

1 LAND USE COMMISSION

2 STATE OF HAWAII

3 Hearing held on January 6, 2021

4 Commencing at 9:00 a.m.

5 Held via ZOOM by Interactive Conference Technology

6
7 I. CALL TO ORDER

8 II. ADOPTION OF MINUTES

9 III. TENTATIVE MEETING SCHEDULE

10 IV. ACTION

11 A11-791 HG Kauai Joint Venture, LLC-Hokua
12 Place (Kauai)
13 Petition to Amend the Land Use District
14 Boundary of Certain Lands Situated at Kapaa,
15 Island of Kauai, State of Hawaii, Consisting
16 of 97 Acres from the Agriculture District to
17 the Urban District, Tax Map Key No.
18 (4)4-3-003:POR 001

19 Consider Intervenor Liko-o-Kalani
20 Martin's Motion to continue contested
21 case hearing dates in Docket No.
22 A11-791.

23 Consider Intervenor Liko-o-Kalani
24 Martin's Motion for Leave to file
25 Response to Applicant's Motion for
Protective Order.

Consider Petitioner HG Kauai Joint
Venture, LLC's Motion for Protective
Order.

V. Adjournment

BEFORE: Rita King, CSR #373

1 APPEARANCES:

2 JONATHAN LIKEKE SCHEUER, Chair (Oahu)
NANCY CABRAL, Vice Chair (Big Island)
3 GARY OKUDA (Oahu)
LEE OHIGASHI (Maui)
4 ARNOLD WONG (Oahu)
DAWN CHANG (Oahu)
5 DAN GIOVANNI (Kauai)
EDMUND ACZON (Oahu)

6
7 STAFF:

8 COLIN J. LAU, ESQ, Deputy Attorney General for LUC
DANIEL E. ORODENKER, Executive Officer
9 RILEY K. HAKODA, Planner/Chief Clerk
SCOTT DERRICKSON, Chief Planner
10 NATASHA A. QUINONES, Program Specialist

11 ALSO PRESENT:

12 DAWN T. APUNA, ESQ, Deputy Attorney General for OP
13 RODNEY FUNAKOSHI, Planning Program Administrator,
State Office of Planning, State of Hawaii
14 CHRISTOPHER M. DONAHOE, ESQ, Kauai Corporation
15 Counsel
JODI SAYEGUSA, Kauai Planning Department
16 WILLIAM W.L. YUEN, ESQ., Counsel for Petitioner
17 LANCE D. COLLINS, Intervenor Counsel
18 BIANCA K. ISAKI, Intervenor Counsel
19 LIKO-O-KALANI MARTIN, Intervenor
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PUBLIC WITNESS:

PAGE

Rayne Regush

26

1 CHAIRPERSON SCHEUER: Aloha mai kakou;
2 Good Morning and Happy New Year! Or as I've been
3 saying, alternately, happy not 2020.

4 This is the January 6th, 2021 Land Use
5 Commission Meeting, and it's being held using
6 interactive videoconference technology linking
7 conference participants and other interested
8 individuals, including members of the public, via
9 the ZOOM internet conferencing program. And we're
10 doing this, of course, to comply with State and
11 County official operational directives during the
12 COVID-19 pandemic. Members of the public are
13 viewing the meeting via the ZOOM webinar platform.

14 For all meeting participants, I would
15 like to stress to everyone the importance of
16 speaking slowly, clearly and directly into your
17 microphone. Before speaking, please state your
18 name and identify yourself for the record. Also,
19 please be aware that all meeting participants are
20 being recorded in this digital record of this ZOOM
21 meeting. Your continued participation is your
22 implied consent to be part of the public record of
23 this event. If you do not wish to be part of the
24 public record, you should exit this meeting now.

25 This ZOOM conferencing technology allows

1 the Parties and each participating Commissioner
2 individual remote access to the meeting via our own
3 personal digital devices. Please note that due to
4 matters entirely outside of our control, occasional
5 disruptions to connectivity may occur for one or
6 more participants of the meeting, at any given
7 time. If this happens please let us know, and then
8 please be patient as we try to restore audiovisual
9 signals to effectively conduct business during the
10 pandemic.

11 For members of the public who are
12 participating via telephone, if there are any, and
13 I will repeat this instruction when it's time for
14 testimony, but you can raise your hand using star
15 nine, and then use the same key stroke, star nine,
16 to virtually lower your hand, if you're calling by
17 phone. If you want to test that out and do that,
18 you should feel free to. If your hand is raised,
19 you can use star six to mute.

20 My name is Jonathan Likeke Scheuer. I
21 currently have the pleasure and honor of serving as
22 the LUC Chair. Along with me, Commissioners Aczon,
23 Chang, Okuda, Wong, our LUC Executive Officer
24 Daniel Orodenker, our Chief Planner Scott
25 Derrickson, our Chief Clerk Riley Hakoda, the LUC's

1 Deputy Attorney General, Colin Lau, and our court
2 reporter for the day, Rita King, are all on the
3 island of Oahu. Commissioner Nancy Cabral is on
4 Hawaii island, Commissioner Ohigashi is on Maui and
5 Commissioner Giovanni is on Kauai. We currently
6 have eight seated commissioners of a possible nine.

7 As we'll discuss later, we received well
8 over 50 written testimonies submitted on this
9 docket. And so I'm just going to say a few words,
10 in case you're tuning in to your first LUC meeting,
11 ever, and you're not sure who we are. The LUC was
12 created by the State Land Use Law (Chapter 205,
13 Hawaii Revised Statutes) which was originally
14 adopted in 1961 and it established a framework of
15 land use management and regulation to which all
16 lands in the State of Hawaii are classified into
17 one of four land use districts. To administer the
18 State Land Use Law, the legislature created this
19 Land Use Commission composed of nine members, and
20 we're all appointed by the Governor and confirmed
21 by the State Senate. One member is appointed from
22 each of the four counties and five members are
23 appointed at-large. And for members of the public,
24 our confirmation means that if you don't like what
25 we're doing and we're up for reconfirmation, you

1 can testify and say: I don't think that you should
2 confirm that person to the position. Or,
3 alternately, if you think we're doing a good job,
4 you can say that as well.

5 With that, I'm going to move to our first
6 agenda item which is adoption of the Minutes. The
7 Minutes are not actually ready. I just want to
8 check with Mr. Hakoda or Mr. Derrickson, if any
9 testimony was submitted regarding adoption of the
10 Minutes.

11 MR. HAKODA: Mr. Chair, this is Riley.
12 There was no public testimony, and we apologize for
13 the Minutes not being ready but circumstances over
14 the weekend, on the bomb scare yesterday, delayed
15 us processing the minutes. Our apologies.

16 CHAIRPERSON SCHEUER: No, we fully
17 understand. Sorry for that. Thank you very much.

18 So we will defer our action on adoption
19 of the minutes until our next meeting.

20 Our next agenda item, then, is our
21 tentative meeting schedule.

22 Mr. Orodenger?

23 MR. ORODENER: Thank you, Mr. Chair.

24 Tomorrow, we have scheduled any matters
25 that are not resolved today with regard to Hokua

1 Place. By ZOOM, on January 28th, we will also be
2 holding a meeting by ZOOM for the monetary trust
3 matter, as well as on February 10th, and on
4 February 10th we will also be picking up the U of N
5 Bencorp matter requesting us to be accepting
6 authorities for monetary assessment. On
7 February 11th, we will have an informational
8 briefing on the Oahu IAL submittal. On
9 February 24th and 25th, we will take up the IAL.
10 On March 10th and 11th, we will once again be
11 taking up the Hokuia Place matter that's before us
12 today. On March 24th and 25th, we will again take
13 up the Oahu IAL matter.

14 CHAIRPERSON SCHEUER: Mr. Orodener, the
15 simultaneously turning of pages by you and
16 Commissioner Wong is being picked up very heavily
17 on the mic.

18 MR. ORODENKER: And on April 14th we will
19 be taking up a declaratory ruling requested in Maui
20 County.

21 CHAIRPERSON SCHEUER: Thank you very
22 much.

23 Commissioners, are there any questions
24 for Daniel?

25 If not, our next agenda item is an action

1 regarding docket number A11-791 HG, Kauai Joint
2 Venture, LLC Hokuia Place, petition to amend the
3 land use district boundary of certain lands
4 situated at Kapaa, Island of Kauai, State of
5 Hawaii, consisting of 97 acres from agricultural
6 and rural district to the urban district, tax map
7 key number 44-3-03 a portion of lot one, to
8 consider Liko-o-Kalani Martin's Motion to Continue
9 the contested case hearing dates for docket number
10 A11-791.

11 Will the parties please identify
12 themselves for the record, beginning with the
13 petitioner.

14 MR. YUEN: William Yuen, on behalf of
15 Petitioner.

16 MR. DONAHOE: Good morning, Commission.
17 Chris Donahoe on behalf of the County.

18 CHAIRPERSON SCHEUER: Thank you.
19 Office of Planning?

20 MS. APUNA: Good morning, Chair, Members.
21 Deputy Attorney General Dawn Apuna, on behalf of
22 the State Office of Planning. Here with me is
23 Rodney Funakoshi.

24 CHAIRPERSON SCHEUER: And Intervenors.

25 MR. COLLINS: Aloha and good morning.

1 This is Lance Collins, together with Bianca Isaki,
2 and Mr. Martin is also present this morning.

3 CHAIRPERSON SCHEUER: Thank you. Good
4 morning to all of you. Before we continue, let me
5 update the record on this docket.

6 On December 3rd, 2020, the Commission met
7 via ZOOM to consider Intervenor Liko Martin's
8 Petition to Intervene.

9 On December 10th, 2020, the Commission
10 received the County of Kauai's position statement
11 in this matter.

12 On December 14th, the Commission received
13 the Intervenor's Notice of Appearance of Counsel,
14 the Intervenor's Motion to Continue. The contested
15 case hearing states, as well as the Intervenor's
16 Motion for Leave to File Response to the
17 Applicant's motion for a protective order.

18 On December 16th, the Commission mailed
19 the order granting Intervenor status for Intervenor
20 Martin's Petition to intervene.

21 On December the 29th, the Commission
22 mailed the agenda notice of our January 6th and
23 7th, 2021 meeting to the parties, to Intervenor
24 Martin, the statewide email and Kauai mailing
25 lists.

1 From December 9th until recently, and
2 possibly through this morning, the Commissioner has
3 received approximately 65 or more emails, as well
4 as written public testimony on this matter. They
5 are being made part of the record and are being
6 posted to the website once they are catalogued and
7 received by the staff.

8 Before we continue on, I'm going to ask:
9 Are there any disclosures on this docket from any
10 members of the Commission?

11 (Collective no.)

12 If not, the Chair has a disclosure. If
13 you recall, at our hearing where we granted
14 Intervenor status to Liko Martin, I very strongly
15 encouraged Mr. Martin to secure outside counsel,
16 even though it wasn't strictly required under our
17 procedures to do so. So perhaps in the case of be
18 careful of what you wish for, I was surprised to
19 then learn that colleague and friend Bianca Isaki
20 was secured as his counsel, along with Lance
21 Collins. I noted above their appearance was filed
22 with the LUC on December 14th, and I saw their
23 notice of appearance the following week.

24 Based on my understanding, I do not have,
25 nor have I had, a financial interest with Ms. Isaki

1 as is defined in the state's ethic code, but I want
2 to explain and be really clear for everyone the
3 current nature of our relationship. I made
4 substantially the same disclosures when Ms. Isaki
5 represented two clients before us on the Kanahale
6 matter, DR 1967, except for my third point, which
7 has arose since in the fall of 2020.

8 I've used Ms. Isaki as a subcontractor to
9 me on two contracts, with those contracts ending a
10 couple of years ago; one was with the National
11 Parks Service, and one was with the Department of
12 Hawaiian Home Lands. She and I have co-written a
13 book together, which is to be published in 2021,
14 entitled Water and Power in West Maui.

15 And finally, my third point, she and I
16 have been in the part of an early negotiation of a
17 new contract, with me as a primary and her as a
18 potential subcontractor. We've been advised by the
19 potential client that the contract may be finalized
20 in March or April of 2021, if selected.

21 Now, my belief is I can be fair and
22 impartial on the matters before the LUC in this
23 docket A11-791, and I hope that the parties and my
24 fellow commissioners will not object to my
25 participation. With that said, I want everybody to

1 feel absolutely clear to object. And,
2 procedurally, here's what I'll do. I will ask any
3 of the parties. If there's no objections, we'll
4 continue. If there is an objection, I will hand
5 the chairing to Nancy Cabral to resolve the
6 objections.

7 I'll start with the Petitioner, Mr. Yuen.

8 MR. YUEN: Mr. Chairman, you said you're
9 negotiating another contract with Intervenor's
10 counsel?

11 CHAIRPERSON SCHEUER: I have been
12 approached on doing some contractual work, and I
13 had indicated in that process that I would use
14 Ms. Isaki as a subcontractor, that is correct.

15 MR. YUEN: So is there any financial
16 interest between you and Ms. Isaki?

17 CHAIRPERSON SCHEUER: No, not under the
18 meaning of the term in the State Ethics law.

19 MR. YUEN: Fine. I have no objection,
20 then.

21 CHAIRPERSON SCHEUER: Thank you.
22 Kauai County.

23 MR. DONAHOE: Thank you, Chair. Deputy
24 County Attorney, Chris Donahoe.

25 Given your responses to Mr. Yuen, the

1 county has no objection as well.

2 CHAIRPERSON SCHEUER: Thank you.

3 Office of Planning.

4 MS. APUNA: OP has no objections.

5 CHAIRPERSON SCHEUER: Intervenor?

6 MR. COLLINS: We have no objection.

7 CHAIRPERSON SCHEUER: Commissioners?

8 (No objections.)

9 Thank you very much.

10 Now, let me briefly review our procedures
11 for today's docket, which I will consider. The
12 motions to continue the contested case hearings
13 states, as well as the Intervenor's Motion for
14 Leave to file a response to the Applicant's motion
15 for a protective order. Depending on the outcome
16 of the Intervenor's Motion for Leave, the
17 Commission may or may not move forward on the
18 applicant's Motion for a Protective Order.

19 The first thing we'll do is call for
20 individuals, who desire to provide public testimony
21 on this docket, to raise their hands and identify
22 themselves. For everybody who is listening in as
23 the attendees, and I see there's 14 members in
24 attendance right now, I want to assure you of a few
25 things. First of all, I, and I'm positive my

1 fellow commissioners have read all the written
2 testimony that's been delivered to date. When I
3 reviewed them late last night and early this
4 morning, all of those were very clear pieces of
5 testimony, all opposed to the substance of the
6 matter of the primary docket before us, not
7 directly related to what our matters are today, the
8 motions before us.

