

LAND USE COMMISSION  
STATE OF HAWAI'I  
Hearing held on February 24, 2021  
Commencing at 9:00 a.m

Held via ZOOM by Interactive Conference Technology

I. Call to Order

II. Adoption of Minutes

III. Tentative Meeting Schedule

IV. ACTION A18-806 BARRY TRUST (HAWAI'I)  
To Consider Amended Petition To Amend the Land  
Use District Boundary of Certain Lands Situated  
At Keaau, Puna, County and State of Hawai'i,  
Consisting of 0.51 acres from the Conservation  
District to the Agricultural District Tax Map  
Key No. (3) 1-5-059:059

V. Action - C&C OF HONOLULU IMPORTANT AGRICULTURAL  
LANDS (IAL) DESIGNATION  
To Consider City and County of Honolulu  
Recommendations for the designation of  
Important Agricultural Lands on the Island of  
Oahu pursuant to Sections 205-47, 205-48 and  
205-49 Hawaii Revised Statutes. The lands  
recommended for designation are listed on the  
Attached Appendix H. Meeting materials are  
also available for public review in advance of  
the meeting at  
<https://luc.hawaii.gov/city-county-ial/>

VI. ADJOURNMENT

Before: Jean Marie McManus, Hawaii CSR #156

## 1 APPEARANCES:

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

10 STAFF:

11 LAUREN CHUN, ESQ.  
12 Deputy Attorney General  
13 DANIEL ORODENKER, Executive Officer  
14 RILEY K. HAKODA, Chief Clerk  
15 SCOTT DERRICKSON, Chief Planner  
16 NATASHA A. QUINONES, Program Specialist

17 BRIAN YEE, ESQ.  
18 Office of Planning  
19 RODNEY FUNAKOSHI, Planning Program Administrator  
20 AARON SETOGAWA, Planner  
21 State of Hawaii

22 JOHN MUKAI, ESQ.  
23 Corporation Counsel  
24 MAIJA JACKSON, Planner  
25 ZENDO KERN, Hawaii County Planning Director  
County of Hawai'i

DEREK SIMON, ESQ.  
ALICIA FUNG, ESQ.  
Carlsmith Ball  
Attorneys for Petitioner

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1 CHAIRPERSON SCHEUER: Aloha mai kakou.

2 This is the February 24th, 2021 Land Use  
3 Commission meeting, and it's being held using  
4 interactive conference technology linking  
5 videoconference participants and other interested  
6 individuals of the public via the ZOOM internet  
7 conferencing program to comply with State and County  
8 official operational directives during the COVID-19  
9 pandemic. Members of the public are viewing the  
10 meeting via the ZOOM webinar platform.

11 For all meeting participants, I would like  
12 to stress to everyone the importance of speaking  
13 slowly, clearly, and directly into your microphone.  
14 Before speaking, please state your name and identify  
15 yourself for the record.

16 Also, please be aware that all meeting  
17 participants are being recorded on the digital record  
18 of this ZOOM meeting. Your continued participation  
19 is your implied consent to be part of the public  
20 record of this event. If you do not wish to be part  
21 of the public record, please exit this meeting now.

22 The ZOOM conferencing technology allows the  
23 Parties and each participating Commissioner  
24 individual remote access to the meeting proceedings  
25 via their digital devices. Also please note that due

1 to matters entirely outside of our control,  
2 occasional disruptions to connectivity may occur for  
3 one or more members of the meeting at any given time.  
4 If such disruptions occur, please let us know, and be  
5 patient as we try to restore the audio/visual signals  
6 to effectively conduct business during the pandemic.

7 For members of the public participating via  
8 telephone, please use the \*6 function to "mute" and  
9 then \*6 to "unmute". Use \*9 to virtually raise your  
10 hand and then \*9 to virtually lower your hand.

11 My name is Jonathan Likeke Scheuer, and I  
12 have the pleasure and honor of currently serving as  
13 the Land Use Commission Chair. Along with me,  
14 Commissioners Aczon, Chang, Okuda, and Wong, our LUC  
15 Executive Officer Daniel Orodener, our Chief Planner  
16 Scott Derrickson, our Chief Clerk, Riley Hakoda, our  
17 Deputy Attorney General, Lauren Chun, Program  
18 Specialist Natasha Quinones and our Court Reporter  
19 Jean McManus are all on the Island of Oahu.  
20 Commissioner Cabral is on the Big Island,  
21 Commissioner Ohigashi is on Maui, and Commissioner  
22 Giovanni is on Kaua'i. There are currently eight  
23 seated Commissioners of a possible nine.

24 I'll announce for everybody though, while  
25 it was originally contemplated that we would be

1 discussing the City and County of Honolulu, the  
2 Important Agricultural Land submittal on this date,  
3 we have had difficulties properly notifying all  
4 affected landowners, and that has resulted in us  
5 having to delay commencement of those proceedings.

6 We will be rectifying this shortly, and we  
7 expect the meetings to be rescheduled for the end of  
8 March. We apologize for any confusion this may have  
9 caused.

10 With that, our first order of business is  
11 the adoption of the February 10th and 11th minutes.

12 Mr. Hakoda, Mr. Derrickson, has anyone  
13 submitted testimony to comment on approval of the  
14 minutes?

15 CHIEF CLERK: Chair, this is Riley, no  
16 public witnesses on the minutes.

17 CHAIRPERSON SCHEUER: Are there any members  
18 of the public in the attendee portion of this hearing  
19 that wish to testify on the adoption of the minutes?  
20 If so, please raise your hand. Seeing none.

21 Are there any comments or corrections to  
22 the minutes, Commissioners?

23 Is there a motion to approve?

24 Nancy Cabral makes a motion to approve the  
25 February 10th and 11th minutes. Is there a second?

1                   COMMISSIONER WONG: Commissioner Wong,  
2 second.

3                   CHAIRPERSON SCHEUER: Thank you,  
4 Commissioner Wong.

5                   A motion has been made by Nancy Cabral and  
6 seconded by Commissioner Wong. All in favor please  
7 say "aye" and raise your hand.

8                   Anybody opposed? The motion carries.

9                   Our next agenda item is our tentative  
10 meeting schedule. Mr. Orodener.

11                   EXECUTIVE OFFICER: Thank you, Mr. Chair.

12                   As the Chair just mentioned, tomorrow's  
13 meeting is cancelled.

14                   On March 10th we will be meeting once again  
15 by ZOOM for the Hokua Place matter.

16                   On March 11th we will also be meeting for  
17 the Hokua Place matter, if necessary.

18                   On March 24th -- I'm sorry, I have to check  
19 this. March 24th meeting to hear the Barry Trust  
20 closing arguments.

21                   On March 25th, our first meeting on City  
22 and County IAL presentation.

23                   On April 14th we will be meeting to adopt  
24 the order in this matter, the Barry Trust matter  
25 before us today, and also to hear a Declaratory

1 Ruling request DR 21-71 from Maui, and hear a status  
2 report with regard to A11-790 the Kula Ridge District  
3 Boundary Amendment.

4 On the April 15th we will be hearing the  
5 continuation of either one of those matters or both.

6 On April 28th we will be hearing A07-772  
7 Kamalani Motion to Extend Time and any further  
8 proceedings with regard to the City and County of  
9 Honolulu IAL submittal.

10 On April 29th we also have reserved for the  
11 City and County of Honolulu's IAL submittal.

12 On May 12th, we have the Pohakea Special  
13 Permit, and we also have -- which is Maui, as well as  
14 on May 13th, and we will be hearing IAL matters, City  
15 and County of Honolulu IAL matters at that time as  
16 well that may be outstanding.

17 On May 26th we have tentatively scheduled  
18 the AES West Oahu Solar matter and Important  
19 Agricultural Land matter continuation as well as on  
20 May 27th.

21 On June 9th we will be hearing the Kula  
22 Ridge matter, Maui matter, and we also have June 10th  
23 set aside for that.

24 And that takes us through the end of June,  
25 Mr. Chair.



1 CHAIRPERSON SCHEUER: Thank you.

2 I'll also note as addendum to your notice  
3 of Commission actions, one that will affect three of  
4 the Commissioners. On March 3rd Commissioners  
5 Cabral, Giovanni and Okuda are up for reconfirmation  
6 in front of the State Senate.

7 EXECUTIVE OFFICER: Thank you. That was  
8 going to be my next statement.

9 We would appreciate any support with the  
10 other Commissioners or members of the public would  
11 have for our Commissioners seeking reappointment.  
12 Thank you.

13 CHAIRPERSON SCHEUER: Commissioners, are  
14 there any questions about our tentative meeting  
15 schedule? Seeing none.

16 We can proceed directly to our main item  
17 today.

18 The next agenda item is an Action item  
19 regarding Docket No. A18-806 Barry Trust (Hawaii),  
20 Amended Petition to Amend the Land Use District  
21 Boundary of Certain Lands Situated at Keaau, Puna,  
22 County and State of Hawai'i, Consisting of 0.51 Acres  
23 from the Conservation District to the Agricultural  
24 District Tax Map Key No. (3) 1-5-059:059.

25 Will the parties please identify themselves

1 for the record, starting with Petitioner?

2 MR. SIMON: Good morning, Chair Scheuer,  
3 Commissioners, Derek Simon on behalf of Petitioners,  
4 Kevin and Monica Barry, Trustees of the Barry Family  
5 Trust.

6 With me today present also from our office  
7 is Alicia Fung. She will be helping out with a  
8 couple of exhibits. And Mr. and Mrs. Barry are also  
9 in the audience and you'll hear testimony from Mrs.  
10 Barry later in the morning.

11 CHAIRPERSON SCHEUER: Will that be during  
12 the public testimony or are you going to call her as  
13 a witness?

14 MR. SIMON: I'll be calling Mrs. Barry as a  
15 witness.

16 CHAIRPERSON SCHEUER: Office of Planning.

17 MR. YEE: Good morning. Deputy Attorney  
18 General Bryan Yee on behalf of the Office of  
19 Planning. With me is Rodney Funakoshi and Aaron  
20 Setogawa from the Office of Planning.

21 CHAIRPERSON SCHEUER: Hawaii County.

22 MR. MUKAI: Thank you. Good morning. This  
23 is John Mukai, Deputy Corporation Counsel on behalf  
24 of County of Hawaii, Department of Planning, and the  
25 Planning Director, also present is Ms. Maija Jackson

1 and also Hawaii County Planning Director Zendo Kern.

2 MR. KERN: Aloha.

3 CHAIRPERSON SCHEUER: Aloha, welcome.

4 Before we begin, let me update the record.

5 On June 25th, 2020, the Commission met via  
6 ZOOM to consider the Petitioner's motion for issuance  
7 of a Finding of No Significant Impacts or FONSI, and  
8 unanimously granted the motion.

9 On June 30th, the LUC transmitted a  
10 determination of FONSI and the Final Environmental  
11 Assessment with necessary material for the next  
12 publication of the Environmental Notice.

13 Also on that date, the LUC received the  
14 Petitioner's OEQC Publication Form, that's the Office  
15 of Environmental Quality Control, the Publication  
16 Form, the Final EA, the CD and the thumb-drive of the  
17 Final EA.

18 On November 4th, 2020, the Commission  
19 received the Petitioner's Amended Petition for the  
20 Land Use District Boundary Amendment along with  
21 Exhibits 1 through 16.

22 On November 27th, 2020, the LUC mailed a  
23 "Deemed Complete Letter" to the Petitioner.

24 On February 12th of this year, the LUC  
25 mailed out our February 24th to 25th, 2021 Agenda to

1 Statewide, Oahu and Hawaii mailing lists.

2 On February 17th the Commission mailed out  
3 an Amended Agenda to the same lists. The Meeting  
4 Notice and Amended Agenda were also filed with the  
5 Lieutenant Governor's office and posted  
6 electronically to the Commission's website.

7 On February 23rd the Commission received  
8 the Office of Planning's testimony in support of the  
9 Petition; the County of Hawaii's Planning Director's  
10 Response to the Amended Petition, as well as the  
11 Affidavit of Derek Simon and Exhibits A through E.

12 Let me briefly describe our procedures for  
13 today on this docket.

14 First, I will give the Petitioner the  
15 opportunity to respond to the Commission's policy  
16 governing reimbursement of hearing expenses.

17 I will then call for any public testimony  
18 on this matter. To date no written public testimony  
19 from the general public has been submitted.

20 I will offer the opportunity to members of  
21 the audience, the opportunity to submit oral  
22 testimony.

23 People will be sworn in if they wish to  
24 submit testimony. They can offer up to two minutes  
25 of testimony on this matter, and they will then be

1 available for questioning by the Petitioner, the  
2 County of Hawaii, the Office of Planning and the  
3 Commissioners.

4           Following any testimony on this matter, I  
5 will close it, and then I will give the opportunity  
6 if there are any additional exhibits on the record to  
7 be offered by any of the Parties.

8           Following that, the Petitioner will present  
9 their case. When the Petitioner is finished with  
10 presenting, they will be followed in turn by the  
11 County of Hawaii and the State Office of Planning.

12           After presentations by each of those  
13 entities, they will be available for questioning by  
14 the Commissioners.

15           I will finally note that from time to time,  
16 approximately every hour, I will call for breaks as  
17 necessary every hour.

18           Do the Parties have any questions on our  
19 procedures today starting with the Petitioner?

20           MR. SIMON: None from the Petitioner.

21           CHAIRPERSON SCHEUER: Mr. Mukai?

22           MR. MUKAI: No, sir.

23           CHAIRPERSON SCHEUER: Mr. Yee?

24           MR. YEE: No questions, thank you.

25           CHAIRPERSON SCHEUER: Mr. Simon, have you

1 reviewed HAR 15-15-45.1 with regard to the  
2 reimbursement of hearing expenses; and if so, what is  
3 your position on this matter?

