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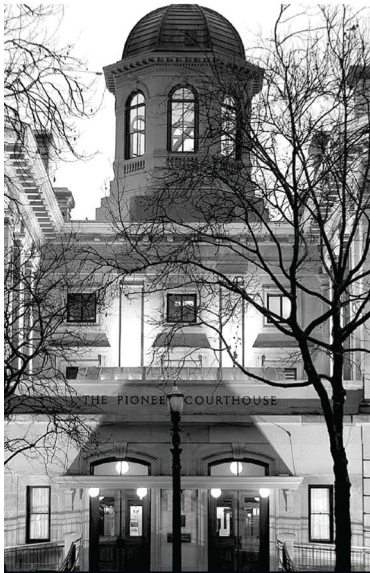
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STATE OF HAWAII  
LAND USE COMMISSION

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

Held via Zoom by Interactive Conference Technology

- I. Call to Order
- II. Adoption of Minutes  
August 25, 2021 Minutes
- III. Tentative Meeting Schedule
- IV. ACTION-DR21-72 CHURCH (Hawaii)  
To Consider Petitioner's Petition for a Declaratory Order requesting clarification and correction to the LUC, December 16, 1992 Boundary interpretation No. 92-48 and reimbursement of LUC and Court Reporter fees.
- V. ACTION-A11-794 STATE OF HAWAII, DEPT. OF EDUCATION - (Kihei High School) (Maui)  
To Consider Petitioner's Emergency Motion for Recusal or Disqualification of LUC's Chair from Participation in any Proceeding related to DOE's Motion to Amend the Land Use Commission's Findings of Fact, Conclusions of Law and Decision and Order filed July 29, 2013.  
  
To Consider Petitioner's Motion to Amend the LUC's Findings of Fact, Conclusions of Law and Decision and Order filed July 29, 2013.  
  
To Consider Petitioner's Request for the Issuance of Written Findings as to its Aug 20, 2020 Motion to Amend the Land Use Commission's Findings of Fact, Conclusions of Law and Decision and Order filed July 29, 20213.
- VI. ADJOURNMENT

BEFORE:

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**APPEARANCES BY VIDEOCONFERENCE:**

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

**STAFF PRESENT BY VIDEOCONFERENCE:**

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

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**STATE OF HAWAII**

**LAND USE COMMISSION**

**Hearing held on September 8, 2021**

**Commencing at 9:00 a.m.**

**COMMISSIONER SCHEUER:** Aloha mai kakou and

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

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

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

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

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

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

1 to being a panelist.

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

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

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

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

25           I note in regards to attendance,

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

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

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

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

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

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

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

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

1 Orodenker, would you please poll the commission?

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

5 **COMMISSIONER CABRAL:** Yes.

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

7 **COMMISSIONER GIOVANNI:** Aye.

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

9 **COMMISSIONER ACZON:** Yes.

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

11 **COMMISSIONER CHANG:** Aye.

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

13 **COMMISSIONER OKUDA:** Yes.

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

15 **COMMISSIONER OHIGASHI:** Yes.

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

18 **COMMISSIONER SCHEUER:** Aye.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

22 **COMMISSIONER SCHEUER:** Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1           **MR. DERRICKSON:** Correct.

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

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

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

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

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

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

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

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

17           **COMMISSIONER SCHEUER:** Okay.

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

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

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

23           **COMMISSIONER SCHEUER:** Okay.

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

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

2 **COMMISSIONER SCHEUER:** Good morning.

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

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

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

11 **MR. CHURCH:** Yes.

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

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

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

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

1 Sustainable Development as well.

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

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

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

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

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

25 I next will recognize the written public

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

11 **MR. CHURCH:** Okay.

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

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

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

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

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

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

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

14 **COMMISSIONER SCHEUER:** Right.

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

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

20 **MR. CHURCH:** Understood.

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

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

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

1 would be great.

2 **MR. CHURCH:** Yes.

3 **COMMISSIONER SCHEUER:** Thank you. Ms.

4 Kato, any questions on the procedures?

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

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

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

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

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

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

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

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

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

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

18 **COMMISSIONER SCHEUER:** Yes.

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

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

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

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

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

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

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

25 **MR. CHURCH:** Yes?

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

6           **MR. CHURCH:** Okay.

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

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

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

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

13           **COMMISSIONER SCHEUER:** Better.

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

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

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

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

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

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

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

25 If the commission agrees to such a narrow

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 **COMMISSIONER SCHEUER:** Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

23 **MR. CHURCH:** Yes.

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

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

5 **MR. CHURCH:** Yes.

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

15 **MR. CHURCH:** Yes.

16 **MS. HILDAL:** Yes.

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

23 **MR. CHURCH:** Yes.

24 **MS. HILDAL:** Yes.

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

1 an attorney?

2 **MR. CHURCH:** No.

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

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

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

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

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

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

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

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

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

16 **COMMISSIONER OKUDA:** Yes.

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

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

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

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

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

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

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

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

21           **COMMISSIONER SCHEUER:** Thank you.

22           **COMMISSIONER WONG:** Thank you.

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

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

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

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

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

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

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

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

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

21 **MR. CHURCH:** Yes.

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



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

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

13           **MR. CHURCH:** Yes.

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

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

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

5 **MR. CHURCH:** Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 **COMMISSIONER OKUDA:** Okay.

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

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

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

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

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

8 **MR. CHURCH:** Yes.

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

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

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

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

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

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

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

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

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

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

2           **MR. CHURCH:** Yeah?

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

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

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

18           **COMMISSIONER OKUDA:** Okay.

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

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



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

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

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

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

5 apologize. Please continue with your response, Ms.

6 Hildal.

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

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

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

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

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

12 point.

13 And also, when we did apply for our farm

14 dwelling first, and then our single-family

15 residence, we had already gotten permits for 13

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

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

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

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

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

21 cultivated under now because you get three years of

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

23 What happened here that confuses this is

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

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

1 do nonconforming use on the property.

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

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

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

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

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

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

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

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

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

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

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

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

1 (Inaudible).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 **MR. CHURCH:** Correct.

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

3           **MR. CHURCH:** Correct.

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

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

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

12           **MR. CHURCH:** Correct.

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

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

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

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

1 case before us.

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

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

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

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

18 **COMMISSIONER CHANG:** Okay.

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

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

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

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

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

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

25 Even you -- even you relied upon that when



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 before an earlier commission.

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

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

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

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

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

1 property?

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

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

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

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

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

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

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

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

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

11 **COMMISSIONER CHANG:** Okay.

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

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

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

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

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

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

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

1 CHURCH: Yes.

2 COMMISSIONER CHANG: All right.

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

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

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

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

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

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

19 COMMISSIONER SCHEUER: Yes.

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



1 cases that have shown that the maps were incorrect?

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

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

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

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

9 **CHURCH:** Okay.

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

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

14 **COMMISSIONER SCHEUER:** Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

1 as to where this boundary is located.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21           **MS. KATO:** Mm-hmm.

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

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

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

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

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

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

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

1 referring to the Stengel property?

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

6 **COMMISSIONER CHANG:** Okay.

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 are necessarily even available or readily found.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Do you recall that being mentioned?

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

4 **COMMISSIONER OHIGASHI:** Yes.

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

6 **COMMISSIONER OHIGASHI:** Yes.

7 **MS. KATO:** Okay.

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

10 **MS. KATO:** Yes.

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

13 **MS. KATO:** Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

7 **MR. FUNAKOSHI:** Yes.

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

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

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

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

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

1 and status of the particular line.

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

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

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

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

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

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

1 description provided by the Churches, if you know?

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

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

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

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

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

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

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

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

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

6 **COMMISSIONER OHIGASHI:** Yes.

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

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

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

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

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

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

1 statements and questions from the commissioners.

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

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

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

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

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

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

25 But regardless of whether it does or not,

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

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

12 **COMMISSIONER SCHEUER:** Okay.

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

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

19 **MS. KATO:** No.

20 **COMMISSIONER SCHEUER:** Okay.

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

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

1 way do you believe Map H65 is unclear?

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 **MS. KATO:** Yes.

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

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

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

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

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

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

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

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

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

24           **COMMISSIONER SCHEUER:** Okay.

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

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

4 **COMMISSIONER SCHEUER:** Yeah.

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

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

14 **MS. MAKI:** Okay.

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

19 **MS. MAKI:** Okay.

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

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

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

1 around the map being drawn wrong.

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

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

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

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

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

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

1 pali.

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

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

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

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

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

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

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

1 **MS. KATO:** I am not.

2 **COMMISSIONER GIOVANNI:** Thank you.

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

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

9 **COMMISSIONER SCHEUER:** Boundary  
10 interpretation.

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

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

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

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

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



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

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

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

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

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

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

1 record?

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

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

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

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

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

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

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

8 **COMMISSIONER SCHEUER:** Okay.

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

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

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

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

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

1 Okuda?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 inspected.

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

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

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

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

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

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

11 **MR. CHURCH:** Okay.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

1 meetings.

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

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

12           So I'm open to your questions.

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

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

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

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

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

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

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

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

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

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

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

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

25          **COMMISSIONER SCHEUER:** Any further

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

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

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

6 **MR. CHURCH:** Okay.

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

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

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

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

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

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

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

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

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

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

1 exist in the near future.

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

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

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

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

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

1 Commissioner Aczon?

2 **COMMISSIONER ACZON:** Aye.

3 **COMMISSIONER SCHEUER:** Commissioner

4 Cabral?

5 **COMMISSIONER CABRAL:** Aye.

6 **COMMISSIONER SCHEUER:** Commissioner Chang?

7 **COMMISSIONER CHANG:** Aye.

8 **COMMISSIONER SCHEUER:** Commissioner

9 Giovanni?

10 **COMMISSIONER GIOVANNI:** Aye.

11 **COMMISSIONER SCHEUER:** Commissioner Okuda?

12 **COMMISSIONER OKUDA:** Yes.

13 **COMMISSIONER SCHEUER:** Commissioner Wong?

14 **COMMISSIONER WONG:** Aye.

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

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

18 Commissioner Wong.

19 **COMMISSIONER SCHEUER:** Commissioner Wong?

20 **COMMISSIONER WONG:** You forgot

21 Commissioner Ohigashi.

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

24 Commissioner Ohigashi?

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

1 Yeah, aye.

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

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

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

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



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

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

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

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

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

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

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

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

19 Commissioner Okuda?

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

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

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

1 **COMMISSIONER SCHEUER:** Please.

