOPPER:** No, Chair. Thank you.

5 **COMMISSIONER GIOVANNI:** And OPSD, any
6 questions?

7 **MS. KATO:** No questions. Thank you.

8 **COMMISSIONER GIOVANNI:** Thank you, Ms.
9 King. Commissioners, any questions for Ms. King?
10 Commissioner Okuda?

11 **COMMISSIONER OKUDA:** Thank you very much,
12 Mr. Chair. Councilmember King, I'm going to ask you
13 a question about Exhibit 6, which was attached to
14 the petitioner's motion to amend the Land Use
15 Commission's Findings of Fact, et cetera.

16 In that Exhibit 6, which was Resolution
17 No., I believe, 19-20 adopted by the Council of the
18 County of Maui on February 1, 2019, let me read a
19 very short sentence from that resolution, and I'm
20 going to ask you whether or not what I read
21 accurately reflected the representations made by the
22 state of Hawai'i to the Maui County Council.

23 And this is my quotation, reading from the
24 resolution. Quote, whereas during a public meeting
25 on the proposed change in zoning bill that become

1 ordinance 4135 on October 30, 2013, the council's
2 land use committee received assurances from
3 representatives of the state that an overpass or
4 underpass would be provided pursuant to the Land Use
5 Commission's conditions.

6 Is that your recollection of what took
7 place at the council land use committee's meeting,
8 to the best of your knowledge?

9 **MS. KING:** Yes. Thank you, Commissioner
10 Okuda. To the best of my knowledge, that is exactly
11 what took place, that we were assuming at that point
12 that they were following through with the underpass
13 or overpass.

14 **COMMISSIONER OKUDA:** Would it be fair to
15 say -- or you tell me. Did the county council of
16 Maui rely on those representations or assurances as
17 described in Resolution No. 19-20, the
18 representations or assurances that were made by the
19 state?

20 **MS. KING:** Yes. I believe so. That is why
21 we passed that resolution unanimously. I can't say
22 for sure what was going through each councilmember's
23 minds, but that was part of the discussion, as I
24 recall.

25 **COMMISSIONER OKUDA:** When the term "state"

1 is used, do you have a recollection with more
2 specificity of what that refers to? Is that the
3 Department of Transportation, Department of
4 Education, or your best recollection is it's just
5 somebody from the state?

6 **MS. KING:** Well, my recollection is, you
7 know, the way that we talk about the state is that
8 the state administration encompasses the Department
9 of Education and the Department of Transportation.
10 So when we talk about the state, it's usually as a
11 broad term, it's the administration.

12 **COMMISSIONER OKUDA:** Did anyone from the
13 state, as that term is used in the resolution, did
14 anyone from the state come back to the county
15 council and tell the county council that the state
16 intended to modify, take back, aggregate, or do
17 anything different from the assurances that were
18 given to the Maui County Council?

19 **MS. KING:** No. In my recollection, there
20 was nobody who made that statement from the state.

21 **COMMISSIONER OKUDA:** Okay. Thank you very
22 much, Councilmember King. I really appreciate the
23 clarification. Thank you, Mr. Vice Chair. No
24 further questions.

25 **COMMISSIONER GIOVANNI:** Thank you.

1 Commissioner Wong, do you have questions for our
2 witness?

3 **COMMISSIONER WONG:** Yes, Chair. Thank you.
4 Thank you, Councilmember. Couple of questions. First
5 off, if I remember correctly in my -- that the
6 County of Maui still has to do a certificate of
7 occupancy, so the DOE cannot move in, pretty much,
8 and start school until a certificate of occupancy is
9 given by the county; correct?

10 **MS. KING:** Correct.

11 **COMMISSIONER WONG:** So does the -- the
12 other thing. Please explain this one to me. Can the
13 council do anything in its wherewithal to stop that
14 certificate of occupancy or say you cannot do
15 anything else until you do something?

16 **MS. KING:** Well, yeah, that's a -- thank
17 you for that question. That's kind of a tricky issue
18 because, you know, the councilmembers are not
19 allowed by our charter to direct administrative
20 employees. But we can set policy.

21 And in my -- in my estimation, the -- the
22 request that's being made of you today is a
23 violation of the community plan, the Kihei Makena
24 Community Plan, as I read those sections to you. So
25 normally, when somebody wants to do something that's

1 outside of the community plan, they would come to
2 the council for a community plan amendment. And we -
3 - we have not had that happen yet.

4 So, you know, the -- one of the actions
5 the council could take is to ask corp counsel for a
6 legal opinion on whether a community plan amendment
7 would be required. And if that's the case, then it
8 would be a council action before the certificate of
9 occupancy could be issued.

10 **COMMISSIONER WONG:** So this is just
11 hypothetical.

12 **MS. KING:** Yeah. Mine -- mine was
13 hypothetical, too, because I don't know what that
14 corp counsel would be, but, you know, I would be
15 prepared to ask for it.

16 **COMMISSIONER WONG:** Just because -- I'm
17 just thinking hypothetically that let's say, you
18 know, you go down that route, council does go down
19 that route to ask corporate counsel. So you pretty
20 much could stop DOE from moving in at that point in
21 time; correct?

22 **MS. KING:** Correct.

23 **COMMISSIONER WONG:** Okay. No, I just
24 wanted to know these things just because, you know,
25 I want to know what is the line of where the council

1 can go and where administrations can go.

2 **MS. KING:** Yeah. I really -- and I
3 appreciate that question so much. You know, I would
4 hope that we -- I had hoped that we would be working
5 together. You know, the Kihei High School is so
6 important to our community, and as a -- as a parent
7 of former high school students, I would love to see
8 that school opened. But not at the expense of even
9 one life.

10 So, you know, I really appreciate your --
11 your discussion, because there are things, you know,
12 that we are going to have to think about if we don't
13 get the ruling that we need today.

14 **COMMISSIONER WONG:** Thank you,
15 councilmember. I just -- like a father, also, and
16 I'm going to, you know, I'll put here that I also
17 think the same way. But thank you again. Thank you,
18 Chair.

19 **MS. KING:** Thank you.

20 **COMMISSIONER GIOVANNI:** Thank you.
21 Commissioners, anybody else? Commissioner Okuda,
22 you have follow-up question for Councilmember King?
23 Put your hand down, then, I guess. Thank you.

24 Seeing no further questions, Councilmember
25 King, thank you for taking the time today to

1 testify.

2 **MS. KING:** Okay. Thank you. And thank you
3 to all your commissioners for all your good work. I
4 sat through the first issue, and I really
5 appreciated all your comments and questioning.

6 **COMMISSIONER GIOVANNI:** Thank you.

7 **MS. KING:** Aloha.

8 **COMMISSIONER GIOVANNI:** Aloha. Mr.
9 Derrickson, who is our next public witness?

10 **MR. DERRICKSON:** Next public witness is
11 Mike Moran.

12 **COMMISSIONER GIOVANNI:** Will you invite
13 him to the virtual room, please?

14 **MR. DERRICKSON:** Yes. It's in process.
15 Next up.

16 **COMMISSIONER GIOVANNI:** Who's on deck?

17 **MR. DERRICKSON:** Next up on deck is Buck
18 Joiner.

19 **COMMISSIONER GIOVANNI:** Thank you. Mr.
20 Moran, please put on your video and your audio.

21 **MR. MORAN:** Aloha, commissioners. My name
22 is Mike Moran. I live at 167 Ahaaina Way in Kihei,
23 and I am testifying as president of the Kihei
24 Community Association for the commission, and I
25 swear to tell the truth.

1 **COMMISSIONER GIOVANNI:** Okay. Well, you
2 took the words out of my mouth, so please proceed.
3 You've got two minutes.

4 **MR. MORAN:** Thank you, sir. Appreciate
5 Vice Chair Giovanni for your stepping in here. And
6 please excuse me. I'll be peeking down. I'm going to
7 try and squeeze this into two minutes.

8 Mahalo for your volunteer public service,
9 especially those commissioners who recently re-
10 upped. It seems like deja vu all over again, as none
11 of you were there in 2013, when this original
12 condition was approved, as we were that day.

13 You have been involved numerous times,
14 such as your site visit over three years ago, and
15 more recently, the declaratory ruling in 2019, and
16 then the deferral in 2020.

17 But I would mention that part of that
18 deferral, the DOE did not reach out to the community
19 after that decision, and we ask the rhetorical
20 question, are they obligated to explain when they
21 simply disregard what is stated by this commission?

22 So we ask has anything changed since the
23 prior meetings? Is there any valid reason to make a
24 change after about eight years? You have heard a
25 plethora of excuses like misunderstanding the

1 meaning of the condition. Is reading comprehension a
2 requirement of this department named education?

3 Our prime concern remains safety of the
4 children, but also, our entire community who will
5 visit the school facilities days and evenings,
6 school days, and weekends. And the condition placed
7 by this commission on the DOE back in 2013 remains
8 sound. Please keep the pedestrians off the highways.

9 But for those who seem to disregard
10 pedestrians and their safety, perhaps -- and perhaps
11 have more concern for motor vehicles, we offer this.
12 Every time any pedestrian walks across the highway,
13 all traffic stops.

14 Currently, it is unsafe to walk or cycle
15 along this highway, and the state has no plans to
16 alter that situation. Rather, the intent is to now
17 to make it even worse by now having a multiple
18 function now go across this highway as well.

19 So we ask you to please continue to keep
20 the condition in place and safeguard our community.
21 Mahalo for the opportunity to testify.