4 MR. SIMON: Petitioners are aware of and  
5 agree to the Commission's policy on reimbursement.

6 CHAIRPERSON SCHEUER: Thank you.

7 I'm now going to see -- Commissioner  
8 Cabral, do you have a disclosure to make? Please  
9 proceed.

10 VICE CHAIR CABRAL: Yes. I may have made  
11 this disclosure, but we have new people involved in  
12 this case on the County level at least, and I wanted  
13 to disclose that at one point in time, approximately  
14 20 years ago, I was appointed by the Third Circuit  
15 Court Judge Nakamura to serve under a temporary  
16 Master Receivership and was the property manager for  
17 all of Hawaiian Paradise Park for approximately six  
18 years, so I'm extremely aware of the subdivision and  
19 actually even that location, but I do not believe  
20 that that would have any affect on me, because that's  
21 just one of 8,835 lots, because I stuffed all those  
22 envelopes many times, so I'm okay if everyone else is  
23 okay with my situation.

24 CHAIRPERSON SCHEUER: So you're asserting  
25 that you can be fair and impartial on this docket?

1 VICE CHAIR CABRAL: Yes, absolutely.

2 CHAIRPERSON SCHEUER: Any objections to Ms.  
3 Cabral's continued participation?

4 MR. SIMON: None from the Petitioners.  
5 We're happy to have Commissioner Cabral.

6 CHAIRPERSON SCHEUER: Mr. Mukai?

7 MR. MUKAI: None.

8 CHAIRPERSON SCHEUER: Mr. Yee?

9 MR. YEE: No objection.

10 CHAIRPERSON SCHEUER: Are there any other  
11 disclosures from the Commission? Seeing none.

12 Just a final confirmation, Mr. Hakoda or  
13 Mr. Derrickson, has any written public testimony been  
14 submitted on this docket?

15 CHIEF CLERK: Mr. Chair, as of this  
16 morning, no testimony has been received.

17 CHAIRPERSON SCHEUER: Any members of the  
18 public who are in the attendee function of this ZOOM  
19 meeting who wish to testify on this matter, excluding  
20 the Barrys who will be called in as witnesses,  
21 anybody who wishes to testify, please use the  
22 raise-your-hand function on ZOOM.

23 If you're calling in by phone it's \*9 to  
24 raise your hand. I will call you in and bring you  
25 into the main room. Seeing none, there is no public

1 testimony on this matter, I'm going to go close  
2 public testimony on this matter and I'm going to  
3 allow Mr. Simon to begin with his presentation.

4 Oh, wait, first are there any exhibits in  
5 addition to any of the written filings that have been  
6 provided already from any of the parties?

7 Mr. Simon?

8 MR. SIMON: Nothing additional from  
9 Petitioners that wasn't filed as of yesterday.

10 CHAIRPERSON SCHEUER: Hawaii County?

11 MR. MUKAI: No, nothing further.

12 CHAIRPERSON SCHEUER: Mr. Yee?

13 MR. YEE: Nothing further.

14 CHAIRPERSON SCHEUER: Now you may begin,  
15 Mr. Simon.

16 MR. SIMON: Thank you, Chair, and good  
17 morning once again.

18 Chair and Commissioners, thank you very  
19 much for being here today. I want to thank staff as  
20 well for all their hard work and help in getting us  
21 to where we are right now.

22 And I also want to thank the County and  
23 Office of Planning for their support.

24 I want to give a quick overview of the  
25 presentation we have planned today. I will start off



1 with a presentation by myself, give you an overview  
2 of the docket, the Hawaiian Paradise Park subdivision  
3 where the Petition Area is located, as well as the  
4 District Boundary Amendment being requested.

5 I will then call Monica Barry who is  
6 Co-Trustee of the Barry Trust, and one of the  
7 Petitioners in this docket, and she will provide some  
8 more information on the project and other related  
9 items. Then we will make ourselves available for  
10 questions after that.

11 Today is a really a big day in what has  
12 been a long journey for the Barrys. They purchased  
13 the Petition Area back in 2007 while still living in  
14 California and still working full-time with really a  
15 big dream of hopefully retiring one day to sort of  
16 this will rural agricultural lifestyle that the Big  
17 Island of Hawai'i offers and is so well-known for.

18 They're now retired and full-time Hawaii  
19 residents, and they're ready to enjoy their  
20 retirement here, and they think they've found the  
21 place to do it.

22 This docket was first opened back in  
23 December of 2018 when the Commission agreed to be the  
24 approving agency for an environmental assessment, and  
25 authorized the Barrys to go ahead and file a Draft

1 Environmental Assessment. That process culminated in  
2 June of this past year, June 2020 when the Commission  
3 unanimously voted to issue a finding of No  
4 Significant Impact for the project, and authorized  
5 publication of the Final EA. That Final EA was  
6 published in the July 9th edition of OEQC's  
7 Environmental Bulletin, and cleared the way for the  
8 filing of the Amended Petition before you today, and  
9 then also this hearing.

10 In our presentation today we are not going  
11 to go into a ton of details in the findings of the  
12 Final Environmental Assessment, in part because the  
13 Commission's FONSI is its own determination that the  
14 project won't have any significant environmental  
15 impacts, but we, of course, are more than happy to  
16 answer any specific questions the Commissioners may  
17 have.

18 Alicia, can you pull up Exhibit 10A for me,  
19 please?

20 Bear with me for just a moment. I don't  
21 have a ton of exhibits, but a little shuffling here  
22 to get started.

23 So what we have here is a tax map with a  
24 State Land Use District overlay showing Hawaiian  
25 Paradise Park subdivision. That's the subdivision

1 there outlined in the red, and you can see the  
2 Petition Area noted up there sort of in the top  
3 right-hand corner. All the green shading you see is  
4 Agricultural District land, State Agricultural  
5 District land.

6 And you'll see some small bits of blue  
7 along the shoreline, and that's Conservation District  
8 land, and I'll talk a little bit about why that land  
9 is in the Conservation District here in a minute.

10 But first I want to provide a little  
11 history on sort of the history of Hawaiian Paradise  
12 Park, and sort of the land use planning history to  
13 it.

14 So Hawaiian Paradise Park was created in  
15 1957 and includes, as Commissioner Cabral noted,  
16 8,835 parcels, so it's quite large. It's actually  
17 the second largest privately-owned subdivision in the  
18 country, and it's the second largest population  
19 center for County of Hawaii.

20 Hawaiian Paradise Park is in the Puna  
21 District, which is also the County's fastest growing  
22 district for about 30 years due in part to its  
23 proximity to Hilo and availability of land.

24 Interestingly, when Hawaiian Paradise Park  
25 was created back in the late '50's, there was no Land

1 Use Commission. There was no Chapter 205, and in  
2 fact, there wasn't even a County zoning code.

3 When the Commission was formed and Chapter  
4 205 enacted, the Commission placed the entirety of  
5 Hawaiian Paradise Park in the Agricultural District.

6 An overwhelming majority of Hawaiian  
7 Paradise Park has remained in the Agricultural  
8 District ever since. However, in 1969 the Commission  
9 conducted one of its 5-year boundary reviews. At  
10 that time, there was no Chapter 205A, which is the  
11 State's Coastal Zone Management Program, that's our  
12 Special Management Area laws and our shoreline laws.

13 So during its boundary review, the  
14 Commission determined that it needed to make sure  
15 that the shoreline was adequately protected, and it  
16 actually placed all these shoreline parcels on the  
17 coast here in Paradise Park into the Conservation  
18 District, and again, the stated purpose of that was  
19 to protect the shoreline.

20 Fast forward about ten years, and a group  
21 of homeowners, all these homeowners of these coastal  
22 parcels were denied permits to build residential  
23 dwellings in this area by the Department of Land and  
24 Natural Resources, because its Conservation District  
25 land and fell under their jurisdiction,

1 notwithstanding that several other owners in the area  
2 had actually been given permits.

3           It's a little bit of a flip-flop on the  
4 policy for dwellings in this area, and that caused  
5 basically all the homeowners of these lots to form  
6 the Paradise Hua Hanalike Association. And in 1976  
7 they filed a petition, sort of en masse petition with  
8 the Commission to put all these parcels back into the  
9 Agricultural District where they were when the Puna  
10 District was first formed.

11           And interestingly, the Petition Area before  
12 you today was actually included in that Petition, but  
13 ultimately was removed after the owner at that time  
14 couldn't be contacted. Obviously, back then  
15 communication was a little different and people  
16 weren't just an email away. So that's why we're here  
17 today.

18           In August of 1977 the Commission issued a  
19 Decision and Order and reclassified the vast majority  
20 of these parcels back into the Agricultural District.  
21 This is essentially the second time the Commission  
22 determined that these coastal parcels satisfied the  
23 requirements for that, you know, met the criteria for  
24 the Agricultural District more appropriate for the  
25 district.

1           In its Decision and Order the Commission  
2 highlights several reasons for its decision. First,  
3 it noted the stated purpose of that 1969 boundary  
4 amendment that was done by the Commission through its  
5 five-year boundary review. The purpose of that was  
6 to protect the shoreline.

7           And now at this point Chapter 205A has been  
8 enacted, and so we had a whole layer of regulations  
9 physically addressing the coast and coastal  
10 resources, so the restricted Conservation District  
11 designation was no longer needed.

12           Second, the Commission noted, as you can  
13 see in this map, that virtually all of the lands  
14 around these parcels is in the Agricultural District.  
15 We're talking thousands and thousands acres of  
16 contiguous land all in the Agricultural District.

17           Third, the Commission noted that the  
18 parcels didn't have any special conservation value,  
19 not to say that coastal resources don't hold  
20 conservation value, but no special value that really  
21 required for these parcels to be in the Conservation  
22 District.

23           And finally, the Commission found the  
24 situation unjust and inequitable in their own words  
25 that these homeowners were essentially very limited

1 in their ability to use their land, virtually all,  
2 unlike their thousands and thousands of neighbors in  
3 the Hawaiian Paradise Park subdivision.

4           Interesting fact about that Decision and  
5 Order -- and I'll circle back to this later -- is the  
6 decision archly expressly notes that these  
7 Petitioners were very up-front with the Commission,  
8 said that they actually intended to use their parcels  
9 for purely residential purposes, notwithstanding that  
10 Chapter 205 then, as it does now, requires dwellings  
11 in the Agricultural District to be farm dwellings,  
12 and we'll talk more about that later.

13           But anyway, notwithstanding that  
14 representation, the Commission still found it  
15 appropriate to place these parcels back into the  
16 Agricultural District.

17           If you walk down Paradise Ala Kai Drive,  
18 which is the coastal road there right now, and you  
19 walk by these parcels, you see a great significant  
20 number of them that have since been developed with  
21 single-family dwellings.

22           So that's really what this Petition is  
23 about today. It's really just a request from  
24 Petitioners to be put on par and be on the same  
25 footing as their neighbor and able to make reasonable

1 use of their land in the same way that people are  
2 able to do so in the thousands and thousands of acres  
3 around them.

4 I want to shift gears a little bit and  
5 focus more on the Petition Area and the requested  
6 boundary amendment.

7 Alicia, can you pull up Exhibit 7?

8 This is a bird's-eye view of the Petition  
9 Area. It says "Barry Property", but that's the  
10 Petition Area outlined in yellow. You can see  
11 Paradise Ala Kai Drive right there, the road I just  
12 mentioned. Then all these existing dwellings built  
13 on these lots that were reclassified by the  
14 Commission back in 1977, including the lot  
15 immediately to the north of the Petition Area.

16 So as I briefly mentioned, the project  
17 proposed, the reason for the boundary amendment being  
18 sought is to allow the Barrys to proceed with a farm  
19 dwelling and associated agricultural use.

20 The Barry's intention is to build a modest  
21 single-family home in the neighborhood of three  
22 bedrooms, two baths to allow them to live, have an  
23 office, and maybe a spare bedroom or so for the  
24 occasional guest. They're not proposing a McMansion,  
25 they're not pushing the building envelope to the



1 maximum amount allowed on the County. Really it's  
2 just a modest simple home for them to enjoy in their  
3 retirement.

4           The dwellings and landscaping style will be  
5 consistent with the existing neighborhood. You  
6 sometimes hear referred to as sort of contemporary  
7 Hawaiian, and I think most people are more or less  
8 familiar with what that means.

9           The Petitioners are hopeful that they'll be  
10 able to, you know, inhabit the dwelling mostly off  
11 the grid. They're going to utilize solar PV panels,  
12 and they're hopeful that will provide all the power  
13 needed for their dwelling, but power is also  
14 available from the utility overhead lines in the  
15 area.

16           They're going to either drill a well on  
17 site or catchment system for water, both of which are  
18 very common in this part of the County. And then  
19 they will utilize a septic or advanced aerobic  
20 individual wastewater treatment system, as there is  
21 no municipal sewer service here in the area.

22           For their agricultural use, the Barrys will  
23 be implementing an apiary or a bee colony or bee  
24 colonies -- actually Ms. Barry will speak a little  
25 bit more in detail on that, and she is really the one

1 you guys want to hear about that from.

2           But before we hear from Ms. Barry, I just  
3 want to go over the criteria for Agricultural  
4 District. That standard is set forth in Hawaii  
5 Administrative Rules 15-15-19, and there's a couple  
6 subsections. We're focusing on Subsection 3 which  
7 says the Agricultural District can include lands that  
8 are surrounded by or contiguous to other agricultural  
9 land or lands that are not suited for agriculture or  
10 ancillary purposes, for reasons of topography soils  
11 and other similar characteristics.

12           We do think that the Petition Area falls  
13 squarely within these requirements.

14           First, as I discussed earlier, the Petition  
15 Area is surrounded by thousands of acres by other  
16 agricultural land and has been for a long, long time.

17           Second, the soils are very poor at the  
18 Petition Area. We will talk more with Mrs. Barry  
19 about that, but the two most important rating systems  
20 for purposes of this request are Agricultural Lands  
21 of Importance to the State of Hawaii or ALISH rating  
22 system, and the Land Survey Bureau rating system or  
23 LSB system.