9 So we are today going to ask you to limit
10 your testimony only to the motions before us,
11 again, the Intervenor's Motion for Continuance, the
12 Intervenor's Motion for Leave to file responses to
13 the Applicant's motion for the protective order and
14 the Applicant's Motion for Protective Order.

15 After that testimony is done, if any,
16 Ms. Isaki and Mr. Collins will make their
17 presentations in support of the Intervenor's motion
18 to continue the contested case hearing dates.
19 After Ms. Isaki's presentation, and Mr. Collins,
20 we'll receive the argument on the Intervenor's
21 Motion to Continue from the petitioner, from the
22 County and the State Office of Planning. After all
23 parties have presented their arguments on that
24 motion to continue, the Commission will conduct our
25 deliberations and possibly render a decision on

1 that motion.

2 After the Commission has decided on the
3 Intervenor's Motion to Continue, we will hear the
4 Intervenor's presentation in support of their
5 Motion to Leave to file a response to the
6 Applicant's Motion For a Protective Order. After
7 their presentation in support of that motion, we'll
8 receive argument on the same from the Petitioner,
9 the County, and the State Office of Planning.
10 After that, the Commission will deliberate and
11 possibly issue a decision on the Motion for Leave,
12 and following that it is possible that we could
13 also decide on whether or not and decide on the
14 Applicant's Motion for a protective order.

15 Are there any questions on our procedures
16 for today, starting again with the Petitioner.

17 MR. YUEN: No questions, Mr. Chairman.

18 CHAIRPERSON SCHEUER: Kauai County,
19 Mr. Donahoe?

20 MR. DONAHOE: Thank you, Chair. No
21 questions.

22 CHAIRPERSON SCHEUER: OP?

23 MS. APUNA: No questions.

24 CHAIRPERSON SCHEUER: Intervenors?

25 MR. COLLINS: No questions.

1 CHAIRPERSON SCHEUER: We're now in the
2 portion of our agenda item for public testimony.
3 If there's any members of the audience who wish to
4 provide public testimony on this matter, either use
5 the raise-your-hand function on the ZOOM software
6 or press star nine if you are dialing in by phone,
7 and then I will bring you into the meeting and
8 swear you in.

9 Are there any members of the public who
10 wish to provide public testimony on this matter?

11 Seeing none, I will repeat that there's
12 extensive public testimony that has been received
13 by the Commission, has been incorporated into the
14 part of the public record and is being posted to
15 the Commission website. With there being no public
16 testimony, I'm going to move on to the presentation
17 by the Intervenor on their motion for -- let me say
18 it correctly -- their Motion For Continuance.

19 Who will be presenting, Mr. Isaki or
20 Mr. Collins?

21 MR. COLLINS: Mr. Chair, I'll be
22 presenting the argument on behalf of the
23 Intervenor.

24 CHAIRPERSON SCHEUER: Please proceed,
25 Mr. Collins.

1 MR. COLLINS: Chair and Commissioners, we
2 are seeking to continue the schedule of hearings
3 and filings as presented in the written moving
4 papers. All of the dates were agreed to by the
5 other parties before Ms. Isaki and I entered our
6 appearance. We, as noted, just were retained last
7 month, and having a small additional time to
8 prepare would be greatly appreciated. And since
9 all of the parties agreed before we were retained,
10 no other party would be prejudiced by the
11 continuance of the dates. Thank you.

12 CHAIRPERSON SCHEUER: Are there questions
13 for the Intervenor from the Commissioners?

14 Seeing none, Mr. Yuen, your response.

15 MR. YUEN: No objection to the motion.

16 CHAIRPERSON SCHEUER: Mr. Donahoe.

17 MR. DONAHOE: No objection by the County.

18 CHAIRPERSON SCHEUER: And Ms. Apuna.

19 MS. APUNA: No objection to the motion.

20 CHAIRPERSON SCHEUER: I don't want to
21 botchi this but we are rocketing along here.

22 Commissioners, I believe we can move on
23 to deliberation on the motion of the Intervenor.
24 Before we do, I will actually ask Mr. -- just so
25 it's clear on the record and for all the

1 participants -- Mr. Orodenger, can you clarify the
2 dates for us that we're talking about.

3 MR. ORODENKER: Thank you, Mr. Chair.

4 Right now -- and I would need
5 clarification from the Intervenor -- these are the
6 dates that we currently have for the various
7 filings and hearing dates. January 25th, 2021, for
8 filing of witness and exhibit lists.

9 February 10th, 2021, for filing of exhibits and
10 including OPs and County's testimony.

11 February 17th, 2021, rebuttal witness and rebuttal
12 testimony for all parties. And March 10 and 11th
13 hearing dates.

14 CHAIRPERSON SCHEUER: So I'm going to ask
15 all the parties to confirm those are your shared
16 understanding of the dates.

17 MR. YUEN: Petitioner understands those
18 dates.

19 MR. DONAHOE: Chair, the County
20 understands those dates as well.

21 CHAIRPERSON SCHEUER: OP?

22 MS. APUNA: Yes, OP, those dates are
23 correct.

24 CHAIRPERSON SCHEUER: And Intervenor?

25 MR. COLLINS: Yes, Chair, those are the

1 dates.

2 CHAIRPERSON SCHEUER: Anything further on
3 this issue, Mr. Orodenger?

4 MR. ORODENER: No, Mr. Chair, that
5 clarifies everything.

6 CHAIRPERSON SCHEUER: Okay, great.

7 Commissioners, I will entertain
8 discussion and a motion, if so inspired to do so.

9 COMMISSIONER WONG: Chair?

10 CHAIRPERSON SCHEUER: Commissioner Wong.

11 COMMISSIONER WONG: I move for the
12 adoption of the motion. Oh, granting of the
13 motion. Sorry.

14 CHAIRPERSON SCHEUER: Commissioner Wong
15 has moved to grant the motion. Commissioner
16 Giovanni is seconding the motion.

17 COMMISSIONER GIOVANNI: Move to second
18 the motion.

19 CHAIRPERSON SCHEUER: Commissioners, we
20 are in discussion to grant the motion filed by the
21 Intervenor.

22 COMMISSIONER WONG: Chair, real fast,
23 this is Commissioner Wong.

24 CHAIRPERSON SCHEUER: Mr. Wong.

25 COMMISSIONER WONG: We will agree upon

1 it, that's why I'll be supporting it, I made the
2 motion.

3 CHAIRPERSON SCHEUER: Commissioner
4 Giovanni?

5 COMMISSIONER GIOVANNI: Same. I feel the
6 same way. I like to see people agree.

7 CHAIRPERSON SCHEUER: Yes.

8 Any discussions, Commissioners?

9 (Collective no.)

10 CHAIRPERSON SCHEUER: Mr. Orodenger,
11 please poll the Commission on the motion.

12 MR. ORODENER: Thank you, Mr. Chair.

13 The motion is to grant the motion for
14 continuance of dates.

15 Commissioner Wong?

16 COMMISSIONER WONG: Aye.

17 MR. ORODENER: Commissioner Giovanni?

18 COMMISSIONER GIOVANNI: Aye.

19 MR. ORODENER: Commissioner Aczon?

20 COMMISSIONER ACZON: Aye.

21 MR. ORODENER: Commissioner Cabral?

22 COMMISSIONER CABRAL: Yes.

23 MR. ORODENER: Commissioner Okuda?

24 COMMISSIONER OKUDA: Yes.

25 MR. ORODENER: Commissioner Ohigashi?

1 COMMISSIONER OHIGASHI: Yes.

2 MR. ORODENKER: Commissioner Chang?

3 COMMISSIONER CHANG: Aye.

4 MR. ORODENKER: Chair Scheuer?

5 CHAIRPERSON SCHEUER: Aye.

6 MR. ORODENKER: Thank you, Mr. Chair.

7 The motion passes unanimously.

8 CHAIRPERSON SCHEUER: Our next agenda
9 item, our fourth order of business is the
10 Intervenor's Motion for Leave to file response to
11 the Applicant's Motion for Protective Order, and
12 we'll follow the same order of presentation. I
13 will ask the -- well, I'll just ask Mr. Collins to
14 begin or Ms. Isaki, as it may be.

15 MR. COLLINS: Thank you, Mr. Chair.

16 We filed this Motion for Leave to reply
17 so that the argument on the primary motion would be
18 more orderly and that all of the parties and the
19 commissioners would have adequate notice of the
20 arguments that we are going to make today.

21 Mr. Martin was admitted as a party the
22 day after the due date to file a response, and we
23 felt by providing in writing our argument and
24 seeking leave to have it accepted it would provide
25 all of the parties with our position for the

1 primary motion today and that no party would be
2 prejudiced by allowing this to be filed, and also
3 that nobody would be surprised by the arguments
4 that we would otherwise make if the written reply
5 were not accepted.

6 CHAIRPERSON SCHEUER: So if I may start
7 the questioning, Mr. Collins, is the entirety of
8 your argument, written argument against the
9 Applicant's Motion for Protective Order contained
10 in the exhibit to your motion or are you asking for
11 additional time to do additional written?

12 MR. COLLINS: No, no, we're simply asking
13 that the proposed reply be allowed to be filed, and
14 just saying that we felt that it was more orderly
15 to do that as opposed to showing up today and then
16 just stating everything verbally, so that everybody
17 would have a fair chance to go through the
18 authorities and so forth and it wouldn't be a
19 surprise.

20 CHAIRPERSON SCHEUER: Thank you very
21 much.

22 Commissioners, questions?

23 No questions from the Commissioners?

24 This is the same Commission I've been serving on
25 for years, isn't it? Okay. If not, then let's

1 hear from Mr. Yuen.

2 MR. YUEN: I have no objection to the
3 motion.

4 CHAIRPERSON SCHEUER: Mr. Donahoe.

5 MR. DONAHOE: The County has no objection
6 to Intervenor's motion.

7 CHAIRPERSON SCHEUER: Office of Planning?

8 MS. APUNA: OP has no objection to
9 Intervenor's motion.

10 CHAIRPERSON SCHEUER: Commissioner Wong?

11 COMMISSIONER WONG: I have nothing,
12 Chair.

13 CHAIRPERSON SCHEUER: Oh, okay. I saw
14 you reaching for the mic button.

15 COMMISSIONER WONG: No, I had to reach
16 for my candy.

17 CHAIRPERSON SCHEUER: Okay.

18 Mr. Orodenger, are there any points that
19 you want clarified on where we are procedurally
20 now?

21 MR. ORODENKER: No, Mr. Chair, I believe
22 we're -- (Indecipherable)

23 CHAIRPERSON SCHEUER: Sorry?

24 MR. ORODENKER: No, Mr. Chair, we don't
25 need any further clarification.

1 COMMISSIONER LAU: Mr. Chair?

2 CHAIRPERSON SCHEUER: Yes.

3 COMMISSIONER LAU: Do we need to take
4 public testimony on this?

5 CHAIRPERSON SCHEUER: When I announced
6 public testimony, I had announced that we were
7 taking public testimony on any of the three motions
8 that are listed on the agenda that may be
9 considered. I'm happy to ask again.

10 Is there any member of the audience who
11 wishes to give testimony on this particular motion
12 that's before us? And for the person who is
13 participating by phone, you can raise your hand
14 using star nine, otherwise you raise your hand
15 using the raise-your-hand function via ZOOM. I see
16 none.

17 Thank you very much, Mr. Attorney
18 General.

19 I'm actually going to ask for a quick
20 three-minute recess, at the discretion of the
21 Chair. It is 9:27, we will resume at 9:30.

22 (Recess taken.)

23 CHAIRPERSON SCHEUER: So we're not
24 discussing the substance of the pros and cons of
25 the overall petition by the Petitioner for

1 reclassification, we're merely discussing right now
2 the Intervenor's Motion for Leave to file a
3 response to the Applicant's motion for a protective
4 order.

5 Did you have testimony you wanted to
6 deliver on that?

7 MS. REGUSH: Yes, please.

8 CHAIRPERSON SCHEUER: Is there any
9 objection by the parties for this late testimony?

10 MR. YUEN: Petitioner has no objection.

11 CHAIRPERSON SCHEUER: County?

12 MR. DONAHOE: County has no objection,
13 Chair.

14 MS. APUNA: OP has no objection.

15 CHAIRPERSON SCHEUER: Intervenors?

16 MR. ORODENKER: No objection.

17 CHAIRPERSON SCHEUER: Ms. Regush, I will
18 give you three minutes. And I ask you again to
19 keep it narrowly focused on the matter before us.
20 Please proceed, stating your name and address for
21 the record, to begin with.

22 MS. REGUSH: Thank you, Commissioner.

23 My name is Rayne Regush, address is
24 5820-A Halikapiki Place, Kapaa, Hawaii.

25 So again, good morning. Apologies for

1 the glitches with ZOOM.

2 So my testimony is related to this Motion
3 for Protective Order, specifically, and over the
4 course of many years the public's interest in this
5 project has been significant, and many of us
6 question whether the Petitioner has the economic
7 ability to carry out this proposed development.

8 This particular project deserves the
9 highest degree of public transparency and I hope
10 you'll find that there is no legitimate basis to
11 approve --

12 CHAIRPERSON SCHEUER: Ms. Regush, if I
13 may, I'm just going to note for the record that
14 your testimony appears to be not actually with the
15 matter that we're about to enter deliberation on,
16 which is the Intervenor's Motion for Leave to file
17 a response, but actually possibly on the
18 Petitioner's Motion for Protective Order, itself,
19 which we have not yet decided whether or not we're
20 going to consider today. I will let you continue
21 but I want to make it clear that you're not
22 speaking directly to the matter that's in front of
23 us.

24 MS. REGUSH: Should I postpone this
25 testimony until the motion for a protective order?

1 CHAIRPERSON SCHEUER: It's up to you.
2 I'm going to leave it up to you since you started,
3 but I just want to clarify what's going on here.

4 MS. REGUSH: Again, my apologies, it's
5 because I've signed on several times. I think I
6 missed something during those gaps.

7 CHAIRPERSON SCHEUER: No problem.

8 MS. REGUSH: So I will continue.

9 And I hope the Commissioners will find
10 that there's no legitimate basis to approve the
11 protective order that the Petitioner is requesting.
12 The public interest in disclosure far outweighs the
13 privacy interest of this Petitioner, and the
14 required standard for a higher level of
15 confidentiality has not been met, and full
16 transparency gives the public access to financial
17 information which helps them assess whether or not
18 they're capable of undertaking this high-density
19 development.