22 **COMMISSIONER GIOVANNI:** Thank you, Mr.
23 Moran. Petitioner, do you have any questions for
24 Mr. Moran?

25 **MR. FUJIOKA:** I'm sorry. I was muted. I do

1 have a few questions, Mr. Vice Chair. Mr. Moran,
2 are you familiar with the Kihei Community
3 Association's website?

4 **MR. MORAN:** Yes, sir. I am.

5 **MR. FUJIOKA:** I was -- I'd like to show
6 you a couple of screenshots and ask you if you can
7 identify them or verify them.

8 **COMMISSIONER GIOVANNI:** So are these
9 exhibits that are in the record, Mr. Fujioka?

10 **MR. FUJIOKA:** Yes. Mr. Moran, I'm going
11 to show you petitioner's Exhibit 43 first. Can you
12 see it?

13 **MR. MORAN:** Yes, sir.

14 **MR. FUJIOKA:** Do you recognize this as, I
15 guess, an invitation or advertisement for sign
16 waving to be held August 19 of this year?

17 **MR. MORAN:** I don't see any. I'm looking
18 at the part that's highlighted. I don't see anything
19 about sign waving on there. Is that what you're
20 referring to?

21 **MR. FUJIOKA:** Do you see a screenshot of
22 something that -- sorry, something else is on the
23 screen. You're right. Okay. Right? Display that. Do
24 you see a screenshot now?

25 **COMMISSIONER GIOVANNI:** We see your --

1 **MR. MORAN:** A screenshot, but it's got
2 several different very tiny items on it.

3 **MR. FUJIOKA:** I'm sorry. This is -- my
4 computer is not -- this is not showing what I wanted
5 you to see.

6 **COMMISSIONER GIOVANNI:** Mr. Fujioka?

7 **MR. FUJIOKA:** Yes.

8 **COMMISSIONER GIOVANNI:** Out of time. Then
9 we'll proceed. Mr. Fujioka, may I suggest that you
10 fix this problem on your own time and then present
11 it as part of your testimony?

12 **MR. FUJIOKA:** Yes, I will. Okay. I could
13 do that.

14 **COMMISSIONER GIOVANNI:** Thank you. Any
15 further questions for Mr. Moran?

16 **MR. FUJIOKA:** Just that there was a sign
17 waving held on August 19 of this year; correct?

18 **MR. MORAN:** That's correct, sir.

19 **MR. FUJIOKA:** Were you there?

20 **MR. MORAN:** I was.

21 **MR. FUJIOKA:** Okay. That's all. Thank you.

22 **COMMISSIONER GIOVANNI:** Thank you. County,
23 any questions for Mr. Moran?

24 **MR. HOPPER:** No, Mr. Chair.

25 **COMMISSIONER GIOVANNI:** Thank you. OP, any

1 questions for Mr. Moran?

2 **MS. KATO:** No questions. Thank you.

3 **COMMISSIONER GIOVANNI:** Thank you.

4 Commissioners, any questions for Mr. Moran? Seeing
5 -- oh, wait. Commissioner Chang, I see your -- yeah,
6 it helps me with my little screen if you could also
7 kind of do this.

8 **COMMISSIONER CHANG:** Yeah. Sorry. I'll
9 wave.

10 **COMMISSIONER GIOVANNI:** Okay. Commissioner
11 Chang?

12 **COMMISSIONER CHANG:** And my hands is nice
13 and brown. It's not yellow, so it's a little
14 difficult to see. Thank you. Thank you, Chair.

15 Mr. Moran, thank you so much. I greatly
16 appreciated the Kihei's community diligence and
17 commitment in this, and yours has become a familiar
18 face. So thank you for being here again. Greatly
19 appreciate it.

20 So, Mr. Moran, I'd like to ask you.
21 Currently, it is Kihei Community Association's
22 position they are opposing the Department of
23 Education's motion to amend the -- amend the
24 condition 1(b).

25 As I read through your testimony dated

1 August 10th, 2021, the KCA is requesting that LUC
2 mandate the DOE to provide an updated accurate GSPC
3 feasibility study and updated traffic studies as
4 required by LUC conditions 1(a) and 1(b). Is that
5 correct?

6 **MR. MORAN:** That -- that is correct,
7 Commissioner.

8 **COMMISSIONER CHANG:** And if those studies
9 -- if those studies -- if LUC requires that these
10 studies be updated, is the community -- and I'm
11 going to ask the question of DOE and DOT -- is the
12 community going to accept the results of those
13 studies, you know, no matter what?

14 If it says an underpass is not acceptable,
15 will you accept that?

16 **MR. MORAN:** I have to -- in my position,
17 Commissioner, I have to try and speak for the
18 community.

19 So, you know, I would have to go back to
20 the community after it happened and try and get the
21 input. But my -- if it was today, like, what does
22 the community think? My expectation is the community
23 would say, no, we're not going to accept anything
24 but safe passage.

25 I base that on some of the past meetings

1 when I felt the most affected people -- we had -- I
2 believe it was the 2019 meeting when we had several
3 potential parents come to the commission and state
4 that we would rather delay our child going to the
5 new school rather than have unsafe passage across
6 this highway. We would rather send our children into
7 Maui High by bus or whatever rather than unsafe
8 passage.

9 And we certainly -- we tried to the last
10 couple of days -- we tried to look at that 300-some
11 written testimonies, and we certainly didn't get
12 through all of them. I would guess, scanning wildly
13 through them, I might have gotten to a hundred, and
14 in those, we did not see one testifier saying
15 anything but they wanted the -- preferably the
16 underpass, but they wanted the condition kept in
17 place.

18 So based on that, I would have to assume -
19 - and I'm assuming because I would have to get it
20 from the community -- that, no, the community is
21 holding strong. We want nothing but safe passage.

22 **COMMISSIONER CHANG:** And I appreciate your
23 candor on that. I'll share with you -- and, you
24 know, we're only at the beginning of the proceeding,
25 but just we have to rely on expert -- expert

1 testimony.

2 And I understand parents' fear. I am a
3 parent, and I have grandchildren as well. Totally
4 understand and appreciate that.

5 But if there is expert testimony saying
6 that, one, the underpass or the overpass or the
7 safest is this roundabout or the underpass or
8 overpass is not safe -- well, let me ask you this
9 question.

10 What is the community relying on to say
11 that it's not safe? I mean that the roundabout is
12 not safe and that the only thing that will be safe
13 is the overpass or underpass?

14 **MR. MORAN:** To clarify, Commissioner,
15 going back to, you know, 2013, KCA has for years
16 advocated for a roundabout in place of a crossroad.
17 We have -- we have had -- I mean, we're an unfunded
18 volunteer group, but we even paid almost a thousand
19 bucks, which is a lot of money to us, to get
20 professional input on the advantage of a roundabout
21 over a cross section.

22 And overwhelmingly, all experts from the
23 federal government down indicate that a roundabout
24 is safer for all modes of transportation. It's safer
25 for the pedestrians. It's safer for the bicyclists.

1 It's safer for the people in the vehicles.

2 So we have advocated for a roundabout.

3 Back in those days, the Department of Transportation
4 of Hawai'i opposed the roundabout. They -- they were
5 completely opposed to it. They said we've never done
6 it; we're not going to do it. And we continued to --
7 to persevere.

8 Now, as you probably know, the Department
9 of Transportation has completely reversed that
10 position and is now taking the position that the
11 federal government does, that most states do, that
12 many countries around the world do, saying a
13 roundabout is safer for everyone. And the concept is
14 that the vehicles must be physically forced to drive
15 slower.

16 So the concept is, okay, well, that will
17 make any collisions -- and we say they're not
18 accidents; they're collisions -- any collisions less
19 severe, because any engineer will tell you that the
20 slower the vehicle is moving, the less damage it
21 will do, the more chance there is to avert the
22 collision by people getting out of the way.

23 So when we hear expert testimony,
24 sometimes the expert testimony changes over the
25 years. And there's many, many experts who have given

1 input on this, saying that the -- the underpass is
2 the safest choice. The grade-separated crossing,
3 either over or under, is certainly safer than going
4 across the highway. And the more practical way,
5 because it would be used more, is to do a -- a
6 underpass.

7 So we've relied on expert testimony, and
8 we see how the State Department of Transportation
9 changed their position on roundabout, but they --
10 they don't seem to be changing their position. And
11 they're kind of the exception to the rule from all
12 the so-called expert testimony that we have.

13 We have seen and we have submitted a lot
14 of it. We've had several meetings over the years
15 with different people, and we have presented
16 examples of what are generally referred to as river
17 walks, where a -- there's a stream. Even though our
18 stream is dry 99 9/10ths of the time, we get it,
19 that sometimes it would flood. But if you have --

20 **COMMISSIONER CHANG:** Mr. Moran?

21 **MR. MORAN:** Oh, I'm going on too long.

22 **COMMISSIONER CHANG:** I'm sorry. I'm sorry
23 to interject, because I know that we've got kind of
24 a short time period, so I just want --

25 **MR. MORAN:** Thank you.

1 **COMMISSIONER CHANG:** Because there is an -
2 - there is an agreement on the roundabout, and I
3 guess the question that I'm facing, the issue that
4 I'm facing right now is there's a condition that
5 before the school can open, that these things have
6 to -- have to occur.

7 And you seem to say that many parents and
8 community members that you've spoken to have said
9 we're willing to say -- and I just heard from Mrs.
10 King that we're willing to say we'd rather not open
11 the school at all, if it means we don't get the
12 underpass or the overpass.