24           Under the ALISH system there is a number of  
25 different designations from prime at the very top,

1 the best agricultural lands, all the way down to  
2 unclassified lands that are determined to not be  
3 important agricultural lands for the State.

4 So the entirety of the Petition Area is  
5 unclassified under the ALISH system.

6 Under the LSB or Land Survey Bureau system,  
7 that's an A to E rating system, A being the highest  
8 most productive land, and E being very poor land for  
9 agricultural purposes. And the Petition Area is  
10 rated E under the LSB rating system.

11 And third, the proximity of the parcel to  
12 the ocean does present additional challenges for  
13 agricultural activities, including because of the  
14 salt spray that comes off there, and I think most of  
15 us know, there's lots of plants that don't like salt  
16 spray.

17 That includes my initial part of the  
18 presentation. At this time I would ask that Ms.  
19 Monica Barry be let into the hearing so we can do a  
20 little Q and A session with her and have her provide  
21 some more information for you.

22 CHAIRPERSON SCHEUER: Okay.

23 Monica Barry or Kevin Barry, raise your  
24 hand. Well, I have a 50/50 chance, right? I did the  
25 wrong one. They raised their hand right after I --

1 they're both going to come in for now. If you would  
2 unmute and turn your camera on. If you're having any  
3 problem with doing it, controls are often visible at  
4 the bottom of your screen if you use your cursor,  
5 depending on the device you're on.

6 I see you're unmuted, and I see a camera  
7 going up. There you are. We can see you. We cannot  
8 hear you yet. However, nobody has a cat filter so  
9 far.

10 I don't know if Alicia or Derek is working  
11 with the Barrys.

12 MR. SIMON: No, I'm here in Honolulu and  
13 the Barrys are on the Big Island.

14 CHAIRPERSON SCHEUER: Can you say something  
15 at least so that we might hear you. You're unmuted,  
16 so it might be the volume control on your device.  
17 I'll give it a few seconds more. If not, Mr. Simon,  
18 I'm going to ask you to continue while they try to  
19 get themselves visible and audible.

20 In the interest of time, Mr. Simon, I'm  
21 going to ask you to continue and hopefully your  
22 witness will be available. I believe there is -- if  
23 nothing else fails, there is instructions to the  
24 ZOOM, the ability to call in connecting to audio.

25 Can you wave if you hear me? Okay, great,

1 partially there.

2 MS. BARRY: My apologies.

3 CHAIRPERSON SCHEUER: It's okay. This is  
4 not the first time since the pandemic started that  
5 somebody has had this problem.

6 Do you swear or affirm the testimony you're  
7 about to give is the truth?

8 THE WITNESS: I do.

9 CHAIRPERSON SCHEUER: Now, you will be  
10 questioned and give testimony in response to your  
11 attorney, Mr. Simon. After that you'll be available  
12 for cross-examination by the Parties and  
13 Commissioners, if any. Mr. Simon.

14 MR. SIMON: Thank you, Chair.

15 MONICA BARRY

16 Was called as a witness by and on behalf of the  
17 Petitioner, was sworn to tell the truth, was examined  
18 and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. SIMON:

21 Q Good morning, Monica. How are you?

22 A My heart is pounding a little bit, but I'm  
23 good.

24 Q Let's dial it down a little bit. You're  
25 here and we're really glad to have you.

1 A Glad to be here.

2 Q Monica -- I'm going to call you Monica, if  
3 that's okay.

4 A Absolutely, yeah.

5 Q All right.

6 You are one of the trustees of the Barry  
7 Family Trust, is that correct?

8 A I am.

9 Q Who is the other trustee?

10 A My husband, Kevin.

11 Q Is Kevin there with you today?

12 A He is.

13 Q He's in another room. He's not feeding you  
14 answers or anything like that?

15 A No.

16 Q And the Barry Family Trust is the  
17 Petitioner for this docket, is that correct?

18 A It is, yes.

19 Q Do you recall when we filed this Amended  
20 Petition you signed what is called a Verification,  
21 and in that Verification you attested to the truth  
22 and accuracy of the contents of the Petition to the  
23 best of your knowledge?

24 A I did.

25 Q And you signed that docket, correct?

1 A Yes.

2 Q Is that still true to this date?

3 A Yes. No Changes.

4 Q Monica, are you and Kevin full-time Hawaii  
5 residents?

6 A We are, yes.

7 Q How long have you lived in Hawaii for?

8 A Since 2017.

9 Q What prompted your move to Hawaii?

10 A We started visiting Hawaii in 2001. We  
11 were raised in San Diego, California. And we took  
12 our first vacation to Hawaii and we kind of  
13 immediately fell in love. So shortly thereafter, we  
14 started visiting every year. And around 2006, when  
15 we started thinking about our retirement options and  
16 how we didn't want to work any more, we decided that  
17 we would plan on moving to Hawaii to retire.

18 Q What did you and Kevin do before retiring?

19 A Kevin was a design engineer, and I was -- I  
20 worked for the San Diego County Superior Court as  
21 staff attorney.

22 Q And where in Hawaii are you guys currently  
23 living?

24 A We live in HPP on 28th Avenue.

25 Q By HPP, you mean Hawaiian Paradise Park?

1           A       Yes.

2           Q       I just want to clarify for some of the  
3 Commissioners that may not be familiar, that you  
4 and/or I may sometimes say HPP and we're referring to  
5 the larger subdivision?

6           A       Yes.

7           Q       When did you and Kevin purchase the  
8 Petition Area?

9           A       In 2007.

10          Q       And when you purchased the Petition Area,  
11 you understood that it was in the Conservation  
12 District?

13          A       We did. Originally it was something we  
14 discovered through escrow. Even the owner at the  
15 time didn't know it was in Conservation land, but we  
16 did, and during the escrow period and our due  
17 diligence, we talked to the County and several other  
18 people who told us that we could build a house there,  
19 we would have to go through special permitting  
20 process, but that it shouldn't be a big deal.

21          Q       So you understood that there was additional  
22 permitting requirements and that's why we're here  
23 today?

24          A       That's right.

25          Q       And so you and Kevin chose to pursue a



1 district boundary amendment instead of a conservation  
2 use permit from the DLNR.

3 Do you be want to provide an explanation as  
4 to why you guys went the route we are currently on?

5 A Well, from our research and everybody we  
6 talked to, we understood that if we went through a  
7 use permit through the DLNR, it would take a  
8 considerably longer period of time to build a house.  
9 Everything would have to go through State permissions  
10 and so forth.

11 And we were looking to retire, we didn't  
12 want to take a whole lot of time, and we decided that  
13 we also wanted to be treated like the rest of our  
14 neighbors in Hawaiian Paradise Park, and primarily  
15 Paradise Ala Kai, without the oversight and the extra  
16 burden of going through DLNR for everything.

17 So we opted to take the boundary amendment  
18 course.

19 Q So the boundary amendment seemed like the  
20 most appropriate avenue for you guys?

21 A Yes. Everything we knew -- the more we  
22 learned about the history of the lot and how it  
23 became to be in Conservation, we realized it was kind  
24 of like a mistake that it was there but for the fact  
25 that the then owner wasn't able to participate for

1 some reason, the land was left in Conservation  
2 District.

3 So we thought that just trying to rectify  
4 that in some way, then the land can be treated just  
5 like everyone else in that area.

6 Q How often do you guys visit the Petition  
7 Area?

8 A We go -- we're only four miles, so we go  
9 down every two or three days and sit out there and  
10 remind ourselves why we're here.

11 Q When was the last time you were at the  
12 Petition Area?

13 A We went Sunday.

14 Q How was it?

15 A It was beautiful. We didn't see any  
16 whales, but we have been. But it was gorgeous.

17 Q Is the Petition Area being used for  
18 anything right now?

19 A No, it's vacant.

20 Q By vacant, you mean no improvements?

21 A No. There is lots of weeds growing, cane  
22 grass and stuff, nothing else.

23 Q Are you aware of the Petition Area ever  
24 being used for any purpose, agricultural,  
25 residential, anything like that?

1           A       No.  As long as we had it -- I think even  
2 before -- there was never anything done there.

3           Q       I wanted you to kind of provide some layman  
4 testimony, what it's like on the ground, the  
5 conditions on the ground in the Petition Area.  We've  
6 got these technical studies, including Final EA.

7                   Can you tell us about some of the  
8 conditions -- a moment ago I talked about soils and  
9 couple of rating systems that really have these soils  
10 listed very poor for agricultural purposes, but can  
11 you explain in layman's terms what the soil looks  
12 like out there on the property?

13           A       When we go out there, we can't actually  
14 access the interior of the lot, but it's mostly all  
15 volcanic, you know, lumps, I mean, crevices and  
16 stuff.  And I suppose, if you dug around each of --  
17 around the actual vegetation, there would be just  
18 decomposed organic material.  There is no soil, per  
19 se.  I wouldn't call it dirt or soil or anything.  
20 It's just mostly like maturated leaves and little  
21 piddly things.  It's mostly all volcanic rock and the  
22 weeds that grow.

23           Q       You mean, like exposed rock where you can  
24 put your hand on the lava?

25           A       Yeah, exposed rocky bits.

1           Q       And then it sounds like it's weeds and  
2 plants grown on top of old decomposed -- it's not  
3 much there?

4           A       No, no.

5           Q       While we are talking about soils and sort  
6 of agricultural productivity, if you walk up and down  
7 Paradise Ala Kai Drive or even sort of mauka a block  
8 or two, is there much agricultural activity going on  
9 in this part of Hawaiian Paradise Park?

10          A       Well, I mean, people might have fruit trees  
11 on their lot, but mostly everything is landscaped,  
12 but I would say no.

13          Q       You know, I mentioned earlier that you guys  
14 are seeking the boundary amendment so you can build a  
15 farm dwelling and implement an agricultural use. Is  
16 that correct?

17          A       Yes.

18          Q       And do you guys intend to use this as your  
19 full-time personal residence?

20          A       Yes.

21          Q       What about your neighbors, are most of your  
22 neighbors in that area, are they full-time residents  
23 based on the time you spend down there?

24          A       I can say that most that we know of and are  
25 aware of are not full-time residents. Most people

1 live part-time there. Some people we don't even know  
2 yet.

3 Q But not a ton of full-time residents that  
4 you're aware of?

5 A No.

6 Q I note this is sort of the first big major  
7 hurdle sort of in the permitting and planning in this  
8 project, and I know it's taken some time, but can you  
9 kind of give the Commissioners a little more  
10 information on your preliminary plans for this  
11 dwelling that you guys are proposing?

12 A Well, we want just a simple modest home,  
13 maybe two bedrooms and office, two baths. And we're  
14 look forward to lots of outdoor space, lanai space  
15 and so forth.

16 We are retired, so we don't want a lot of  
17 maintenance, don't want to clean a big house. And  
18 we're just wanting to be comfortable and be able to  
19 enjoy that area.

20 Q Now, the Petition does mention a pool. Do  
21 you guys have any immediate plans on building a pool?

22 A No. Kind of on our wish list. It's a  
23 matter of ability. At this point we're just focused  
24 on the house.

25 Q But you wanted the Commission to be aware

1 that that's something you may consider down the road?

2 A If we can do that, yes, we would probably  
3 like to have a pool.

4 Q Now, as you're aware, this is a farm  
5 dwelling and it requires to be used in connection  
6 with an agricultural use. And I mentioned earlier  
7 very briefly you're planning on an apiary, which is a  
8 fancy term for a bee colony.

9 Can you provide more information on what  
10 you guys are planning?

11 A Well, I'm a master gardener out of  
12 University of Hawaii-Hilo, and that was where I was  
13 first exposed to beekeeping. About a year ago,  
14 unfortunately, they let go of the apiary that was  
15 onsite there, but I learned in that process -- I was  
16 sort of fascinated by the bee community and how they  
17 structure their hives and everything.

18 So anyway, something I never thought I  
19 would be interested in, but I actually did get very  
20 interested. And when it came down to selecting an  
21 agricultural purpose for our lot, we realized we were  
22 restrained in a lot of different areas because of the  
23 small size, and the lack of good soil, bunch of other  
24 stuff, salt air, wind and all that.

25 So I looked into doing beekeeping, and it

1 turns out that it's actually a possibility. So we're  
2 going to go that way. And we're going to create a  
3 bee yard on the side of the house with mostly native  
4 salt tolerant plants that bees like for their  
5 purposes, and then maybe do an herb garden and some  
6 other plants.

7 I also understand that bees travel, so they  
8 will go to other places to get their pollen and so  
9 forth. But we thought that would be a great idea, so  
10 we will be dedicating that area to the bees.

11 We're going to start out with two colonies.  
12 We have been told two are good to have together  
13 because you can kind of compare the health of one  
14 colony to another to see if everything is going well,  
15 that they're both doing good. If something fails,  
16 they get bugs or mites, you can get a head's up. But  
17 that's what we're looking for.

18 Q You mentioned the salt spray and the air  
19 down that area presents problems, but you've also  
20 discussed with people knowledgeable in apiaries that  
21 bees can do well in this environment; is that  
22 correct?

23 A Yes. It can be tricky. Wind is a factor,  
24 salt air, but we thought if we build a fence or some  
25 sort of a break or something like that, we will pay

1 attention to that closely. We've actually been told  
2 it's just a little bit of extra work, but we're okay  
3 with that.

4 Q And so presumably these bees -- the purpose  
5 of having bees is for them -- I mean, I understand  
6 that they become somewhat like pets, like people with  
7 more domesticated pets, but the purpose of the bees  
8 is to produce honey and other sort of byproducts?

9 A Yes, honeycomb, pollen. You can  
10 extrapolate the wax and make candles, lip balm, all  
11 kinds of stuff.

12 Q You guys will then sell those products; is  
13 that correct?

14 A Yes. Hopefully, you know, either on a  
15 roadside thing at the house, or farmers market if we  
16 have enough to pass on, yeah.