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

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

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

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

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

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

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

1 (inaudible).

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

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

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

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

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

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

1 statements that it has made".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And likewise, as Commissioner Ohigashi, if



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

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

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

14 **COMMISSIONER SCHEUER:** Commissioner Okuda?

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

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

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

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

1 agree, seconder Commissioner Cabral?

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

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

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

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

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

16 And I'm not really convinced to the Church  
17 petitioner's arguments, and I kind of go back to  
18 that the official LUC Map H65 of Papaikou accurately  
19 reflects the commission's intent in the 1969  
20 boundary review for properties locating -- located  
21 along the Hilo Papaikou coastline.

22 So I'll -- I'll be voting for, in favor of  
23 the motion, Mr. Chair.

24 **COMMISSIONER SCHEUER:** Thank you very  
25 much, Commissioner Aczon. Anything further? I don't

1 want to cut you off. Commissioner Giovanni?

2 **COMMISSIONER GIOVANNI:** Thank you, Chair.

3 I will also be joining my fellow commissioners  
4 who've already spoken in support of the motion as  
5 amended for many of the same reasons that have been  
6 given.

7 I just want to add to that, however, that  
8 I was a resident of the beautiful Hamakua Coast for  
9 five years during the period when many of these  
10 parcels of land came up for sale. It was like a land  
11 rush, and there was a lot of confusion by the  
12 parties involved in terms of representations by  
13 realtors, in terms of interpretations that were  
14 bandied about.

15 It was generally known to the residents of  
16 the area that there was uncertainty, and it seems to  
17 me personally that the Churches entered into their  
18 real estate purchase with their eyes wide open,  
19 quote-unquote, meaning they knew it was conservation  
20 land and districted as such. And they expected --  
21 they must have expected that there were some  
22 complications or burdens to fulfill their dream.

23 They probably had no real appreciation for  
24 how burdensome or complicated it could be.  
25 Nonetheless, I am sympathetic to their efforts,

1 having to have gone through what they've gone  
2 through, but that's the reality of purchasing  
3 conservation districted land on the coast in  
4 Hawai'i.

5 So eyes wide open, it's unfortunate. I  
6 think this -- this matter, if they want to pursue  
7 it, is far more suited for a petition as a district  
8 boundary amendment. I will support the motion for  
9 denial. Thank you.

10 **COMMISSIONER SCHEUER:** Thank you,  
11 Commissioner Giovanni. Commissioners, anything  
12 further? Commissioner Wong?

13 **COMMISSIONER WONG:** No, Chair. Other  
14 commissioners were eloquent enough. I'll just say  
15 I'm going to support the motion.

16 **COMMISSIONER SCHEUER:** Seeing no further  
17 statements from the commissioners, I will add to my  
18 original comments.

19 I'm going to vote in favor of the motion  
20 as well. I agree with Commissioner Okuda's statement  
21 regarding the applicable standard that there has to  
22 be a preponderance of the evidence.

23 And while Mr. Church and Ms. Hildal have  
24 certainly laid out some very interesting points, I  
25 believe in his oral presentation, towards the end of

1 it, Mr. Church stated that he was forced to  
2 interpret based on the absence of certain  
3 information that this is what the commission had  
4 done in the past.

5 That doesn't rise to the standard, I  
6 believe, that we need to follow in this case. And  
7 then the second reason, just to explain a little bit  
8 more which came up during our deliberations, I'm  
9 actually fairly confident that if we ruled in favor  
10 in this case, we would end up in litigation. We  
11 would be dramatically affecting the location of the  
12 conservation district versus agricultural district  
13 boundary line along this section of coast.

14 I believe there would be a rush of people  
15 who would come to us seeking reinterpretations.  
16 There could be theoretically -- well, people could  
17 potentially be taking these arguments against former  
18 -- the commission based on former actions as a  
19 commission, were we to rule in favor of the  
20 Churches' motion. I'm not saying those would  
21 prevail, but the standard that we have to look at on  
22 DRs is there a likelihood of litigation.

23 And knowing the County of Hawai'i's  
24 sometimes very relaxed allowance of the building of  
25 homes and residences in an agricultural district, we

1 could see this coastal portion of the state have a  
2 lot more residential use on it, which would go to  
3 the fundamental purposes that we are charged with  
4 protection -- protecting in our actions.

5 That said, I'd just highlight, like, I am  
6 looking forward to, if the Churches are so inclined,  
7 them bringing back their district boundary amendment  
8 petition. I don't know if they're on the 10-yard  
9 line or the 1-yard line on it, but I know that they  
10 are definitely, like, on the home half of the field  
11 and close to being able to bring that in front of  
12 us.

13 So with that said, is there anything  
14 further? If not, Mr. Orodenger, will you please  
15 poll the commission?

16 **MR. ORODENKER:** Thank you, Mr. Chair. The  
17 motion is to deny the petition, including the  
18 request for waiver of fees. Commissioner Okuda?

19 **COMMISSIONER OKUDA:** Yes.

20 **MR. ORODENKER:** Commissioner Cabral?

21 **COMMISSIONER CABRAL:** Yes.

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

23 **COMMISSIONER ACZON:** Aye.

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

25 **COMMISSIONER GIOVANNI:** Aye.

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

2           **COMMISSIONER CHANG:** Aye.

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

4           **COMMISSIONER OHIGASHI:** Aye.

5           **MR. ORODENKER:** Commissioner Wong?

6           **COMMISSIONER WONG:** Aye.

7           **MR. ORODENKER:** Chair Scheuer?

8           **COMMISSIONER SCHEUER:** Aye.

9           **MR. ORODENKER:** Thank you, Mr. Chair. The  
10 motion passes with eight votes, unanimously.

11           **COMMISSIONER SCHEUER:** Thank you very  
12 much. With that, it is 12:31. Our next agenda item  
13 is the Kihei High School matter, but we need to take  
14 a break for lunch.

15           My indication is to go on the shorter side  
16 of things for 30 minutes. I know that might be too  
17 little for certain people, but I'd prefer to meet at  
18 1:05 to take up the Kihei High School matter, which  
19 has considerable things. Commissioner Aczon?

20           **COMMISSIONER ACZON:** Just a reminder that  
21 I will have to leave by 2:30.

22           **COMMISSIONER SCHEUER:** Thank you. And  
23 Commissioner Wong has to leave by 3, I believe.

24           **COMMISSIONER WONG:** Yes, Chair. Thank you.

25           **COMMISSIONER SCHEUER:** Okay. We're going

1 to go into recess and reconvene at 1:05 to take up  
2 the next agenda item.

3 **(Recess taken from 12:31-1:06 p.m.)**

4 **COMMISSIONER SCHEUER:** It is 1:06 p.m.

5 We're back on the record.

6 All I'm going to say at this point is that  
7 I have filed a voluntary recusal on the next agenda  
8 item regarding Kihei School. I'm going to read my  
9 recusal into the record, an email I sent to, among  
10 others, Vice Chair Giovanni on the 3rd.

11 As you're all aware, on August 19th, 2021,  
12 the State Department of Education filed a motion,  
13 quote, for recusal or disqualification of Land Use  
14 Commission Chair Jonathan Scheuer from participation  
15 in any proceedings related to the Department of  
16 Education's motion to amend the Land Use  
17 Commission's Findings of Fact, Conclusions of Law,  
18 and Decision and Order filed July 29th, 2013.

19 Because the motion was filed after the  
20 August 25th agenda for their main motion to amend  
21 was proposed, and hence, this later motion was not  
22 able to properly placed on the agenda, I deferred  
23 both of these matters at our August 25th, 2021,  
24 meeting.

25 After thoughtful consideration, I have



1 decided to recuse myself from any further  
2 deliberations on this petition and the motions  
3 associated with this petition.

4 I do not agree that the petitioner DOE  
5 with regard to their assertions that my recusal or  
6 disqualification was required under the law.

7 However, I do believe their motion for recusal or  
8 disqualification is itself a distraction.

9 Because of this, I further believe my  
10 withdrawal from deliberations will eliminate the  
11 distraction and allow the remaining commissioners to  
12 focus on the substantive matters before the Land Use  
13 Commission, which most importantly, is concerned  
14 with the safety of students and other pedestrians  
15 related to this docket.

16 So from here, First Vice Chair Giovanni  
17 will chair the meeting, and I will excuse myself.  
18 Mahalo nui.

19 **COMMISSIONER GIOVANNI:** Thank you, Chair  
20 Scheuer, for your careful consideration and  
21 thoughts. We will miss you.

22 But we will proceed with the next agenda  
23 item. I am in absence of a gavel that Chair Scheuer  
24 has, so I will probably be making different noises  
25 along the way.

1 The next matter is item A11794, Department  
2 of Education Kihei School, Maui, to consider  
3 petitioner's emergency motion for disqualification  
4 of LUC chair from participation in any proceeding  
5 related to the DOE motion to amend the Land Use  
6 Commission Findings of Fact, Conclusions of Law, and  
7 Decision and Order filed July 29th.

8 This motion is now rendered as moot due to  
9 the Chair Scheuer's voluntary recusal. We will  
10 therefore move on to the next agenda item relating  
11 to Kihei High School.

12 We will now consider the petitioner  
13 Department of Education Kihei High School motion to  
14 amend the LUC's finding of fact, conclusions of law,  
15 and decision and order that was filed July 29th,  
16 2013.

17 Can I ask the parties please identify  
18 themselves in this petition, starting with  
19 petitioner?

20 **MR. FUJIOKA:** My name is Stuart Fujioka,  
21 Deputy Attorney General appearing on behalf of the  
22 petitioners.

23 **COMMISSIONER GIOVANNI:** Is there anybody  
24 with you, or are you just the sole representative  
25 for DOE?

1           **MR. FUJIOKA:** On the panel, it's just me.  
2 There are two deputies listening -- from my office  
3 listening in, and I do have some -- I'm hoping that  
4 Randall Tanaka will be joining us. He's been in and  
5 out.

6           **COMMISSIONER GIOVANNI:** Okay. Thank you.  
7 From OPSD?

8           **MS. KATO:** Alison Kato, Deputy Attorney  
9 General for the Office of Planning and Sustainable  
10 Development. Also here are Rodney Funakoshi,  
11 Lorraine Maki, and Mary Alice Evans from OPSD. Thank  
12 you.