13 So I'm wondering is the community willing
14 to accept sort of this phased approach of doing the
15 roundabout first, open the school, Phase I; continue
16 the studies, get an updated TIAR, GSPC, before we
17 move into Phase II, which may or may not include the
18 overpass or the underpass?

19 But as a compromise -- and I believe the
20 county's raised it, so has the community talked
21 about that and is the community willing to accept
22 that phased approach?

23 **MR. MORAN:** Well, our understanding,
24 Commissioner, from hearing the Department of
25 Transportation's spokesperson last month said that

1 the -- the roundabout would start construction next
2 month. Now, October -- it would be finished in July.
3 No questions asked. The roundabout is a go.

4 That's what we heard the Department of
5 Transportation state publicly. So that doesn't seem
6 to be part of the equation. They're going to do it
7 before the Department of Education has forecast when
8 the school is going to be opened.

9 We do have some questions about when the
10 Department of Education says the school is going to
11 be opened, because we go back to 2016 when they told
12 us the school was going to be opened, so we always
13 have reservations on these predictions, when it will
14 be.

15 But our understanding is the earliest the
16 DOE says the school would be opened would be August
17 of next year. The DOT says the roundabout will be
18 completed. So that part seems to be a done deal on
19 the DOT's part.

20 But our community is saying having a
21 roundabout, which will slow the vehicles down, is
22 still not -- we don't want to make a compromise that
23 it's okay for a child crossing the highway to get
24 hit by a car going 20 miles an hour as opposed to a
25 car going 50 miles an hour.

1 **COMMISSIONER GIOVANNI:** Mr. Moran, let me
2 -- let me stop you there.

3 **MR. MORAN:** Yes, sir.

4 **COMMISSIONER GIOVANNI:** I don't think
5 you're -- we appreciate the -- the energy that you
6 have behind your position, but you need to listen to
7 the questions and answer them specifically.

8 **MR. MORAN:** Thank you.

9 **COMMISSIONER GIOVANNI:** And let me
10 encourage you when you're asked a yes or no
11 question, try to answer it yes or no.

12 I think the question was would you agree,
13 yes or no, to a phased approach where the school is
14 opened with only a roundabout, and then some future
15 time, there would be a study that may go up or down
16 on an overpass or underpass?

17 Yes or no. Would you agree with that
18 phased approach? Is that a correct statement of your
19 question?

20 **COMMISSIONER CHANG:** Yes, it is. Thank
21 you. Thank you, Commissioner Giovanni. Yes.

22 **MR. MORAN:** Today's answer would be no,
23 sir.

24 **COMMISSIONER GIOVANNI:** Thank you, sir.

25 **COMMISSIONER CHANG:** Thank you. No further

1 questions, Commissioner Giovanni.

2 **COMMISSIONER GIOVANNI:** Thank you.

3 **COMMISSIONER CHANG:** And thank you, Mr.

4 Moran.

5 **COMMISSIONER GIOVANNI:** Commissioner

6 Okuda?

7 **COMMISSIONER OKUDA:** Thank you, Mr. Vice
8 Chair. Mr. Moran, with respect to the Waipuilani
9 Gulch, do pedestrians today go and walk underneath
10 the highway bridge at the Waipuilani Gulch area? In
11 other words, are people using that underpass as a
12 method of getting from one side of the highway to
13 the other side? Is that happening now?

14 **MR. MORAN:** It is certainly happening. I
15 have personally seen it dozens and dozens and dozens
16 of times. I ride a --

17 **COMMISSIONER OKUDA:** Okay. That's
18 basically what I --

19 **MR. MORAN:** Oh, I'm sorry. Yes. Yes. Thank
20 you.

21 **COMMISSIONER OKUDA:** Yes. Okay. Then let
22 me ask a question which may or may not be related,
23 shifting gears slightly to what Mr. Fujioka was
24 asking.

25 If you had, or since you had all these

1 picketers or sign-wavers -- let's not call them
2 picketers -- sign-wavers on the highway, how would
3 you respond to an observation saying KCA is just
4 exaggerating the danger of the highway because you
5 all not only invited people to come out and sign
6 wave, you actually went out there and sign waved.

7 So you're overstating the danger of the
8 highway. What is your response, if that was the
9 question or comment?

10 **MR. MORAN:** To be clear, Chair, we were
11 not on the highway. We were not even on the shoulder
12 of the highway. We were, I guess, minimal 20 feet,
13 30 feet away from the shoulder on a plot of land.

14 The land juts out there before the gulch,
15 and we did have one exuberant sign-waver who did
16 walk out onto the bridge, and the rest of us were
17 saying, "Get off there. What, are you crazy? That's
18 not what we're doing." But, you know, when --

19 **COMMISSIONER OKUDA:** Okay. I -- I --

20 **MR. MORAN:** But, no, we were not out
21 there, our group.

22 **COMMISSIONER OKUDA:** Okay. Thank you very
23 much. I just needed clarification of that. Thank
24 you, Mr. Vice Chair. No further questions.

25 **COMMISSIONER GIOVANNI:** Thank you,

1 Commissioner Okuda. Any other commissioner have a
2 question for Mr. Moran? Thank you, Mr. Moran.
3 You're excused.

4 **MR. MORAN:** Oh. Mahalo.

5 **COMMISSIONER GIOVANNI:** So it's 1:56. I
6 want to take a short break at this time. We will
7 resume at 2:03. Here's my gavel.

8 **(Recess taken from 1:56-2:04 p.m.)**

9 **COMMISSIONER GIOVANNI:** Okay. We're back
10 on the record. It's 2:04. Let me just encourage
11 everyone. This is a Zoom meeting, so we are going to
12 try to zoom. The intent is to adjourn today at 3.

13 We have six additional testifiers in the
14 waiting room, which will require us to go through
15 expeditiously, if we're going to meet our target
16 adjournment time.

17 And I really encourage everybody to listen
18 to the questions, and if they're simple yes or no
19 questions, please answer with a simple yes or no, if
20 you can. So, Ms. Kato, did you have a comment?

21 **MS. KATO:** Sorry. It was just to ask if we
22 had an estimated time, but you just gave an
23 estimated time. Thank you.

24 **COMMISSIONER GIOVANNI:** Very well. Mr.
25 Derrickson, next up for testimony?

1 **MR. DERRICKSON:** Next up is Buck Joiner,
2 and on deck is Madeleine Wells.

3 **COMMISSIONER GIOVANNI:** Okay. Mr. Joiner
4 will be coming in. When you do, Mr. Joiner, please
5 start your video and your audio.

6 **MR. JOINER:** Hi, there. Camera not
7 working.

8 **COMMISSIONER GIOVANNI:** Okay. Well, just
9 go with your audio. We do hear you fine.

10 **MR. JOINER:** I don't understand why the
11 camera isn't working. I will give oral testimony --

12 **COMMISSIONER GIOVANNI:** Yes.

13 **MR. JOINER:** -- and extreme apologies and
14 try to share screen, if that possible.

15 **COMMISSIONER GIOVANNI:** You can't give
16 video. You can't share the screen. It's audio only.

17 **MR. JOINER:** No. Crap. Hang on. I'm not
18 good at this. There we are. Okay. So I'm Buck Joiner
19 from Kihei.

20 **COMMISSIONER GIOVANNI:** What's your
21 address, please?

22 **MR. JOINER:** And I will be telling the
23 truth. 3443 Malina Place, Kihei.

24 **COMMISSIONER GIOVANNI:** Do you affirm the
25 testimony you're about to give will be the truth?

1 **MR. JOINER:** Absolutely. Yes.

2 **COMMISSIONER GIOVANNI:** Mr. Joiner, you
3 have two minutes.

4 **MR. JOINER:** Thank you. I am 40-year Maui
5 resident, formerly on the board of directors of the
6 Kihei Community Association. I was chairman of that
7 traffic safety committee for 12 years.

8 I was also chairman of the Maui County
9 Traffic Safety Council. I am -- have been a member
10 of several state highway traffic groups. I'm a
11 retired professional engineer.

12 There is no consensus right now on the
13 best solution for students crossing Piilani Highway.
14 I agree with DOT and DOE, hereafter abbreviated as
15 DOT-E, that a gargantuan overpass or a tunnel under
16 Piilani Highway would be grossly expensive and
17 seldom used. Is my graphic showing?

18 **COMMISSIONER GIOVANNI:** No.

19 **MR. JOINER:** Okay. Then my camera isn't
20 working either.

21 **COMMISSIONER GIOVANNI:** Please make your
22 remarks the best you can.

23 **MR. JOINER:** In my written testimony, I
24 provided a map showing the -- showing that
25 approximately 85 percent of the students live either

1 north or south of the two bridges that abut the high
2 school property.

3 And those children have to walk across the
4 bridge to -- and that bridge is three feet wide. The
5 bridges are approximately 100 feet long.

6 I'm really -- I am frustrated. Is my
7 screen showing now?

8 **COMMISSIONER GIOVANNI:** It is.

9 **MR. JOINER:** Okay. I'm just going to have
10 to go.

11 **COMMISSIONER GIOVANNI:** You're at two
12 minutes now to complete the process.

13 **MR. JOINER:** Now, 85 percent of the
14 students live on either side of the bridges, and to
15 pass those to get to the school, they have to --
16 they have to cross this bridge. And that picture is
17 not showing.

18 **COMMISSIONER GIOVANNI:** I'm sorry. Mr.
19 Joiner, you're going to have to wrap this up.