17 Q As you mentioned, roadside stand. Is that  
18 fairly common in Hawaiian Paradise Park?

19 A Yes. Around the corner from us there is a  
20 person that sells eggs. When they have got them  
21 available, they have a sign out.

22 Q And as we have discussed before, further  
23 mauka there is a little more agricultural activity, a  
24 bit more --

25 A Yeah. There are signs where people sell



1 plants. I guess they grow plants in pots, then sell  
2 pots. Then we have also seen --

3 CHAIRPERSON SCHEUER: Mr. Simon, about how  
4 much longer do you think for this witness?

5 MR. SIMON: My first and only witness  
6 probably has another five to ten minutes.

7 CHAIRPERSON SCHEUER: We will do that, and  
8 then if there is (indecipherable).

9 MR. SIMON: Okay, thank you, Chair.

10 Q Monica, because this farm dwelling requires  
11 you guys to maintain an agricultural use, what  
12 happens if, for whatever reason, the apiary bees  
13 aren't happy, they don't produce well or whatnot,  
14 what then?

15 A Well, we will get another agricultural  
16 purpose. We have to get an appropriate purpose that  
17 will work for us, obviously, but we hope the bees  
18 would work, but there are other things we could do.

19 Q So you guys are committed to working  
20 agricultural use?

21 A Yes, yes.

22 Q Shift gears a little bit.

23 So the Amended Petition states that, you  
24 know, assuming you get -- we get a favorable decision  
25 from this Commission and then you go to the County to

1 get permits, the Petition says you guys would  
2 anticipate that the dwelling and agriculture use may  
3 take about 18 to 24 months to build.

4 Does that still sound right?

5 A Yeah. That's the outside window. We're  
6 hoping it would be quicker, but if we have learned  
7 anything in the past few years, you never know what's  
8 going to happen, so, yes, that is our outside --

9 Q But you're hopeful you may be able to do it  
10 sooner?

11 A Very hopeful we can do it sooner.

12 Q The Amended Petition also includes a  
13 pre-approval letter from your local Hawaii-based  
14 federal credit union, and it states you're  
15 pre-qualified for the loan sufficient for the amount  
16 you guys believe to develop the project; is that  
17 correct?

18 A Yes.

19 Q And in the Petition, you guys represent  
20 that you have the financial ability to build the  
21 project; correct?

22 A Yes.

23 Q And that's still the case today?

24 A Oh, yes, uh-huh.

25 Q As we saw the picture a moment ago and you

1 kind of touched on it. This is the shoreline parcel.  
2 Is that correct?

3 A Yes, it is.

4 Q Can you describe for the Commission what  
5 the shoreline looks like in the area of the Petition  
6 Area?

7 A It's lava rock and cliff. It's got some  
8 shrubbery growing along the edge, but it's mostly  
9 lava rock. That's where we only go now. When we go  
10 now, we only go and sit out there. It's got a cliff  
11 about 20, 25 feet down, and it's pretty deep water.

12 Q So you can't really access the ocean on  
13 this part of the coast?

14 A Okay, well, what we like to say is you can  
15 get into the water, but you probably can't get out.

16 Q Probably get in by accident too, huh?

17 A Yeah, on accident. Very rocky, like I  
18 said, deep water, and there's no access, there's no  
19 ocean access.

20 Q And in our Petition we note that this  
21 area -- you guys are aware that this area is used by  
22 local fishermen and cultural practitioners for  
23 gathering purposes; is that correct?

24 A Yes.

25 Q And do people use the shoreline area there

1 for anything else?

2 A Well, we go down, there's other people who  
3 sit out there, not a whole lot. It depends on when  
4 you go. Watching the sunrise or catching the sunset  
5 reflected in the clouds from Kona, but there is  
6 always someone else down there looking at the water  
7 or fishing or walking. They walk the coast there.

8 Q Monica, are you aware that, you know, under  
9 Hawaii law, shoreline access, lateral -- including  
10 lateral along the shoreline, is protected for both  
11 the public and cultural practitioners?

12 A Yes.

13 Q And I note it's your Petition -- can you  
14 confirm again for the Commission whether this project  
15 will in any way interfere with public access to or  
16 use of that shoreline area?

17 A It will not, no.

18 Q That's about all we have.

19 Before we end, is there anything else you  
20 would like the Commission to know?

21 A Well, I do -- we do appreciate the  
22 Commission's consideration of our Petition. It has  
23 been a long haul. We're certainly hoping that things  
24 go our way. We just want to have the property in our  
25 names and in the designation that will allow us to be

1 treated like all the other neighbors in our area.  
2 And that's what we're hoping.

3 Q Thank you, Monica.

4 MR. SIMON: Chair, that's all I have for  
5 Ms. Barry.

6 CHAIRPERSON SCHEUER: Great, thank you.

7 Let me get a sense first before we take a  
8 break. Are there any questions for the witness from  
9 the County?

10 MR. MUKAI: None, Chair.

11 CHAIRPERSON SCHEUER: Mr. Yee from Office  
12 of Planning?

13 MR. YEE: No questions, thank you.

14 CHAIRPERSON SCHEUER: Commissioners?  
15 Commissioner Chang and Commissioner Okuda. Let's do  
16 it, then we will take a break.

17 Commissioner Chang.

18 COMMISSIONER CHANG: Thank you.

19 Thank you so much, Mrs. Barry, for being  
20 here. Appreciate your patience.

21 I just wanted to follow up on some  
22 questions regarding, one, access.

23 So when you mention that when you go down  
24 there, occasionally you'll see people maybe fishing.  
25 Are they fishing on your property or is there other

1 properties that they're fishing on?

2 THE WITNESS: I can tell you that we have,  
3 over the years, seen people fishing on our property,  
4 but as the houses have been developed along those  
5 lots and there's no more direct access in front of  
6 ours, there are fewer people who actually do fish.

7 Mostly they go to the end of the road or to  
8 the two County lots that are about a half mile south,  
9 then they will go out there.

10 Sometimes they will walk along to get to a  
11 different spot. But the other reason why I know they  
12 do fish, is because they put in like a PVC hole to  
13 hold. So I know that they leave those there, so I  
14 think that they are.

15 We don't see them as often as we used to,  
16 but they do, yes.

17 COMMISSIONER CHANG: And you mentioned  
18 there's two County at the end of the road. Are those  
19 public access or are those --

20 THE WITNESS: Yes, those are two county  
21 lots, they're not at the end of the road, they're  
22 actually in the middle of Paradise Ala Kea, but they  
23 are considered county parks in a way. They're not  
24 developed at all, but you frequently see cars parked  
25 there, people go out. That's where they mainly do.

1           Closer to our lot is, there is a dead-end  
2 road, Paradise Ala Kai dead ends and people will park  
3 down there and traverse over. Tell you the truth,  
4 it's probably private property, but it's Shipman  
5 land, but the people will go out to the cliff that  
6 way.

7           COMMISSIONER CHANG: Have you had the  
8 opportunity to talk to any of these fishermen that  
9 may have been on your property?

10          THE WITNESS: We have over the years, not  
11 lately, but we have over the years.

12          COMMISSIONER CHANG: Is it your  
13 understanding that these fishermen have fished there  
14 all the time, or they fish there because your lot's  
15 been vacant and it seems to be an easy access to the  
16 shoreline?

17          THE WITNESS: Gosh, that I don't really  
18 know. They're always friendly. And we always talk,  
19 they get big fish, they say, and they enjoy the area.  
20 It's quiet and peaceful, and sometimes they bring  
21 their kids, but I don't know why they pick that area.

22                 I imagine it's because it is deep water and  
23 there's not a lot of people there, so they probably  
24 have a better opportunity to catch some.

25          COMMISSIONER CHANG: You said you

1 understood that people have the right of access. So  
2 is it your understanding that assuming you are able  
3 to build your home there, would it then -- would you  
4 be putting up a fence? Would you continue to permit  
5 people to go through your property to fish?

6 THE WITNESS: Well, they actually don't go  
7 through our property. But even when we develop the  
8 property -- we rescue greyhounds. We have dogs, so  
9 we do need a fenced area. We would not prohibit  
10 people from fishing in front of -- and I'm saying  
11 front, but I mean ocean side, makai side. If they  
12 happen to go down there, we -- the lot will be  
13 fenced. We can't not do that. But they're welcome  
14 to come in the public area there and on our ocean  
15 side lot.

16 COMMISSIONER CHANG: One final question.  
17 Do you know whether the certified shoreline  
18 is at the end of your lot, that it falls into the  
19 cliff, or is the certified shoreline further mauka,  
20 so that there is an access, lateral access?

21 THE WITNESS: My limited experience with  
22 that is that there is a buffer that's State land. I  
23 think it's 20 feet, maybe 30, that is considered the  
24 certified shoreline. I'm not real sure.

25 But back from that 20, 30 feet, then there



1 is another 40 feet that I think the County requires  
2 has to be open as well, so it's a good portion.

3 COMMISSIONER CHANG: That's really helpful.  
4 It wasn't clear in my mind when I looked at the map.

5 So your property is not adjacent to the  
6 cliff that goes into the ocean, there's at least a  
7 20, 40 feet buffer from the cliff. Okay.

8 THE WITNESS: Yes.

9 COMMISSIONER CHANG: And you would not  
10 prohibit anybody from accessing the public area?

11 THE WITNESS: No, not at all.

12 COMMISSIONER CHANG: Thank you very much.  
13 I appreciate your testimony.

14 THE WITNESS: Thank you very much,  
15 appreciate it.

16 CHAIRPERSON SCHEUER: Thank you,  
17 Commissioner Chang.

18 Commissioner Okuda, then we will take a  
19 break.

20 COMMISSIONER OKUDA: Chair, since we have  
21 been going about an hour, do you want to take a break  
22 now?

23 CHAIRPERSON SCHEUER: How long do you have,  
24 Commissioner Okuda?

25 COMMISSIONER OKUDA: Ten minutes.

1 CHAIRPERSON SCHEUER: Let' take a break.  
2 It's 9:59. We will go into recess and reconvene at  
3 10:10.

4 (Recess taken.)

5 CHAIRPERSON SCHEUER: We're back on the  
6 record, and we're continuing with the  
7 cross-examination of the witness, Ms. Monica Barry,  
8 questions from Commissioner Okuda. Please proceed.

9 COMMISSIONER OKUDA: Thank you very much.  
10 Thank you for taking time to testify today.

11 THE WITNESS: My pleasure. Good morning to  
12 you too.

13 COMMISSIONER OKUDA: I want to ask a few  
14 follow-up questions. One is, your attorney, Mr.  
15 Simon, mentioned that you were with the courts out in  
16 San Diego.

17 THE WITNESS: I was a staff attorney for  
18 San Diego County Superior Court, yes.

19 COMMISSIONER OKUDA: And can I ask about  
20 how many years have you been an attorney?

21 THE WITNESS: Since 1996.

22 COMMISSIONER OKUDA: Before you and your  
23 husband purchased the property, you gave us some  
24 testimony about some due diligence, or your attorney  
25 was describing some due diligence that had taken

1 place.

2 So before you purchased the property, you  
3 understood that the property was in the Conservation  
4 District; is that correct?

5 THE WITNESS: We did. As I mentioned  
6 before, we learned that through escrow proceedings.  
7 It wasn't initially known that it was Conservation  
8 land, so it was through that process that we learned  
9 it was Conservation land.

10 So then we went into full gear, like what  
11 does that mean? What's Conservation land? Of  
12 course, that's different than anything we were used  
13 to in California. So we did lots of research and  
14 talked to people.

15 In 2007, which seems like an eternity from  
16 now, things were different. We opted to start the  
17 process once we moved over as full-time residents.  
18 So that's what we did.

19 COMMISSIONER OKUDA: You know, frankly  
20 speaking, I went to law school at UC Davis and left  
21 in 1981, so I have no recollection of the law in  
22 California, so please don't ask me about that.

23 If I can ask you about your due diligence  
24 process. When you were purchasing the property, were  
25 you represented by a Hawaii real estate agent?

1 THE WITNESS: We were, yes.

2 COMMISSIONER OKUDA: And what was your  
3 intention and/or your husband's intention in  
4 purchasing the property? Was it to engage in any  
5 type of business activity on the site, or was it  
6 simply for retirement purposes?

7 THE WITNESS: We only wanted retirement.  
8 As I kind of alluded to, we were at that point  
9 looking to quit working, and we made a full-on pledge  
10 and plan to sock away as much money as we could so  
11 that we could retire as soon as we could.

12 So we had, and continue to have no interest  
13 in doing anything business-wise. We just wanted to  
14 retire.

15 COMMISSIONER OKUDA: I understand that.

16 You mentioned that you wanted to be treated  
17 just like your neighbors. Can I ask about that?

18 You know, with whatever distance to the  
19 left or right of your property, are any of your  
20 neighbors, based on your personal observation, using  
21 their properties for agricultural activities? Or  
22 does it appear to be, frankly speaking, like a  
23 single-family residential subdivision?

24 THE WITNESS: It is, for all intents and  
25 purposes, and as you say speaking frankly, it's a

1 single-family residential subdivision, particularly  
2 down in our area, because of the half-acre parcels.

3 In the area of HPP where they have the  
4 single-acre parcels, there may be more actual  
5 agricultural purpose. But you don't see rows of  
6 planting, or you don't see any of that sort of stuff.  
7 It's a very casual application, in my opinion, of the  
8 agriculture purpose use. But that's basically how  
9 the neighborhood is set up.

10 COMMISSIONER OKUDA: Now, you also  
11 mentioned or testified about doing your intended  
12 development, and you gave us reasons why you did not  
13 want to go through a Conservation District Use Permit  
14 with the Department of Land and Natural Resources.

15 Without getting too technical here, can you  
16 tell me in plain English, if you can, what you saw as  
17 the impediment or problem with going through the  
18 permitting process through the Department of Land and  
19 Natural Resources?

20 THE WITNESS: I can tell you anecdotally.

21 Over the years, once we bought the land, it  
22 became a great distraction for us to plan like what  
23 the house would look like, what we would do when we  
24 got there and so forth.