20 So please deny the Petitioner's request
21 for protective order, they have not met the burden
22 of proof. Mahalo.

23 CHAIRPERSON SCHEUER: Thank you.

24 Are there questions from the parties for
25 the testifier? Starting with the Petitioner.

1 MR. YUEN: No questions, Mr. Chair.

2 MR. DONAHOE: No questions by the County,
3 Mr. Chairman.

4 MS. APUNA: No questions from OP.

5 CHAIRPERSON SCHEUER: Intervenor?

6 MR. COLLINS: No questions.

7 CHAIRPERSON SCHEUER: Commissioners?

8 I will note for the record, also due to
9 the sort of unusual sequencing of this, I didn't
10 swear in Ms. Regush.

11 Ms. Regush, was the testimony that you
12 just gave the truth?

13 MS. REGUSH: Yes, it was.

14 CHAIRPERSON SCHEUER: Okay. Thank you.

15 Any other questions?

16 (No questions.)

17 Thank you for your testimony. I'm going
18 to move you to be a nonattendeé again.

19 Commissioners, we have a motion before us
20 from the Intervenor who has explained why they
21 filed the motion to make their arguments known to
22 other parties. Is there consideration of the
23 motion, does somebody want to take that up?

24 Commissioner Chang.

25 COMMISSIONER CHANG: Sorry, I can't seem

1 to find a raise hand function either.

2 Can I ask a procedural question?

3 CHAIRPERSON SCHEUER: Yes.

4 COMMISSIONER CHANG: I appreciate that
5 the Intervenor actually included an exhibit of
6 their argument and that all the other parties have
7 no objections to the Intervenor's motion to file a
8 response on the protective order. This is a
9 question procedurally.

10 Are the other parties, specifically the
11 Petitioner, requesting time to respond to the
12 Petitioner's motion? I'm just not sure
13 procedurally how we're going to proceed, once we
14 take action.

15 CHAIRPERSON SCHEUER: So there's both a
16 procedural legal aspect to that, as well as a
17 scheduling aspect to that. I'm going to actually
18 ask Dan Orodener to respond first on the
19 scheduling aspect of that, and Mr. Lau to follow
20 on, as well as any thoughts from the parties.

21 Starting with Dan.

22 MR. ORODENKER: From a scheduling
23 standpoint, the hearing on this protective order,
24 we could hear the -- I mean, if the parties are not
25 prepared to move forward today, and we have not had

1 a request from any of the parties to, in writing at
2 least, to hone the hearing on the Motion for
3 Protective order. If the parties feel that we need
4 to move the date for this, if they need additional
5 time, then we can hear this matter on January 27th,
6 but I would question the parties as to whether or
7 not that is actually necessary.

8 CHAIRPERSON SCHEUER: Anything to add,
9 Mr. Lau, before we hear from the parties?

10 MR. LAU: Not really, other than that the
11 Intervenor's already said that he doesn't intend to
12 file anything in addition, so perhaps that could be
13 filed as of today, if the motion is granted.

14 CHAIRPERSON SCHEUER: So, Mr. Yuen?

15 MR. YUEN: We do not require additional
16 time.

17 CHAIRPERSON SCHEUER: Mr. Donahoe?

18 MR. DONAHOE: The County is not
19 requesting additional time. And no objection to
20 the Commission to accepting the attached exhibit as
21 the Intervenor's response.

22 MS. APUNA: OP has no objection to the --
23 I'm sorry, we don't require any additional time to
24 reply.

25 CHAIRPERSON SCHEUER: I believe we've

1 heard from the Intervenor on this matter but --
2 (Indecipherable)

3 Commissioner Chang?

4 COMMISSIONER CHANG: I greatly appreciate
5 the cooperation of all the parties on this matter.
6 It appears that there is no additional arguments to
7 be added by the parties other than what's already
8 been filed, so I guess we can proceed on the
9 Intervenor's motion to file his response and then
10 move forward on the next motion.

11 So thank you very much, Mr. Chair.

12 CHAIRPERSON SCHEUER: So, thank you.

13 So my understanding is what we can do is
14 we can consider this motion, and, if it's granted,
15 we can then decide whether or not to just move into
16 the consideration of the motion today. Or we
17 could, alternatively, the Commission could say we
18 want to take it up on the 27th, but that can come
19 next, if this motion is granted.

20 Commissioner Wong?

21 COMMISSIONER WONG: I would like to move
22 for the adoption of this motion.

23 CHAIRPERSON SCHEUER: There's a motion
24 for adoption by Commissioner Wong. Is there a
25 second? Commissioner Cabral seconds the motion.

1 COMMISSIONER WONG: If I may speak on my
2 motion.

3 CHAIRPERSON SCHEUER: Sorry, can I just
4 get an oral confirmation, Commissioner Cabral? I
5 saw you raise your hand. Yes, you're seconding?

6 COMMISSIONER CABRAL: Yes.

7 CHAIRPERSON SCHEUER: The motion's been
8 made by Commissioner Wong to grant, seconded by
9 Commissioner Cabral. Commissioner Wong wishes to
10 speak to the motion.

11 COMMISSIONER WONG: First off, all the
12 parties agree upon this motion, so that's why I
13 made the motion.

14 Also, I just want to say, the Intervenor
15 was given enough time -- I mean, wasn't part of our
16 timeline but was allowed to file this motion with
17 this, all their points, so that's why I made the
18 motion.

19 CHAIRPERSON SCHEUER: Ms. Cabral, did you
20 wish to say anything on this?

21 COMMISSIONER CABRAL: My feeling is that
22 unless there's a reason, I mean, I think that we
23 want to be sure that we always respect all of the
24 parties involved, and if they need to have
25 additional time or need to have a situation

1 changed, if it's within our power, or legally
2 allowed, then I'm typically agreeable to be, try be
3 to nice starting the new year. Thank you.

4 CHAIRPERSON SCHEUER: There's so much one
5 could say in response to that, Commissioner Cabral.

6 Commissioners, we are in discussion on
7 the motion before us, made by Commissioner Wong and
8 seconded by Commissioner Cabral.

9 Does anyone wish to discuss the motion?

10 If not, Mr. Orodenger, will you please
11 poll the Commission.

12 MR. ORODENER: Thank you, Mr. Chair.

13 The motion is to grant the Intervenor's
14 Motion for Leave to file a response to motion for a
15 protective order.

16 Commissioner Wong?

17 COMMISSIONER WONG: Aye.

18 MR. ORODENER: Commissioner Cabral?

19 COMMISSIONER CABRAL: Yes.

20 MR. ORODENER: Commissioner Giovanni?

21 COMMISSIONER GIOVANNI: Aye.

22 MR. ORODENER: Commissioner Aczon?

23 COMMISSIONER ACZON: Yes.

24 MR. ORODENER: Commissioner Okuda?

25 COMMISSIONER OKUDA: Yes.

1 MR. ORODENKER: Commissioner Chang?

2 COMMISSIONER CHANG: Aye.

3 MR. ORODENKER: Commissioner Ohigashi?

4 COMMISSIONER OHIGASHI: Yes.

5 MR. ORODENKER: Chair Scheuer?

6 CHAIRPERSON SCHEUER: Aye.

7 MR. ORODENKER: Thank you, Mr. Chair.

8 The motion passes unanimously with eight
9 votes.

10 CHAIRPERSON SCHEUER: We are on to our
11 fifth and final order of business on this agenda,
12 slated for two days, the Petitioner's Motion for
13 Protective Order.

14 I will triple check. Is there anybody in
15 the audience who wishes to testify on this matter,
16 which is the Petitioner's Motion for Protective
17 Order. If you are calling in via phone, it's
18 supposed to work that you can press star nine to
19 raise your hand, otherwise there's supposed to be a
20 raise-your-hand function in ZOOM which, from the
21 indications of one public testifier and one
22 commissioner, may have disappeared in the software
23 update, I hope not, but if it's still there, is
24 somebody able to raise their hand at all?

25 MS. ISAKI: It does appear that you can

1 raise your hand but only as a panelist. I'm not
2 sure if the attendees have that.

3 CHAIRPERSON SCHEUER: As the cohost of
4 the meeting, from the electronic version, I'm not
5 able to do it.

6 Commissioners, I want to make sure, are
7 you able to?

8 We have not come across this before. I
9 see some hands going up. Thank you.

10 So, any public testimony on this matter?

11 Seeing none, I believe we will first hear
12 from the Petitioner.

13 MR. YUEN: Thank you, Mr. Chairman.

14 The Petitioner requests a protective
15 order to protect what Petitioner believes is highly
16 confidential personal financial information. We
17 believe that certain of the information contained
18 in the full credit agreement submitted to the
19 Commission in response to the commission's request
20 contain confidential financial information that
21 would effectively place the Petitioner at a
22 competitive disadvantage in obtaining additional
23 financing if this information were made known to
24 sources of potential financing. We have no
25 objection to disclosing the fact that the

1 Commissioner did obtain these lines of credit, but
2 we would like to keep the terms of the credit
3 agreements confidential. That's essentially it.

4 CHAIRPERSON SCHEUER: Are there questions
5 for the Petitioner, starting with Commissioner
6 Okuda.

7 COMMISSIONER OKUDA: Thank you very much,
8 Mr. Chair, thank you Mr. Yuen. I'll try to speak
9 directly into my iPad, and if for some reason you
10 can't hear me, please stop me because somebody
11 commented that at some point they couldn't hear me.

12 Mr. Yuen, just to give you a slight heads
13 up, my questions that I'm going to be asking will
14 fall into two areas. The first area is whether or
15 not the protective order is permissible under
16 Hawaii law, based on the current record. And the
17 second part is the practical effect if the
18 protective order is granted.

19 Just so that we're clear, do you agree
20 that protective orders that would be issued by a
21 government agency, like the Land Use Commission,
22 must be specific and not overbroad?

23 MR. YUEN: I would agree with that
24 statement.

25 COMMISSIONER OKUDA: So can you, again,

1 so that we're very clear, what is the specific
2 information that the Petitioner wants kept
3 confidential, is it simply terms of loans or -- can
4 you specifically state what specific information
5 the Petitioner wants to keep confidential?

6 MR. YUEN: It's the terms and conditions
7 of the various lines of credit that the Petitioner
8 has arranged in order to develop the project, the
9 fact that the commissioner has obtained these lines
10 of credit, we've disclosed that and that can be
11 disclosed to the public, but the terms and
12 conditions of the credit agreements themselves we
13 would like to keep confidential.

14 COMMISSIONER OKUDA: And when you say the
15 terms and conditions of these various credit
16 agreements, can you be more specific about what
17 terms and conditions you want or your client wants
18 kept confidential?

19 MR. YUEN: The interest rates charged,
20 the covenants that the Petitioner must comply with,
21 the events of default. Basically all of
22 the essential business terms of the credit
23 facilities.

24 COMMISSIONER OKUDA: Would you agree or
25 disagree -- well, let me just ask, first, what we

1 all call the closing question.

2 Besides what you just described, as far
3 as the terms and conditions that your client wants
4 kept confidential, are there any other terms or
5 conditions which your client wants kept
6 confidential?

7 MR. YUEN: I suppose I would have to mark
8 up the credit agreement, if you will, to indicate
9 what I would want, exactly what I would want to be
10 kept confidential, but I would say essentially it's
11 all of the various affirmative covenants and
12 negative covenants, the interest rates, conditions
13 of draws, events of default.

14 COMMISSIONER OKUDA: Besides those items
15 which you have described, are there any items that
16 you can give a description which your client wants
17 kept confidential?

18 MR. YUEN: That sums it up.

19 COMMISSIONER OKUDA: Is it true or not
20 true that if your client applies for other or
21 additional financing or replacement financing, a
22 lender could demand as a condition of, you know,
23 providing or evaluating or underwriting a new loan,
24 that these documents be produced to the new
25 potential lender?

1 MR. YUEN: A potential lender could, but
2 the Petitioner could also decline to submit the
3 documents and have the new lender judge the
4 Petitioner's financial condition based on the
5 information the Petitioner provides to that lender.

6 COMMISSIONER OKUDA: Okay. Do you
7 believe that this information, which you want to
8 keep confidential or what your client wants to keep
9 confidential, is relevant in any way in determining
10 whether or not your client, for example, has the
11 financial ability to move forward with this
12 project? And when I use the term "relevance," I
13 mean it as defined by the Hawaii Rules of Evidence,
14 a fact which makes a matter of consequence either
15 more likely or less likely.

16 Is the information which you want to keep
17 confidential, which you just described, is it
18 relevant to determining whether or not your client
19 is financially able to carry out its
20 representations which would be made to the
21 Commission and to the community?

22 MR. YUEN: No, because the fact that the
23 Petitioner has obtained a particular credit
24 facility has been disclosed, and I believe that's
25 sufficient on which the Commission can base its

1 decision as to whether the Petitioner has the
2 financial ability to undertake the project.

3 COMMISSIONER OKUDA: So now I'm getting a
4 little bit confused, because if this information in
5 the Petitioner's view is not relevant to an issue
6 that's going to be before the Land Use Commission,
7 why would the applicant submit it in the first
8 place? And let me tell you the reason why I'm
9 asking the question. It's like the applicant is
10 creating on its own a problem and seeking a
11 solution for a problem which if the applicant says
12 this information is not relevant, then the
13 applicant, you know, need not submit it based on
14 the applicant's view of the law and procedure in
15 the first place.

16 MR. YUEN: Well, the reason we submitted
17 these credit agreements is because we were asked by
18 the Commission to do so, we didn't do it
19 voluntarily, we disclosed their existence in the
20 Petitioner's financial statement, which the
21 Petitioner submitted to the Commission. We then
22 received a letter from the executive officer
23 requesting the submission of the two credit
24 agreements.

25 COMMISSIONER OKUDA: Okay, then let me

1 follow up with this question. Is it totally
2 impossible for the credit agreements not to be
3 relevant to determine whether or not the applicant
4 has the financial ability to proceed with whatever
5 it's applying for?

6 MR. YUEN: I believe the existence of the
7 credit agreements and the fact that the Petitioner
8 has obtained credit from third-party sources is
9 relevant, but the terms and conditions under which
10 the Petitioner has obtained credit I don't believe
11 are relevant to the Commission making its decision.
12 I think the Commission can and should consider the
13 fact that Petitioner has obtained financing from
14 independent third-party sources to proceed at least
15 through the pre-development stage, but the next
16 stage, the terms and conditions under which
17 Petitioner has obtained this financing, are not
18 necessarily relevant to the Commission's
19 determination.