13           **COMMISSIONER GIOVANNI:** Thank you.  
14 County of Maui?

15           **MR. HOPPER:** Thank you, Mr. Chair. Michael  
16 Hopper, Deputy Corporation Counsel representing the  
17 Maui County Department of Planning. With me is  
18 Deputy Planning Director Jordan Hart.

19           **COMMISSIONER GIOVANNI:** Thank you. Okay.  
20 Before we begin, I'd like to update the record. On  
21 November 2nd, 2020, the commission received  
22 petitioner's update regarding the motion to amend  
23 the Land Use Commission's Finding of Facts,  
24 Conclusions of Law, Decision and Order filed July  
25 29th, 2013, and Exhibits 10 through 18 and the

1 accompanying certificate of service.

2 From November 2nd to 4th, the commission  
3 received testimony from Andrew Beerer, Mike Moran,  
4 Libby and Terry Fulton, Patricia Stillwell,  
5 Representative Tina Wildberger.

6 November 4th, 2020, the commission met via  
7 Zoom virtual conferencing to hear this matter. On  
8 November 10th, the commission mailed LUC questions  
9 for DOE and DOT.

10 On February 1st, 2021, petitioner filed  
11 its response to LUC's letter dated November 10th,  
12 2020, with respect to the petitioner's motion to  
13 amend the LUC's Findings of Fact, Conclusions of  
14 Law, and Decision and Order filed July 29th, 2013,  
15 Exhibits 19 to 30.

16 On May 4th, 2021, the commission received  
17 petitioner's request for hearing in reference to the  
18 motion to amend. On July 29th, petitioner filed its  
19 request for the issuance of written findings on its  
20 August 20, 2020, motion to amend the Land Use  
21 Commission's Findings of Fact, et cetera, a  
22 declaration of Stuart Fujioka and Exhibits 31 to 37.

23 On August 2nd, 2021, the commission  
24 received DOE's 2021 annual report from the  
25 petitioner. On August 12th, 2021, LUC emailed and

1 mailed out LUC's meeting agenda for the August 25th,  
2 2021, meeting to the parties in this docket and to  
3 the statewide and county lists.

4 On August 17th, 2021, OPSD filed its  
5 response to the petitioner's request and for the  
6 issuance of written findings. Also on that day, the  
7 commission received public testimony from Michelle  
8 Muir White. On August 19th, 2021, the commission  
9 received DOE's emergency motion for recusal or  
10 disqualification of LUC's chair.

11 On August 24th, the commission received  
12 Maui County's petition of statement as to the DOE's  
13 request for issuance of its written findings of  
14 fact.

15 On August 25th, 2021, the commission met  
16 via Zoom to hear this matter, but due to the  
17 emergency motion filed by the petitioner, decided to  
18 defer this matter for today to properly agendize it.

19 On August 31st, 2021, petitioner filed  
20 supplemental exhibits to its motion, Exhibits 38,  
21 39, 40, 41, and 42.

22 Between August 17th and September 7th --  
23 that's yesterday -- the commission has received 327  
24 public written testimonies in this -- in this  
25 petition. Those will not be identified, but they are

1 posted on our website due to the lengthy amount of  
2 them.

3 On September 1st, 2021, LUC mailed and  
4 emailed an agenda for the September 8th and 9th  
5 meetings to the parties in this docket and the  
6 statewide and county lists. On September 3rd, 2021,  
7 the commission received testimony from the Wailea  
8 Community Association. Also on that day, the  
9 commission received OPSD's response to DOE's  
10 emergency motion for recusal.

11 On September 3rd, 2021, the commission  
12 received an email communication from Chair Jonathan  
13 Scheuer formally recusing himself from further  
14 participation in this matter, and this morning Chair  
15 Scheuer voluntarily recused himself from the  
16 proceedings.

17 We also had two late filings of public  
18 testimony that were also posted received yesterday.  
19 One were Exhibits 43 to 44 from the petitioner and  
20 their certificates of service, both of which have  
21 been posted.

22 So let me run over our procedure for this  
23 docket. First, I will recognize any written public  
24 testimony that has been submitted in this matter.

25 Next, I will call on individuals who want

1 to provide public testimony in this docket. All such  
2 individuals will identify themselves using their  
3 Raise Hand webinar function on their device screens  
4 or by pressing \*9 if accessing by telephone.

5 Let me say that I do not have the same  
6 functionality and visibility as Chair Scheuer did  
7 from his location, so I will be relying on Mr.  
8 Derrickson, who is a member of the LUC staff, to  
9 work with me online to recognize and call into the  
10 Zoom room for testimony, for public testimony, for  
11 those. So it may be a little bit cumbersome compared  
12 to what you've been used to, but we're going to have  
13 to work through that.

14 But once you get in there, you'll be  
15 called into our virtual witness box. You'll be able  
16 to and will be asked to turn on your audio and video  
17 and will be sworn in by me. You'll be asked to keep  
18 your testimony to two minutes each and will also  
19 remain available after the testimony to respond to  
20 any questions the parties or commissioners may have.

21 When all questions have been completed, I  
22 will excuse the witness, put them back into the  
23 viewing audience. Again, I will ask Mr. Derrickson  
24 to assist me in doing this maneuver, and we will  
25 call the next witness into the virtual witness box.

1 The commission will then begin proceeding  
2 on the motion to amend starting with the  
3 petitioner's presentation followed by questions and  
4 answers from the commissioners.

5 Next, the County of Planning -- County of  
6 Maui Planning Department will make its presentations  
7 and receive questions. Finally, I will call on the  
8 state's Office of Planning and Sustainable  
9 Development to make its presentations and receive  
10 questions and comments.

11 Petitioner will then be given the  
12 opportunity to provide any rebuttal it wishes to put  
13 on the record. The commission will then hear the  
14 request of issuance of written findings.

15 Finally, after all parties have presented  
16 their arguments on the petitioner's motion to amend  
17 and the request for the issuance of written  
18 findings, the commission will conduct deliberations  
19 and issue a decision on this motion.

20 I will also note for the parties and the  
21 public and from time to time, I will be calling for  
22 short breaks of approximately 10 minutes. Let me  
23 note that the intent as of this time is that due to  
24 having two members of the commission -- two  
25 commissioners will be leaving, one at 2:30 today and



1 one at 3:00, I intend to adjourn this meeting at  
2 3:00 today and therefore will only plan to call one  
3 10-minute recess at approximately 2:00.

4 Are there any questions with our  
5 procedures today on the matter? First, from the  
6 petitioner.

7 **MR. FUJIOKA:** I don't have a question on  
8 the procedure, but I did want to say that when the  
9 filings were being decided, there was one that was  
10 made early this morning. We submitted an Exhibit 45.  
11 I think the list only went up to 44.

12 **COMMISSIONER GIOVANNI:** Yeah. I will be  
13 asking next to the staff, LUC staff, about any  
14 filings, so we'll catch that at the time.

15 **MR. FUJIOKA:** Thank you. Other than that,  
16 nothing on the procedure.

17 **COMMISSIONER GIOVANNI:** Thank you.  
18 County?

19 **MR. HOPPER:** No, Chair -- I mean Vice  
20 Chair. We also had a late filing, so hopefully, that  
21 will be addressed in the same manner. Thank you.

22 **COMMISSIONER GIOVANNI:** Thank you. OPSD?

23 **MS. KATO:** No questions. Thanks.

24 **COMMISSIONER GIOVANNI:** Okay. So now, Mr.  
25 Hakoda, have there been any written testimony

1 submitted on this matter or any late filings?

2 **MR. HAKODA:** Yes, Mr. Vice Chair. As Mr.  
3 Fujioka mentioned, there were two late filings, one  
4 as late as this morning about 8:30. It was the  
5 Exhibit 45 and the earlier one that you mentioned,  
6 the recap of the record.

7 County of Maui also submitted a  
8 supplemental update to their position statement with  
9 a couple of exhibits that Commission Okuda had  
10 requested in regards to the pedestrian separation  
11 traffic and pedestrian crosswalks.

12 **COMMISSIONER GIOVANNI:** Okay. Thank you  
13 for that clarification. So now we'll proceed to  
14 public testimony. Mr. Derrickson, are you ready to  
15 work with me on this?

16 **MR. DERRICKSON:** I am.

17 **COMMISSIONER GIOVANNI:** So let me first --  
18 I know we've had a request from somebody who has to  
19 leave early. Would it be possible to bring Ms. -- I  
20 believe it's -- let me just doublecheck.

21 Yeah. I think Kelly is in the waiting  
22 room. Can you see Kelly in the waiting room?

23 **MR. DERRICKSON:** Kelly King?

24 **COMMISSIONER GIOVANNI:** Kelly King. Yes.

25 **MR. DERRICKSON:** Yes.

1           **COMMISSIONER GIOVANNI:** Since she has to  
2 leave early for another matter, I would like to move  
3 forward and bring her in first.

4           **MR. DERRICKSON:** Yes. So I'll bring in  
5 Kelly King first, with Mike Moran on deck.

6           **COMMISSIONER GIOVANNI:** Aloha, Kelly.

7           **MS. KING:** Aloha, commissioners.

8           **COMMISSIONER GIOVANNI:** Guys, can you  
9 please say your name and address for the record, and  
10 may I swear you in?

11           **MS. KING:** Okay. My name is Kelly Takaya  
12 King. I live at 72 Kalola Place, Kihei, Hawai'i  
13 96753.

14           **COMMISSIONER GIOVANNI:** Do you swear or  
15 affirm the testimony that you're about to give will  
16 be the truth?

17           **MS. KING:** I do.

18           **COMMISSIONER GIOVANNI:** Please proceed.  
19 You have two minutes.

20           **MS. KING:** Okay. Thank you so much,  
21 Commissioner Giovanni. I'm really happy to be here.  
22 I have my -- I had submitted written testimony  
23 yesterday, so I stand on that testimony.

24           But I want to -- I want to impress that  
25 I'm speaking as a longtime Kihei resident, 40 years

1 as a councilmember for the South Maui District, as a  
2 former Board of Education representative for Maui  
3 District, and most importantly, as a parent who has  
4 raised two children in Kihei who are now out of  
5 college.

6 I thought a long time ago when I joined  
7 the group that was working for this high school that  
8 was trying to get the Kihei High School built, that  
9 my kids would actually be able to go there, but that  
10 -- that has long passed.