25 So we visited it regularly, probably once a

1 year at least, and when we would come, we would  
2 attempt to talk to professionals, you know, home  
3 drafters, architects, planning people. I kid you  
4 not, as soon as we mentioned we're going to  
5 eventually plan on building after we retire, but we  
6 have to go through some permitting process because  
7 it's Conservation land, everything stopped. Nobody  
8 talked to us. We are on Conservation land. They  
9 literally would say, oh, well, come back to me when  
10 you have this squared away, because they -- you know,  
11 everything takes longer. You have a little bit more  
12 scrutiny, a little bit more oversight, a little bit  
13 more burden in everything you do.

14 In fact, at one point early on in our  
15 process, I called the DLNR and they told me -- the  
16 word stands out in my brain -- you cannot cut a blade  
17 of grass on your lot without a permit from the DLNR.  
18 And I thought, what?

19 So we thought we don't want that. We  
20 understand what it meant to be in Conservation  
21 District, but we didn't -- and based on the 1977  
22 order, we realized that that parcel wasn't really  
23 appropriately in Conservation land. So we didn't  
24 want to have the -- always looking over our shoulder  
25 or landscaping purposes or any little thing where we

1 were going to worry about having a permit or having  
2 permission.

3 So we wanted to be in -- on par and in  
4 parity with our neighbor so that we knew how we could  
5 use our land, we knew without worry that we would be  
6 overstepping or something.

7 So that's why we really wanted to go with  
8 boundary amendment.

9 COMMISSIONER OKUDA: I'm not asking the  
10 next question for any communications you or your  
11 husband had with your attorneys. Because as an  
12 attorney you understand --

13 THE WITNESS: Yes.

14 COMMISSIONER OKUDA: And even though we are  
15 quasi-judicial, we cannot invade that privilege.

16 So without asking you to divulge anything  
17 your attorneys have ever told you, has anyone ever  
18 told you that it would be impossible for you to get a  
19 Conservation District Use Permit to build a house,  
20 this retirement house as you planned from the DLNR,  
21 the Department of Land and Natural Resources? Anyone  
22 give you advice saying it's just not going to be  
23 possible at all to get such an approval?

24 THE WITNESS: Quite honestly, it was to the  
25 opposite. We actually had people say why don't you

1 just go through the permitting process, the  
2 Conservation District permitting process, that's what  
3 everyone else does.

4 But we were looking at the length of time  
5 that it would probably take, and the fact that we  
6 didn't want to use that time. We're seniors now, and  
7 we want to kind of expedite that whole process.

8 So it worried us to have to rely on that.  
9 We actually -- I can't recall anyone ever telling us  
10 that it was impossible.

11 COMMISSIONER OKUDA: And two final  
12 questions.

13 One is: Did you ever form an opinion that  
14 the reality in Hawaii is, frankly, no government  
15 agency is really enforcing restrictions on  
16 agricultural land, that's why, for example, you see  
17 your neighbors with single-family residences and no  
18 agricultural activity taking place, that once you get  
19 an agricultural designation, hey, nobody is going to  
20 really enforce the rules? Did you form at any time  
21 that impression or opinion?

22 THE WITNESS: I suppose one could say  
23 there's very little enforcement, but considering my  
24 background, there's always a possibility of  
25 enforcement. So that's always a concern of mine.



1 I'm a structured person, and I like to live  
2 within the structure. So I understand that, yeah,  
3 there may not be a great deal of enforcement, but  
4 there's always a possibility.

5 The other thing I would like to say in that  
6 regard is that I also find fascinating the conundrum  
7 between the County and the State, right? Because the  
8 County considers that lot Agriculture, but the State  
9 considers it Conservation. And there is a tension,  
10 right, between public use and custom, and what's  
11 evolved into -- because originally like Derek was  
12 saying in 1957 there was none of that, so it's  
13 evolved. So you never know.

14 COMMISSIONER OKUDA: And this might not be  
15 really the place to go into a lot of it, but I think  
16 one of the reasons why the legislature passed the  
17 Land Use law was because of -- it might be this  
18 particular subdivision, that there where these people  
19 named Hirotooshi Yamamoto or Yamamoto and a bunch of  
20 other people, Manoa Finance Company that developed  
21 these subdivisions, and policymakers decided there  
22 had to be regulation. But that's maybe neither nor  
23 there.

24 One final point, whatever we do here, you  
25 probably understand that we are quasi-judicial,

1 meaning when you talk about your structured people,  
2 we are required by the structure to take the laws  
3 that the legislature has passed and look at the  
4 evidence.

5 The strict rules of evidence don't apply,  
6 but there are rules of evidence that apply here, and  
7 we basically have to make what amounts to a judicial  
8 determination, or quasi-judicial determination.

9 So as far as structure goes, we are  
10 constrained about what we can do and we cannot do.

11 But anyway, Ms. Barry, thank you very much  
12 for participating in your testimony. Very much  
13 appreciated.

14 Thank you, Mr. Chair. No further  
15 questions.

16 THE WITNESS: Thank you.

17 CHAIRPERSON SCHEUER: Thank you very much.  
18 Commissioners, any more questions for the  
19 witness? If not, very briefly, Ms. Barry.

20 Did you ever consider doing this pro se?

21 THE WITNESS: No.

22 CHAIRPERSON SCHEUER: Why not?

23 THE WITNESS: Working as long as I did for  
24 almost 19 years with the court, I realized the old  
25 adage that it's a fool who uses himself as his own

1 attorney. And I understand that there's a  
2 significant amount of law that I don't understand  
3 coming from California that's here in Hawaii,  
4 especially land use topics and so forth.

5 So, no, we never did.

6 CHAIRPERSON SCHEUER: Thank you very much.  
7 That was my only question for you.

8 Anything else, Commissioners? If not,  
9 thank you very much.

10 Mr. Simon, you can continue on your  
11 presentation.

12 MR. SIMON: Can I ask follow-up questions?

13 CHAIRPERSON SCHEUER: Of course.

14 REDIRECT EXAMINATION

15 BY MR. SIMON:

16 Q A couple quick points, and I did a poor job  
17 on my direct of you.

18 Let's talk about access real quick.  
19 Commissioner Chang asked you some questions about  
20 access.

21 Are you guys able to access the shoreline  
22 area right now through your lot?

23 A Not through the lot, but around the lot,  
24 yes.

25 Q How do you guys get to the shoreline?

1           A       We go to the end of the road, to the end of  
2 Paradise Ala Kai, and traverse over that property.

3           Q       Which may or may not be trespassing?

4           A       Yeah.

5           Q       But there's no public access through your  
6 lot, there's not even private access through your  
7 lot.

8           A       Actually physically you cannot walk through  
9 it. It's debris and, you know, it's overgrown.  
10 Yeah, you can't.

11          Q       Thank you.

12                   And I also did a poor job of describing  
13 what this area looks like that the public sometimes  
14 uses to fish and to gather for cultural purposes.

15                   I think it came out, what essentially we  
16 have is sort of a lava shelf; is that correct?

17          A       Yes, lava shelf, yes, uh-huh.

18          Q       And you guys haven't certified your  
19 shoreline; is that correct?

20          A       Not yet.

21          Q       It's an empty lot.

22                   But you can kind of tell where the  
23 vegetation stops and it's bare --

24          A       Yes.

25          Q       How wide is that area?

1           A        I would say 20, 25 feet or more.

2           Q        And the public has free use of that whole  
3 area; is that correct?

4           A        Yes.

5           Q        And you guys will in no way interfere with  
6 the public's use of that area?

7           A        No, uh-uh.

8           Q        And not access that area?

9           A        Pardon?

10          Q        You won't interfere with their access to  
11 that area?

12          A        Oh, no, not at all. We kind of enjoy that.

13          Q        Commissioner Okuda asked you some questions  
14 about ag activity in that area and your intentions.

15                 And you mentioned that you didn't buy the  
16 Petition Area with the idea of starting a brand new  
17 business; is that correct?

18          A        Correct.

19          Q        But you guys intend on conducting business  
20 using your agricultural activity to conduct business,  
21 is that correct?

22          A        Absolutely, yeah. I understand that I  
23 should distinguish that in saying that because it's  
24 an agricultural purpose, we understand that we had to  
25 since commit to some sort of business activity in

1 order to sell the honey and the bee products that we  
2 get from our bee colonies.

3 Q Do you understand that under the  
4 Commission's rules and also -- (indecipherable) --  
5 205, that you are -- if the Commission grants you the  
6 requested boundary amendment, you're bound by these  
7 commitments and representations that you're making to  
8 the Commission, both in our filings as well as your  
9 testimony today; is that correct?

10 A Absolutely, yes.

11 Q And you guys remain firmly committed to  
12 pursuing this agricultural activity; is that correct?

13 A Yes.

14 Q And kind of unrelated, you kind of  
15 mentioned how you kind of like to stay within the  
16 rules and work with what is provided.

17 And so -- and there was talk about a lack  
18 of enforcement in that area, and I think what your  
19 point was that notwithstanding the lack of perhaps  
20 active enforcement, that that won't in any way affect  
21 how you guys conduct your own use of the parcel; is  
22 that correct?

23 A Correct.

24 I should clarify that in saying that we  
25 understand that on some level we will be treated

1 differently than our neighbors. The part that we  
2 want to be on parity with is we want to go through  
3 the County, we want go to through -- try to avoid  
4 DLNR in the building process. But we do understand  
5 that we are promising and we are committing to doing  
6 an agricultural purpose. For the purpose of this  
7 process, we do know that we will be treated  
8 differently that way.

9 MR. SIMON: I don't have anything further,  
10 Chair. Thank you very much.

11 CHAIRPERSON SCHEUER: Thank you, Ms. Barry.  
12 I'll put you back into being an attendee, and Mr.  
13 Simon can continue with his presentation.

14 MR. SIMON: Chair, that includes the chief  
15 part of my presentation.

16 I would like to reserve time to respond to  
17 anything from the other parties as well as provide  
18 some closing statements.

19 CHAIRPERSON SCHEUER: You certainly can.

20 Okay, with that, I'm going to call on  
21 Hawaii County.

22 MR. MUKAI: Thank you, Chair.

23 For the record, this is John Mukai, Deputy  
24 Corporation Counsel.

25 Just for clarification of something

1 regarding the Barry property, I would like to have  
2 Hawaii County Planning Director Zendo Kern address an  
3 issue.

4 CHAIRPERSON SCHEUER: Mr. Kern, I'm going  
5 to swear you in. I think the last time I saw you,  
6 you swore me in. So it's fair play.

7 Do you swear or affirm the testimony you're  
8 about to give is the truth?

9 THE WITNESS: I do.

10 CHAIRPERSON SCHEUER: Please proceed.

11 ZENDO KERN

12 Was called as a witness by and on behalf of the  
13 County of Hawaii, was sworn to tell the truth, was  
14 examined and testified as follows:

15 DIRECT EXAMINATION

16 THE WITNESS: Thank you, Mr. Chair.

17 Yeah, so, Zendo Kern, Planning Director.

18 I actually grew up in this area and  
19 actually grew up fishing along this coast, as well as  
20 diving along this coast.

21 I just wanted to make a slight point of  
22 clarification.

23 Their TMK, this property actually does abut  
24 the coast, actually does abut the water. Where the  
25 certified shoreline survey will end up being might be



1 at the top of the pali or the top of the cliff. I  
2 just wanted to make sure that that was clear. We  
3 will have a 40-foot shoreline setback in that area.

4 Our SMA rules will not allow any fencing up  
5 in there. So the lateral movement along the coast  
6 would remain open.

7 I'm sure the Petitioner is fully aware of  
8 that, but wanted to clarify this property is  
9 technically oceanfront.

10 Happy to answer any questions. More of a  
11 clarification.

12 CHAIRPERSON SCHEUER: Mr. Mukai, was that  
13 it from Mr. Kern?

14 MR. MUKAI: Yes.

15 CHAIRPERSON SCHEUER: You're making Mr.  
16 Kern available for questions.

17 Mr. Simon, any followup?

18 MR. SIMON: Any followup for Director Kern?

19 CHAIRPERSON SCHEUER: Correct.

20 MR. SIMON: Not at this time.

21 CHAIRPERSON SCHEUER: OP?

22 MR. YEE: No questions, thank you.

23 CHAIRPERSON SCHEUER: Commissioners?

24 Commissioner Okuda, followed by

25 Commissioner Chang.

1                   COMMISSIONER OKUDA: Thank you very much,  
2 Mr. Chair.

3                   Thank you, Mr. Kern.

4                   Can I ask you this question, Mr. Kern?

5                   I'll tell you what my concern is, and I  
6 don't know whether you can address it. The concern  
7 is that when applicants -- and I'm not indicating a  
8 decision one way or the other regarding this Barry  
9 Petition -- but, you know, sometimes I get the  
10 feeling that people will tell us what we want to hear  
11 to get a petition granted or a permit issued, and  
12 then, you know, we know from the case law, that once  
13 there's substantial commencement of the use of the  
14 property, the Land Use Commission loses the ability  
15 to simply revert the property as a result of  
16 noncompliance.

17                   And we don't see the County enforcing the  
18 requirements, for example, that actual agriculture,  
19 or commercial agriculture takes place, you know, on  
20 the land.

21                   I mean, do you have any comments about  
22 that, because, you know, I get the feeling that if  
23 we're not going to see County enforcement of some of  
24 these requirements, it's almost like people are  
25 forcing the Land Use Commission to have to take a

1 really strict view of applications.

2           THE WITNESS: You know this probably better  
3 than I. This is a very complicated subject matter.  
4 And I'm sure some folks do say what they want to  
5 hear. In this case, I'm not saying that. I think  
6 they have -- their intention is to do what they want  
7 to do.

8           I think the land use conversation in  
9 general around agriculture use and the State Land Use  
10 Ag on the Big Island is complicated, especially for  
11 an area like Paradise Park, where it's much more of a  
12 rural-type setting, and probably be actually more  
13 effective to be rural as far as State Land Use goes,  
14 and actually focusing the agriculture component into  
15 the areas like on the Hamakua Coast where we have  
16 actually higher, greater potential there.