20 COMMISSIONER OKUDA: Well, is it true or
21 not true that terms and conditions, in fact,
22 provide evidence about how firm or how much really
23 of substance the loan or credit facility is.
24 Example: Isn't it true that there's a difference
25 between a loan for, let's say, \$50 million due in

1 30 days versus a loan of \$50 million due in two
2 years?

3 MR. YUEN: I suppose that would be
4 relevant depending on what the purpose of the loan
5 is.

6 COMMISSIONER OKUDA: Well, for example,
7 if I, Gary Okuda, and I assure you I do not have
8 \$50 million, am an applicant for a developer and
9 I'm trying to tell you, Mr. Yuen, you know,
10 leasehold property from a client that you
11 represent, I assure you I have the ability to build
12 the development and you won't face a mechanic's
13 lien because I don't pay my bills, but if you find
14 out that the terms and conditions of my loan is
15 \$50 million due in 30 days and not \$50 million due
16 in three years where I can take out permanent
17 financing, you know, the difference in the term
18 would be material and relevant to you making a
19 decision whether I would have the financial
20 ability.

21 Would you agree that could be a fair and
22 reasonable concern?

23 MR. YUEN: Not necessarily, because the
24 fact -- I think what's relevant is the fact that
25 somebody's willing to lend you \$50 million, whether

1 it's for 30 days or 2 years. Once the lender hands
2 you that \$50 million, the lender has to have some
3 reasonable assurance that you're going to repay it.

4 COMMISSIONER OKUDA: Okay. If -- let me
5 move on. Let me move on.

6 CHAIRPERSON SCHEUER: Commissioner Okuda,
7 we're going to do a time check because we might
8 take a break at some point. Do you have a bunch
9 more?

10 COMMISSIONER OKUDA: Yeah, maybe a slight
11 bunch.

12 CHAIRPERSON SCHEUER: A small bunch of
13 bananas. Okay.

14 If it's okay with the parties, it's
15 9:57 a.m., I'd like to take a ten -- well, a
16 13-minute recess and reconvene at 10:10 a.m., and
17 we'll continue with questions from Commissioner
18 Okuda followed by questions from Commissioner
19 Ohigashi.

20 We're in recess until 10:10.

21 (Recess taken.)

22 CHAIRPERSON SCHEUER: Okay, 10:10.

23 Petitioner's counsel, Mr. Yuen, we're
24 still waiting for.

25 I'll just note that I was encouraged to

1 go on to national news. Things are hairy in the
2 nation's capitol, and whatever individual tradition
3 you might come from, you might at least hope for
4 everyone's health and safety, for what's going on
5 there.

6 Let's continue with the questioning on
7 Mr. Yuen by Commissioner Okuda.

8 I guess the last thing I'll say in
9 transition, I'm glad that we are modeling how one
10 can take care of so many policy issues in a
11 thoughtful and respectful way.

12 Mr. Okuda.

13 COMMISSIONER OKUDA: Thank you,
14 Mr. Chair.

15 Thank you very much, Mr. Yuen, for your
16 indulgence in answering my questions.

17 Do you agree that the Land Use Commission
18 must make its decision based on specific evidence
19 and not necessarily conclusory statements?

20 MR. YUEN: Yes, Commissioner.

21 COMMISSIONER OKUDA: What specifically in
22 the record or what evidence is there specifically
23 in the record which shows that your client actually
24 suffered prejudice from releasing the information
25 which you want protected or specific evidence

1 showing a substantial risk or a real risk of
2 prejudice?

3 And let me be more specific. For
4 example, I don't see any declaration of any expert
5 or loan officer or business consultant stating
6 that, you know, based on their education and
7 experience, release of this information creates any
8 type of prejudice, or I don't see any specific
9 evidence showing other instances where release of
10 this information has led to specific prejudice.

11 Can you point to anything in the record
12 which shows specific evidence demonstrating the
13 existence of this risk of harm or risk of prejudice
14 based on other similar events?

15 MR. YUEN: There is a declaration of the
16 manager of the Petitioner, that the Petitioner
17 would or could suffer prejudice should this
18 information be disclosed to the wider community.
19 No events have happened as of this date but that
20 doesn't mean the Petitioner will suffer prejudice
21 in the future.

22 COMMISSIONER OKUDA: I read that
23 declaration. Would it be clearly erroneous for me
24 to come to the conclusion that that's a conclusory
25 statement or a statement which is speculative?

1 MR. YUEN: Well, speculative because the
2 Petitioner is concerned about future harm. The
3 harm has not yet occurred but the Petitioner has a
4 long way to go to develop this project, and the
5 kinds of financing that Petitioner will have to
6 secure by way of a construction loan has -- you
7 know, you don't go out and get your construction
8 loan until you're ready to construct, and there's
9 no -- Petitioner is not in a position to do any
10 construction until after Petitioner has secured
11 approvals from the Land Use Commission and County
12 zoning, so we're a long way off from that point,
13 and there's no telling what or how this disclosure
14 may come back to haunt the Petitioner in the
15 future.

16 COMMISSIONER OKUDA: And I see your
17 point, but would I be wrong to conclude that at
18 this point in time, on this record, one could
19 reasonably describe this as speculation? Because
20 except for the stated concern, there's no specific
21 evidence showing that there is this existence of
22 harm. I mean, would I be wrong -- I mean
23 reasonable people could disagree -- but would I be
24 wrong to conclude that this is really just
25 speculation?

1 MR. YUEN: Well, speculation at this
2 point in time because one can't predict the future,
3 one can't predict what would happen, say, two years
4 from now when Petitioner goes to try to obtain a
5 construction loan and how this disclosure may, two
6 years in the future, affect Petitioner's ability to
7 get that loan in the future.

8 COMMISSIONER OKUDA: Okay. Let me move
9 on to another question here.

10 Once the Petitioner submits this
11 information as part of its filing, is it true or
12 not true that the information, the documents become
13 a government record, as that term government record
14 is defined in HRS Chapter 92-F?

15 MR. YUEN: It becomes a government record
16 but the government agency that has this record may
17 apply procedural safeguards to this record.

18 COMMISSIONER OKUDA: Okay. And Chapter
19 92F, and that's specifically Chapter 92-F-11,
20 basically states the starting point for government
21 records, which is essentially that government
22 records are to be, and I believe the term that's
23 used is, quote, "open to the public," close quote.

24 Do you agree that that's the starting
25 rule or point of HRS Chapter 92-F?

1 MR. YUEN: Yes.

2 COMMISSIONER OKUDA: And 92-F has a
3 section that lists the type of government records
4 where there's an expectation, for lack of a better
5 word, of privacy which the government is supposed
6 to keep private, correct, and that would be the
7 list in, for example, HRS Section 92-F-14; isn't
8 that correct?

9 MR. YUEN: Yes.

10 COMMISSIONER OKUDA: But that section
11 specifically states that these protections are
12 limited to records of individuals, and that
13 specific word "individual" is used. Would you
14 agree?

15 MR. YUEN: I'm looking up 92-F.

16 COMMISSIONER OKUDA: Maybe you can take a
17 look at 92-F-14. 92-F-14 is titled Significant
18 Privacy Interest; Examples, and subparagraph A
19 says: Disclosure of a government record shall not
20 constitute a clearly unwarranted invasion of
21 personal privacy if the public interest in
22 disclosure outweighs the privacy interest of the
23 individual. And then subparagraph B states: The
24 following are examples of information in which the
25 individual has a significant privacy interest.

1 So my question is: Isn't it true that
2 this section, which deals with release and
3 non-release of a government record, deals with
4 records of an individual?

5 MR. YUEN: To the extent the financial
6 information involves a personal guaranty by an
7 individual, the 92-F-6 would tend to support a
8 request to keep that information confidential.

9 COMMISSIONER OKUDA: Yeah, and I would
10 agree possibly with that but my question is a more
11 general question, that the protection under 92-F
12 regarding nondisclosure of certain records would be
13 limited to, under 92-F-14, records of an
14 individual, that's the term that's used,
15 "individual." Would you agree?

16 MR. YUEN: It does refer to the term
17 "individual," however, I could direct your
18 attention to the rules of the Natural Energy
19 Laboratory of Hawaii, which is a sister agency of
20 DBEDT, in which the agency is authorized to keep
21 confidential information which is related to a
22 competitive position in a particular business or
23 field of endeavor of potential tenants to seeking
24 leases from NELHA.

25 COMMISSIONER OKUDA: Yeah, and I'm going

1 to get to that in a very fast question, but I just
2 want to make sure we're talking about the same
3 thing here. I'm only asking about 92-F-14, that
4 the protections regarding government records, under
5 92-F-14, is limited to individuals.

6 That's what it says on the face of the
7 statute, correct?

8 MR. YUEN: Yes.

9 COMMISSIONER OKUDA: Okay. And if you
10 look at HRS 92-F-3, "individual" is defined as a
11 natural person. Would you agree? 92-F-3, there's
12 a definition of the word "individual" and the
13 statute says: "Individual," close quote, means a
14 natural person.

15 MR. YUEN: Yes.

16 COMMISSIONER OKUDA: So when it comes to
17 protection of government records, there's nothing
18 in the statute that says that there's a protection
19 of a government record with respect to a
20 corporation or an artificial entity, correct?

21 MR. YUEN: Under 92-F, no.

22 COMMISSIONER OKUDA: Now, you cited a
23 couple of Hawaii Supreme Court cases in your brief,
24 one was the SHOPO case and the other one was -- do
25 you think that person's name is pronounced Brede,

1 is it B-R-E-D-E -- I'm sorry, let me get my notes
2 up here. I'm sorry, Brende, B-R-E-N-D-E. And you
3 cited the case Brende versus Hara, H-A-R-A, that's
4 113 Hawaii reports at 424-A-2007 Hawaii Supreme
5 Court case. And you also cited the State of Hawaii
6 Organization of Police Officers, SHOPO, that's
7 S-H-O-P-O, versus Society of Professional
8 Journalists, University of Hawaii Chapter, that's
9 Hawaii Supreme Court case, in 1996 found that 83
10 Hawaii 378.

11 Besides those two cases you cited, do you
12 know of any other Hawaii Supreme Court authority
13 which supports the request that you are making
14 regarding the protective order?

15 MR. YUEN: No.

16 COMMISSIONER OKUDA: And these two cases
17 did not deal with the protection of corporate
18 financial information being submitted as part of an
19 application to a government agency, such as the
20 Land Use Commission for, you know, a government
21 entitlement or benefit like a boundary amendment,
22 correct?

23 MR. YUEN: These cases did not involve
24 boundary limits.

25 COMMISSIONER OKUDA: In fact, these two

1 cases dealt with the rights of individuals to
2 maintain privacy for --

3 CHAIRPERSON SCHEUER: Commissioner Okuda,
4 about how much longer?

5 COMMISSIONER OKUDA: Five minutes, Chair.

6 CHAIRPERSON SCHEUER: Okay. Thank you.

7 COMMISSIONER OKUDA: So, Mr. Yuen, these
8 two cases dealt with the protection of individual
9 privacy interest, not protection of information
10 which a corporation is submitting to a government
11 agency to gain a benefit from the government
12 agency, correct?

13 MR. YUEN: The Petitioner is not a
14 corporation, it's a limited liability company.

15 COMMISSIONER OKUDA: I shouldn't have
16 said a corporation. What I mean is --

17 MR. YUEN: (Indecipherable) --
18 individuals.

19 COMMISSIONER OKUDA: Yeah, but a
20 corporation is owned by individuals, too, so maybe
21 I should be more specific.

22 These cases that you cited did not deal
23 with an artificial entity, which is seeking
24 protection for information which it's required to
25 submit to the government agency, correct?

1 MR. YUEN: It does not deal with
2 artificial entities, no.

3 COMMISSIONER OKUDA: So it's reasonable
4 to come to a conclusion -- I'm not saying you're
5 totally wrong, but a reasonable person could
6 conclude that the cases you cited really might not
7 support the relief you're requesting, correct?

8 MR. YUEN: Well, it's the closest we
9 could find, Commissioner.

10 COMMISSIONER OKUDA: And then let me ask
11 you, finally, the practical question about how this
12 protective order would work as a practical matter.

13 The protective order states that a party
14 can label information as confidential, correct?

15 MR. YUEN: Correct.

16 COMMISSIONER OKUDA: And the stipulation
17 says that if the information is labeled
18 "confidential," there's certain procedures that
19 parties would need to follow, including the signing
20 of a declaration where whoever receives the
21 information promises not to disseminate the
22 information, so forth and so on.

23 Am I fairly stating part of the procedure
24 that the stipulation contemplates?

25 MR. YUEN: That's correct.

1 COMMISSIONER OKUDA: You know, one of the
2 things that I think the Land Use Commission can be
3 proud of is the good work of its staff to try to
4 give transparency to the community on what goes on
5 in the Commission, along the lines of doing things
6 like everything that comes into the Commission is
7 posted to a website, to the Land Use Commission
8 website, so that the public has access to all the
9 information. Whatever we, as commissioners, see,
10 the public sees.

11 How does your stipulation address the
12 fact that if something is submitted to the Land Use
13 Commission, it's posted on the website?

14 MR. YUEN: We would ask that certain
15 portions of the agreement be redacted from what's
16 posted on the website.

17 COMMISSIONER OKUDA: Okay. But your
18 stipulation also or stipulated protective order
19 would also restrict parties who gain access to
20 information that is or documents which are stamped
21 confidential to carry out certain duties.

22 Do you expect the public as a whole to be
23 bound by what is stated in the protective order?

24 MR. YUEN: About all we can do is expect
25 that certain information be redacted but we can't

1 control what someone who accesses the Commission's
2 website does.

3 COMMISSIONER OKUDA: Okay. Do you agree
4 that if your stipulation is adopted by the
5 Commission there's going to be some practical
6 problems about posting this information and giving
7 public access?

8 MR. YUEN: Well, I think it would be a
9 simple matter to withdraw the credit agreements
10 from the Commission's website and redact them and
11 repost them.