11 But I still have concerns for my community  
12 and the safety of our students and our children. And  
13 as you have seen in my written testimony, the  
14 underpass is vitally important for this community.

15 You'll hear a lot of other testimony in  
16 regards to the report that was done for the South  
17 Maui community in connection with pedestrian and  
18 bicycle paths called "The Safe Routes to Kihei High  
19 School Pedestrian Route Safety Study" in 2014, and  
20 you'll note in that study that it recommends  
21 Waipuilani Gulch as the best site for the underpass.  
22 And the reasons, I'm sure, will come up in other  
23 people's testimonies.

24 I want to talk about safe routes and  
25 pedestrian safety because our council just passed a

1 resolution recognizing August 2021 as Pedestrian  
2 Safety Month.

3           And I have to tell you it makes me really  
4 sad that the Department of Education is setting  
5 aside the safety of our students and our high school  
6 children in this area, asking them to walk across a  
7 four-lane highway to just to get to school.

8           But safety is a primary component of  
9 County of Maui's Vision Zero Maui Action Plan. And  
10 to me, this does not fit in with -- with Vision  
11 Zero. We've already had, just in the recent couple  
12 of years, one young lady who was killed in an auto  
13 accident on that highway in that same area.

14           Another goal of our Vision Plan is to  
15 institute Vision's -- institutionalize Vision Zero.  
16 That requires agencies, organizations, and  
17 jurisdictions across Maui to collaborate and build a  
18 broad coalition of support for Vision Zero so that  
19 our principles can be imbedded in the planning,  
20 design, prioritization, funding, and implementation.

21           And then lastly, I didn't have this in my  
22 testimony, but I wanted to point out, as others may  
23 as well, that our Kihei Makena Community Plan  
24 actually states upon adoption of this plan, allow no  
25 further development unless infrastructure, public

1 facilities, and services needed to service new  
2 development are available prior to or concurrent  
3 with the impacts of new development, and under the  
4 physical and social infrastructure goal, allow no  
5 development where its infrastructure may not be  
6 available concurrent with the development's impacts.

7           The crossing of a highway is a huge  
8 impact, and we -- I think the community, from the  
9 people that I've talked to, there's nobody who has  
10 said we're so ready to open this school that we're  
11 willing to let our children cross that crowded  
12 highway in that -- that dangerous intersection, and  
13 on a highway that was meant to expedite traffic as  
14 well.

15           So I just hope you pay attention to what  
16 we have as a community decided. And we are in the  
17 review period right now, but right now this is the  
18 language from our existing community plan.

19           So thank you very much for the opportunity  
20 to testify in opposition to the petition being  
21 proposed today. And I am ready to answer questions,  
22 if you have them. Thank you.

23           **COMMISSIONER GIOVANNI:** Thank you, Ms.  
24 King. Petitioner, do you have any questions for Ms.  
25 King?

1           **MR. FUJIOKA:** No, thank you.

2           **COMMISSIONER GIOVANNI:** County, any  
3 questions?

4           **MR. HOPPER:** No, Chair. Thank you.

5           **COMMISSIONER GIOVANNI:** And OPSD, any  
6 questions?

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

8           **COMMISSIONER GIOVANNI:** Thank you, Ms.  
9 King. Commissioners, any questions for Ms. King?  
10 Commissioner Okuda?

11           **COMMISSIONER OKUDA:** Thank you very much,  
12 Mr. Chair. Councilmember King, I'm going to ask you  
13 a question about Exhibit 6, which was attached to  
14 the petitioner's motion to amend the Land Use  
15 Commission's Findings of Fact, et cetera.

16           In that Exhibit 6, which was Resolution  
17 No., I believe, 19-20 adopted by the Council of the  
18 County of Maui on February 1, 2019, let me read a  
19 very short sentence from that resolution, and I'm  
20 going to ask you whether or not what I read  
21 accurately reflected the representations made by the  
22 state of Hawai'i to the Maui County Council.

23           And this is my quotation, reading from the  
24 resolution. Quote, whereas during a public meeting  
25 on the proposed change in zoning bill that become

1 ordinance 4135 on October 30, 2013, the council's  
2 land use committee received assurances from  
3 representatives of the state that an overpass or  
4 underpass would be provided pursuant to the Land Use  
5 Commission's conditions.

6 Is that your recollection of what took  
7 place at the council land use committee's meeting,  
8 to the best of your knowledge?

9 **MS. KING:** Yes. Thank you, Commissioner  
10 Okuda. To the best of my knowledge, that is exactly  
11 what took place, that we were assuming at that point  
12 that they were following through with the underpass  
13 or overpass.

14 **COMMISSIONER OKUDA:** Would it be fair to  
15 say -- or you tell me. Did the county council of  
16 Maui rely on those representations or assurances as  
17 described in Resolution No. 19-20, the  
18 representations or assurances that were made by the  
19 state?

20 **MS. KING:** Yes. I believe so. That is why  
21 we passed that resolution unanimously. I can't say  
22 for sure what was going through each councilmember's  
23 minds, but that was part of the discussion, as I  
24 recall.

25 **COMMISSIONER OKUDA:** When the term "state"



1 is used, do you have a recollection with more  
2 specificity of what that refers to? Is that the  
3 Department of Transportation, Department of  
4 Education, or your best recollection is it's just  
5 somebody from the state?

6 **MS. KING:** Well, my recollection is, you  
7 know, the way that we talk about the state is that  
8 the state administration encompasses the Department  
9 of Education and the Department of Transportation.  
10 So when we talk about the state, it's usually as a  
11 broad term, it's the administration.

12 **COMMISSIONER OKUDA:** Did anyone from the  
13 state, as that term is used in the resolution, did  
14 anyone from the state come back to the county  
15 council and tell the county council that the state  
16 intended to modify, take back, aggregate, or do  
17 anything different from the assurances that were  
18 given to the Maui County Council?

19 **MS. KING:** No. In my recollection, there  
20 was nobody who made that statement from the state.

21 **COMMISSIONER OKUDA:** Okay. Thank you very  
22 much, Councilmember King. I really appreciate the  
23 clarification. Thank you, Mr. Vice Chair. No  
24 further questions.

25 **COMMISSIONER GIOVANNI:** Thank you.

1 Commissioner Wong, do you have questions for our  
2 witness?

3 **COMMISSIONER WONG:** Yes, Chair. Thank you.  
4 Thank you, Councilmember. Couple of questions. First  
5 off, if I remember correctly in my -- that the  
6 County of Maui still has to do a certificate of  
7 occupancy, so the DOE cannot move in, pretty much,  
8 and start school until a certificate of occupancy is  
9 given by the county; correct?

10 **MS. KING:** Correct.

11 **COMMISSIONER WONG:** So does the -- the  
12 other thing. Please explain this one to me. Can the  
13 council do anything in its wherewithal to stop that  
14 certificate of occupancy or say you cannot do  
15 anything else until you do something?

16 **MS. KING:** Well, yeah, that's a -- thank  
17 you for that question. That's kind of a tricky issue  
18 because, you know, the councilmembers are not  
19 allowed by our charter to direct administrative  
20 employees. But we can set policy.

21 And in my -- in my estimation, the -- the  
22 request that's being made of you today is a  
23 violation of the community plan, the Kihei Makena  
24 Community Plan, as I read those sections to you. So  
25 normally, when somebody wants to do something that's

1 outside of the community plan, they would come to  
2 the council for a community plan amendment. And we -  
3 - we have not had that happen yet.

4 So, you know, the -- one of the actions  
5 the council could take is to ask corp counsel for a  
6 legal opinion on whether a community plan amendment  
7 would be required. And if that's the case, then it  
8 would be a council action before the certificate of  
9 occupancy could be issued.

10 **COMMISSIONER WONG:** So this is just  
11 hypothetical.

12 **MS. KING:** Yeah. Mine -- mine was  
13 hypothetical, too, because I don't know what that  
14 corp counsel would be, but, you know, I would be  
15 prepared to ask for it.

16 **COMMISSIONER WONG:** Just because -- I'm  
17 just thinking hypothetically that let's say, you  
18 know, you go down that route, council does go down  
19 that route to ask corporate counsel. So you pretty  
20 much could stop DOE from moving in at that point in  
21 time; correct?

22 **MS. KING:** Correct.

23 **COMMISSIONER WONG:** Okay. No, I just  
24 wanted to know these things just because, you know,  
25 I want to know what is the line of where the council

1 can go and where administrations can go.

2 **MS. KING:** Yeah. I really -- and I  
3 appreciate that question so much. You know, I would  
4 hope that we -- I had hoped that we would be working  
5 together. You know, the Kihei High School is so  
6 important to our community, and as a -- as a parent  
7 of former high school students, I would love to see  
8 that school opened. But not at the expense of even  
9 one life.

10 So, you know, I really appreciate your --  
11 your discussion, because there are things, you know,  
12 that we are going to have to think about if we don't  
13 get the ruling that we need today.

14 **COMMISSIONER WONG:** Thank you,  
15 councilmember. I just -- like a father, also, and  
16 I'm going to, you know, I'll put here that I also  
17 think the same way. But thank you again. Thank you,  
18 Chair.

19 **MS. KING:** Thank you.

20 **COMMISSIONER GIOVANNI:** Thank you.  
21 Commissioners, anybody else? Commissioner Okuda,  
22 you have follow-up question for Councilmember King?  
23 Put your hand down, then, I guess. Thank you.

24 Seeing no further questions, Councilmember  
25 King, thank you for taking the time today to

1 testify.

2 **MS. KING:** Okay. Thank you. And thank you  
3 to all your commissioners for all your good work. I  
4 sat through the first issue, and I really  
5 appreciated all your comments and questioning.

6 **COMMISSIONER GIOVANNI:** Thank you.

7 **MS. KING:** Aloha.

8 **COMMISSIONER GIOVANNI:** Aloha. Mr.  
9 Derrickson, who is our next public witness?

10 **MR. DERRICKSON:** Next public witness is  
11 Mike Moran.

12 **COMMISSIONER GIOVANNI:** Will you invite  
13 him to the virtual room, please?

14 **MR. DERRICKSON:** Yes. It's in process.  
15 Next up.

16 **COMMISSIONER GIOVANNI:** Who's on deck?

17 **MR. DERRICKSON:** Next up on deck is Buck  
18 Joiner.

19 **COMMISSIONER GIOVANNI:** Thank you. Mr.  
20 Moran, please put on your video and your audio.