20 **MR. JOINER:** The bridge is only three feet
21 wide, the walk path, 100 feet long, cars screaming
22 past, hundreds of kids, hundreds of cars. It's
23 absolutely unacceptable. The DOT, DOE have said that
24 the students may not cross through the gully;
25 therefore, they have to go over the bridge.

1 So there is a solution, and that is to
2 build a walkway across the bridge -- across the
3 gully, the gulches. That will allow 85 percent of
4 the students to go through that walkway and then
5 pass under the bridge. And we need two pathways and
6 two underpasses. If my graphic is showing, you can
7 see that the --

8 **COMMISSIONER GIOVANNI:** Mr. Joiner?

9 **MR. JOINER:** -- is about equal. The gulch
10 is dry 99 percent of the time, 99.99, and --

11 **COMMISSIONER GIOVANNI:** Please conclude.

12 **MR. JOINER:** Flooding is a concern. The
13 walkway could be on pontoons; okay? And that would
14 eliminate the problem of the -- of the water. Okay.

15 **COMMISSIONER GIOVANNI:** Thank you.

16 **MR. JOINER:** I think I will pause there.

17 **COMMISSIONER GIOVANNI:** Yeah. So,
18 petitioner, do you have any questions for Mr.
19 Joiner?

20 **MR. FUJIOKA:** No questions. Thank you.

21 **COMMISSIONER GIOVANNI:** Mr. Hopper, does
22 County have any questions for Mr. Joiner?

23 **MR. HOPPER:** No questions.

24 **COMMISSIONER GIOVANNI:** Ms. Kato, do you
25 have any questions for Mr. Joiner?

1 **MS. KATO:** No questions. Thank you.

2 **COMMISSIONER GIOVANNI:** Thank you.

3 Commissioners, any questions for Mr. Joiner?

4 **MR. JOINER:** I'm sure my screen worked
5 last night in a test run.

6 **COMMISSIONER GIOVANNI:** Seeing none, thank
7 you, Mr. Joiner, for joining us today. We did see
8 your screen. So we will excuse you now. Mr.
9 Derrickson, could you bring our next witness?

10 **MR. DERRICKSON:** Next witness is Madeleine
11 Wells, followed by Louise Lambert.

12 **COMMISSIONER GIOVANNI:** Thank you. Ms.
13 Wells, please activate your video and your audio, if
14 you can.

15 **MS. WELLS:** Got it. Okay.

16 **COMMISSIONER GIOVANNI:** Great. We hear
17 you. Do you affirm the testimony you're about to
18 give will be the truth?

19 **MS. WELLS:** Yes.

20 **COMMISSIONER GIOVANNI:** Please give us
21 your full name and address.

22 **MS. WELLS:** Okay.

23 **COMMISSIONER GIOVANNI:** And then give us a
24 couple of minutes of testimony.

25 **MS. WELLS:** Okay. Madeleine Wells. I live

1 at 168 Oluea Circle in Kihei 9 -- you know what I
2 mean, in Kihei. Sorry. And, okay, so I got to run
3 through all this stuff.

4 Aloha, Land Use Commission. I'm testifying
5 to urge the commission to deny DOE's petition to
6 change the above or below grade requirements for
7 students to cross Piilani Highway to the new high
8 school.

9 I live off Kulanihakoi, directly across
10 the highway from the new school. Although this
11 subdivision where I live is in a sheltered
12 enclosure, the highway noise sounds like we are
13 living just below a major freeway.

14 During the years prior to this new traffic
15 light installation three weeks ago, I would be stuck
16 for many minutes waiting to make my left turn off
17 the highway onto Kulanihakoi.

18 Once I noticed in real time how long the
19 wait was, when I heard how many songs played on
20 Pandora, it was almost four full songs.

21 Since most are in the four to five-minute
22 range, it's easy enough to do the math, but not easy
23 getting across. Not easy for students either, which
24 is why charter school kids have to be driven, no
25 matter how close they live, as long -- if it's makai

1 of the highway.

2 My car is heavy and built close to the
3 ground. Even so, it gets jostled alarmingly in the
4 high winds caused from air currents moved by
5 multiple vehicles racing more than 20 miles above
6 the speed limit. This is a windy part of the island,
7 but during the shutdown last year, it was amazing
8 how still the air seemed by comparison.

9 Until I can get safely wedged into the
10 left turnoff section, other cars close in behind me,
11 pressuring me to speed. Many travel at terrifying
12 velocity. Posted speeds in this area are 30 or 35.
13 Most cars in the left lane are going between 50 and
14 65, but plenty at 70 and above.

15 All it would take is a split-second
16 attention lapse of an oncoming driver for me to get
17 knocked across the road and cause a multiple wreck
18 in both directions. But I would be inside my car.
19 Imagine what it would do to a child on foot or
20 skateboard, or several adolescents walking together.

21 They are under pressure to get to class on
22 time or to practice or rehearsal or meetings. When
23 two minutes can make the difference in a lowered
24 grade or some form of demerit, it's easy to see how
25 some might be tempted to run across against the

1 stoplight. A walkway --

2 **COMMISSIONER GIOVANNI:** Please summarize,
3 if you can.

4 **MS. WELLS:** Okay. Okay. A walkway under
5 the Waipuilani and Kulanihakoi bridges would provide
6 access mauka and makai to high school students and
7 charter school students up the hill on Lipoa.

8 Engineering information responses. Buck
9 provided that. I guess, hopefully, you all we have a
10 chance to see it later.

11 Anyway, that's the only practical
12 solution. It would cost almost nothing. It could be
13 finished within about three weeks. And that could
14 happen way before this roundabout would be done.
15 This is a really dangerous stretch of road, and
16 despite police issuing tickets up and down the
17 highway, the speeding is heavy.

18 Community members do -- yeah, there's no
19 way this could happen without sacrificed keiki lives
20 in the --

21 **COMMISSIONER GIOVANNI:** Thank you.

22 **MS. WELLS:** Okay.

23 **COMMISSIONER GIOVANNI:** Thank you very
24 much.

25 **MS. WELLS:** Thanks for your consideration.

1 **COMMISSIONER GIOVANNI:** Thank you.

2 Petitioner, questions for Ms. Wells? Mr. Fujioka,
3 any questions for Ms. Wells?

4 **MR. FUJIOKA:** I'm sorry. No questions.
5 Thank you.

6 **COMMISSIONER GIOVANNI:** Thank you. Mr.
7 Hopper, any questions?

8 **MR. HOPPER:** No questions.

9 **COMMISSIONER GIOVANNI:** Thank you. Ms.
10 Kato?

11 **MS. KATO:** No questions. Thank you.

12 **COMMISSIONER GIOVANNI:** Thank you.
13 Commissioners, any questions for Ms. Wells? Thank
14 you, Ms. Wells, for joining us today. You will be
15 excused now. Thank you.

16 **MS. WELLS:** Thank you.

17 **COMMISSIONER GIOVANNI:** Mr. Derrickson,
18 who's next?

19 **MR. DERRICKSON:** Louise Lambert.

20 **COMMISSIONER GIOVANNI:** Thank you.

21 **MR. DERRICKSON:** Nick Drance on deck.

22 **COMMISSIONER GIOVANNI:** Who's on deck?

23 **MR. DERRICKSON:** Nick Drance.

24 **COMMISSIONER GIOVANNI:** Okay. Thank you.

25 Aloha, Ms. Lambert. Can you hear us?

1 **MS. LAMBERT:** Aloha. Yes. Can you hear me?

2 **COMMISSIONER GIOVANNI:** Yes. We hear you,
3 and we see you. Do you --

4 **MS. LAMBERT:** Oh, thank you.

5 **COMMISSIONER GIOVANNI:** Do you affirm that
6 --

7 **MS. LAMBERT:** My name is Louise Lambert. I
8 live at 3265 Kehala Drive in Kihei 96753.

9 **COMMISSIONER GIOVANNI:** Do you affirm that
10 your testimony that you're about to give is the
11 truth?

12 **MS. LAMBERT:** Yes.

13 **COMMISSIONER GIOVANNI:** Please proceed for
14 two minutes.

15 **MS. LAMBERT:** Thank you. Thank you. Thank
16 everybody for their support in this matter.

17 I'm a grandparent -- a parent, of course,
18 but a grandparent, and I have a 10-year-old grandson
19 who will likely be going to the school. I'm a former
20 teacher at Montessori Hale o Keiki, which is --
21 actually was in that neighborhood where the school
22 entrance is.

23 There are dangerous sidewalks at the
24 Kulanihakoi and Waipuilani bridges, which Buck has
25 in his -- his pictures that, hopefully, you all have

1 access to. So hundreds of students will need to
2 walk, bike, or skate to school who live closer than
3 the 1.5 miles from school that are ineligible for a
4 school bus ride.

5 And if we're depending on car rides for
6 all these hundreds of children, it's definitely
7 going to create more traffic challenges.

8 So if we expect a large body of students
9 to only cross at one place, it's not practical.
10 Students will be coming from north of Kulanihako
11 and south of Waipuilani, and either we need to widen
12 the bridges or create safe walkways, bike paths
13 above, below, or beside the bridges to provide safe
14 access for the students and all the people coming
15 and going from school.

16 With three-foot wide bridges with the
17 cement three foot from the edge of the road for
18 large groups of youths and fast-moving traffic and
19 cyclists and skateboards and whatever other means of
20 transportation youth will use to get to school,
21 we've got scenes for fatal injuries.