12 COMMISSIONER OKUDA: Okay. And this, I
13 promise you, is my absolute final question.

14 CHAIRPERSON SCHEUER: I'm going to hold
15 you to it, Commissioner.

16 COMMISSIONER OKUDA: And you can, you
17 can.

18 Because I wanted to end my questionings
19 with this, and my question to you, Mr. Yuen, is:
20 I'd like to read the preamble, Section 92-F, which
21 is specifically HRS 92-F-2, and it does recognize
22 the right of individuals to have protection of
23 private interest, but tell me whether or not this
24 really should be the guiding principle on whether
25 or not the Commission approves the stipulation or

1 approves it in part or denies it. And let me quote
2 this, what the legislature has said: In a
3 democracy, the people are vested with the ultimate
4 decision-making power. Government agencies exist
5 to aid the people in the formation and conduct of
6 public policy. Opening up the government processes
7 to public scrutiny and participation is the only
8 viable and reasonable method of protecting the
9 public's interest. Therefore, the legislature
10 declares that it is the policy of this state that
11 the formation and conduct of public policy, the
12 discussions, deliberations, decisions and action of
13 government agencies shall be conducted as openly as
14 possible and the statute that deals with access and
15 openness to government records follows.

16 Did I accurately read the statement of
17 law there?

18 MR. YUEN: I believe you did.

19 COMMISSIONER OKUDA: Thank you, Mr. Yuen,
20 for answering my questions.

21 Thank you, Mr. Chair. No further
22 questions.

23 CHAIRPERSON SCHEUER: Thank you very
24 much, Commissioner Okuda and Mr. Yuen.

25 Commissioner Ohigashi followed by

1 Commissioner Chang.

2 COMMISSIONER OHIGASHI: Mr. Yuen, I'm
3 just looking at your submittal on page 4 of your
4 proposed stipulation or post order. Looking at
5 number 11, it says: The terms of this order do not
6 preclude, limit, restrict or otherwise apply to the
7 use of documents at the Commission hearing.

8 So I'm supposing that even if we redact
9 them, that intervenors are free to use it at the
10 Commission hearing and it will become public
11 anyway. Is that what the stipulation reads?

12 MR. YUEN: If the redacted information is
13 produced, they're free to use the redacted
14 information.

15 COMMISSIONER OHIGASHI: Well, what I'm
16 trying to get at is that the order doesn't prevent
17 the use of the unredacted documents.

18 MR. YUEN: If the documents are submitted
19 into evidence. I do not intend to submit the
20 credit agreements into evidence, though.

21 COMMISSIONER OHIGASHI: But they may be
22 used in cross-examination, wouldn't they, and
23 wouldn't they be permitted to be attached as an
24 exhibit to be used in cross-examination?

25 MR. YUEN: (Indecipherable)

1 COMMISSIONER OHIGASHI: I'm not sure how
2 it would work or how it would afford your position
3 that we should have certain portions of that
4 document redacted.

5 The second question that I have is one
6 that's been bothering me. You know, we practice in
7 court and we know that confidential information is
8 subject to in-camera review for somebody to make or
9 a judge to determine whether or not it may set the
10 burden (Indecipherable) of whether or not
11 prejudicial, one party versus. Do the balancing
12 test on those issues.

13 Is there any procedure that you would be
14 willing to submit to that would have that kind of
15 in-camera inspection done by maybe the chairman of
16 the Commission, make that determination?

17 MR. YUEN: Well, that would be a
18 suggestion we could accept.

19 COMMISSIONER OHIGASHI: Knowing that each
20 side would set up, you would provide their redacted
21 portions that you are requesting, and I'm assuming
22 that the Intervenors agreed to some kind of
23 mechanism where they will keep it confidential for
24 the purpose of submitting arguments on the
25 Chairman, for him to do an in-camera inspection of

1 it. That's what I'm thinking.

2 MR. YUEN: I suppose that would work.

3 COMMISSIONER OHIGASHI: I don't have any
4 other questions.

5 CHAIRPERSON SCHEUER: Thank you very
6 much, Commissioner Ohigashi.

7 Commissioner Chang.

8 COMMISSIONER CHANG: Thank you,
9 Mr. Chair.

10 Mr. Yuen, just a few questions.

11 You would agree that the financial
12 condition and the ability of your client to proceed
13 with the development is a critical consideration by
14 the Commission in moving forward on this boundary
15 amendment. Would you agree?

16 MR. YUEN: I'd agree.

17 COMMISSIONER CHANG: Could you just
18 confirm with me that your client obtained this
19 property through a foreclosure action.

20 MR. YUEN: My client purchased the
21 property at a foreclosure sale, that's correct. My
22 client was not the foreclosing lender.

23 COMMISSIONER CHANG: Okay. And that your
24 client obtained a commissioner's deed for this
25 property; is that correct?

1 MR. YUEN: Correct.

2 COMMISSIONER CHANG: So it's not a
3 warranty deed but a commissioner's deed.

4 MR. YUEN: Correct.

5 COMMISSIONER CHANG: And you would agree
6 that the granting or denial of this motion is
7 really within the discretion of the Land Use
8 Commission based upon balancing, you know, all of
9 the different considerations, both the privacy
10 interests of your client versus the ability of your
11 client to proceed with the project.

12 Would you agree that the ultimate
13 decision is within the discretion of the
14 Commissioners?

15 MR. YUEN: Yes, I'd agree with that
16 statement.

17 COMMISSIONER CHANG: Thank you very much.
18 I have no further with questions,
19 Mr. Chair.

20 CHAIRPERSON SCHEUER: Thank you very
21 much, Commissioner Chang.

22 Commissioners, are there further
23 questions for Mr. Yuen at this time?

24 Oh, Commissioner Wong. Sorry.

25 COMMISSIONER WONG: No problem, Chair.

1 Thank you.

2 CHAIRPERSON SCHEUER: I'm not used to you
3 being so small.

4 COMMISSIONER WONG: Anyway, good morning,
5 Mr. Yuen. I've got a question for you. I just
6 want to make sure I have everything in my mind
7 correct.

8 So the docket itself is about a DBA,
9 correct, Mr. Yuen?

10 MR. YUEN: I'm sorry, could you restate
11 the question.

12 COMMISSIONER WONG: The issue that's
13 going to come in front of us is about a District
14 Boundary Amendment; is that correct?

15 MR. YUEN: Correct. Yes.

16 COMMISSIONER WONG: The protective order
17 about financial conditions and statements and et
18 cetera, correct?

19 MR. YUEN: Yes.

20 COMMISSIONER WONG: Let's say the County
21 OP or the Intervenor says, to you or your client:
22 Hey, I want to see all the financial statements.

23 Could you at that time also say: No, I
24 don't want to and let the LUC -- and explain why
25 the LUC can then determine that, just at that point

1 in time?

2 MR. YUEN: Well, the LUC rules require
3 the submission of a financial statement and we did
4 submit a financial statement. What is at issue is
5 after we submitted the financial statement we
6 received the letter from the executive officer
7 requesting certain credit agreements.

8 COMMISSIONER WONG: So that portion --
9 from what I gather from what Commissioner Okuda was
10 asking, is you want to either redact the terms or
11 not even show it, is that correct, that's the only
12 portion you don't want to show.

13 MR. YUEN: That's correct but, you know,
14 we acknowledge that the financial statement itself
15 is part of the Land Use Commission requirements and
16 we submitted it.

17 COMMISSIONER WONG: I just wanted to make
18 sure I had everything correct in my mind before we
19 continue on this. That's all. Thank you,
20 Mr. Yuen.

21 MR. YUEN: Thank you.

22 CHAIRPERSON SCHEUER: Thank you,
23 Commissioner Wong.

24 Commissioners, further questions for
25 Mr. Yuen at this time? If not we'll hear from the

1 County of Kauai.

2 MR. DONAHOE: Thank you, Chair. Just a
3 couple of follow-ups.

4 Mr. Yuen, are you familiar with HAR
5 15-15-50-C, so when a petition for boundary
6 amendments are submitted it must include a
7 statement describing the financial condition,
8 right?

9 MR. YUEN: And we did submit the
10 financial statement, yes.

11 MR. DONAHOE: And as part of that it has
12 to be a clear description of the manner in which
13 the Petitioner, your client, proposes to finance
14 the proposed use or the development.

15 MR. YUEN: We have recited in the
16 petition and supporting papers that the Petitioner
17 intends to obtain a construction loan to finance
18 the proposed development at the appropriate time.

19 MR. DONAHOE: And is it your, as part of
20 your request that things that you mentioned, like
21 the interest rates, the terms and condition of the
22 loan and the conditions of default, that should be
23 kept out of that clear description of the manner of
24 the --

25 MR. YUEN: Correct. The fact that the

1 Petitioner has to pay this pre-development
2 financing speaks for itself.

3 MR. DONAHOE: And is it your claim that
4 that information falls under 92-F-14?

5 MR. YUEN: We believe it falls within the
6 spirit of 92-F-14, but to the extent it's not a
7 financial information on any individual, then
8 technically it may not.

9 COMMISSIONER OKUDA: Mr. Chair, this is
10 Commissioner Okuda, I'm sorry to interrupt. If I
11 may.

12 CHAIRPERSON SCHEUER: Please,
13 Commissioner Okuda.

14 COMMISSIONER OKUDA: Mr. Chair, my
15 observation is I thought the parties would make
16 their presentation, that one party is not supposed
17 to cross-examination another party.

18 CHAIRPERSON SCHEUER: I was a little bit
19 taken aback.

20 MR. DONAHOE: I apologize. Nothing
21 further. I'll wait for my presentation.

22 CHAIRPERSON SCHEUER: So this is your
23 time for your presentation.

24 MR. DONAHOE: Okay. Well, the County's
25 position is that it's concerned or has interest in

1 reviewing the financial documentation, all
2 conditions of it, so that it can verify that not
3 only are the resources there but the financing to
4 guarantee construction of the project, if it's
5 ultimately approved, under the submitted, one, the
6 incremental plan, as well as the ten-year
7 timeframe. And so it does appear that the interest
8 rates of the terms and conditions fall under any of
9 the 92-F-14 privacy standards, and it does not seem
10 to outweigh the public interest in that
11 information, and the county's unclear how there
12 would be a competitive disadvantage, as cited in
13 the motion, in obtaining a construction loan. I'll
14 submit for the County under that.

15 CHAIRPERSON SCHEUER: Are there questions
16 for Kauai County from the Commissioners?

17 Mr. Okuda?

18 COMMISSIONER OKUDA: Thank you very much,
19 Mr. Chair.

20 Questions to the County.

21 Did the County sign the stipulated
22 protective order?

23 MR. DONAHOE: Not to my knowledge, no.

24 COMMISSIONER OKUDA: Thank you,
25 Mr. Chair. No further questions.

1 CHAIRPERSON SCHEUER: Thank you.

2 Commissioner Chang.

3 COMMISSIONER CHANG: So just a point of
4 clarification to the County. Are you opposing the
5 Petitioner's Motion for Protective Order? I'm not
6 clear.

7 MR. DONAHOE: It's the County's position
8 that if the Commission believes that the privacy
9 interest outweighs the public's interest, we'll
10 submit on that. But the County does have an
11 interest in whether or not the interest rates, the
12 terms and conditions, that's enough to outweigh the
13 public interest in knowing, and for the County to
14 know, how this project, if approved, is going to be
15 financed and/or completed in the proposed time
16 limits.

17 COMMISSIONER CHANG: And one final
18 question. So the County would agree that it is
19 within the discretion of the Land Use Commission to
20 balance the privacy interests versus obtaining all
21 the necessary interest to serve the public's best
22 interest on this particular boundary amendment,
23 that that is within the discretion of the Land Use
24 Commission whether to grant or deny this motion.

25 CHAIRPERSON SCHEUER: You're muted.

1 MR. DONAHOE: I'm sorry.

2 Commissioner, yes, that's the position of
3 the County, the Land Use Commission. Thank you for
4 the question.

5 COMMISSIONER CHANG: Thank you very much.
6 I have no other questions.

7 CHAIRPERSON SCHEUER: Commissioners,
8 further questions for Mr. Donahoe.

9 (No questions.)

10 So just to be clear with our procedures,
11 we've heard from the Petitioner, we've heard from
12 the County, we'll now hear argument from the
13 planning, followed by arguments from the
14 Intervenor, and the Commissioners will be given a
15 chance to ask each of the parties questions as to
16 their argument. I'll give a last bite at the apple
17 for the Commissioners to ask further questions for
18 clarification, as well as for a brief final
19 statement from any of the parties, and then we'll
20 go into deliberation. We will still go for a
21 little while until we take our next break.

22 Any questions on that?

23 (No questions.)

24 Let's hear from the Office of Planning.

25 MS. APUNA: Thank you, Chair.

1 So the Office of Planning had previously
2 agreed to the Stipulation for Protective Order, but
3 since that time we've done a further review and we
4 have withdrawn our support for the protective
5 order, and we basically take no position on
6 Petitioner's motion. Thank you.

7 CHAIRPERSON SCHEUER: Thank you,
8 Ms. Apuna. I'm always taken aback at the brevity
9 of some of your arguments.

10 Are there questions for Ms. Apuna from
11 the Commissioners?

12 (No questions.)

13 CHAIRPERSON SCHEUER: If not, I will. I
14 will subject you to a little questioning, Ms.
15 Apuna.

16 Because you appear in every single docket
17 that's before us, has it been in your observation
18 that in other dockets the financial ability of
19 Petitioner to execute on a project has been an
20 issue, have you seen that occur?

21 MS. APUNA: No, I have not seen that
22 occur. No, I have not.

23 CHAIRPERSON SCHEUER: You've never seen
24 us have an issue with whether or not -- a concern
25 with whether or not a Petitioner is financially

1 capable.

2 MS. APUNA: Oh, no, I'm sorry, I didn't
3 understand the question. Yes, I think that the
4 Commission has seen instances where there were
5 issues with the Petitioner's ability to finance the
6 proposed project.

7 CHAIRPERSON SCHEUER: As Commissioner
8 Chang explained the balancing considerations that
9 we have to go to, which if I properly understood
10 some of the extensive questioning of Mr. Yuen by
11 Mr. Okuda, that there was some agreement that
12 there's a balancing test that we have to go
13 through.

14 Do you believe that our experiences in
15 other dockets, where we've seen petitioners unable
16 to financially complete projects, should be part of
17 our consideration in the balancing?

18 MS. APUNA: Yes, I think that could be
19 part of the balancing.

20 CHAIRPERSON SCHEUER: I don't have
21 anything further for you.

22 Are there any other questions for the
23 Office of Planning?

24 (No questions.)