17           We're challenged as the County as far as  
18 bandwidth goes. I mean, just keeping up with  
19 processing permits and whatnot is something that we  
20 are working on streamlining and working through, so  
21 greater enforcement across-the-board is challenged.  
22 It's something that we're discussing and bringing up  
23 on the general land use policies and how we can  
24 actually create some more cohesion in that regard,  
25 because it's challenged.

1           We don't have any immediate plans for that  
2 as we're still kind of working through General Plan,  
3 inner gov, and taking on this position with the new  
4 administration.

5           We're buried with some of these other  
6 issues. And then this would be probably phase two of  
7 my conversation with the team.

8           COMMISSIONER OKUDA: Thank you very much,  
9 Planning Director. Appreciate your answer.

10          Thank you, Mr. Chair.

11          CHAIRPERSON SCHEUER: Thank you,  
12 Commissioner Okuda.

13          Commissioner Chang.

14          COMMISSIONER CHANG: Thank you, Mr. Kern.  
15 I appreciate the clarification.

16          So I want to talk about the shoreline. So  
17 your testimony is that the Barry's TMK actually goes  
18 all the way up to the edge of the cliff; is that  
19 correct?

20          THE WITNESS: Correct.

21          COMMISSIONER CHANG: But the County has a  
22 40-foot setback requirement; is that correct?

23          THE WITNESS: That's correct, yeah. In  
24 certain cases 20-foot, depending on the depth of the  
25 lot, but Act 15 that was passed last year now

1 basically creates a 40-foot shoreline setback in all  
2 cases. So that would be from the certified shoreline  
3 survey.

4 COMMISSIONER CHANG: And are you aware  
5 whether this property has a certified shoreline?

6 THE WITNESS: I'm not.

7 COMMISSIONER CHANG: And so notwithstanding  
8 the testimony about the vegetation, in this case, the  
9 TMK shows that the property goes to the edge of the  
10 cliff and the County has a 40-foot setback, and  
11 within that setback, they cannot build any  
12 structures?

13 THE WITNESS: That's correct, no  
14 structures, no fencing. The only way they would be  
15 able to do that is come through with a shoreline  
16 setback variance, which would require an  
17 environmental assessment, and it would be a  
18 discretionary application that be approved by the  
19 Planning Commission.

20 COMMISSIONER CHANG: With the shoreline  
21 setback, is there an implied public easement that  
22 they can cross over?

23 THE WITNESS: That's my understanding.

24 Mr. Mukai can maybe expand on that. But,  
25 yeah, as far as the lateral movement along the coast,

1 it's pretty much open to the public to traverse, and  
2 that whole area is pretty maintained that way. No  
3 one has tried to block it. So fishermen can walk up  
4 and down the coast. People picking opii, et cetera.  
5 I mean, I've walked that entire coast many times, and  
6 that lateral movement is basically never questioned.

7 COMMISSIONER CHANG: So currently by  
8 practice it's unobstructed lateral movement, that's  
9 been your experience of the properties along the  
10 shoreline. However, under --

11 THE WITNESS: Uh-huh.

12 COMMISSIONER CHANG: -- if they did come  
13 in, and I'm not saying that they will, but if any  
14 landowner came in requesting a permit to build a  
15 fence, you would still go through the process of  
16 determining whether a fence is appropriate or not?

17 THE WITNESS: Yeah. There would be a  
18 process. We have to go through the process, the  
19 application review and how that -- you know, whether  
20 conflicted or complied with, you know, SMA  
21 requirements. They'd have to do an EA. They'd have  
22 to get a FONSI on that.

23 And from our standpoint, even if it kind of  
24 worked for the most part, we would not allow  
25 restriction, we would maintain lateral access along

1 the coast. That would be our recommendation. The  
2 Planning Department doesn't get the final say. We're  
3 a recommending body for that, so it would be the  
4 Commission that would have the final say on that.  
5 And my experience with the commissions, shoreline  
6 access and movement is something that is looked at  
7 with great detail and honor.

8 COMMISSIONER CHANG: I guess that's my  
9 question to you. To ensure -- and I believe Mrs.  
10 Barry is extremely genuine when she says she has no  
11 intention, but to ensure that access continues to run  
12 with this land, public access, would you find it  
13 appropriate for LUC to include a condition in the  
14 approval that there be at least a required public  
15 access fronting the property 40 feet or 20 feet?

16 THE WITNESS: I don't think that that's  
17 necessary. I think with the practices that we have  
18 and all the conditions and requirements that we have,  
19 I don't feel that that would be necessary.

20 COMMISSIONER CHANG: Are you aware of any  
21 of the other properties having such a condition on  
22 their properties?

23 THE WITNESS: I'm not, but I wouldn't say  
24 that I'm extremely knowledgeable in that department  
25 either.

1                   COMMISSIONER CHANG: Thank you, very much.  
2 I appreciate your testimony.

3                   THE WITNESS: My pleasure.

4                   CHAIRPERSON SCHEUER: Commissioner Cabral.

5                   VICE CHAIR CABRAL: Thank you, Chair.

6                   I wanted to kind of comment and actually  
7 support the comments that Petitioner Barry gave and  
8 Director Kern gave.

9                   In one of my former lives I used to be a  
10 fisherman, and I fished along that coastline, alua  
11 fishing, of course, because we went for the big game,  
12 of course.

13                   And that area, because I'm kind of draw  
14 that picture, this is not one of these beautiful  
15 little beaches you walk out to. And in some areas,  
16 the lava is so horrible that even walking along that  
17 coastline you're going to need that 40 feet, because  
18 sometimes there's drop-off and big pukas. This is  
19 not where you would take the children to go play in  
20 the sand location.

21                   And this particular lot, Parcel 59, is very  
22 close to the end of the entire Paradise Park  
23 subdivision. And like Mrs. Barry said, about two  
24 more lots down is the end of the roadway. And I am  
25 familiar with people that do stop there, they park



1 there, and they go into the WH Shipman property a  
2 lot, and they'll go along that coastline for most of  
3 that.

4 I've been there. And that same kind of  
5 terrain, and it just drops off. And the surf, when  
6 its high surf, it's pounding up against you. You  
7 know, so --

8 CHAIRPERSON SCHEUER: Commissioner Cabral,  
9 if I may. Do you have a question for Mr. Kern?

10 VICE CHAIR CABRAL: No. Well, yeah but I  
11 wanted to also support Mr. Kern's suggestion to  
12 Commissioner Chang that we probably don't want to  
13 have to require that the 40-foot setback be enforced  
14 as part of our LUC, because the people who do use  
15 that and go along their, trust me, if someone's  
16 blocks them, the County will hear about it. It will  
17 not be tolerated because a of people do terrain  
18 across there for fishing and camping and what have  
19 you.

20 So I think we can let the County and their  
21 enforcement -- and the County does -- is very  
22 responsive to complaints. It doesn't go out looking  
23 for problems, but if somebody complains, they're  
24 pretty good at coming out.

25 So this is not a beach scene that I think

1 some people are picturing this pretty beach that we  
2 need to protect. That's not it. So I would  
3 encourage that we move along.

4 CHAIRPERSON SCHEUER: Thank you,  
5 Commissioner Cabral.

6 Commissioner Ohigashi.

7 COMMISSIONER OHIGASHI: Yeah, well, Nancy's  
8 comments made me realize that -- or seem to get the  
9 picture that it's not rubber-slipper friendly over  
10 there. But besides that, I have a question for Mr.  
11 Kern.

12 Mr. Kern, there is testimony from the  
13 Petitioner saying that they have certain types of  
14 stands to sell agriculture products.

15 Is that area governed by -- are those type  
16 of activities governed by the Special Use Permit, or  
17 is that area do-what-you-like area?

18 THE WITNESS: Well, I wouldn't say totally  
19 do what-you-like area, but they're not governed by  
20 special permits. We have provision in the code that  
21 if you're on ag land, you can have your fruit stand  
22 out in front, so it's not like a store or anything,  
23 usually on the honor system where you put out two  
24 dozen avocados and some papayas and whatnot and, you  
25 know, someone leaves a couple bucks and grabs them.

1 Or kids kind of doing their own little fruit stand.  
2 And usually that's from small scale, you know, kind  
3 of personal little orchards or got extra fruit on  
4 their property.

5 COMMISSIONER OHIGASHI: How much of that  
6 subdivision, the actual lots and the buildings  
7 they're on, sort of grandfathered in? Because it was  
8 mentioned by Mr. Simon that subdivision occurred even  
9 before 205A or 205. I'm just curious. Is there a  
10 percentage that you can give me?

11 THE WITNESS: To my knowledge -- and I  
12 could be not 100 percent accurate here -- but pretty  
13 much the entirety of Hawaiian Paradise Park  
14 subdivision was pre 205.

15 Again, there could be a couple on the  
16 fringe that maybe have been subdivided, but I don't  
17 even think that would be the case. I don't think  
18 anything's really happened in that sense.

19 COMMISSIONER OHIGASHI: So what I was just  
20 curious that is will the Petitioners be subject to  
21 regulations that were implemented, will not be able  
22 to avail themselves of any grandfathered-in-rights  
23 that the other residents have?

24 THE WITNESS: Unless you folks make some  
25 other decision, we would treat them the same as

1 everybody else as far as zoning goes.

2 COMMISSIONER OHIGASHI: So they would have  
3 some grandfather-type of rights, because your zoning  
4 is Agriculture.

5 THE WITNESS: The zoning is Ag, yes.

6 Yeah, I would have to double check with our  
7 corp counsel, but I don't see any reason that we  
8 would treat them any different based on this  
9 Petition, because they're basically conforming with  
10 the surrounding areas. Right?

11 COMMISSIONER OHIGASHI: I was just curious.  
12 Thank you.

13 THE WITNESS: Thank you.

14 CHAIRPERSON SCHEUER: Thank you,  
15 Commissioner Ohigashi.

16 Any other questions, Commissioners?

17 Thank you very much, Director Kern, for  
18 your clarification on the TMK boundary.

19 Can I ask you one very quick question  
20 following up on Commissioner Okuda's question?

21 If you know, can you describe at all at  
22 what point, if somebody is coming in for a permit,  
23 will the Planning staff on Hawaii County check  
24 against the LUC records for any conditions that might  
25 exist on the property?

1           THE WITNESS:  Pretty much immediately.  So  
2 the permit would be generated at the Building  
3 Department.  It would come to the Planning  
4 Department.  We would immediately see that it's an  
5 SMA and we would followup.  Any time there's  
6 especially a shoreline area, we would look through  
7 the record to see anything from the LUC, SMA,  
8 anything else from SHPD.

9           In this case there would be an SMA  
10 assessment.  And it could be an SMA major, depending  
11 on what the -- Act 16 changed those exemptions, so  
12 immediately we would get that.  We would look at all  
13 of those.

14           All of those issues would have to be  
15 addressed prior to it moving forward to getting the  
16 Building Permit.

17           So we are very detailed, especially with  
18 the shoreline properties like this.

19           CHAIRPERSON SCHEUER:  That's very helpful.  
20 Thank you.

21           I notice Commissioner Okuda has some follow  
22 up questions.

23           COMMISSIONER OKUDA:  Thank you very much,  
24 Mr. Chair.

25           Director Kern, following up to the Chair's

1 question, will your permitting people look to  
2 determine whether or not there is business or  
3 commercial agricultural activity going on on the  
4 property?

5 Your predecessor in a prior administration,  
6 I believe, a representative when the short-term  
7 vacation rental issue came up before the Commission  
8 said that the department would not check whether or  
9 not there is bona fide agricultural activity taking  
10 place before any type of permit would be issued.

11 Is that still the policy of the County that  
12 there's going to be no check of whether or not  
13 there's bona fide agricultural activity? And when I  
14 use the term "bona fide agricultural activity", I'm  
15 using that term consistent with the Land Use  
16 Commission Declaratory Ruling in Docket DR83-8, which  
17 states that the agricultural activity cannot be  
18 simply for personal or household use, it has to be  
19 for commercial purposes.

20 Is that issue going to be checked or not  
21 checked when the permit application comes in?

22 CHAIRPERSON SCHEUER: Mr. Kern, please,  
23 respond, but I also just want, since you're not in  
24 the same physical location, Mr. Mukai can jump in.

25 THE WITNESS: To be quite frank, that

1 policy hasn't changed yet. We have been in this  
2 position for maybe about three months, and we have  
3 been focused on a lot of other policies as far as  
4 process and flow goes right now that we've been  
5 dealing with.

6 So as of right now, it hasn't. Again, it's  
7 something that we are going to be having a  
8 conversation about. We do have them fill out the  
9 document that you're aware of that was brought up  
10 during that previous LUC hearing, but as of right  
11 now, it's the same as expressed before.

12 CHAIRPERSON SCHEUER: Anything further for  
13 Director Kern, Commissioners?

14 If not, Mr. Mukai --

15 Thank you very much, Director.

16 Mr. Mukai, you may continue.

17 MR. MUKAI: Nothing further, Chair.

18 CHAIRPERSON SCHEUER: Any other general  
19 questions from the Commissioners for the County?

20 If not, we will go to the Office of  
21 Planning.

22 MR. YEE: First, have to apologize. The  
23 Office of Planning submitted its written testimony,  
24 and you will notice on the caption it references  
25 Exhibit 1, which was intended to be attached to our

1 testimony.

2           During the hearing I was informed that  
3 unfortunately we did not include Exhibit 1 in our  
4 filing. It consisted of comments from DLNR to the  
5 Office of Planning and is referenced in our testimony  
6 that was filed.

7           I was wondering if I could beg the  
8 indulgence of both the Commission and parties? I  
9 only sent it to the parties during the hearing, so  
10 admittedly they've had, frankly, little time to view  
11 it.