21 **MR. MORAN:** Aloha, commissioners. My name  
22 is Mike Moran. I live at 167 Ahaaina Way in Kihei,  
23 and I am testifying as president of the Kihei  
24 Community Association for the commission, and I  
25 swear to tell the truth.

1           **COMMISSIONER GIOVANNI:** Okay. Well, you  
2 took the words out of my mouth, so please proceed.  
3 You've got two minutes.

4           **MR. MORAN:** Thank you, sir. Appreciate  
5 Vice Chair Giovanni for your stepping in here. And  
6 please excuse me. I'll be peeking down. I'm going to  
7 try and squeeze this into two minutes.

8           Mahalo for your volunteer public service,  
9 especially those commissioners who recently re-  
10 upped. It seems like deja vu all over again, as none  
11 of you were there in 2013, when this original  
12 condition was approved, as we were that day.

13           You have been involved numerous times,  
14 such as your site visit over three years ago, and  
15 more recently, the declaratory ruling in 2019, and  
16 then the deferral in 2020.

17           But I would mention that part of that  
18 deferral, the DOE did not reach out to the community  
19 after that decision, and we ask the rhetorical  
20 question, are they obligated to explain when they  
21 simply disregard what is stated by this commission?

22           So we ask has anything changed since the  
23 prior meetings? Is there any valid reason to make a  
24 change after about eight years? You have heard a  
25 plethora of excuses like misunderstanding the

1 meaning of the condition. Is reading comprehension a  
2 requirement of this department named education?

3 Our prime concern remains safety of the  
4 children, but also, our entire community who will  
5 visit the school facilities days and evenings,  
6 school days, and weekends. And the condition placed  
7 by this commission on the DOE back in 2013 remains  
8 sound. Please keep the pedestrians off the highways.

9 But for those who seem to disregard  
10 pedestrians and their safety, perhaps -- and perhaps  
11 have more concern for motor vehicles, we offer this.  
12 Every time any pedestrian walks across the highway,  
13 all traffic stops.

14 Currently, it is unsafe to walk or cycle  
15 along this highway, and the state has no plans to  
16 alter that situation. Rather, the intent is to now  
17 to make it even worse by now having a multiple  
18 function now go across this highway as well.

19 So we ask you to please continue to keep  
20 the condition in place and safeguard our community.  
21 Mahalo for the opportunity to testify.

22 **COMMISSIONER GIOVANNI:** Thank you, Mr.  
23 Moran. Petitioner, do you have any questions for  
24 Mr. Moran?

25 **MR. FUJIOKA:** I'm sorry. I was muted. I do

1 have a few questions, Mr. Vice Chair. Mr. Moran,  
2 are you familiar with the Kihei Community  
3 Association's website?

4 **MR. MORAN:** Yes, sir. I am.

5 **MR. FUJIOKA:** I was -- I'd like to show  
6 you a couple of screenshots and ask you if you can  
7 identify them or verify them.

8 **COMMISSIONER GIOVANNI:** So are these  
9 exhibits that are in the record, Mr. Fujioka?

10 **MR. FUJIOKA:** Yes. Mr. Moran, I'm going  
11 to show you petitioner's Exhibit 43 first. Can you  
12 see it?

13 **MR. MORAN:** Yes, sir.

14 **MR. FUJIOKA:** Do you recognize this as, I  
15 guess, an invitation or advertisement for sign  
16 waving to be held August 19 of this year?

17 **MR. MORAN:** I don't see any. I'm looking  
18 at the part that's highlighted. I don't see anything  
19 about sign waving on there. Is that what you're  
20 referring to?

21 **MR. FUJIOKA:** Do you see a screenshot of  
22 something that -- sorry, something else is on the  
23 screen. You're right. Okay. Right? Display that. Do  
24 you see a screenshot now?

25 **COMMISSIONER GIOVANNI:** We see your --



1           **MR. MORAN:** A screenshot, but it's got  
2 several different very tiny items on it.

3           **MR. FUJIOKA:** I'm sorry. This is -- my  
4 computer is not -- this is not showing what I wanted  
5 you to see.

6           **COMMISSIONER GIOVANNI:** Mr. Fujioka?

7           **MR. FUJIOKA:** Yes.

8           **COMMISSIONER GIOVANNI:** Out of time. Then  
9 we'll proceed. Mr. Fujioka, may I suggest that you  
10 fix this problem on your own time and then present  
11 it as part of your testimony?

12           **MR. FUJIOKA:** Yes, I will. Okay. I could  
13 do that.

14           **COMMISSIONER GIOVANNI:** Thank you. Any  
15 further questions for Mr. Moran?

16           **MR. FUJIOKA:** Just that there was a sign  
17 waving held on August 19 of this year; correct?

18           **MR. MORAN:** That's correct, sir.

19           **MR. FUJIOKA:** Were you there?

20           **MR. MORAN:** I was.

21           **MR. FUJIOKA:** Okay. That's all. Thank you.

22           **COMMISSIONER GIOVANNI:** Thank you. County,  
23 any questions for Mr. Moran?

24           **MR. HOPPER:** No, Mr. Chair.

25           **COMMISSIONER GIOVANNI:** Thank you. OP, any

1 questions for Mr. Moran?

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

3 **COMMISSIONER GIOVANNI:** Thank you.

4 Commissioners, any questions for Mr. Moran? Seeing  
5 -- oh, wait. Commissioner Chang, I see your -- yeah,  
6 it helps me with my little screen if you could also  
7 kind of do this.

8 **COMMISSIONER CHANG:** Yeah. Sorry. I'll  
9 wave.

10 **COMMISSIONER GIOVANNI:** Okay. Commissioner  
11 Chang?

12 **COMMISSIONER CHANG:** And my hands is nice  
13 and brown. It's not yellow, so it's a little  
14 difficult to see. Thank you. Thank you, Chair.

15 Mr. Moran, thank you so much. I greatly  
16 appreciated the Kihei's community diligence and  
17 commitment in this, and yours has become a familiar  
18 face. So thank you for being here again. Greatly  
19 appreciate it.

20 So, Mr. Moran, I'd like to ask you.  
21 Currently, it is Kihei Community Association's  
22 position they are opposing the Department of  
23 Education's motion to amend the -- amend the  
24 condition 1(b).

25 As I read through your testimony dated

1 August 10th, 2021, the KCA is requesting that LUC  
2 mandate the DOE to provide an updated accurate GSPC  
3 feasibility study and updated traffic studies as  
4 required by LUC conditions 1(a) and 1(b). Is that  
5 correct?

6 **MR. MORAN:** That -- that is correct,  
7 Commissioner.

8 **COMMISSIONER CHANG:** And if those studies  
9 -- if those studies -- if LUC requires that these  
10 studies be updated, is the community -- and I'm  
11 going to ask the question of DOE and DOT -- is the  
12 community going to accept the results of those  
13 studies, you know, no matter what?

14 If it says an underpass is not acceptable,  
15 will you accept that?

16 **MR. MORAN:** I have to -- in my position,  
17 Commissioner, I have to try and speak for the  
18 community.

19 So, you know, I would have to go back to  
20 the community after it happened and try and get the  
21 input. But my -- if it was today, like, what does  
22 the community think? My expectation is the community  
23 would say, no, we're not going to accept anything  
24 but safe passage.

25 I base that on some of the past meetings

1 when I felt the most affected people -- we had -- I  
2 believe it was the 2019 meeting when we had several  
3 potential parents come to the commission and state  
4 that we would rather delay our child going to the  
5 new school rather than have unsafe passage across  
6 this highway. We would rather send our children into  
7 Maui High by bus or whatever rather than unsafe  
8 passage.

9           And we certainly -- we tried to the last  
10 couple of days -- we tried to look at that 300-some  
11 written testimonies, and we certainly didn't get  
12 through all of them. I would guess, scanning wildly  
13 through them, I might have gotten to a hundred, and  
14 in those, we did not see one testifier saying  
15 anything but they wanted the -- preferably the  
16 underpass, but they wanted the condition kept in  
17 place.

18           So based on that, I would have to assume -  
19 - and I'm assuming because I would have to get it  
20 from the community -- that, no, the community is  
21 holding strong. We want nothing but safe passage.

22           **COMMISSIONER CHANG:** And I appreciate your  
23 candor on that. I'll share with you -- and, you  
24 know, we're only at the beginning of the proceeding,  
25 but just we have to rely on expert -- expert

1 testimony.

2 And I understand parents' fear. I am a  
3 parent, and I have grandchildren as well. Totally  
4 understand and appreciate that.

5 But if there is expert testimony saying  
6 that, one, the underpass or the overpass or the  
7 safest is this roundabout or the underpass or  
8 overpass is not safe -- well, let me ask you this  
9 question.

10 What is the community relying on to say  
11 that it's not safe? I mean that the roundabout is  
12 not safe and that the only thing that will be safe  
13 is the overpass or underpass?

14 **MR. MORAN:** To clarify, Commissioner,  
15 going back to, you know, 2013, KCA has for years  
16 advocated for a roundabout in place of a crossroad.  
17 We have -- we have had -- I mean, we're an unfunded  
18 volunteer group, but we even paid almost a thousand  
19 bucks, which is a lot of money to us, to get  
20 professional input on the advantage of a roundabout  
21 over a cross section.

22 And overwhelmingly, all experts from the  
23 federal government down indicate that a roundabout  
24 is safer for all modes of transportation. It's safer  
25 for the pedestrians. It's safer for the bicyclists.

1 It's safer for the people in the vehicles.

2 So we have advocated for a roundabout.

3 Back in those days, the Department of Transportation  
4 of Hawai'i opposed the roundabout. They -- they were  
5 completely opposed to it. They said we've never done  
6 it; we're not going to do it. And we continued to --  
7 to persevere.

8 Now, as you probably know, the Department  
9 of Transportation has completely reversed that  
10 position and is now taking the position that the  
11 federal government does, that most states do, that  
12 many countries around the world do, saying a  
13 roundabout is safer for everyone. And the concept is  
14 that the vehicles must be physically forced to drive  
15 slower.

16 So the concept is, okay, well, that will  
17 make any collisions -- and we say they're not  
18 accidents; they're collisions -- any collisions less  
19 severe, because any engineer will tell you that the  
20 slower the vehicle is moving, the less damage it  
21 will do, the more chance there is to avert the  
22 collision by people getting out of the way.