22 Thank you for paying attention to the very
23 important safety of our youth. I believe underpasses
24 are necessary for students traveling to and from
25 school, and so I strongly advocate not waiving the

1 requirement. Thank you very much.

2 **COMMISSIONER GIOVANNI:** Thank you, Ms.
3 Lambert. You hit two minutes on the button, and I'm
4 so proud of you for doing so. Thank you.

5 So, petitioner, do you have any questions
6 for Ms. Lambert?

7 **MR. FUJIOKA:** No questions.

8 **COMMISSIONER GIOVANNI:** Mr. Hopper from
9 the County, any questions?

10 **MR. HOPPER:** No questions, Chair.

11 **COMMISSIONER GIOVANNI:** Thank you. Ms.
12 Kato from OPSD, any questions?

13 **MS. KATO:** No questions. Thank you.

14 **COMMISSIONER GIOVANNI:** Thank you.
15 Commissioners, any questions? Seeing none, thank
16 you, Ms. Lambert. You'll be excused.

17 **MS. LAMBERT:** Thank you.

18 **COMMISSIONER GIOVANNI:** Mr. Derrickson,
19 who's next? Who's on deck?

20 **MR. DERRICKSON:** Nick Drance next, and
21 Andrew Beerer on deck.

22 **COMMISSIONER GIOVANNI:** Mr. Drance, please
23 activate your audio and visual.

24 **MR. DRANCE:** There we go.

25 **COMMISSIONER GIOVANNI:** There you go.

1 **MR. DRANCE:** All right.

2 **COMMISSIONER GIOVANNI:** Do you affirm that
3 the testimony you're about to give is the truth?

4 **MR. DRANCE:** I do.

5 **COMMISSIONER GIOVANNI:** Thank you. Can you
6 please state your name and your address for the
7 record and proceed with your two minutes of
8 testimony?

9 **MR. DRANCE:** Nick Drance, 2441 South Kihei
10 Road, Kihei. That was my assistant. And I will tell
11 the truth.

12 In the interest of saving time, just let
13 me reaffirm the testimony from the prior speakers.
14 And there's a tremendous number of people on social
15 media, Next Door Neighbor Kihei and Facebook, who
16 are voicing similar opinions about -- that others
17 have expressed here. A few have been dropped off
18 because they were ready to sign up this morning at
19 9.

20 So this is a big topic with the public
21 here, and I think if a requirement is made,
22 requirements are made for a reason, and we should
23 leave it be and not accept the petitioner's request.
24 And I thank you.

25 **COMMISSIONER GIOVANNI:** Thank you, Mr.

1 Drance. You just broke the record. Thank you. One
2 minute. So questions, Mr. Fujioka, from the
3 petitioner?

4 **MR. FUJIOKA:** No questions. Thank you.

5 **COMMISSIONER GIOVANNI:** Thank you. Mr.
6 Hopper?

7 **MR. HOPPER:** No questions, Chair.

8 **COMMISSIONER GIOVANNI:** Thank you. Ms.
9 Kato?

10 **MS. KATO:** No questions. Thank you.

11 **COMMISSIONER GIOVANNI:** Thank you.

12 Commissioners? Seeing none, thank you, Mr. Drance.
13 You're excused. Thank you for coming forward.

14 **MR. DRANCE:** Thank you.

15 **COMMISSIONER GIOVANNI:** Mr. Beerer, come
16 into the room. And, Mr. Derrickson, who's on deck?

17 **MR. DERRICKSON:** Andrew Beerer being
18 promoted and Tina Wildberger on deck.

19 **COMMISSIONER GIOVANNI:** Okay. Is Tina --
20 is Representative Wildberger the last one in the
21 room?

22 **MR. DERRICKSON:** Last one with their hand
23 up. Yes.

24 **COMMISSIONER GIOVANNI:** Thank you. Mr.
25 Beerer, please activate your audio and video. There

1 you go.

2 **MR. BEERER:** All right. Apologies there.

3 **COMMISSIONER GIOVANNI:** No problem. Do you
4 affirm that the testimony you're about to give is
5 the truth?

6 **MR. BEERER:** Yes, I do.

7 **COMMISSIONER GIOVANNI:** Yeah, name and
8 address for the record, and proceed for two minutes.

9 **MR. BEERER:** My name is Andrew Beerer, 56
10 Kolola Place, Kihei, Hawai'i 96753.

11 I'm going to give my oral testimony, but
12 also hope you'll read my written testimony, as it
13 speaks to the need for updated traffic studies and
14 the need for DOE compliance with other LUC-imposed
15 conditions, specifically conditions 1(b), 1(d) for
16 pedestrian shoulders and condition 2 for annual
17 updates.

18 I can also address the questions that were
19 given to Mr. Moran earlier. The Fehr & Peers traffic
20 studies both mandate an underpass or a grade-
21 separated crossing in 252031, although I do believe
22 they use drastically underestimated pedestrian
23 volumes.

24 So I think a new pedestrian study would
25 even show greater pedestrian volumes, but they are

1 mandated in those two studies. All right. Let's
2 talk about the intent of this condition. In 2019,
3 the LUC reaffirmed that the intent of the condition
4 was to provide for an over or underpass.

5 Furthermore, at that time, the LUC
6 reaffirmed that the DOT has no decision-making
7 power, but only advises. Today the intent of the
8 condition is still true: to provide a safe grade-
9 separated pedestrian crossing to keep students off
10 the highway.

11 The intent of the Department of Education
12 should be to protect their students and provide the
13 safest crossing to school. The intent of the
14 Department of Transportation should be to protect
15 pedestrians and provide a functioning highway.

16 To excuse the DOE from this obligation
17 does not solve or fulfill the intent of the
18 condition. It is a disservice to the future of this
19 community and the safety of its students.

20 These Land Use Commission conditions are
21 sacred and dear to us. It is the only leverage a
22 community has to make sure that the community gets
23 critical infrastructure in exchange for a land use
24 amendment.

25 The underpass is warranted and suggested.

1 How many years can we kick the can down the road and
2 why? We have heard from countless experts and
3 engineers that the underpass is feasible and
4 recommended. And we've seen plenty of tragedy on
5 this highway. It is inevitable.

6 We have seen hundreds of examples of
7 underpasses built along coastal waterways and next
8 to raging rivers. We are in a dry gulch that barely
9 flows, a dry gulch that is crossed every day by the
10 hundreds of men and women working on the high
11 school. We should be grateful that we have such a
12 wide underpass, and experts advise a pedestrian
13 trail is inexpensive and commonplace.

14 **COMMISSIONER GIOVANNI:** Please summarize,
15 Mr. Beerer.

16 **MR. BEERER:** The Land Use Commission has
17 reaffirmed that the Department of Transportation has
18 no decision-making power, but only advises. We need
19 the DOE and the DOT to end this game of chicken. We
20 need to move forward now. We need to move forward
21 with good faith and immediately contact the
22 engineers and experts to survey and design a
23 pedestrian underpass. The clock is ticking, same as
24 it has been for nine years.

25 **COMMISSIONER GIOVANNI:** Thank you.

1 Petitioner, do you have any questions for Mr.
2 Beerer?

3 **MR. FUJIOKA:** No, Mr. Chair.

4 **COMMISSIONER GIOVANNI:** Mr. Hopper?

5 **MR. HOPPER:** No, Chair.

6 **COMMISSIONER GIOVANNI:** Ms. Kato?

7 **MS. KATO:** No questions. Thank you.

8 **COMMISSIONER GIOVANNI:** Thank you.

9 Commissioners? Commissioner Chang? You're on mute.

10 **COMMISSIONER CHANG:** Thank you,
11 Commissioner Giovanni. And I'm going to try to keep
12 my questions really tight.

13 Mr. Beerer, you seem like someone who's
14 going to give me a yes or no answer, so I'm going to
15 ask you the questions that I was asking Mr. Moran.

16 As I understand, KCA is asking that an
17 updated feasibility, GPSC study, and an updated TIAR
18 be completed; is that correct?

19 **MR. BEERER:** Yes.

20 **COMMISSIONER CHANG:** Okay. And I know you
21 don't speak on behalf of all the community, but you
22 seem to know a lot of what's going on. Will the
23 community accept, if the updated study says that the
24 roundabout is sufficient, the DOT additional
25 mitigation methods are sufficient, an underpass or

1 an overpass is not -- is not feasible or is not --
2 is not required at this time, do you believe that
3 the community will accept that?

4 **MR. BEERER:** Not without an unbiased
5 review. It took our review to determine that the
6 Department of Education and their consultants were
7 not using their own data for bussing statistics.

8 So as laymen, we have to go through these
9 hundreds of documents as if we were attorneys to
10 make sure that they're legitimate or are these
11 consultants just doing the bidding of the dictators
12 that have asked them to do this study for them.

13 **COMMISSIONER CHANG:** So what's the basis?
14 How do you determine an unbiased? Is that something
15 that the community would participate in the
16 selection of the expert?

17 **MR. BEERER:** Well, yeah. Well, first, you
18 -- you read the study. And so, say in this 2016 Fehr
19 & Peers study, they estimate 20 percent of
20 pedestrians would walk to school, those within .2
21 miles. Well, the DOE bussing policy does not provide
22 bussing unless you live outside of 1.5 miles. So
23 that's a three-mile radius. That is significantly
24 more than what was used to determine the numbers for
25 the 2016 study.