12           We were wondering if we could amend our  
13 written testimony to include those Exhibits to make  
14 it complete?

15           CHAIRPERSON SCHEUER: Thank you for that  
16 disclosure, Mr. Yee.

17           Mr. Orodenker or Mr. Hakoda, has that been  
18 provided, at least via email, to the Commissioners?

19           CHIEF CLERK: This is Riley. The email was  
20 received. I'll forward it to the Commissioners once  
21 I'm able to get it on my phone.

22           CHAIRPERSON SCHEUER: Thank you. Are there  
23 any objections to the amendment of the exhibit,  
24 amendment of the testimony to include the exhibit?

25           Petitioner?



1           MR. SIMON: Chair, just speaking purely for  
2 purposes of the record, Petitioners have no objection  
3 to inclusion of the letter as part of Office of  
4 Planning's testimony in support of the Petition.

5           CHAIRPERSON SCHEUER: Mr. Mukai?

6           MR. MUKAI: No objection.

7           CHAIRPERSON SCHEUER: Commissioners?

8           We let you go off on your own for a few  
9 years, Bryan, you get sloppy when you came back in  
10 front of us.

11           Commissioner Wong.

12           COMMISSIONER WONG: Chair, for my  
13 indulgence, can I get like, when we receive it, can I  
14 have like five minutes to review it so I can complete  
15 the record?

16           CHAIRPERSON SCHEUER: I think that's  
17 appropriate. So given the time we're at, we will go  
18 about ten more minutes and take a break. What I'd  
19 like to do -- Mr. Orodenker.

20           COMMISSIONER WONG: They're going to send  
21 it right now, Chair.

22           CHAIRPERSON SCHEUER: Mr. Orodenker, do you  
23 wish to say something?

24           EXECUTIVE OFFICER: I'm good.

25           CHAIRPERSON SCHEUER: What I was going to

1 suggest -- but feel free to interrupt, Mr.  
2 Orodenker -- was that let's do the formal acceptance  
3 of the exhibit after our next break when  
4 Commissioners have had a chance to look at it.

5 Can we proceed with your presentation  
6 before that, Mr. Yee?

7 MR. YEE: Yes.

8 I think for Mr. Funakoshi's benefit, given  
9 that, I think we will not need -- the alternative was  
10 for Mr. Funakoshi to talk about it during his  
11 testimony, if the Commission was not inclined to so  
12 accept.

13 But given that, I think it would not be  
14 necessary to go into the level of detail regarding  
15 the exhibit.

16 So with that, we have just one witness. I  
17 believe we can waive our opening statements. Request  
18 a few minutes to provide final argument at some  
19 point.

20 CHAIRPERSON SCHEUER: But you're going to  
21 call Mr. Funakoshi?

22 MR. YEE: Yes.

23 CHAIRPERSON SCHEUER: Do you swear or  
24 affirm the testimony you're about to give is the  
25 truth?

1 MR. FUNAKOSHI: I do.

2 CHAIRPERSON SCHEUER: Please proceed.

3 RODNEY FUNAKOSHI

4 Was called as a witness by and on behalf of the State  
5 Office of Planning, was sworn to tell the truth, was  
6 examined and testified as follows:

7 CHAIRPERSON SCHEUER: Mr. Funakoshi, can  
8 you give us your name and title and then just proceed  
9 summarizing the Office of Planning's testimony at  
10 this time?

11 THE WITNESS: Thank you. Good morning,  
12 Chair and Commissioners.

13 Rodney Funakoshi. I'm with the State of  
14 Hawaii Office of Planning. I'm the Land Use Division  
15 Administrator.

16 DIRECT EXAMINATION

17 BY MR. YEE:

18 Q What is the Office of Planning's testimony  
19 in this case?

20 A This will be fairly brief.

21 The Office of Planning recommends approval  
22 subject to conditions. And so we have basically two  
23 conditions, and these are already represented and  
24 committed to by the Petitioner, and so I'm going to  
25 read them into the record.

1           Petitioner has committed to a condition  
2 first of all that construction will refrain from  
3 activities that disturb or remove the woody  
4 vegetation within 15 feet between June 1st and  
5 September 15 when the Hawaiian Hoary bats may be  
6 sensitive to disturbance.

7           Secondly, all exterior lighting will be  
8 shielded from shining upward in conformance with  
9 Hawaii County Code 14-15 in sequence to minimize the  
10 potential for disorientation of seabirds.

11           So the DLNR Division of Forestry and  
12 Wildlife letter that you should be getting or looking  
13 at during the break basically covered more than that,  
14 but we thought that these two conditions are fine in  
15 adjusting the DLNR memo to the Office of Planning.

16           Beyond that, Petitioner's Final EA has  
17 addressed archeological and Ka Pa'akai analysis, and  
18 there are no other issues of concern around the State  
19 resources, and so we recommend that the Petition be  
20 approved with the conditions, as represented by the  
21 Petitioner, that we feel will address the concerns  
22 raised.

23           The boundary amendment does not conflict  
24 with HRS Chapter 205, and generally meets the  
25 Commission's decisionmaking criteria in 205 and

1 Administrative Rules Chapter 15-15.

2 So that concludes my testimony.

3 MR. YEE: Thank you. No other questions.

4 He's available for cross-examination.

5 CHAIRPERSON SCHEUER: Thank you very much,  
6 Mr. Yee.

7 Mr. Simon, questions for the witness?

8 MR. SIMON: Good morning, Mr. Funakoshi.  
9 Thank you very much. I just want, on behalf of  
10 Petitioner, I just want to thank you, Director Evans,  
11 and the Office's support on this Petition.

12 THE WITNESS: You're welcome.

13 CHAIRPERSON1 SCHEUER: Mr. Mukai?

14 MR. MUKAI: No questions, Chair.

15 CHAIRPERSON SCHEUER: Commissioners?

16 Commissioner Okuda.

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

19 Mr. Yee or Mr. Funakoshi, can you respond  
20 to this question?

21 In the other prior dockets that the Office  
22 of Planning brought to our attention, a ruling that  
23 the Land Use Commission made in Docket DR 83-8, the  
24 ruling is rather short, so I would like to just read  
25 it very quickly and ask you whether or not it's the

1 Office of Planning's position that that ruling is  
2 still in effect and is good law? And let me read it  
3 from the last page of the DR order. And I quote:

4 "Based on the above, the Land Use  
5 Commission rules that a single-family dwelling can be  
6 defined as a farm dwelling only if the dwelling is  
7 used in connection with a farm where agricultural  
8 activity provides income to the family occupying the  
9 dwelling, and that a single-family dwelling, which  
10 use is accessory to an agricultural activity for  
11 personal consumption and use only is not permissible  
12 within the Land Use Agricultural District. This  
13 ruling is applicable to all lands located within the  
14 State Land Use Agricultural District."

15 Is that a correct statement of law, number  
16 one?

17 And number two, if it's a correct statement  
18 of law, is it the Office of Planning's position that  
19 that statement of law binds the Land Use Commission  
20 as of today?

21 MR. YEE: Mr. Funakoshi, would you like to  
22 answer that, or would you like me to answer that?

23 MR. FUNAKOSHI: Yeah. I would say " yes"  
24 and "yes".

25 COMMISSIONER OKUDA: Thank you. No further

1 questions.

2 CHAIRPERSON SCHEUER: That's the shortest  
3 answer Mr. Funakoshi has ever given to the Land Use  
4 Commission. I'm taken aback.

5 Any other questions, Commissioners?

6 Seeing none, Mr. Yee, that's it; right?

7 MR. YEE: I have no further questions,  
8 thank you.

9 CHAIRPERSON SCHEUER: Okay. It's 10:57.  
10 What I'm going to suggest is that we take a break and  
11 then I'll allow for closing arguments by each of the  
12 parties, final questions from the Commissioners, and  
13 then we can go into deliberations.

14 Does that sound acceptable to the parties?

15 Mr. Simon?

16 MR. SIMON: Yes. Thank you, Chair.

17 CHAIRPERSON SCHEUER: Mr. Mukai?

18 MR. MUKAI: That's fine, Chair.

19 CHAIRPERSON SCHEUER: Mr. Yee?

20 COMMISSIONER GIOVANNI: Yes, thank you.

21 CHAIRPERSON SCHEUER: It's 10:57, let's  
22 reconvene at 11:07 A.M.

23 (Recess taken.)

24 CHAIRPERSON SCHEUER: It's 11:07 A.M.

25 We're back on the record. And just to

1 clarify, before we go into final arguments,  
2 Commissioners, I'm assuming you've had a chance to  
3 review your email and see the attachment to the  
4 Office of Planning's testimony, the letter from the  
5 Division of Forestry and Wildlife, which was  
6 inadvertently admitted.

7 Are there any objections to entering that  
8 as a corrected exhibit? Seeing none, and hearing no  
9 objections from any of the parties or the  
10 Commissioners, Mr. Yee, that's been corrected.

11 MR. YEE: Thank you.

12 CHAIRPERSON SCHEUER: With that, we will  
13 proceed with Mr. Simon to do closing argument with  
14 questions from the Commissioners, followed by Mr.  
15 Mukai, if any, followed by Mr. Yee, if any, following  
16 which we don't do deliberation today, but we will  
17 close the evidentiary portion of the proceedings, and  
18 I'll give instructions to the Parties.

19 Mr. Simon.

20 MR. SIMON: Thank you. In keeping with  
21 today's theme, I'll try to keep it brief, but I'd  
22 like to begin first by thanking the Commission. I  
23 know you guys all work on a voluntary basis, and the  
24 Petitioners, the Barrys and myself, really appreciate  
25 all the time you spend to help process these



1 petitions.

2 Also want to thank staff, especially Scott  
3 Derrickson and Riley Hakoda and Executive Officer  
4 Orodanker for all their help along the way.

5 Based on the extensive record before the  
6 Commission, including the very firm representations  
7 made by the Petitioners, the Final EA and the FONSI,  
8 we ask that the Commission find, grant the amended  
9 Petition to reclassify the Petition Area from the  
10 Conservation District to Agricultural District by  
11 finding by a clear preponderance of the evidence that  
12 the proposed boundary amendment meets the standard  
13 for the Agricultural District under Hawaii  
14 Administrative Rule 15-15-19 is reasonable, is not  
15 violative of HRS Section 205-2, and is consistent to  
16 the policies and criteria established by HRS 205-16,  
17 205-17 and 205A-2.

18 Thank you very much.

19 CHAIRPERSON SCHEUER: Thank you, Mr. Simon,  
20 and thank you for the brevity.

21 Commissioners are there any questions?

22 Commissioner Wong.

23 COMMISSIONER WONG: Mr. Simon, I read OP's  
24 exhibit during our break, and following Mr.  
25 Funakoshi's statements, do you agree with those two

1 conditions that's in the exhibit?

2 MR. SIMON: I haven't had -- sorry, I'm  
3 unmuted, sorry about that.

4 I haven't had a chance to read that super  
5 thoroughly, but my understanding is that the  
6 conditions are not just in the exhibit, they're  
7 actually in the testimony that they filed yesterday,  
8 and those relate to shielding lighting, which is  
9 actually requirement under the Hawaii County Code,  
10 and also refraining from, you know, falling trees of  
11 15 feet or taller, which the Petitioners' have  
12 already committed to doing in the Petition as well as  
13 the Final EA.

14 So we have no objection to those two  
15 conditions as expressed in Office of Planning's  
16 testimony.

17 CHAIRPERSON SCHEUER: Thank you.

18 Commissioner Okuda.

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

21 Mr. Simon, maybe you can help me in this  
22 little conflict I have in my mind.

23 You know, I find your client, Mrs. Barry,  
24 to be a very credible person, and if that was the  
25 only thing, then that would make the decisionmaking a

1 lot easier. But the other stuff -- and help me out  
2 with this -- that is kind weighing in my mind is  
3 number one, the fact that the stated intentions of  
4 the Barrys were to retire and, you know, and there's  
5 nothing in, for example, your Final EA where there  
6 was any discussion of commercial agricultural  
7 activity. So that seems to conflict with, you know,  
8 representation that there would be commercial  
9 agricultural activity.

10 And I think the overriding concern I have,  
11 and maybe you can help address or answer this, is  
12 that we seem to see, across the State, you know,  
13 people giving a wink and nod to the requirements,  
14 which were the requirement that in an Agriculturally  
15 Districted property you have to have commercial  
16 agricultural activity.

17 In other words, agriculture simply for home  
18 or personal use is not sufficient. But we have  
19 people representing yeah, yeah, don't worry, don't  
20 worry, we're going to comply with the law, and we  
21 start seeing just residential use without  
22 agriculture.

23 And that seems to take away from the  
24 protections that I thought we were supposed to  
25 perform in the Land Use Commission to protect

1 agricultural land from bona fide agricultural use.

2 How do I resolve these conflicting points?  
3 How can you help me with that?

4 MR. SIMON: Thank you, Commissioner.

5 You know, I understand your concerns, and I  
6 would say in part, I don't know if I can resolve all  
7 of your concerns, because I can only speak on behalf  
8 of the Petitioners, Monica and Kevin Barry.

9 I will say they've made very firm  
10 representations to this Commission and they've been  
11 advised repeatedly, and are well aware that they will  
12 be held to those representations.

13 I understand that there appears to be some  
14 disconnect between what the law says and the  
15 application and the reality on the ground, especially  
16 in places like the Big Island where you have  
17 thousands and thousands of acres like Hawaiian  
18 Paradise Park where agricultural and sort of rural  
19 uses begin to co-ed.

20 But for the purposes of decisionmaking on  
21 the docket before you, on the Petition before you, I  
22 agree that Ms. Barry is extremely credible and she's  
23 sincere and she's very honest. She's a licensed  
24 attorney. You know, she understands representations  
25 and legal ramifications for failing to follow through

1 with her representations.