23 So when we hear expert testimony,  
24 sometimes the expert testimony changes over the  
25 years. And there's many, many experts who have given

1 input on this, saying that the -- the underpass is  
2 the safest choice. The grade-separated crossing,  
3 either over or under, is certainly safer than going  
4 across the highway. And the more practical way,  
5 because it would be used more, is to do a -- a  
6 underpass.

7 So we've relied on expert testimony, and  
8 we see how the State Department of Transportation  
9 changed their position on roundabout, but they --  
10 they don't seem to be changing their position. And  
11 they're kind of the exception to the rule from all  
12 the so-called expert testimony that we have.

13 We have seen and we have submitted a lot  
14 of it. We've had several meetings over the years  
15 with different people, and we have presented  
16 examples of what are generally referred to as river  
17 walks, where a -- there's a stream. Even though our  
18 stream is dry 99 9/10ths of the time, we get it,  
19 that sometimes it would flood. But if you have --

20 **COMMISSIONER CHANG:** Mr. Moran?

21 **MR. MORAN:** Oh, I'm going on too long.

22 **COMMISSIONER CHANG:** I'm sorry. I'm sorry  
23 to interject, because I know that we've got kind of  
24 a short time period, so I just want --

25 **MR. MORAN:** Thank you.

1           **COMMISSIONER CHANG:** Because there is an -  
2 - there is an agreement on the roundabout, and I  
3 guess the question that I'm facing, the issue that  
4 I'm facing right now is there's a condition that  
5 before the school can open, that these things have  
6 to -- have to occur.

7           And you seem to say that many parents and  
8 community members that you've spoken to have said  
9 we're willing to say -- and I just heard from Mrs.  
10 King that we're willing to say we'd rather not open  
11 the school at all, if it means we don't get the  
12 underpass or the overpass.

13           So I'm wondering is the community willing  
14 to accept sort of this phased approach of doing the  
15 roundabout first, open the school, Phase I; continue  
16 the studies, get an updated TIAR, GSPC, before we  
17 move into Phase II, which may or may not include the  
18 overpass or the underpass?

19           But as a compromise -- and I believe the  
20 county's raised it, so has the community talked  
21 about that and is the community willing to accept  
22 that phased approach?

23           **MR. MORAN:** Well, our understanding,  
24 Commissioner, from hearing the Department of  
25 Transportation's spokesperson last month said that



1 the -- the roundabout would start construction next  
2 month. Now, October -- it would be finished in July.  
3 No questions asked. The roundabout is a go.

4 That's what we heard the Department of  
5 Transportation state publicly. So that doesn't seem  
6 to be part of the equation. They're going to do it  
7 before the Department of Education has forecast when  
8 the school is going to be opened.

9 We do have some questions about when the  
10 Department of Education says the school is going to  
11 be opened, because we go back to 2016 when they told  
12 us the school was going to be opened, so we always  
13 have reservations on these predictions, when it will  
14 be.

15 But our understanding is the earliest the  
16 DOE says the school would be opened would be August  
17 of next year. The DOT says the roundabout will be  
18 completed. So that part seems to be a done deal on  
19 the DOT's part.

20 But our community is saying having a  
21 roundabout, which will slow the vehicles down, is  
22 still not -- we don't want to make a compromise that  
23 it's okay for a child crossing the highway to get  
24 hit by a car going 20 miles an hour as opposed to a  
25 car going 50 miles an hour.

1           **COMMISSIONER GIOVANNI:** Mr. Moran, let me  
2 -- let me stop you there.

3           **MR. MORAN:** Yes, sir.

4           **COMMISSIONER GIOVANNI:** I don't think  
5 you're -- we appreciate the -- the energy that you  
6 have behind your position, but you need to listen to  
7 the questions and answer them specifically.

8           **MR. MORAN:** Thank you.

9           **COMMISSIONER GIOVANNI:** And let me  
10 encourage you when you're asked a yes or no  
11 question, try to answer it yes or no.

12           I think the question was would you agree,  
13 yes or no, to a phased approach where the school is  
14 opened with only a roundabout, and then some future  
15 time, there would be a study that may go up or down  
16 on an overpass or underpass?

17           Yes or no. Would you agree with that  
18 phased approach? Is that a correct statement of your  
19 question?

20           **COMMISSIONER CHANG:** Yes, it is. Thank  
21 you. Thank you, Commissioner Giovanni. Yes.

22           **MR. MORAN:** Today's answer would be no,  
23 sir.

24           **COMMISSIONER GIOVANNI:** Thank you, sir.

25           **COMMISSIONER CHANG:** Thank you. No further

1 questions, Commissioner Giovanni.

2 **COMMISSIONER GIOVANNI:** Thank you.

3 **COMMISSIONER CHANG:** And thank you, Mr.

4 Moran.

5 **COMMISSIONER GIOVANNI:** Commissioner

6 Okuda?

7 **COMMISSIONER OKUDA:** Thank you, Mr. Vice  
8 Chair. Mr. Moran, with respect to the Waipuilani  
9 Gulch, do pedestrians today go and walk underneath  
10 the highway bridge at the Waipuilani Gulch area? In  
11 other words, are people using that underpass as a  
12 method of getting from one side of the highway to  
13 the other side? Is that happening now?

14 **MR. MORAN:** It is certainly happening. I  
15 have personally seen it dozens and dozens and dozens  
16 of times. I ride a --

17 **COMMISSIONER OKUDA:** Okay. That's  
18 basically what I --

19 **MR. MORAN:** Oh, I'm sorry. Yes. Yes. Thank  
20 you.

21 **COMMISSIONER OKUDA:** Yes. Okay. Then let  
22 me ask a question which may or may not be related,  
23 shifting gears slightly to what Mr. Fujioka was  
24 asking.

25 If you had, or since you had all these

1 picketers or sign-wavers -- let's not call them  
2 picketers -- sign-wavers on the highway, how would  
3 you respond to an observation saying KCA is just  
4 exaggerating the danger of the highway because you  
5 all not only invited people to come out and sign  
6 wave, you actually went out there and sign waved.

7 So you're overstating the danger of the  
8 highway. What is your response, if that was the  
9 question or comment?

10 **MR. MORAN:** To be clear, Chair, we were  
11 not on the highway. We were not even on the shoulder  
12 of the highway. We were, I guess, minimal 20 feet,  
13 30 feet away from the shoulder on a plot of land.

14 The land juts out there before the gulch,  
15 and we did have one exuberant sign-waver who did  
16 walk out onto the bridge, and the rest of us were  
17 saying, "Get off there. What, are you crazy? That's  
18 not what we're doing." But, you know, when --

19 **COMMISSIONER OKUDA:** Okay. I -- I --

20 **MR. MORAN:** But, no, we were not out  
21 there, our group.

22 **COMMISSIONER OKUDA:** Okay. Thank you very  
23 much. I just needed clarification of that. Thank  
24 you, Mr. Vice Chair. No further questions.

25 **COMMISSIONER GIOVANNI:** Thank you,

1 Commissioner Okuda. Any other commissioner have a  
2 question for Mr. Moran? Thank you, Mr. Moran.  
3 You're excused.

4 **MR. MORAN:** Oh. Mahalo.

5 **COMMISSIONER GIOVANNI:** So it's 1:56. I  
6 want to take a short break at this time. We will  
7 resume at 2:03. Here's my gavel.

8 **(Recess taken from 1:56-2:04 p.m.)**

9 **COMMISSIONER GIOVANNI:** Okay. We're back  
10 on the record. It's 2:04. Let me just encourage  
11 everyone. This is a Zoom meeting, so we are going to  
12 try to zoom. The intent is to adjourn today at 3.

13 We have six additional testifiers in the  
14 waiting room, which will require us to go through  
15 expeditiously, if we're going to meet our target  
16 adjournment time.

17 And I really encourage everybody to listen  
18 to the questions, and if they're simple yes or no  
19 questions, please answer with a simple yes or no, if  
20 you can. So, Ms. Kato, did you have a comment?

21 **MS. KATO:** Sorry. It was just to ask if we  
22 had an estimated time, but you just gave an  
23 estimated time. Thank you.

24 **COMMISSIONER GIOVANNI:** Very well. Mr.  
25 Derrickson, next up for testimony?

1           **MR. DERRICKSON:** Next up is Buck Joiner,  
2 and on deck is Madeleine Wells.

3           **COMMISSIONER GIOVANNI:** Okay. Mr. Joiner  
4 will be coming in. When you do, Mr. Joiner, please  
5 start your video and your audio.

6           **MR. JOINER:** Hi, there. Camera not  
7 working.

8           **COMMISSIONER GIOVANNI:** Okay. Well, just  
9 go with your audio. We do hear you fine.

10          **MR. JOINER:** I don't understand why the  
11 camera isn't working. I will give oral testimony --

12          **COMMISSIONER GIOVANNI:** Yes.

13          **MR. JOINER:** -- and extreme apologies and  
14 try to share screen, if that possible.

15          **COMMISSIONER GIOVANNI:** You can't give  
16 video. You can't share the screen. It's audio only.

17          **MR. JOINER:** No. Crap. Hang on. I'm not  
18 good at this. There we are. Okay. So I'm Buck Joiner  
19 from Kihei.

20          **COMMISSIONER GIOVANNI:** What's your  
21 address, please?

22          **MR. JOINER:** And I will be telling the  
23 truth. 3443 Malina Place, Kihei.

24          **COMMISSIONER GIOVANNI:** Do you affirm the  
25 testimony you're about to give will be the truth?

1           **MR. JOINER:** Absolutely. Yes.

2           **COMMISSIONER GIOVANNI:** Mr. Joiner, you  
3 have two minutes.

4           **MR. JOINER:** Thank you. I am 40-year Maui  
5 resident, formerly on the board of directors of the  
6 Kihei Community Association. I was chairman of that  
7 traffic safety committee for 12 years.

8           I was also chairman of the Maui County  
9 Traffic Safety Council. I am -- have been a member  
10 of several state highway traffic groups. I'm a  
11 retired professional engineer.

12           There is no consensus right now on the  
13 best solution for students crossing Piilani Highway.  
14 I agree with DOT and DOE, hereafter abbreviated as  
15 DOT-E, that a gargantuan overpass or a tunnel under  
16 Piilani Highway would be grossly expensive and  
17 seldom used. Is my graphic showing?

18           **COMMISSIONER GIOVANNI:** No.

19           **MR. JOINER:** Okay. Then my camera isn't  
20 working either.