25 Seeing none, Mr. Collins or Ms. Isaki.

1 MR. COLLINS: Thank you, Mr. Chair. I'll
2 try to be brief.

3 The motion raises claims, protection
4 under Article 1, Section 6 of the Hawaii
5 Constitution, as well as the Hawaii Rules of Civil
6 Procedure. It's our position that the type of
7 information that's protected by Article 1,
8 Section 6 of the Hawaii Constitution, at least the
9 information prong of Section 6 does not apply in
10 this instance, in Brende versus Hara, which was
11 previously cited. The Supreme Court noted that
12 highly personal and intimate information includes
13 medical, financial, educational or employment
14 records, but as the Petitioner concedes the
15 information being sought is commercial information,
16 and that is not included within the statement of
17 the Supreme Court in Brende. Instead, they rely
18 upon the Hawaii Rules of Civil Procedure, Rule
19 26-E, for the protection for commercial
20 information. But as the Hawaii Rules of Civil
21 Procedure state, it applies to proceedings in the
22 Circuit Court, not in the Land Use Commission, and
23 the Land Use Commission is not adopting the Hawaii
24 Rules of Civil Procedure.

25 It's our contention under HRS 92-F-14,

1 which the Land Use Commission must consider because
2 92-F imposes a duty on all state agencies to make
3 their records as open as possible, it's our
4 contention under 92-F-14 that Petitioner is not a
5 natural person and so there is no balancing test,
6 there is no significant privacy interest under
7 Chapter 92-F, so the Land Use Commission has no
8 discretion in making a balancing test because there
9 is no significant privacy interest for a limited
10 liability company under 92-F. That being said, if
11 the Land Use Commission were to close government
12 records to the public, applying the balancing test
13 that is for individuals' significant privacy
14 interests, that that decision would be immediately
15 challengeable by any individual of the public.

16 And I think also, you know, as a policy
17 matter, the reason why Intervenor is opposed to
18 closing these records is because, you know, the
19 financial status of the Petitioner is highly
20 relevant to these proceedings, and if that portion
21 of the proceeding has to be closed to the public,
22 then if the decision, if the public is unhappy with
23 the decision, then there could be an inference that
24 Intervenor was somehow, you know, participated in
25 this closed door proceeding with all of these

1 secrets that shouldn't be secret.

2 Unless there is a competing interest to
3 the public's right to know, I think it's to
4 everybody's protection in this deliberative process
5 to keep this information as open as possible, but
6 of course under 92-F it's required and there is no
7 exception for a limited liability company.

8 And if the Commission were to consider
9 whether or not this information is relevant, of
10 course our position is that it is relevant, and I
11 would like to draw your attention. Maybe some of
12 you remember far back to 2008 when credit was being
13 extended to people, and the terms of the credit as
14 to purchase homes, a huge difference between prime
15 lending and sub prime lending, the variance of the
16 terms of those and whether or not the individuals
17 getting that credit were creditworthy, based on
18 those terms caused the entire global economy to
19 collapse.

20 So it's not just the existence of credit,
21 which is relevant to somebody's financial
22 abilities, but it's also the terms of those credit,
23 highly, highly relevant, our global economy came to
24 a standstill because of the terms of people's
25 credit for their home, and that's like a highly

1 regulated industry with very standard terms.
2 Commercial credit is not -- I mean it is highly
3 regulated but it isn't like there's like three
4 choices in terms of terms. It's like every
5 commercial credit document is basically a new one
6 unless it's, you know, like a consumer credit, you
7 know, so the terms are very, very important to
8 properly evaluate whether or not the Petitioner has
9 the financial ability to actually do this or if
10 this isn't just some, you know, paper way of making
11 money by getting an approval from the Commission.

12 Finally, you know, the Intervenor does
13 have a due process right to this information,
14 regardless of whether or not if it's kept
15 confidential from somebody else. But, again, under
16 92-F there is no significant privacy interest,
17 there's no balancing test for the Land Use
18 Commission to do under 92-F. We do not believe
19 that the informational prong of Article 1,
20 Section 6 applies in this instance, there's no case
21 law that supports that, and that the Hawaii Rules
22 of Civil Procedure don't apply and have not been
23 adopted by the Land Use Commission. Thank you.

24 CHAIRPERSON SCHEUER: Thank you,
25 Mr. Collins.

1 Questions for Mr. Collins, starting with
2 Commissioner Okuda.

3 COMMISSIONER OKUDA: Thank you very much,
4 Mr. Chair.

5 Mr. Collins, the recital that you just
6 gave about the meltdown of the mortgage industry,
7 that's your argument, but there's nothing in the
8 record which evidences what you just cited or what
9 you just argued; isn't that correct?

10 MR. COLLINS: That there was a mortgage
11 meltdown in 2008 or?

12 COMMISSIONER OKUDA: No, the causes of
13 it. And this is the reason why I asked the
14 question. As you may or may not be aware, in my
15 other life my law firm does a lot of mortgage
16 foreclosures and, in fact, my partner was asked by
17 the legislature to testify at the Hawaii
18 legislature even before the meltdown, and there
19 really is a difference of opinion of what led to
20 it. The same status that I was trying to impose or
21 ask that Mr. Yuen follow which is point to
22 something in the record, I think in all fairness it
23 should apply to everyone, and there's nothing in
24 the record or evidence on which you base your
25 argument. Isn't that true?

1 MR. COLLINS: Well, to the extent that
2 this is a proceeding about a district boundary
3 amendment, no, there's nothing in the record that
4 refers back to all of the various things about the
5 2008 financial meltdown. And, yeah, actually,
6 probably a more direct cause of it would be the
7 securitization and packaging and credit default and
8 stuff. Yeah, I totally agree, but under that are
9 these sub prime versus prime mortgages and then
10 being treated equal when, in fact, they're not, and
11 so that's the -- it's more of an argument than
12 trying to prove, saying that these two things were
13 different but they were treated the same and
14 basically became a cause of the meltdown. I'm not
15 asking you folks to make a finding that that
16 happened in 2008, I'm basically using it as
17 argument.

18 COMMISSIONER OKUDA: I want to make sure
19 that our argument is limited to what we have in the
20 record.

21 Now, let me ask you this: Even though
22 92-F has a specific definition of individual and a
23 section that deals with protection of information
24 dealing with individuals, is it your contention,
25 and, if it is, what is your legal citation to

1 indicate that artificial entities under Hawaii law
2 have no privacy protections?

3 MR. COLLINS: Well, as to 92-F-3, the
4 definition of individual means a natural person,
5 and the definition of person means an individual,
6 corporation, government or government subdivision
7 or agency, business trust, estate trust,
8 partnership association or any other legal entity.

9 So we cited OIP opinions that have
10 interpreted this, and I think under the general
11 principle of the exclusion of one is the exclusion
12 of the other and other principles of statutory
13 construction. When "individual" means natural
14 person and then the definition of "person" means an
15 individual and a bunch of nonindividual legal
16 categories, that those nonindividual legal
17 categories are excluded from the definition of
18 individual, at least under this section.

19 COMMISSIONER OKUDA: But I'm asking, and
20 I understand your argument there, but is there, for
21 example, a Hawaii Supreme Court case which
22 specifically holds that artificial entities do not
23 enjoy a privacy protection or a right to privacy,
24 we can debate about what the scope of that right
25 is, but is there a Hawaii Supreme Court or

1 appellate case that flat-out states an artificial
2 entity enjoys no privacy protection?

3 MR. COLLINS: Sure. So I think there's a
4 two-part answer to that. The first is that the
5 rule that the Land Use Commission adopted said that
6 a party can obtain a protective order for
7 information if it's protected under 92-F or by
8 other law. So the burden is on the Petitioner to
9 show under 92-F that they have a right or some
10 interest in closing it. And under 92-F, only
11 individuals have a significant privacy interest.

12 So the question is: Is there other law
13 that does that, and our contention is, no, there's
14 no other law that confers on the Petitioner a right
15 to submit this information but keep it from the
16 public. So it's not our burden to find a Supreme
17 Court case that does the negative, it's the
18 Petitioner's burden to actually provide a law
19 saying that they can close the proceedings.

20 So that's our answer, that the rule very
21 specifically gives the standard for which laws
22 should be considered, and under 92-F there is no
23 interest, and Petitioner has not presented another
24 law that the LUC has, that it's subject to, that
25 would provide that protection.

1 COMMISSIONER OKUDA: And I'm not going to
2 belabor this point, my question was just: Can you
3 point to an appellate case that says we don't have
4 to worry about a corporation's argument, it has a
5 right to privacy.

6 MR. COLLINS: Right, and our answer is
7 that it's not our burden and there is no case law
8 that they've provided that says there is.

9 COMMISSIONER OKUDA: So is it your
10 contention that the Land Use Commission, for
11 example, could force the applicant to provide like
12 a bank account number which, if revealed, might
13 lead to identity theft or improper access to that
14 bank account? I mean, if the corporation has no
15 rights to privacy, wouldn't we have the power, if
16 we decided to use our discretion, hey, produce
17 these bank accounts so that we can verify you
18 actually got money in the bank account, and that
19 information would be made public, everybody can see
20 the account number, the bank routing number, and
21 even though there's a risk of harm of identity
22 theft, too bad, you're an artificial entity so you
23 don't get any protection.

24 Is that your contention or does the Land
25 Use Commission have the discretion to draw the line

1 someplace?

2 MR. COLLINS: I'm not entirely clear
3 under the LUC's rules what would be the basis for
4 asking for bank account numbers or routing numbers.
5 I definitely think that the LUC under its rules
6 would be allowed to ask for, you know, possibly
7 deposit and debit information from a bank account,
8 but I'm not exactly sure what authority the LUC
9 would have to ask for a bank account number.

10 COMMISSIONER OKUDA: Let's say that I
11 convinced my fellow commissioners that, hey, we
12 don't trust the applicant, I'm not saying it's
13 Mr. Yuen's client, but the applicant, we don't
14 trust their representation to even have this
15 banking relationship or money in that bank so we
16 want the account number, we want it stated so that
17 we might issue some type of subpoena, you know, to
18 get the records of that specific account. And if
19 the artificial entity has no right to privacy,
20 then, under 92-F, the way I understand your
21 description of it, that gets off to the public,
22 too.

23 Is it your contention we have no
24 discretion to draw the line to say, in the exercise
25 of our discretion, based on the evidence presented

1 to us, we're not -- even though it's theoretically
2 possible to get that information under the law,
3 we're not going to allow it to be done as a
4 discretionary event.

5 MR. COLLINS: Well, the instance of this
6 motion is being brought under a specific rule, and
7 the rule is under 92-F or by other law, and under
8 92-F, a limited liability company does not have a
9 significant privacy interest because it's not an
10 individual. So the question is by other law, and
11 that other law has not been identified by the
12 Petitioner who has the burden under the LUC's rules
13 to determine that, so I don't know, and under a
14 hypothetical I don't know enough information to be
15 able to answer it. I do think that there's a
16 question about whether or not the LUC could ask for
17 things like a bank account number and then publish
18 it on LUC's website, but I'd have to see what would
19 be the power of the LUC to ask for that bank
20 account number. Maybe the LUC doesn't presently
21 have the authority to ask for a bank account number
22 in the manner that I'm suggesting.

23 COMMISSIONER OKUDA: That was just an
24 extreme example.

25 Thank you, Mr. Chair. Thank you,

1 Mr. Collins. No further questions.

2 CHAIRPERSON SCHEUER: Thank you.

3 Commissioners, further questions for
4 Mr. Collins?

5 (No questions.)

6 It's 11:04. I'm going to suggest that we
7 take a 10-minute break, reconvene at 11:15, and I
8 think that within -- I won't close off things, but
9 I think within 45 minutes or so before lunch we'll
10 be able to conclude proceedings. I'm going to
11 offer each of the parties a couple minutes to make
12 any final statements before I allow for a last
13 round of any burning questions from the
14 Commissioners to any of the parties before we go on
15 to deliberation on the motion before us.

16 Does that sound like an acceptable
17 procedure?

18 It's 11:04. We will reconvene at 11:15.

19 (Recess taken.)

20 CHAIRPERSON SCHEUER: Commissioners, are
21 there any final questions that you have for any of
22 the parties? If not, I'm going to give each party,
23 starting with Petitioner, a couple of minutes.

24 Commissioner Giovanni.

25 COMMISSIONER GIOVANNI: Just a point of

1 clarification. I'm a little confused about whether
2 or not we got, we asked for the general public,
3 whether they had any comments on the last motion,
4 the current motion.

5 CHAIRPERSON SCHEUER: We did, twice. At
6 the beginning, I indicated I was going to take
7 testimony on any of the matters on our agenda, and
8 prior to the start of this I did a final check to
9 see whether or not there was anybody who wished to
10 testify on this motion.

11 COMMISSIONER GIOVANNI: Thank you, Chair.

12 CHAIRPERSON SCHEUER: Thank you,
13 Commissioner.

14 Just as a final aside on this, because
15 some people are able to easily access the various
16 features of ZOOM, including raising hands and
17 things, I would hope that in the office of
18 information practices, not only is drafting laws on
19 how to deal with our new hybrid or all on-line
20 meetings, it would be great if OIP did training on
21 some of these basic things that further enable them
22 to meaningfully participate in the way that we have
23 to do business at this time.

24 That said, any other questions for any of
25 the parties at this time? If not, I'll give each

1 party a couple minutes to do some closing and then
2 we'll go on to deliberations, starting with
3 Mr. Yuen.

4 MR. YUEN: Thank you, Mr. Chair.

5 Petitioner submits that while the request
6 for protective order may not necessarily fall under
7 the strict bounds of Chapter 92-F, Petitioner
8 submits it's within the discretion of the
9 Commission to grant the protective order, and
10 Petitioner submits that the disclosure of the fact
11 of the credit agreements is sufficient.

12 Frankly, the -- it's premature for the
13 Petitioner to seek construction loan financing so
14 that the ability to produce, say, a \$100 million
15 construction facility is just not something that
16 the Petitioner or any other developer could obtain
17 at this stage and time.

18 The Petitioner will introduce other
19 testimony to describe the Petitioner's financial
20 condition and ability to obtain the necessary
21 financing at the hearing. Thank you very much.

22 CHAIRPERSON SCHEUER: Thank you.
23 County.

24 MR. DONAHOE: Thank you Commission, thank
25 you Chair.

1 It does not appear that the interest
2 falls under 92-F-14. Under HAR 15-15-50-C, which
3 it does require a clear description of the manner
4 in which the Petitioner proposes to propose use of
5 development, which the information that is included
6 in the Petitioner's request, it's the County's
7 position that the County privacy procedures is not
8 outweighed by the public's interest in the
9 disclosure. It is in the discretion of the Land
10 Use Commission to weigh the factors, but the County
11 does have some interest in releasing this
12 information to the public. Thank you.