1 **COMMISSIONER CHANG:** Okay. And I guess I'm
2 -- I'm not asking for the details of what would be
3 in there, but it's mostly a procedural question,
4 because we're faced with this -- this very critical
5 decision. There is -- if that underpass or overpass
6 is not built, based upon the representations, the
7 school cannot open.

8 So let me ask you this question. In your
9 view, would a phased approach -- do the -- do the
10 roundabout, open the school, Phase I; continue the
11 updated studies for Phase II and have further
12 discussions with the community about both the
13 updated study and the roundabout or overpass, if
14 that's necessary, and get legislative funding for
15 Phase II of the opening. Would that be acceptable?

16 **MR. BEERER:** I personally hold dear to a
17 Land Use Commission condition, because once you
18 remove a condition, your chances of ever getting it
19 back are pretty nil. If there was a way to get the
20 DOE to move forward with some studies and work
21 collaboratively with our local engineers, I think
22 you could find some solutions there. But the
23 condition must remain until they do the due
24 diligence and work that this condition requires.

25 **COMMISSIONER CHANG:** So are you saying

1 that the condition means building an overpass or an
2 underpass before the school opens, that there's
3 nothing less -- that the community would not accept
4 anything less than that?

5 **MR. BEERER:** At this point, correct.

6 **COMMISSIONER CHANG:** All right. Thank you
7 very much for your candid answers. No further
8 questions.

9 **MR. BEERER:** You're welcome.

10 **COMMISSIONER GIOVANNI:** Thank you.
11 Commissioner Wong, did you have your hand up?

12 **COMMISSIONER WONG:** Yes, Chair. Thank you.
13 Mr. Beerer, I got to -- sorry, I pressed the wrong
14 button. Can't use this mouse well.

15 My question is two -- well, several
16 questions. The first question I have is do you --
17 you heard me talking to Councilmember King; correct?

18 **MR. BEERER:** Correct.

19 **COMMISSIONER WONG:** So we're going through
20 a hypothetical situation, because we're not -- well,
21 I'm not living on Maui. You know, I mean, we have
22 Commissioner Ohigashi, but the rest of us live on
23 different islands.

24 So do you -- do you think that the council
25 and executive branch of Maui will have more ideas of

1 what should be in place in that location?

2 **MR. BEERER:** Well, that's a hypothetical
3 question, but I think what I allude to is this has
4 become a game of chicken where the Department of
5 Education isn't doing any diligence and keeps
6 bringing us back for these hearings. That brings us
7 no closer to a solution.

8 What we're ultimately headed towards is a
9 school that will be ready to open without a safe
10 crossing that was a part of a nine-year-old Land Use
11 Commission condition.

12 Now, what can we do in the meantime to
13 speed up the process? We've been speaking against
14 this for years, when they've had plenty of time.
15 There's still time on the clock to start some
16 serious studies. That's what needs to happen right
17 now before we start talking about what could happen
18 in two years when the school is open, and they're
19 applying for occupancy permits.

20 Because I agree. It's going to be really
21 tough to keep people out of a brand-new school. But
22 at the same time, does waiting out the community and
23 the Land Use Commission warrant squashing the wishes
24 of the community and the safety of the students? It
25 doesn't.

1 **COMMISSIONER WONG:** So, no, I just was
2 wondering if you heard the hypothetical of what if
3 the County of Maui and the city council decides not
4 to give a certificate of occupancy and say that it's
5 not part of the community plan, so you cannot open
6 up.

7 So we see the Land Use -- again, the
8 hypothetical is what if the Land Use Commission says
9 right now build the roundabout plus add stuff to the
10 community plan?

11 **MR. BEERER:** I -- I personally don't want
12 to give up this condition. Like I said before -- I
13 hate to repeat myself, but once you give up a
14 condition, you're unlikely to see them again. As
15 commissioners, you all know that very well.

16 **COMMISSIONER WONG:** Okay. Thank you.
17 Thank you, Chair.

18 **COMMISSIONER GIOVANNI:** Thank you,
19 Commissioner Wong. Any other questions for this
20 witness from the commissioners? Seeing none, Mr.
21 Beerer, thank you very much for your testimony.

22 **MR. BEERER:** Thank you for your time.
23 Appreciate it.

24 **COMMISSIONER GIOVANNI:** Thank you. Mr.
25 Derrickson, who's next?

1 **MR. DERRICKSON:** Representative Wildberger
2 being promoted to panelist now.

3 **COMMISSIONER GIOVANNI:** Excellent.

4 **REPRESENTATIVE WILDBERGER:** Aloha,
5 commissioners. And Vice Chair, thank you for your
6 time and your service and attention to this
7 incredibly important matter. I'm back with you again
8 on this issue to oppose the DOE's request to drop
9 this requirement.

10 **COMMISSIONER GIOVANNI:** Can I quickly have
11 you --

12 **REPRESENTATIVE WILDBERGER:** Oh, yes. I'm
13 sorry. Representative Tina Wildberger. I live at
14 2710 Kauhale Street in Kihei, and I attest to tell
15 the truth today.

16 **COMMISSIONER GIOVANNI:** Very good. Imua.

17 **REPRESENTATIVE WILDBERGER:** Thank you. For
18 over a decade, KCA has been working to realize this
19 vision of Kihei. It's really difficult to understand
20 that we're here again on this issue that has already
21 been decided twice very judiciously in a careful
22 consideration by this very commission in 2013 and in
23 2019.

24 The community's demand for safe GSPC has
25 not changed. Residents want a walkable, bikeable

1 community. Without safe crossing to a new center of
2 our community, this goal is not attainable. Students
3 crossing Piilani Highway twice a day during a shift
4 change where thousands of drivers are commuting
5 through Kihei to Wailea resorts will destroy the
6 daily commute.

7 Like O'ahu right now, commuters sit
8 through multiple cycles at other intersections,
9 trying to traverse Kihei. That's already happening
10 when the charter school on Lipoa gets out.

11 The first student pedestrian traffic
12 fatality will be on the hands of those choosing to
13 put kids in traffic. I implore and beseech the LUC
14 commissioners today to once again uphold the
15 requirement for pedestrian separated crossing for
16 Kihei High School. Mahalo.

17 **COMMISSIONER GIOVANNI:** Thank you. And
18 thank you for your written testimony that you've
19 submitted as well.

20 **REPRESENTATIVE WILDBERGER:** Thank you.

21 **COMMISSIONER GIOVANNI:** So, petitioner, do
22 you have any questions for Representative
23 Wildberger?

24 **MR. FUJIOKA:** No. Thank you.

25 **COMMISSIONER GIOVANNI:** Thank you. Mr.

1 Hopper?

2 **MR. HOPPER:** No, Chair.

3 **COMMISSIONER GIOVANNI:** Ms. Kato?

4 **MS. KATO:** No, thank you.

5 **COMMISSIONER GIOVANNI:** Thank you.

6 Commissioners, what's your pleasure? Let's start
7 with Commissioner Okuda.

8 **COMMISSIONER OKUDA:** Thank you very much,
9 Mr. Chair. Thank you, Representative Wildberger. I
10 read your -- and I read all the testimony, believe
11 it or not, but I read your very detailed testimony
12 with citations to studies and other pieces of
13 evidence.

14 After you submitted your testimony which
15 appears as part of the public record on the Land Use
16 Commission website, did anyone from the executive
17 branch, including the Department of Education or
18 Department of Transportation, contact you to discuss
19 the specific studies or specific data that you
20 included in your testimony, including the
21 photographs that you included and the arguments you
22 made? Did anyone from the executive branch contact
23 you?

24 **REPRESENTATIVE WILDBERGER:** No,
25 Commissioner.

1 **COMMISSIONER OKUDA:** Okay. Oh, okay, Mr.
2 Chair. Thank you very much. I have no further
3 questions.

4 **COMMISSIONER GIOVANNI:** I can see you're
5 not accustomed to a simple yes or no answer to your
6 questions, so that's -- that's fine. Commissioner
7 Chang, you had a question?

8 **COMMISSIONER CHANG:** Yes. I did. Thank you
9 so much. And thank you, Representative Wildberger. I
10 appreciate you being here again. Obviously, this is
11 a very important issue for your community.

12 I just have one question, and I -- and I
13 don't follow the legislative budget process, but I
14 was wondering have you put in money? Have you put
15 in, requested on behalf of Kihei community any
16 budget for an underpass and overpass?

17 **REPRESENTATIVE WILDBERGER:** I have not.

18 **COMMISSIONER CHANG:** Okay. Thank you very
19 much.

20 **COMMISSIONER GIOVANNI:** Thank you.
21 Commissioners, any further questions? Commissioner
22 Ohigashi?

23 **COMMISSIONER OHIGASHI:** On the same lines
24 as Commissioner Chang, I seem to recall the last
25 time we were here, a long time ago when we talked

1 about this, is that the -- there was concern as to
2 the cost of an underpass being in excess of \$30
3 million by the DOT if it's built up to their prior
4 specifications.

5 And I had the impression here that DOT
6 would be seeking guidance from the legislature as to
7 whether or not they would take funding for those,
8 that provision.

9 Have you -- have you any idea, one,
10 whether or not the budget or the budgetary amounts,
11 if there is available money, the existing
12 appropriation for such an underpass; and number two,
13 whether or not they have sought specific guidance
14 from the legislature with regard to whether or not
15 to secure such funding?

16 **REPRESENTATIVE WILDBERGER:** Thanks,
17 Commissioner. I have not had any conversations with
18 the DOT or the DOE regarding funding about the
19 underpass. I found the deputy director's estimate
20 really high, because he seemed to think that he
21 would need to raise the bridge, which would quickly
22 cost millions.