2           So I can't offer you much beyond the  
3 Petitioners, because I can't speak for them beyond  
4 what they've said for themselves, but I do think you  
5 have a sufficient basis to act on the current  
6 Petition, and approve it based on the representations  
7 of the Petitioners that they will satisfy the  
8 requirements of the farm dwelling under both Chapter  
9 205 and County Zoning requirements.

10           COMMISSIONER OKUDA: Well, Mr. Simon, can I  
11 also ask an additional question?

12           If it's possible to have their development  
13 approved through the Department of Land and Natural  
14 Resources under a Conservation District Use Permit,  
15 why not just go through that, you know, that route,  
16 because then, if for some reason, you know,  
17 commercial beekeeping or other commercial  
18 agricultural activities can't take place, then, you  
19 know, there's not going to be a potential violation  
20 there?

21           MR. SIMON: Well, again, my  
22 (indecipherable) -- not disclose privileged  
23 conversations, but I think Monica Barry summed it up  
24 her reasoning, her and Kevin's reasoning for going  
25 this route. I think it's good reasoning. I think

1 they had a justifiable basis to go down this route.

2           You know, even in the past hearings, Chair  
3 Scheuer committed us for not going the Conservation  
4 District Use Permit route, and I think that there are  
5 critics of the Conservation District Use Permit, the  
6 idea that single-family dwellings belong on  
7 Conservation land.

8           So I think there's tension regardless of  
9 which direction they head in, and I think the  
10 direction that they have chosen is appropriate and  
11 able for -- ready for approval for the Commission.

12           COMMISSIONER OKUDA: Thank you very much  
13 for that explanation.

14           CHAIRPERSON SCHEUER: Commissioners, any  
15 further questions?

16           Commissioner Cabral.

17           VICE CHAIR CABRAL: This again is not  
18 necessarily a statement -- I mean a question, more of  
19 a statement, particularly to Planning Director Kern,  
20 who mentioned this is a huge problem.

21           And I can absolutely appreciate my fellow  
22 Commissioner Okuda's conflict here, because not only  
23 are probably most of the houses around them  
24 residential, they're probably short-term vacation  
25 rentals, and how many of those are even paying the

1 proper taxes? God only knows. It's another large  
2 problem over here.

3           And the land is absolutely not suitable for  
4 anything agriculture. I was impressed that they  
5 figured out beekeeping, because I was thinking what  
6 can you even do on that? I mean, find a lava tube  
7 and grow mushrooms or something?

8           So it's a monster problem. And I'm going  
9 to defend the Barrys' right or ability to make use of  
10 their land in the most appropriate manner possible on  
11 a half acre of land in that oceanfront setting that I  
12 would hate to see that a mistake of the past be  
13 something to restrict them from their ability to  
14 have, you know, private use of their land in a manner  
15 to which all their neighbors have.

16           And it's something I would absolutely want  
17 to encourage the new administration and our County to  
18 clean up.

19           As a realtor, how many of my agents have  
20 taken our client down there, and say, oh, yes, just  
21 sign this paper that it's going to be a farm dwelling  
22 and on a half acre or one acre of lava land. There's  
23 not a lot you're going to do.

24           So I really want to defend the Barrys for  
25 their attempt and their decision to try and do --

1           CHAIRPERSON SCHEUER: You muted yourself.  
2 It wasn't me, I promise. You're still muted,  
3 Commissioner.

4           VICE CHAIR CABRAL: Sorry, I did it.

5           Anyway, Commissioner Okuda, I agree with  
6 you, it's a horrible conflict, but I'm not quite sure  
7 the Barrys should be the only one on the lynching pad  
8 there, you know. There's a lot of people that -- and  
9 I would say our government leaders need to clean this  
10 up in a really big way. Thank you.

11           CHAIRPERSON SCHEUER: Further questions for  
12 Mr. Simon?

13           Mr. Simon, I'm going to ask you whether you  
14 advised your client, Mrs. Barry, that the one product  
15 or trademark that she probably would not be able to  
16 sell is cookies?

17           MR. SIMON: You know, I'm not an  
18 intellectual property attorney, but now that issue  
19 has been flagged for us, and we will look into that.

20           CHAIRPERSON SCHEUER: Only the people who  
21 know Mrs. Barry's Cookies in Kona get that.

22           MR. SIMON: Can I make one final note?

23           CHAIRPERSON SCHEUER: You may.

24           MR. SIMON: The comment that Commissioner  
25 Okuda made earlier with respect to the declaratory



1 ruling from back in 1983, 83-8. And there's nothing  
2 we need to parse out here amongst all of us, but I  
3 want to make sure it's on the record that there has  
4 been some verbiage change to the definition of "farm  
5 dwelling" since then. It's similar in a lot of  
6 respects, but just wanted to clarify that for the  
7 record.

8 CHAIRPERSON SCHEUER: Anything further for  
9 Mr. Simon, Commissioners?

10 If not, Mr. Mukai.

11 MR. MUKAI: Nothing further, Mr. Chair,  
12 other than our submission.

13 CHAIRPERSON SCHEUER: Any questions for the  
14 County, Commissioners?

15 Closing, Mr. Yee?

16 MR. YEE: Thank you very much, briefly.

17 The Office of Planning supports the  
18 reclassification. We note that in 1977 all the 57  
19 acres, I think, were reclassified of surrounding  
20 property from Conservation to Agriculture. This  
21 property would have been included in that 1977  
22 decision except the owners couldn't be found.

23 So for the Office of Planning, one of the  
24 factors we looked at is we had to weigh both the  
25 importance of recognizing the value in the finality

1 of decisionmaking, as well as recognizing and  
2 respecting prior decisions. And also, as well, to  
3 make sure that any decision is consistent with the  
4 LUC's constitutional legal obligations.

5 So in the 1977 decision, all of these  
6 surrounding properties were moved from Conservation  
7 into Agriculture. No conditions were imposed. That  
8 was just the decision was made back then.

9 You know, that might not be the decision we  
10 would have made today, but we have to respect, I  
11 think, the decision that was made and accept the  
12 choices that were done by a prior Commission.

13 So when we apply it to this case,  
14 respecting and understanding that the case does need  
15 to comply with the old constitutional obligations,  
16 the Office of Planning is only recommending two  
17 relatively small conditions consistent with their  
18 finding that impact our representations, and as well  
19 as, of course, as the LUC standard conditions.

20 I believe that that would be satisfactory  
21 to meet the LUC's constitutional legal obligations.

22 We understand and share some of the  
23 concerns that were raised by the Commissioners. The  
24 Office of Planning certainly stands behind and  
25 supports DR 83-8's determination as to the definition

1 of "farm dwelling" and recognize the larger questions  
2 that exist in the State on this question.

3 We don't think though that this case is  
4 where the problem needs to be solved. It is one  
5 parcel in a much larger area which has already been  
6 reclassified. As I said, reclassified without  
7 conditions.

8 So in light of these facts, we think in  
9 this particular case, we think only these two  
10 conditions plus standard LUC conditions should be  
11 imposed, and that we should rely upon the County to  
12 ensure that the property complies with Chapter 205 as  
13 well as any other legal and constitutional  
14 obligations that may arise.

15 We accept and appreciate the comments that  
16 are raised about farm dwellings, and if there is  
17 (indecipherable) -- any future cases, we welcome it.  
18 In this particular case, we support the Petition. It  
19 should be approved.

20 CHAIRPERSON SCHEUER: Just because of the  
21 extensive final argument -- well, not extensive, but  
22 final argument from Mr. Yee, I'm going to give Mr.  
23 Simon any opportunity to rebut if he wishes to.

24 MR. SIMON: Nothing to rebut. I want to --  
25 I think Mr. Yee kind of echoed -- my comment was that

1 while there might be problems elsewhere, I don't  
2 think that should be used against the Petitioners  
3 here who have made fairly firm representations to  
4 comply with the law that sits here today as it may be  
5 in the future.

6 Nothing further. Thank you very much.

7 CHAIRPERSON SCHEUER: Thank you very much.

8 With that -- sorry, any questions for Mr.  
9 Yee from the Commissioners? Anyone?

10 With that, and given that the Parties have  
11 completed representations and final arguments before  
12 the Land Use Commission, I will declare the  
13 evidentiary portion of this proceeding to have been  
14 completed, subject to the receipt of any follow-up  
15 reports or answers that may have been requested.

16 I direct that the parties to draft their  
17 individual proposed findings of fact, conclusions of  
18 law and decision and order based upon the record in  
19 this docket and serve the same upon each other and  
20 the Commission.

21 The proposed findings or fact must  
22 reference the witness as well as the date, page and  
23 line numbers of the transcripts to identify your  
24 facts. In addition to the transcript, the exhibits  
25 in evidence should also be referenced. Please

1 contact our court reporter to arrange for copies of  
2 today's transcript.

3 I will note for the parties that the  
4 Commission --

5 Mr. Yee? You're muted, Mr. Yee.

6 MR. YEE: You can finish, but I wanted to  
7 ask for permission to not file findings of facts,  
8 conclusions of law, and decision and order. We are  
9 in agreement with the proposed reclassification  
10 (indecipherable) and allow the parties to submit  
11 comments.

12 CHAIRPERSON SCHEUER: You can certainly  
13 waive.

14 MR. MUKAI: Same thing with the County of  
15 Hawaii, Department of Planning. Thank you.

16 CHAIRPERSON SCHEUER: Thank you. To  
17 continue.

18 In addition to the transcript, the exhibits  
19 in evidence should also be referenced. You can  
20 obtain the transcript from our court reporter.

21 The parties should all note the Commission  
22 has standard conditions. We would like the parties  
23 to include these in preparing the proposed orders,  
24 include, agree that the parties have prepared and  
25 proposed orders. A copy of the standard conditions

1 may be obtained from the Commission staff. I  
2 recommend that the parties, particularly the  
3 Petitioner, consult with the Commission staff early  
4 in the process to ensure that technical and  
5 non-substantive formatting protocols observed by the  
6 Commission are adhered to.

7 As I was suggesting if any -- as Mr. Yee  
8 anticipated -- if any of the parties wish to  
9 stipulate to any of the proposed portions of findings  
10 of fact, conclusions of law and decision and order,  
11 they are encouraged to do so.

12 Deadlines. If you are filing partially or  
13 full stipulations or your own orders, you should  
14 serve these no later than March 8th on the  
15 Commission, any comments, stipulations or objections  
16 to the party's respective proposals should be filed  
17 with the Commission and served upon the other parties  
18 no later than close of business on March 12th.

19 The deadline for any rebuttals would be  
20 March 17th.

21 Are there any questions from the parties  
22 with respect to our procedures, starting with Mr.  
23 Simon?

24 MR. SIMON: None from Petitioner. Thank  
25 you, Chair.

1 CHAIRPERSON SCHEUER: Mr. Mukai?

2 MR. MUKAI: Nothing further, Chair.

3 CHAIRPERSON SCHEUER: Anything further, Mr.  
4 Yee?

5 MR. YEE: Would it be possible to have --  
6 well, to get a few more days on the review of their  
7 proposed findings?

8 CHAIRPERSON SCHEUER: I'm trying to  
9 expedite this so that we can take this up again on  
10 March 24th. So this is really the schedule that we  
11 need to adhere to.

12 MR. YEE: All right. Then I we will ask if  
13 we can get a courtesy copy of a draft, which might  
14 not be the final from Petitioner as early as  
15 possible. Thank you.

16 CHAIRPERSON SCHEUER: Can we work with  
17 that, Mr. Simon?

18 MR. SIMON: Yes, Chair. I will work to get  
19 a draft as soon as possible. I can't make any  
20 promises on time, but I'll certainly work with the  
21 Office of Planning and their counsel to get them  
22 something as soon as we can.

23 MR. MUKAI: Mr. Simon, same request from  
24 County of Hawaii.

25 MR. SIMON: Yeah, as well as Planning and

1 Corp Counsel as well.

2 CHAIRPERSON SCHEUER: Thank you, Mr. Mukai.

3 Thank you to everyone for your efficiency  
4 and due diligence of my fellow volunteer  
5 Commissioners in your questioning.

6 Mr. Orodenker, is there anything further  
7 regarding procedures?

8 EXECUTIVE OFFICER: Mr. Chair, that  
9 concludes the business for the day, I believe.

10 CHAIRPERSON SCHEUER: Is there any further  
11 business or comments from any of the parties?

12 I would like to extend my thanks to the  
13 Petitioner, to the Barrys, and we look forward to it.  
14 Mr. Kern?

15 MR. KERN: Mr. Chair, thank you.

16 Just briefly, I just want to make sure the  
17 Barrys are covered.

18 When, if this goes through, make sure that  
19 they come talk to the Planning Department to cover  
20 any SMA issues prior to any ground disturbance or  
21 anything like that.

22 Oftentimes folks will think they got an  
23 approval and it's okay, and they go down there  
24 inadvertently and next we know we're getting a  
25 complaint, we're having to issue and NOV on it.



1           So just want to throw that out there so  
2 everyone's above-board on that. Thank you.

3           CHAIRPERSON SCHEUER: Thank you, Director  
4 Kern.

5           Any further business, Commissioners?

6           Seeing none, I wish you well and declare  
7 this meeting adjourned.

8           (The proceedings adjourned at 11:28 P.M.)

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## CERTIFICATE.

1 STATE OF HAWAII )  
2 ) SS.  
3 COUNTY OF HONOLULU )

4 I, JEAN MARIE McMANUS, do hereby certify:

5 That on February 24, 2021 at 9:00 a.m.,  
6 the proceedings contained herein was taken down by me  
7 in machine shorthand and was thereafter reduced to  
8 typewriting under my supervision; that the foregoing  
9 represents, to the best of my ability, a true and  
10 correct copy of the proceedings had in the foregoing  
11 matter.

12 I further certify that I am not of counsel for  
13 any of the parties hereto, nor in any way interested  
14 in the outcome of the cause named in this caption.

15 Dated this 24th day of February, 2021, in  
16 Honolulu, Hawaii.

17  
18  
19 /s/ Jean Marie McManus  
20 JEAN MARIE McMANUS, CSR #156  
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