13 CHAIRPERSON SCHEUER: Thank you very
14 much.

15 Ms. Apuna, Office of Planning.

16 MS. APUNA: OP has nothing further to
17 add. Thank you.

18 CHAIRPERSON SCHEUER: Intervenor?

19 MR. COLLINS: We just, as stated before,
20 that under 92-F, the Petitioner doesn't have a
21 significant privacy interest, the Hawaii Rules of
22 Civil Procedure don't apply in this context, and
23 that Article 1, Section 6, they have identified no
24 law that would suggest that the information they
25 seek to keep confidential is of a highly personal

1 and intimate nature to satisfy the Section 6
2 requirements, that the LUC has a duty to have all
3 of its government records open unless one of the
4 exceptions under 92-F apply, but the information
5 within these credit agreements are highly relevant.

6 And I just also note that because the
7 Office of Planning and the County of Kauai are
8 government agencies, if they are in receipt of this
9 information and the LUC does not have the authority
10 to make this information confidential, they have an
11 independent duty under the statute to provide the
12 information that they would receive to the public
13 that asks for it.

14 So to the extent that the LUC does not
15 have discretion to make this information
16 confidential, both Kauai and the Office of Planning
17 have independent statutory duties to provide this
18 information to the public and LUC doesn't have the
19 authority to override that independent duty. Thank
20 you.

21 CHAIRPERSON SCHEUER: Thank you,
22 Mr. Collins.

23 Commissioners, we have the Motion For
24 Protective Order in front of us, we have heard
25 public testimony on this matter, arguments and

1 we've had the opportunity to question the parties
2 on their arguments. We may enter into
3 deliberation.

4 Does anybody want to discuss this matter
5 and/or make a motion?

6 Mr. Yuen, are you there?

7 MR. YUEN: Yes.

8 CHAIRPERSON SCHEUER: Commissioners?

9 This is an unusual day in all sorts of
10 ways, certainly at the national level where I
11 continue to be concerned.

12 Commissioner Giovanni.

13 COMMISSIONER GIOVANNI: I move to deny
14 the Motion for Protective Order.

15 CHAIRPERSON SCHEUER: A motion has been
16 made to deny.

17 Commissioner Cabral, you are seconding
18 it?

19 COMMISSIONER CABRAL: Yes, I will second
20 that motion.

21 CHAIRPERSON SCHEUER: A motion to deny
22 the Motion for Protective Order has been made by
23 Commissioner Giovanni and seconded by Commissioner
24 Cabral, and I will call on the Movant and the
25 seconder to speak to their motions.

1 COMMISSIONER GIOVANNI: Thank you, Chair.
2 I concur with the position of the
3 Intervenor and the arguments that he's presented,
4 and I come down on the favor of transparency in the
5 interests of the community.

6 CHAIRPERSON SCHEUER: Commissioner
7 Cabral.

8 COMMISSIONER CABRAL: I'm of that same
9 mind, and I want to thank my fellow Commissioners
10 for their elegant legal positions.

11 I'm of the feeling that when you enter
12 the game of development, for lack of a better word,
13 and I'm not a lawyer, I'm a private citizen in
14 business, and I typically prefer governments that
15 governs least governs best, but in the case of this
16 type of situation when you decide you're going to
17 buy this property, under whatever circumstances,
18 the rules and regulations are all clearly printed
19 and you should enter into it and you should be
20 ready to meet those bars of requirements as you
21 move forward. So I don't see that there's any
22 massively extenuating circumstances and there
23 appears there's no legal standing for us to make an
24 exception. And I'm also concerned that if we make
25 exceptions, we set precedents to have to make those

1 exceptions or changes every time we turn around for
2 everyone. So I would agree with my fellow
3 Commissioner Giovanni in denying this request.
4 Thank you.

5 CHAIRPERSON SCHEUER: Commissioners, we
6 have a motion before us. We are in deliberation.
7 Commissioner Okuda.

8 COMMISSIONER OKUDA: Thank you,
9 Mr. Chair.

10 I join in the motion, and an additional
11 reason is the fact that I believe whatever action
12 the Land Use Commission takes, especially on
13 restricting access to information on which a
14 decision is being made, that decision by the Land
15 Use Commission has to be based on specific
16 evidence, not speculation and not just argument of
17 counsel. So I do not agree with a position that an
18 artificial entity enjoys absolutely no protection,
19 but given the fact that the public policy, as
20 reflected in the first sections of Chapter 92-F,
21 but also as stated in the various appellate cases,
22 is for transparency, is to allow the public access
23 to look at documents and allow that to be part of
24 the meaningful participation in the democracy. I
25 do not believe that the Petitioner at this time has

1 met its burden to limit what the legislature has
2 basically set forth as the starting point, which is
3 transparency and openness of government. So for
4 those reasons I will be voting in favor of this
5 motion. Thank you.

6 CHAIRPERSON SCHEUER: Thank you,
7 Commissioner Akuda.

8 Commissioners, you're in deliberation.

9 Commissioner Wong.

10 COMMISSIONER WONG: Yeah, I want to tell
11 you the truth, I'm in a quandary right now, I'm
12 still thinking about this motion. Just because I
13 believe that companies, organizations does have
14 privacy issues, especially in terms of going
15 forward to get some sort of terms, other monies.
16 However, there is the public issues that they
17 should know, they have rights, also.

18 So right now I have to tell you the
19 truth, Chair, I am in that quandary because I don't
20 know if in the future the Petitioner can come up
21 and say: We would like to just redact this portion
22 of our financial statements, or I have that issue
23 because it's a "yes" or "no" right now, we don't
24 have a "maybe" or you can have a portion. So I
25 just wanted to say that's where I am right now,

1 Chair. Thank you.

2 CHAIRPERSON SCHEUER: Thank you,
3 Commissioner Wong.

4 Commissioners, we are in deliberation.

5 I will, perhaps, prompt discussion. I
6 will echo that -- Commissioner Wong, I'd like to
7 say that I'm not 100 percent one way or the other
8 and I share in Commissioner Okuda's observation,
9 and I don't think that a non-individual entity is
10 completely bereft of privacy concerns. And I'll
11 say what I'm thinking about right now and why I
12 encourage and hope for informed discussion from my
13 fellow Commissioners to help us decide.

14 One observation, somewhat
15 tongue-in-cheek, somewhat not, is that we all
16 disclose a lot of information just to be here. We
17 disclose -- we show you our underwear to be able to
18 serve on this Commission. We have to file our
19 yearly disclosures and say who we're getting paid
20 by and how much we're getting paid, within ranges,
21 and what kind of loans we have out there. So it
22 would be disingenuous to say that that doesn't sort
23 of inform my approach on how we should do business
24 in front of the Commission.

25 I'd also say that, just as an

1 orientation, part of my orientation to questions
2 like this is that the LUC is really around to help
3 sustainable good development to occur while
4 protecting public trust resources, and the
5 interest in -- I just want to be really clear --
6 the interest in disclosure is not to punish
7 business and not to punish developers but we've
8 seen in so many cases -- I have seen in my six-plus
9 years -- many cases where the Petitioner said, oh,
10 yeah, I have this capability and then it was clear
11 that they did not have the capability whatsoever,
12 and we want good projects to succeed but they can
13 only succeed and follow through on commitments when
14 we know that there is some level of financial
15 capability of actually seeing the project through
16 and particularly the financial means to follow
17 through with any representations that might be made
18 on the main part of our deliberation on this. So
19 those are the kinds of considerations that I think
20 we need to deliberate these matters.

21 Commissioner Chang.

22 COMMISSIONER CHANG: Thank you,
23 Mr. Chair, for sort of invoking some discussion on
24 this matter.

25 I guess over the last several different

1 dockets that we've been hearing, we have seen
2 parties come in requesting changes to original dba
3 approvals and conditions because, one, I think at
4 that point in time when the decision was made based
5 upon representations, primarily regarding their
6 financial ability to proceed with the project and
7 communities relied upon that, certain conditions
8 were made. So we today have inherited those
9 conditions, and in hindsight we're now asked to
10 kind of look back and what did they mean.

11 So I think we have the opportunity at
12 this time to do the record right, to insure that
13 the petitioners who come before us to do projects,
14 to change ag land to urban land, even if it's for
15 affordable housing, that they are doing this, one,
16 they may believe that they have the financial
17 ability, but what we also need to insure is that
18 the community feels a sense of trust based upon
19 transparency, based upon full disclosure that the
20 developer likewise has the ability to proceed. We
21 have seen in this particular docket there is a lot
22 of community interest in this project.

23 So I think it is incumbent upon the
24 Petitioner to really consider that, that this is an
25 opportunity to, you know, sort of proactively

1 address those community concerns, including the
2 financial ability. We have seen over our period of
3 time, as Land Use Commissioners, those projects
4 that have had community support, based upon robust
5 community engagement, have come to the Commission
6 and been well-received.

7 So I think the Petitioner has an
8 inclination of the community's concerns here,
9 including financial ability. And I think as the
10 Commissioners we also have a responsibility to not
11 only make a decision for today but a decision that
12 should be able to withstand for the next 10,
13 20 years.

14 So based upon that I really believe that
15 the full financial disclosure on the ability of
16 this developer, this owner, to fulfill all of the
17 representations that they are making, is critical
18 to the Land Use Commission in ultimately making its
19 decision.

20 So for those kinds of reasons I am going
21 to support the motion, and if at the time Mr. Yuen
22 brings forward a witness, that there is particular
23 confidential information, we can also address it at
24 that point in time. But at this point in time I
25 think it is important for both the Commission and

1 the Petitioner to have full disclosure so that the
2 community has a sense of transparency and trust in
3 our own process. Thank you very much.

4 CHAIRPERSON SCHEUER: Thank you very
5 much, Commissioner Chang.

6 Commission Ohigashi followed by
7 Commissioner Aczon.

8 COMMISSION OHIGASHI: I'm like
9 Commissioner Wong, I'm kind of in a quandary. I
10 want to make sure that, uh. The way I understand
11 it, that the Petitioner is saying, we just don't
12 want certain information to be released to the
13 public. The Intervenors, and all other parties to
14 insure compliance with their financial ability, can
15 have this information. The parties to this
16 proceeding can have the un-redacted information and
17 and to prepare themselves for the purposes of the
18 issue of financial ability to -- (Indecipherable)

19 So the question then turns is, is that
20 interest to keep it quiet, is that sufficient
21 enough to keep it from the public. So I don't view
22 this issue as whether or not they have the
23 financial capability to finish the project, that
24 that issue will be litigated and everybody will
25 have the necessary information to litigate. The

1 question turns is whether the public should have
2 that information.

3 It appears to me that number 11, that I
4 referred to, will give them -- number 11 in the
5 proposed order will give them the information
6 eventually. That's why I'm in a quandary. I'm not
7 sure whether or not we are keeping this information
8 from the public (Indecipherable) and whether or not
9 those information contained therein will be
10 available, given the fact that condition 11 allows
11 them to use, any party to use the documents within
12 the contested cases. That's where I'm standing
13 right now. That's all I have to say.

14 CHAIRPERSON SCHEUER: Thank you,
15 Commissioner Ohigashi.

16 Commissioner Aczon followed by
17 Commissioner Okuda.

18 COMMISSIONER ACZON: Thank you,
19 Mr. Chair.

20 It's really very unfortunately that the
21 decision today is just up or down, there's no
22 really compromise, there's no really, you know,
23 center where it's very left or very far right.

24 My issue on this one is, really, I don't
25 know how much Land Use Commission is entitled to

1 any of financial information. Like, you know,
2 Chair mentioned about during our confirmation, they
3 ask how much but they don't ask what is your
4 account number or, you know, they only ask where is
5 the bank. So that is really my, you know, issue
6 right now. I don't know how much we can ask.
7 Unfortunately, Petitioner didn't -- you know, the
8 motion is kind of broad, we don't really know how
9 much or what else he wants privacy.

10 Secondly is, you know, we might be
11 jeopardizing this project because of that. Because
12 as you know on financial transactions, there are
13 certain -- well, it is confidential, the banks to
14 compete with each other, and maybe sometimes a bank
15 would say, you know, we want this confidential. So
16 what do we do with that. If the financial
17 institution says, you know, you cannot disclose
18 this because bank A or bank B, you know, might use
19 it against us.

20 So I'm just hoping that when the time
21 comes, you know, Land Use Commission would re-visit
22 again how much information we would, you know,
23 allow the public to know versus, you know, what
24 information we can keep, you know, confidential for
25 just maybe among just the Commissioners but nothing

1 public.

2 Having said that, you know, I'm still
3 kind of debating what are my positions on this one.

4 Thank you, Commissioner.

5 CHAIRPERSON SCHEUER: Thank you
6 Commissioner Aczon.

7 Commissioner Okuda.

8 COMMISSIONER OKUDA: Thank you,
9 Mr. Chair.

10 I think Commissioner Aczon and
11 Commissioner Ohigashi raised important points, and
12 that's why, even though I'm supporting this motion,
13 my commentary in questioning Mr. Yuen was, you
14 know, to what extent is what's being presented to
15 us speculative. I believe that since the Movant,
16 the Petitioner, has the burden of proof and the
17 burden to justify its position of a protective
18 order, the burden rests with them. And the reason
19 why I do not believe they're entitled to a
20 protective order at this point in time is because
21 we are being just given speculative situations
22 about what may or may not occur.

23 And just to make my position clear, I'm
24 not saying that if the Petitioner were to come with
25 clear evidence of a detriment or harm in releasing

1 certain information that I would not vote in favor
2 of giving some type of protection. I believe the
3 problem here is the fact that we're not being given
4 specific evidence of specific situations which
5 require specificity about protection.

6 The other point I'd like to raise, again,
7 is the fact that the Petitioner can always come
8 back to us, and it's within the Petitioner's
9 control to determine what they want to present and
10 what they don't want to present, and I do share a
11 concern that Commissioner Chang has been raising
12 about the fact of compliance, ultimate compliance,
13 ultimate performance of conditions. It very well
14 may be that if a Petitioner does not provide
15 sufficient financial support but the Land Use
16 Commission exercising its discretion decides to
17 vote in favor of a boundary amendment, a condition
18 that we might impose is one of a performance bond,
19 and maybe we should just require and impose
20 performance bonds across-the-board, and the bottom
21 line is, okay, if you don't want to present
22 evidence because of confidential information that's
23 fine, the representation is being made by the
24 applicant or the Petitioner to have the ability to
25 perform, we won't go beyond that representation,

1 you just make sure you post a performance bond,
2 because then if the affordable housing, for
3 example, if not built, the roads aren't built, the
4 bridge isn't built, well, you know what, we won't
5 chase any lender's representation or anything,
6 we'll just ask the varies counties to execute on
7 the performance bond.