23 **COMMISSIONER OHIGASHI:** I'm sorry,
24 Representative Wildberger. I'm just trying to find
25 out whether or not that you know if there is

1 sufficient moneys in existing appropriations to pay
2 for that type of underpass because -- because that's
3 what the impression I got, that they would check if
4 they have, and they would seek legislative guidance
5 on this matter. That's what my impression was with
6 the last time we were here.

7 The second part was just some questions,
8 whether or not they sought the same guidance,
9 because -- if you know.

10 **REPRESENTATIVE WILDBERGER:** I don't think
11 they have.

12 **COMMISSIONER OHIGASHI:** And what about the
13 first question? Is there any funding available? Have
14 you -- has the legislature conducted an inquiry as
15 to what -- whether or not there's moneys available
16 in existing appropriation or whether it's used up or
17 pledged on?

18 **REPRESENTATIVE WILDBERGER:** I think for
19 the underpass that the community is asking for, it
20 would be very easy to allocate funding to that. It
21 would not be a large change order at all in the
22 scope of that project.

23 **COMMISSIONER OHIGASHI:** I understand. But
24 I'm asking from the point of view in -- is there any
25 money available in the existing appropriation that

1 you could repurpose that you know about?

2 **REPRESENTATIVE WILDBERGER:** I don't have
3 any information about reappropriating funding.

4 **COMMISSIONER OHIGASHI:** Thank you.

5 **COMMISSIONER GIOVANNI:** Thank you. That's
6 it, Commissioner? That's the end of it? Okay. Any
7 other questions from commissioners for
8 Representative Wildberger?

9 **COMMISSIONER WONG:** Chair?

10 **COMMISSIONER GIOVANNI:** Yes, Mr. Wong.
11 Commissioner Wong, please proceed.

12 **COMMISSIONER WONG:** Thank you, Mr. Chair.
13 Good afternoon, Representative. I got a question.
14 This is legislatively dealing with this issue. Could
15 the legislature do a -- I guess an info brief or
16 something with the DOE to bring it up to the
17 legislative level to -- you know what I'm saying?
18 You know there's always info briefs or something
19 that say, hey, DOE, come and inform us of what's
20 happening, what you need, and why you're not doing
21 it? So could the legislature do something like that?

22 **REPRESENTATIVE WILDBERGER:** Typically, the
23 info briefings are held and conducted by the chairs
24 of those committees. Representative Justin Woodson
25 is the chair of the education committee, and that is

1 something that he certainly could do on our behalf.

2 **COMMISSIONER WONG:** Yeah. It's just that,
3 you know, there is -- as we see, there's Phase I,
4 Phase II, Phase III, I believe, for the Kihei High
5 School.

6 And I think at one of our hearings, we say
7 don't do -- there's appropriated money already in
8 Phase II or Phase III. Reappropriate it for this
9 issue and put it part of the info brief and then
10 talk to Chair Luke and say, hey, we want to do this,
11 can we do this. Something like that.

12 **REPRESENTATIVE WILDBERGER:** Thank you.
13 It's an excellent suggestion.

14 **COMMISSIONER WONG:** Yeah. That's all.
15 Thank you, Representative. Thank you, Chair.

16 **COMMISSIONER GIOVANNI:** Thank you,
17 Commissioner Wong. Okay. One more time. Any follow-
18 up questions from any commissioners for
19 Representative Wildberger?

20 Seeing none, thank you, Representative,
21 for being with us today and for your testimony.

22 **REPRESENTATIVE WILDBERGER:** Thank you all
23 for your time and careful consideration. We
24 appreciate it so much.

25 **COMMISSIONER GIOVANNI:** Thank you. Mr.

1 Derrickson, anybody left with their hands up?

2 **MR. DERRICKSON:** There's no one else in
3 the audience with the hands up.

4 **COMMISSIONER GIOVANNI:** Okay. This will be
5 the last chance for anybody to raise their hand. I'm
6 going to give it five seconds. If not, we'll close
7 public testimony, so counting down in my head.

8 Anybody raise their hand?

9 **MR. DERRICKSON:** No.

10 **COMMISSIONER GIOVANNI:** Okay. So we will
11 close public testimony for this docket. I again want
12 to reaffirm the commission's appreciation for the
13 written testimony and the volume of that testimony
14 that came in on this docket. We take that very
15 seriously, so thank you.

16 So we'll now move to the petitioner's
17 presentation, Mr. Fujioka, recognizing we've got
18 about 17 minutes on the clock before the targeted
19 deadline. Do you have -- what is -- what is your
20 pleasure? How would you like to proceed?

21 **MR. FUJIOKA:** I wanted to share one of our
22 exhibits, the PowerPoint presentation, but I'm
23 having difficulty sharing screen, so I'm wondering
24 if I should get that resolved and then perhaps
25 resume tomorrow with our presentation, since it's,

1 like, a quarter to three already.

2 **COMMISSIONER GIOVANNI:** It's a quarter to
3 three. So are you basically saying that you've got
4 nothing meaningful to present in the time available
5 to you at this time?

6 **MR. FUJIOKA:** I wanted to present through
7 the PowerPoint, and I don't know if my screen will
8 share. I can try checking, because I could -- is my
9 screen up now?

10 **COMMISSIONER GIOVANNI:** Yup. And we see a
11 PowerPoint.

12 **MR. FUJIOKA:** It says Kihei High School
13 LUC Docket?

14 **COMMISSIONER GIOVANNI:** Yeah. So how long
15 will it take you to go through this PowerPoint?

16 **MR. FUJIOKA:** I hope less than 15 minutes.

17 **COMMISSIONER GIOVANNI:** Okay. Proceed.

18 **MR. FUJIOKA:** Okay. Since it's been a
19 while that we were here to address this issue, I
20 wanted to go through a little bit of the history of
21 what has happened from the petitioner's point of
22 view. So I think it's -- everybody knows that we're
23 trying to have the grade-separated pedestrian
24 requirement removed from the boundary amendment so
25 that the school can open for the 2022-23 school

1 year.

2 Some things that have happened since the
3 filing, or this most current filing, is now we have
4 a principal. Her name is Halle Maxwell. She used to
5 be -- until August 1st, she was the principal of
6 Kihei Elementary School. She's invested in the
7 community. She's been living here, I think, at least
8 20 years.

9 And there's going to be a later slide that
10 shows she -- that confirms that she's committed to
11 meeting once a month with the community. She's
12 already started so, you know, I think that's very
13 encouraging in terms of trying to get the school up
14 and running on schedule.

15 There were -- I know the -- there are some
16 of them critical of traffic and pedestrian studies
17 that have been done. But, you know, there have been
18 a number of them.

19 Back in 2011 and 2012, there was the
20 traffic impact report, including a traffic signal
21 warrant study. We recently submitted this as Exhibit
22 38 in one of the supplements. This was one of the
23 earlier ones -- or actually, I think it's the
24 earliest. It was done for Wilson Okomoto, or by
25 Wilson Okomoto, the original engineers.

1 Then there was a Kihei High School
2 pedestrian and bicycle analysis. That's the Stantec
3 report. We submitted that one a while ago as Exhibit
4 26. That one was from 2012. So these two studies
5 actually preceded the Findings of Fact and
6 Conclusions of Law and Order which were filed on
7 July 29, 2013, and the DOE is seeking to have
8 amended currently.

9 Then in 2014, WALC, Walkable and Livable
10 Communities, issued this Safe Routes to Kihei High
11 School, that pedestrian route study from 2014.
12 Initially, it was submitted as an exhibit -- as
13 Exhibit 2, and then when Commissioner Okuda made his
14 request for additional reports, this was one of
15 them. So now in its entirety, it's included as
16 Exhibit 42.

17 And at that point, the Department of
18 Transportation had not approved the pedestrian route
19 study, so additional work was done, and this Fehr &
20 Peers report of October 25, 2016, which is Exhibit
21 4, that was done in 2016.

22 Subsequently, in 2017, that's July 18,
23 that's when the DOT approved the -- the traffic
24 study. One of the important conclusions there was
25 that the grade-separated crossing warrants were not

1 met. The Department of Transportation letter is
2 Exhibit 5.

3 And then subsequently, notwithstanding
4 that, the commission issued its declaratory order
5 April 25th, 2019, reaffirming the grade-separated
6 pedestrian crossing requirement. Subsequently, Fehr
7 & Peers did a study, August 1, 2019. And that's in
8 as Exhibit 11. And that one, I believe, concluded
9 that the grade-separated crossing was not warranted.

10 And after that, there's been some
11 additional work. July 28, 2020, WSP did a roundabout
12 evaluation. That's Exhibit 8. So there's been quite
13 a bit of work done on the necessity for -- necessity
14 of grade-separated crossings and the desirability of
15 a roundabout.

16 So it came a point where the roundabout
17 became the most viable solution recommended by the
18 Department of Transportation. And even if the motion
19 is granted, the preceding condition still requires
20 further updates for traffic studies. DOE would still
21 be required to do several more traffic impact
22 analysis reports, first one to be one year after
23 opening Phase I of the project, which would be the
24 school.

25 There's been some confusion, because

1 there's phases in roman numeral, and there are
2 construction phases in Arabic numerals. But Phase --
3 I think Phase I is the opening of the school. So one
4 year after that, there's going to be a TIAR. Then
5 there's another one before Phase II can be occupied,
6 and another one after Phase II is -- one year after
7 Phase II is built out.