21           **COMMISSIONER GIOVANNI:** Please make your  
22 remarks the best you can.

23           **MR. JOINER:** In my written testimony, I  
24 provided a map showing the -- showing that  
25 approximately 85 percent of the students live either

1 north or south of the two bridges that abut the high  
2 school property.

3 And those children have to walk across the  
4 bridge to -- and that bridge is three feet wide. The  
5 bridges are approximately 100 feet long.

6 I'm really -- I am frustrated. Is my  
7 screen showing now?

8 **COMMISSIONER GIOVANNI:** It is.

9 **MR. JOINER:** Okay. I'm just going to have  
10 to go.

11 **COMMISSIONER GIOVANNI:** You're at two  
12 minutes now to complete the process.

13 **MR. JOINER:** Now, 85 percent of the  
14 students live on either side of the bridges, and to  
15 pass those to get to the school, they have to --  
16 they have to cross this bridge. And that picture is  
17 not showing.

18 **COMMISSIONER GIOVANNI:** I'm sorry. Mr.  
19 Joiner, you're going to have to wrap this up.

20 **MR. JOINER:** The bridge is only three feet  
21 wide, the walk path, 100 feet long, cars screaming  
22 past, hundreds of kids, hundreds of cars. It's  
23 absolutely unacceptable. The DOT, DOE have said that  
24 the students may not cross through the gully;  
25 therefore, they have to go over the bridge.



1 So there is a solution, and that is to  
2 build a walkway across the bridge -- across the  
3 gully, the gulches. That will allow 85 percent of  
4 the students to go through that walkway and then  
5 pass under the bridge. And we need two pathways and  
6 two underpasses. If my graphic is showing, you can  
7 see that the --

8 **COMMISSIONER GIOVANNI:** Mr. Joiner?

9 **MR. JOINER:** -- is about equal. The gulch  
10 is dry 99 percent of the time, 99.99, and --

11 **COMMISSIONER GIOVANNI:** Please conclude.

12 **MR. JOINER:** Flooding is a concern. The  
13 walkway could be on pontoons; okay? And that would  
14 eliminate the problem of the -- of the water. Okay.

15 **COMMISSIONER GIOVANNI:** Thank you.

16 **MR. JOINER:** I think I will pause there.

17 **COMMISSIONER GIOVANNI:** Yeah. So,  
18 petitioner, do you have any questions for Mr.  
19 Joiner?

20 **MR. FUJIOKA:** No questions. Thank you.

21 **COMMISSIONER GIOVANNI:** Mr. Hopper, does  
22 County have any questions for Mr. Joiner?

23 **MR. HOPPER:** No questions.

24 **COMMISSIONER GIOVANNI:** Ms. Kato, do you  
25 have any questions for Mr. Joiner?

1 **MS. KATO:** No questions. Thank you.

2 **COMMISSIONER GIOVANNI:** Thank you.

3 Commissioners, any questions for Mr. Joiner?

4 **MR. JOINER:** I'm sure my screen worked  
5 last night in a test run.

6 **COMMISSIONER GIOVANNI:** Seeing none, thank  
7 you, Mr. Joiner, for joining us today. We did see  
8 your screen. So we will excuse you now. Mr.  
9 Derrickson, could you bring our next witness?

10 **MR. DERRICKSON:** Next witness is Madeleine  
11 Wells, followed by Louise Lambert.

12 **COMMISSIONER GIOVANNI:** Thank you. Ms.  
13 Wells, please activate your video and your audio, if  
14 you can.

15 **MS. WELLS:** Got it. Okay.

16 **COMMISSIONER GIOVANNI:** Great. We hear  
17 you. Do you affirm the testimony you're about to  
18 give will be the truth?

19 **MS. WELLS:** Yes.

20 **COMMISSIONER GIOVANNI:** Please give us  
21 your full name and address.

22 **MS. WELLS:** Okay.

23 **COMMISSIONER GIOVANNI:** And then give us a  
24 couple of minutes of testimony.

25 **MS. WELLS:** Okay. Madeleine Wells. I live

1 at 168 Oluea Circle in Kihei 9 -- you know what I  
2 mean, in Kihei. Sorry. And, okay, so I got to run  
3 through all this stuff.

4 Aloha, Land Use Commission. I'm testifying  
5 to urge the commission to deny DOE's petition to  
6 change the above or below grade requirements for  
7 students to cross Piilani Highway to the new high  
8 school.

9 I live off Kulanihakoi, directly across  
10 the highway from the new school. Although this  
11 subdivision where I live is in a sheltered  
12 enclosure, the highway noise sounds like we are  
13 living just below a major freeway.

14 During the years prior to this new traffic  
15 light installation three weeks ago, I would be stuck  
16 for many minutes waiting to make my left turn off  
17 the highway onto Kulanihakoi.

18 Once I noticed in real time how long the  
19 wait was, when I heard how many songs played on  
20 Pandora, it was almost four full songs.

21 Since most are in the four to five-minute  
22 range, it's easy enough to do the math, but not easy  
23 getting across. Not easy for students either, which  
24 is why charter school kids have to be driven, no  
25 matter how close they live, as long -- if it's makai

1 of the highway.

2 My car is heavy and built close to the  
3 ground. Even so, it gets jostled alarmingly in the  
4 high winds caused from air currents moved by  
5 multiple vehicles racing more than 20 miles above  
6 the speed limit. This is a windy part of the island,  
7 but during the shutdown last year, it was amazing  
8 how still the air seemed by comparison.

9 Until I can get safely wedged into the  
10 left turnoff section, other cars close in behind me,  
11 pressuring me to speed. Many travel at terrifying  
12 velocity. Posted speeds in this area are 30 or 35.  
13 Most cars in the left lane are going between 50 and  
14 65, but plenty at 70 and above.

15 All it would take is a split-second  
16 attention lapse of an oncoming driver for me to get  
17 knocked across the road and cause a multiple wreck  
18 in both directions. But I would be inside my car.  
19 Imagine what it would do to a child on foot or  
20 skateboard, or several adolescents walking together.

21 They are under pressure to get to class on  
22 time or to practice or rehearsal or meetings. When  
23 two minutes can make the difference in a lowered  
24 grade or some form of demerit, it's easy to see how  
25 some might be tempted to run across against the

1 stoplight. A walkway --

2 **COMMISSIONER GIOVANNI:** Please summarize,  
3 if you can.

4 **MS. WELLS:** Okay. Okay. A walkway under  
5 the Waipuilani and Kulanihakoi bridges would provide  
6 access mauka and makai to high school students and  
7 charter school students up the hill on Lipoa.

8 Engineering information responses. Buck  
9 provided that. I guess, hopefully, you all we have a  
10 chance to see it later.

11 Anyway, that's the only practical  
12 solution. It would cost almost nothing. It could be  
13 finished within about three weeks. And that could  
14 happen way before this roundabout would be done.  
15 This is a really dangerous stretch of road, and  
16 despite police issuing tickets up and down the  
17 highway, the speeding is heavy.

18 Community members do -- yeah, there's no  
19 way this could happen without sacrificed keiki lives  
20 in the --

21 **COMMISSIONER GIOVANNI:** Thank you.

22 **MS. WELLS:** Okay.

23 **COMMISSIONER GIOVANNI:** Thank you very  
24 much.

25 **MS. WELLS:** Thanks for your consideration.

1                   **COMMISSIONER GIOVANNI:** Thank you.

2   Petitioner, questions for Ms. Wells? Mr. Fujioka,  
3   any questions for Ms. Wells?

4                   **MR. FUJIOKA:** I'm sorry. No questions.  
5   Thank you.

6                   **COMMISSIONER GIOVANNI:** Thank you. Mr.  
7   Hopper, any questions?

8                   **MR. HOPPER:** No questions.

9                   **COMMISSIONER GIOVANNI:** Thank you. Ms.  
10   Kato?

11                   **MS. KATO:** No questions. Thank you.

12                   **COMMISSIONER GIOVANNI:** Thank you.  
13   Commissioners, any questions for Ms. Wells? Thank  
14   you, Ms. Wells, for joining us today. You will be  
15   excused now. Thank you.

16                   **MS. WELLS:** Thank you.

17                   **COMMISSIONER GIOVANNI:** Mr. Derrickson,  
18   who's next?

19                   **MR. DERRICKSON:** Louise Lambert.

20                   **COMMISSIONER GIOVANNI:** Thank you.

21                   **MR. DERRICKSON:** Nick Drance on deck.

22                   **COMMISSIONER GIOVANNI:** Who's on deck?

23                   **MR. DERRICKSON:** Nick Drance.

24                   **COMMISSIONER GIOVANNI:** Okay. Thank you.

25   Aloha, Ms. Lambert. Can you hear us?

1 **MS. LAMBERT:** Aloha. Yes. Can you hear me?

2 **COMMISSIONER GIOVANNI:** Yes. We hear you,  
3 and we see you. Do you --

4 **MS. LAMBERT:** Oh, thank you.

5 **COMMISSIONER GIOVANNI:** Do you affirm that  
6 --

7 **MS. LAMBERT:** My name is Louise Lambert. I  
8 live at 3265 Kehala Drive in Kihei 96753.

9 **COMMISSIONER GIOVANNI:** Do you affirm that  
10 your testimony that you're about to give is the  
11 truth?

12 **MS. LAMBERT:** Yes.

13 **COMMISSIONER GIOVANNI:** Please proceed for  
14 two minutes.

15 **MS. LAMBERT:** Thank you. Thank you. Thank  
16 everybody for their support in this matter.

17 I'm a grandparent -- a parent, of course,  
18 but a grandparent, and I have a 10-year-old grandson  
19 who will likely be going to the school. I'm a former  
20 teacher at Montessori Hale o Keiki, which is --  
21 actually was in that neighborhood where the school  
22 entrance is.

23 There are dangerous sidewalks at the  
24 Kulanihakoi and Waipuilani bridges, which Buck has  
25 in his -- his pictures that, hopefully, you all have

1 access to. So hundreds of students will need to  
2 walk, bike, or skate to school who live closer than  
3 the 1.5 miles from school that are ineligible for a  
4 school bus ride.

5 And if we're depending on car rides for  
6 all these hundreds of children, it's definitely  
7 going to create more traffic challenges.