8 So I'm still in favor of this motion
9 because the motion doesn't preclude the Petitioner
10 from coming back and asking for specific relief,
11 and, number two, it doesn't preclude us for
12 imposing a requirement for a performance bond in
13 the future. Thank you.

14 CHAIRPERSON SCHEUER: Thank you,
15 Commissioner Okuda.

16 Commissioner Aczon followed by
17 Commissioner Giovanni.

18 COMMISSIONER ACZON: I fully agree with
19 Commissioner Okuda's suggestions about performance
20 bond or coming back to us later on. That's what I
21 said earlier, I'm hoping they can come back later.
22 My struggle is the motion doesn't say that, the
23 motion, whether we deny or not, it doesn't say, you
24 know, on this motion that, you know, Land Use
25 Commission can impose, require those things that

1 Commissioner Okuda mentioned. So that is really my
2 dilemma, the motion doesn't reflect all those, it's
3 saying maybe this, maybe that but, you know, once
4 you vote on this motion, that's it.

5 CHAIRPERSON SCHEUER: Commissioner Aczon,
6 if I may. When you say that the motion does not
7 consider these things, are you referring to the
8 motion filed by the Petitioner or the motion made
9 by your fellow Commissioners?

10 COMMISSIONER ACZON: My fellow
11 Commissioners.

12 CHAIRPERSON SCHEUER: I believe and I
13 would invite, to the degree that it's not
14 privileged communication, our deputy attorney
15 general to opine, but I believe that if, for
16 instance, we were to vote to -- the motion before
17 us was supported, the discussion has reflected a
18 willingness of the Commissioners to consider more
19 specific motions in the future, as well as other
20 remedies to address these issues. And in our own
21 rules that govern how you see procedure, the
22 Petitioner is not prohibited from filing a further
23 motion later even if this motion is denied.

24 Do I understand that correctly, Mr. Lau?

25 MR. LAU: That's correct.

1 CHAIRPERSON SCHEUER: Perhaps that gives
2 you some comfort, Mr. Aczon.

3 Commissioner Giovanni.

4 COMMISSIONER GIOVANNI: Thank you, Chair,
5 and thank you for saying a few of the things that I
6 was going to attempt to say.

7 My motion, clearly, is a denial of the
8 motion that's been presented by the Petitioner,
9 which in my view is a very general catch-all type
10 of a motion to protect his financial information
11 that might be of value to this Commission as it
12 determines the wherewithal of the Petitioner to
13 actually execute on the project. And as we have
14 all experienced in recent hearings and dockets, and
15 you're hearing from my fellow Commissioners
16 concerns about the representations that have been
17 made before this Commission in the past about the
18 financial capability of developers that follow
19 through on projects only to learn that that was not
20 the case, and now we're having to deal with those
21 troubles that have been created by those
22 representations which did not prove to be true. I
23 think this Commission does need to look forward to
24 things like performance bonds to help assure that
25 the projects will go forward.

1 I also feel that if we go forward with my
2 motion, it does not foreclose the Petitioner from
3 coming forth to protect in the future or to ask
4 this Commission to protect in the future specific
5 information that does compromise their privacy.

6 And, finally, I do not accept the
7 Petitioner's argument that by divulging details of
8 which he indicated were the specifics that
9 Commissioner Okuda asked for relative to the
10 project development money that they have secured to
11 date, which probably represents, on an average,
12 less than 10 percent, in many cases less than
13 5 percent of the total amount of money that would
14 be required to actually execute these projects. I
15 don't accept those arguments that those specifics,
16 if they are made public through this Commission's
17 hearing, would in any way jeopardize the ultimate
18 ability of the Petitioner to secure the other
19 90 percent of the financing, plus, that would be
20 required to execute the project.

21 So I am reaffirming my position to deny
22 this motion. Thank you.

23 CHAIRPERSON SCHEUER: Thank you,
24 Commissioner Giovanni.

25 I have been swayed by the arguments and

1 believe that no harm would come to the Petitioner
2 through denial at this time, and that the
3 Petitioner can avail themselves of a future more
4 specific motion, and that the motion from the
5 Petitioner, as presented to us, should not be
6 granted. So that's where I've landed.

7 Commissioners, we are in deliberation.

8 Is there further discussion or
9 deliberation? If there is not, I will ask
10 Mr. Orodener to poll the Commission.

11 Is there any further discussion?

12 Seeing none, Mr. Orodener, would you
13 please poll the Commission.

14 MR. ORODENKER: Thank you, Mr. Chair.

15 The motion is to deny the Motion for
16 Protective Order.

17 Commissioner Giovanni?

18 COMMISSIONER GIOVANNI: Aye.

19 MR. ORODENKER: Commissioner Cabral?

20 COMMISSIONER CABRAL: Aye.

21 MR. ORODENKER: Commission Aczon?

22 COMMISSIONER ACZON: Yes.

23 MR. ORODENKER: Commissioner Chang?

24 COMMISSIONER CHANG: Aye.

25 MR. ORODENKER: Commissioner Ohigashi?

1 COMMISSIONER OHIGASHI: Reluctantly, aye.

2 CHAIRPERSON SCHEUER: "Reluctantly aye,"
3 was the response.

4 MR. ORODENKER: Commissioner Okuda.

5 COMMISSIONER OKUDA: Yes.

6 MR. ORODENKER: Chair Scheuer?

7 CHAIRPERSON SCHEUER: Aye.

8 MR. ORODENKER: Thank you, Mr. Chair.

9 The motion passes unanimously with eight
10 votes.

11 CHAIRPERSON SCHEUER: Thank you,
12 Commissioners, thank you to the parties.

13 COMMISSIONER CHANG: What about Mr. Wong?

14 COMMISSIONER WONG: I follow the
15 "reluctant aye."

16 CHAIRPERSON SCHEUER: Commissioner Aczon
17 also voted, correct? Yes.

18 The motion has passed unanimously. Thank
19 you for all the parties and your thoughtfulness and
20 the agreeableness with which you approached today's
21 business. It stands in stark relief with the
22 violence that is going in our nation's capital. So
23 I thank all of the parties.

24 Before I adjourn, I normally ask if
25 there's any further business, and I understand that

1 counsel for the Office of Planning would like to
2 make a statement to us.

3 MS. APUNA: Thank you, Chair.

4 So this is my last time before the
5 Commission as OP Deputy Attorney General, so I just
6 wanted to say thank you so much for the past almost
7 five years. It's been so wonderful to work with
8 all of you, you're so thoughtful and diligent and
9 put a lot of heart into what you do, and I've
10 always appreciated coming here each month to work
11 with you all, and you make me laugh, too.

12 So I will miss you all but thank you so
13 much and hope to see you in the future.

14 CHAIRPERSON SCHEUER: May I question
15 counsel as to where you are going?

16 MS. APUNA: I'm going to DPP, I don't
17 know how official it is but I probably shouldn't
18 say it in a public hearing, but, yes. Thank you.

19 CHAIRPERSON SCHEUER: We look forward to
20 hearing.

21 Any comments, Commissioners?

22 Commissioner Wong.

23 COMMISSIONER WONG: I would first like to
24 thank the counsel for OP for her time and effort.

25 I should have asked you more questions at this past

1 hearing. So just to keep it no comment, I just
2 want to say good luck, thank you and hope for all
3 the best for you.

4 COMMISSIONER CHANG: Thank you. Thank
5 you, Commissioner.

6 CHAIRPERSON SCHEUER: Commissioner Chang
7 followed by Commissioner Giovanni.

8 COMMISSIONER CHANG: Ms. Apuna, I am very
9 sad to see you go. I will tell you, I look to
10 Office of Planning, you are sort of, in my view,
11 you represent the public, but more importantly it's
12 also the manner in which you conduct yourself.
13 Besides being very professional, you likewise are
14 very thoughtful but you're also firm. I have
15 greatly appreciated your participation in the Land
16 Use Commission hearings. Your participation, in my
17 view, has been quite instrumental. So thank you, I
18 wish you well, I do, I wish you the best. I'm
19 sorry to see you leave us but I wish you the world.
20 Thank you.

21 MS. APUNA: Thank you, Commissioner
22 Chang.

23 CHAIRPERSON SCHEUER: Commissioner Okuda
24 followed by Commissioner Giovanni.

25 COMMISSIONER OKUDA: If, in fact,

1 Ms. Apuna, you're going to a position of leadership
2 and policy, I'm not sorry for you to leave, and
3 this is the reason why. We need people like you at
4 the County level who can see not only statewide big
5 picture but County issues but really have the
6 public interest and public trust in mind. We can
7 all differ about what really is in the public
8 interest, we can differ about how our state should
9 move forward, but it's a real tragedy and it's a
10 real fear when people don't even consider looking
11 at the bigger issues to make the community better
12 and focus just on narrow, selfish interests like:
13 What's in it for me, how can I make it financially
14 better for me and, you know -- what is it -- me me
15 me me.

16 So I'm not sorry you're leaving, I'm
17 serious about that, because if you are going to
18 where I think you're going, in the position that I
19 think you're going, I think we on Oahu and the City
20 and County of Honolulu will benefit greatly from
21 that, so this is a positive thing. I'm glad you're
22 going, I'm glad, if you volunteered or you were
23 arm-twisted into it, that you made the decision. I
24 don't even have to wish you good luck because
25 you're going to do an outstanding job even without

1 luck. So thank you very much for your service to
2 the Commission.

3 Thank you, Mr. Chair.

4 CHAIRPERSON SCHEUER: Thank you.

5 Commissioners Giovanni followed by Aczon,
6 followed by Ohigashi, followed by Cabral.

7 COMMISSIONER GIOVANNI: Thank you, Chair.

8 So Ms. Apuna, I'm the newest
9 Commissioner, I've only been on the Commission for
10 about a year, and so I was only blessed with one of
11 your five years before us, but let me say that you
12 have been the bright light of sanity for me, as we
13 have considered the different matters along the
14 way.

15 CHAIRPERSON SCHEUER: Not your fellow
16 Commissioners?

17 COMMISSIONER GIOVANNI: No, it has been
18 Ms. Apuna that has been the bright light of sanity
19 and critical thinking and logic, which I have
20 relied upon for my own judgment-making.

21 So thank you for providing that light.
22 And, like Commissioner Okuda, I know you will do
23 well. I'm glad to see that you're going to be
24 active in performing in another very important job
25 for Hawaii. So I wish you well, I know that you

1 will do well, and I look forward to seeing you
2 again.

3 MS. APUNA: Thank you, Commissioner.

4 CHAIRPERSON SCHEUER: Thank you,
5 Commissioner Giovanni.

6 Commission Aczon followed by Commissioner
7 Ohigashi.

8 COMMISSIONER ACZON: Thank you,
9 Mr. Chair.

10 I just want to echo the comments of my
11 fellow Commissioners, you will be certainly missed
12 during our meetings. I just wanted to wish you the
13 best because there is a lot of work waiting for you
14 where you're going, and I know you're going to do a
15 good job. Again, thank you for your opinions, I
16 greatly appreciate it, so I wish you the best.
17 Thank you.

18 MS. APUNA: Thank you.

19 CHAIRPERSON SCHEUER: Thank you.
20 Commissioner Ohigashi?

21 COMMISSIONER OHIGASHI: My impression of
22 you is that I can make an agreement with you on a
23 handshake. I don't say that to every lawyer that I
24 meet in the world. I find you very honest and when
25 you give your word, you give your word, and I'm

1 sure that you will take that into your new
2 position. I am sure that (Indecipherable) is
3 crying right now because he's losing his best
4 advocate.

5 And I agree with you, Dawn, that
6 (Indecipherable) makes me laugh. So with that I
7 wish you good luck.

8 MS. APUNA: Thank you, Commissioner.

9 CHAIRPERSON SCHEUER: Commissioner
10 Cabral.

11 COMMISSIONER CABRAL: Yes, thank you, and
12 of course I'll echo what everyone else said. But
13 to add to that, I want to say that I appreciate --
14 often what I find, which is my specialty, I think,
15 common sense. I'm not a lawyer so I really
16 appreciate, sometimes you do the best job of just
17 bringing it down to putting it in a box that a lay
18 person like me can understand, and showing the
19 "this" and the "that's," but making it at a level
20 that can represent what the law requires, and you
21 make those references but you've also very clearly
22 made it understandable to, in my opinion, I'm the
23 common woman, common man, and I appreciate that.

24 So I don't know exactly where you're
25 going in the County, we at the state level will

1 take the loss, and hopefully you can improve Oahu,
2 they need you. So, thank you.

3 MS. APUNA: Thank you, Commissioner
4 Cabral.

5 CHAIRPERSON SCHEUER: Is there anything
6 further, Commissioners?

7 I will join and echo in all of the
8 comments of my fellow Commissioners, and add just
9 two specific observations. I've been most grateful
10 for your service, Ms. Apuna, when you've disagreed
11 with things that I've said and argued against what
12 I was thinking, and when I've seen you change your
13 position in the midst of dockets, in the face of
14 new evidence, and I think those have been
15 incredible strengths.

16 Thank you to the parties on this docket
17 that today was dealing with, for dealing with this
18 additional time that we have, that we want to
19 provide time for sharing our aloha.

20 Thank you to all of you, beginning with
21 Mr. Yuen, Mr. Donahoe, Ms. Apuna, Mr. Collins and
22 Ms. Isaki, for really the best kind of public
23 discussions that we could have. It means a great
24 deal to me, and I think it means a great deal to
25 the State of Hawaii.

1 If there is no further business, I will
2 declare this entire meeting adjourned. We're not
3 meeting tomorrow, we've gotten through all of our
4 business. Thank you very much.

5 (Ended 11:58 a.m.)

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1 STATE OF HAWAII)
)
2 COUNTY OF HONOLULU) ss.

3 BE IT KNOWN that the foregoing hearing was
4 taken on January 6th, 2021, before me, RITA KING, a
5 Certified Shorthand Reporter for the State of
6 Hawaii; that the witnesses before testifying were
7 duly sworn to testify to the whole truth; that the
8 questions propounded to the witnesses and the
9 answers of the witnesses thereto were taken down by
10 me in shorthand and thereafter reduced to print by
11 computer-aided transcription under my direction;
12 that the foregoing pages are a full, true and
13 accurate transcript of all proceedings and
14 testimony had and adduced upon the taking of said
15 hearing, all done to the best of my skill and
16 ability.

17 I FURTHER CERTIFY that I am in no way
18 related to nor employed by any of the parties
19 hereto nor am I in any way interested in the
20 outcome hereof.

21 DATED at Honolulu, Hawaii, this 19th
22 day of January, 2021.

23
24 

25 RITA KING, RPR, CSR No. 373