8 And meanwhile, if there's any delay over
9 three years, the TIAR needs to be updated again. So
10 it's going to be an ongoing process to carefully
11 monitor whether the safety measures are adequate.

12 So these are some of the things
13 procedurally that we've done. August 20, the motion
14 was -- the current motion was filed. There were two
15 hearings, September 10 and November 4. And granted
16 at the strong urging of the commission, there was a
17 meeting with Kihei Community Association October 27.

18 There was -- then after the October 4th
19 hearing, DOE received a request dated November 10
20 for additional information, so we -- that was
21 submitted February 1. And in the meantime, January
22 12, there was a virtual meeting with the DOE,
23 Department of Transportation, and the community. One
24 week later, DOE added some links and photos to its
25 website.

1 And okay, so after that February 1
2 response, construction updates were uploaded to the
3 website. And then there was another DOE virtual
4 meeting August 17, 2021. That's the one where the
5 principal, Halle Maxwell, was also involved, as was
6 the complex area superintendent, Kathy Dimino.

7 So this is what Phase II is anticipated to
8 be. This is something that was obtained from page 7
9 of this PowerPoint. The DOE's Assessment and
10 Accountability Branch of the Office of Strategy,
11 Innovation, and Performance was consulted.

12 And as of May 5th, 2021, which is towards
13 the end of this school year, they look at all of the
14 demographics, who's living in the area, who's going
15 to middle school, where, and so forth. And what they
16 came up with is for the target opening year, 2022-23
17 school year, they're only expecting 167 ninth
18 graders to enroll in Kihei High School.

19 A decision was made to start with ninth
20 grade only, so we're looking at 167 ninth graders
21 for the first year. Then the second year, they're
22 going to bump up to 299, adding 10th graders. But in
23 the fall of 2023, there's going to be that one year
24 where another study has to be done. And then there
25 will be further studies if we get to the point of

1 Phase II.

2 The other thing that this -- that's
3 contained here is a slideshow that was shared with
4 the community on January 12th of this year. This is
5 the Department of Transportation's presentation, so
6 I'm hoping that a little further on, we can get some
7 assistance from a representative of DOT to clarify
8 the slides here.

9 So I can -- I'll stop sharing this. And so
10 that I just wanted to provide by way of update,
11 because some of that stuff was review, and a few
12 things have happened since. So --

13 **COMMISSIONER GIOVANNI:** Just a quick
14 question to clarify.

15 **MR. FUJIOKA:** Yes.

16 **COMMISSIONER GIOVANNI:** That last part of
17 your shared screen showed a different PowerPoint. I
18 think you said it was DOT's PowerPoint. Is that an
19 exhibit on the record in this matter?

20 **MR. FUJIOKA:** It's part of that same
21 Exhibit 45, but it's something that I would want to
22 review with the DOT representative.

23 **COMMISSIONER GIOVANNI:** Understood. But
24 it's in the record is what my question was.

25 **MR. FUJIOKA:** Yes. Yes, it is. Thank you.

1 **COMMISSIONER GIOVANNI:** Thank you.

2 Continue.

3 **MR. FUJIOKA:** And so we -- we respect the
4 input of the community, and it's hard to be in this
5 kind of disagreement, but all of the studies that
6 have been available have shown that the roundabout
7 would be -- provide safe, I guess, pedestrian
8 crossing and vehicular traffic.

9 And there's knowing that we're going to
10 start -- or they're projected to start with a lot
11 fewer students than originally anticipated.

12 I think it's -- if the motion is granted,
13 starting with a roundabout, which was already being
14 -- if it's not being constructed, the foundation has
15 been laid for it -- and the school is ready to get
16 up and running, I think it's time to just address
17 this grade-separated pedestrian crossing in light of
18 the availability of a roundabout, which wasn't
19 considered before.

20 And the studies have told us that the
21 underpass especially is not warranted, and it cannot
22 be done safely. So those are the things that -- or
23 the reasons we want to go ahead and proceed with the
24 school, using the roundabout, safeguarding the
25 initial 167 students, and mindful that additional

1 studies will need to be done. Thank you.

2 **COMMISSIONER GIOVANNI:** Commissioner
3 Cabral, did you have a question?

4 **COMMISSIONER CABRAL:** Yes. And I know time
5 is of the essence, but since the initial
6 introduction -- and this is to Mr. Fujioka -- I'm
7 not really -- I want to have a better understanding
8 who you work for. You work -- are you employed by
9 the government? What agency, state? Are you an
10 attorney with Department of Education? I mean,
11 exactly where do you fit in the large picture here?

12 **MR. FUJIOKA:** I am a deputy in the
13 Department of the Attorney General. I work in the
14 education division. So one of the main things we do
15 is represent the Department of Education in
16 education-related matters.

17 **COMMISSIONER CABRAL:** Okay. Thank you. And
18 then my second question is, then, can you identify
19 for me -- hopefully, it's simple; it surely is in
20 business -- who is the decision-maker in this case?

21 **MR. FUJIOKA:** For the DOE?

22 **COMMISSIONER CABRAL:** DOE -- oh, I'm
23 sorry. I was looking for a person. I mean, is this
24 just the proverbial "the government made this
25 decision"? I'm just concerned who -- who -- I mean,

1 there's got to be a person or a title. Is there a
2 title? I mean, is -- DOE seems like an awfully big
3 title to making a decision. I'm just kind of curious
4 as of the -- I mean, I don't know. I'm looking for
5 who. Who makes these decisions?

6 **MR. FUJIOKA:** You mean the decision to
7 request removal of the grade-separated crossing?

8 **COMMISSIONER CABRAL:** Well, that would be
9 a current decision. And then a few years back, the
10 decision to somewhat ignore what the LUC said, et
11 cetera. I mean, is there a title of who makes these
12 decisions?

13 **MR. FUJIOKA:** I was not involved at the
14 time, and I don't know who actually made the
15 decision, whatever that decision was to. I don't
16 think it was totally ignoring what the order was,
17 but in terms of traffic control and railways and
18 crossings and so forth, the DOE does have to defer
19 to the Department of Transportation.

20 **COMMISSIONER CABRAL:** So it's just sort of
21 the government in general, various, and then the
22 legislature funds or doesn't fund you as -- you
23 know, I've got a concern here. I mean, thank you to
24 the government.

25 I've been to several seminars in my time

1 at the Land Use, and I've got to tell you the entire
2 direction that -- that communities and urban and
3 people are being -- looking at is instead of
4 sprawling out all over the land, is consolidating so
5 that people can walk to school, that they can walk
6 to work, that they can bicycle places.

7 And so meanwhile, eight, nine years ago,
8 LUC said, yeah, this is a lot of land, based on
9 allowing people to walk and to bicycle to school.
10 And because knowing -- if I knew then, if I was on
11 the LUC then and I knew that this requirement was
12 going to be decided against or ignored, as the case
13 may have been, I would have said make it a 10-story
14 building somewhere in the middle of where the
15 community is.

16 If necessary, buy this five acres or
17 something and set up a massive -- and have -- have
18 an elevator and have kids be able to get there
19 safely. Because part of these decisions is trying to
20 build a community, in addition to having children be
21 safe.

22 I mean, I'm concerned as to who makes the
23 decision and at what point -- when the body count
24 gets at some point -- do you look at those decisions
25 again?

1 So anyway, Mr. Fujioka, if you're at all
2 able to find out what title or what person makes
3 those kind of decisions, I'd truly appreciate it.
4 Thank you.

5 **COMMISSIONER GIOVANNI:** So, Mr. Fujioka,
6 we're going to cut. I'm going to move to adjournment
7 here shortly, and we'll resume tomorrow with your
8 presentation and Q&A on your presentation of your
9 case.

10 Let me encourage you to have
11 representatives from DOE and DOT in attendance, if
12 you can. That would be helpful.

13 **MR. FUJIOKA:** Yes.

14 **COMMISSIONER GIOVANNI:** Let me also say
15 that in terms of the agenda for tomorrow, we're
16 obligated to take up the Maui Solar matter first, so
17 we would resume on this docket following the
18 completion of that agenda item. Does everybody
19 understand that?

20 **MR. FUJIOKA:** So it would be kind of like
21 today?

22 **COMMISSIONER GIOVANNI:** Kind of like
23 today. I can't predict how long the Maui Solar
24 docket will -- I mean, I think it's an O'ahu solar
25 project -- will take, but it'll be first. Okay?

1 **MR. FUJIOKA:** Okay. Thank you.

2 **COMMISSIONER GIOVANNI:** Understood?

3 And so with that, I'm going -- do I have a
4 motion for adjournment for today? Or do I need a
5 motion? I don't need a motion, so I'm going to
6 adjourn the meeting for today. Thank you very much.
7 And we'll see you all -- I will see the fellow
8 commissioners and participants at 9:00 tomorrow.
9 Thank you.

10 **COMMISSIONER CHANG:** Good job.

11 **(The meeting was adjourned at 3:04 p.m.)**

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1 CERTIFICATE

2

3 I, Davilyn Payne, do hereby certify that the

4 proceeding named herein was professionally transcribed on

5 the date set forth in the certificate herein; that I

6 transcribed all testimony adduced and other oral

7 proceedings had in the foregoing matter; and that the

8 foregoing transcript pages constitute a full, true, and

9 correct record of such testimony adduced and oral

10 proceeding had and of the whole thereof.

11

12 IN WITNESS HEREOF, I have hereunto set my hand this

13 24th day of September, 2021.

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19 Davilyn Payne

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