8 So if we expect a large body of students  
9 to only cross at one place, it's not practical.  
10 Students will be coming from north of Kulanihakoī  
11 and south of Waipuīlani, and either we need to widen  
12 the bridges or create safe walkways, bike paths  
13 above, below, or beside the bridges to provide safe  
14 access for the students and all the people coming  
15 and going from school.

16 With three-foot wide bridges with the  
17 cement three foot from the edge of the road for  
18 large groups of youths and fast-moving traffic and  
19 cyclists and skateboards and whatever other means of  
20 transportation youth will use to get to school,  
21 we've got scenes for fatal injuries.

22 Thank you for paying attention to the very  
23 important safety of our youth. I believe underpasses  
24 are necessary for students traveling to and from  
25 school, and so I strongly advocate not waiving the



1 requirement. Thank you very much.

2 **COMMISSIONER GIOVANNI:** Thank you, Ms.  
3 Lambert. You hit two minutes on the button, and I'm  
4 so proud of you for doing so. Thank you.

5 So, petitioner, do you have any questions  
6 for Ms. Lambert?

7 **MR. FUJIOKA:** No questions.

8 **COMMISSIONER GIOVANNI:** Mr. Hopper from  
9 the County, any questions?

10 **MR. HOPPER:** No questions, Chair.

11 **COMMISSIONER GIOVANNI:** Thank you. Ms.  
12 Kato from OPSD, any questions?

13 **MS. KATO:** No questions. Thank you.

14 **COMMISSIONER GIOVANNI:** Thank you.  
15 Commissioners, any questions? Seeing none, thank  
16 you, Ms. Lambert. You'll be excused.

17 **MS. LAMBERT:** Thank you.

18 **COMMISSIONER GIOVANNI:** Mr. Derrickson,  
19 who's next? Who's on deck?

20 **MR. DERRICKSON:** Nick Drance next, and  
21 Andrew Beerer on deck.

22 **COMMISSIONER GIOVANNI:** Mr. Drance, please  
23 activate your audio and visual.

24 **MR. DRANCE:** There we go.

25 **COMMISSIONER GIOVANNI:** There you go.

1           **MR. DRANCE:** All right.

2           **COMMISSIONER GIOVANNI:** Do you affirm that  
3 the testimony you're about to give is the truth?

4           **MR. DRANCE:** I do.

5           **COMMISSIONER GIOVANNI:** Thank you. Can you  
6 please state your name and your address for the  
7 record and proceed with your two minutes of  
8 testimony?

9           **MR. DRANCE:** Nick Drance, 2441 South Kihei  
10 Road, Kihei. That was my assistant. And I will tell  
11 the truth.

12           In the interest of saving time, just let  
13 me reaffirm the testimony from the prior speakers.  
14 And there's a tremendous number of people on social  
15 media, Next Door Neighbor Kihei and Facebook, who  
16 are voicing similar opinions about -- that others  
17 have expressed here. A few have been dropped off  
18 because they were ready to sign up this morning at  
19 9.

20           So this is a big topic with the public  
21 here, and I think if a requirement is made,  
22 requirements are made for a reason, and we should  
23 leave it be and not accept the petitioner's request.  
24 And I thank you.

25           **COMMISSIONER GIOVANNI:** Thank you, Mr.

1 Drance. You just broke the record. Thank you. One  
2 minute. So questions, Mr. Fujioka, from the  
3 petitioner?

4 **MR. FUJIOKA:** No questions. Thank you.

5 **COMMISSIONER GIOVANNI:** Thank you. Mr.  
6 Hopper?

7 **MR. HOPPER:** No questions, Chair.

8 **COMMISSIONER GIOVANNI:** Thank you. Ms.  
9 Kato?

10 **MS. KATO:** No questions. Thank you.

11 **COMMISSIONER GIOVANNI:** Thank you.

12 Commissioners? Seeing none, thank you, Mr. Drance.  
13 You're excused. Thank you for coming forward.

14 **MR. DRANCE:** Thank you.

15 **COMMISSIONER GIOVANNI:** Mr. Beerer, come  
16 into the room. And, Mr. Derrickson, who's on deck?

17 **MR. DERRICKSON:** Andrew Beerer being  
18 promoted and Tina Wildberger on deck.

19 **COMMISSIONER GIOVANNI:** Okay. Is Tina --  
20 is Representative Wildberger the last one in the  
21 room?

22 **MR. DERRICKSON:** Last one with their hand  
23 up. Yes.

24 **COMMISSIONER GIOVANNI:** Thank you. Mr.  
25 Beerer, please activate your audio and video. There

1 you go.

2 **MR. BEERER:** All right. Apologies there.

3 **COMMISSIONER GIOVANNI:** No problem. Do you  
4 affirm that the testimony you're about to give is  
5 the truth?

6 **MR. BEERER:** Yes, I do.

7 **COMMISSIONER GIOVANNI:** Yeah, name and  
8 address for the record, and proceed for two minutes.

9 **MR. BEERER:** My name is Andrew Beerer, 56  
10 Kolola Place, Kihei, Hawai'i 96753.

11 I'm going to give my oral testimony, but  
12 also hope you'll read my written testimony, as it  
13 speaks to the need for updated traffic studies and  
14 the need for DOE compliance with other LUC-imposed  
15 conditions, specifically conditions 1(b), 1(d) for  
16 pedestrian shoulders and condition 2 for annual  
17 updates.

18 I can also address the questions that were  
19 given to Mr. Moran earlier. The Fehr & Peers traffic  
20 studies both mandate an underpass or a grade-  
21 separated crossing in 252031, although I do believe  
22 they use drastically underestimated pedestrian  
23 volumes.

24 So I think a new pedestrian study would  
25 even show greater pedestrian volumes, but they are

1 mandated in those two studies. All right. Let's  
2 talk about the intent of this condition. In 2019,  
3 the LUC reaffirmed that the intent of the condition  
4 was to provide for an over or underpass.

5           Furthermore, at that time, the LUC  
6 reaffirmed that the DOT has no decision-making  
7 power, but only advises. Today the intent of the  
8 condition is still true: to provide a safe grade-  
9 separated pedestrian crossing to keep students off  
10 the highway.

11           The intent of the Department of Education  
12 should be to protect their students and provide the  
13 safest crossing to school. The intent of the  
14 Department of Transportation should be to protect  
15 pedestrians and provide a functioning highway.

16           To excuse the DOE from this obligation  
17 does not solve or fulfill the intent of the  
18 condition. It is a disservice to the future of this  
19 community and the safety of its students.

20           These Land Use Commission conditions are  
21 sacred and dear to us. It is the only leverage a  
22 community has to make sure that the community gets  
23 critical infrastructure in exchange for a land use  
24 amendment.

25           The underpass is warranted and suggested.

1 How many years can we kick the can down the road and  
2 why? We have heard from countless experts and  
3 engineers that the underpass is feasible and  
4 recommended. And we've seen plenty of tragedy on  
5 this highway. It is inevitable.

6 We have seen hundreds of examples of  
7 underpasses built along coastal waterways and next  
8 to raging rivers. We are in a dry gulch that barely  
9 flows, a dry gulch that is crossed every day by the  
10 hundreds of men and women working on the high  
11 school. We should be grateful that we have such a  
12 wide underpass, and experts advise a pedestrian  
13 trail is inexpensive and commonplace.

14 **COMMISSIONER GIOVANNI:** Please summarize,  
15 Mr. Beerer.

16 **MR. BEERER:** The Land Use Commission has  
17 reaffirmed that the Department of Transportation has  
18 no decision-making power, but only advises. We need  
19 the DOE and the DOT to end this game of chicken. We  
20 need to move forward now. We need to move forward  
21 with good faith and immediately contact the  
22 engineers and experts to survey and design a  
23 pedestrian underpass. The clock is ticking, same as  
24 it has been for nine years.

25 **COMMISSIONER GIOVANNI:** Thank you.

1 Petitioner, do you have any questions for Mr.  
2 Beerer?

3 **MR. FUJIOKA:** No, Mr. Chair.

4 **COMMISSIONER GIOVANNI:** Mr. Hopper?

5 **MR. HOPPER:** No, Chair.

6 **COMMISSIONER GIOVANNI:** Ms. Kato?

7 **MS. KATO:** No questions. Thank you.

8 **COMMISSIONER GIOVANNI:** Thank you.

9 Commissioners? Commissioner Chang? You're on mute.

10 **COMMISSIONER CHANG:** Thank you,  
11 Commissioner Giovanni. And I'm going to try to keep  
12 my questions really tight.

13 Mr. Beerer, you seem like someone who's  
14 going to give me a yes or no answer, so I'm going to  
15 ask you the questions that I was asking Mr. Moran.

16 As I understand, KCA is asking that an  
17 updated feasibility, GPSC study, and an updated TIAR  
18 be completed; is that correct?

19 **MR. BEERER:** Yes.

20 **COMMISSIONER CHANG:** Okay. And I know you  
21 don't speak on behalf of all the community, but you  
22 seem to know a lot of what's going on. Will the  
23 community accept, if the updated study says that the  
24 roundabout is sufficient, the DOT additional  
25 mitigation methods are sufficient, an underpass or

1 an overpass is not -- is not feasible or is not --  
2 is not required at this time, do you believe that  
3 the community will accept that?

4 **MR. BEERER:** Not without an unbiased  
5 review. It took our review to determine that the  
6 Department of Education and their consultants were  
7 not using their own data for bussing statistics.

8 So as laymen, we have to go through these  
9 hundreds of documents as if we were attorneys to  
10 make sure that they're legitimate or are these  
11 consultants just doing the bidding of the dictators  
12 that have asked them to do this study for them.

13 **COMMISSIONER CHANG:** So what's the basis?  
14 How do you determine an unbiased? Is that something  
15 that the community would participate in the  
16 selection of the expert?

17 **MR. BEERER:** Well, yeah. Well, first, you  
18 -- you read the study. And so, say in this 2016 Fehr  
19 & Peers study, they estimate 20 percent of  
20 pedestrians would walk to school, those within .2  
21 miles. Well, the DOE bussing policy does not provide  
22 bussing unless you live outside of 1.5 miles. So  
23 that's a three-mile radius. That is significantly  
24 more than what was used to determine the numbers for  
25 the 2016 study.



1                   **COMMISSIONER CHANG:** Okay. And I guess I'm  
2 -- I'm not asking for the details of what would be  
3 in there, but it's mostly a procedural question,  
4 because we're faced with this -- this very critical  
5 decision. There is -- if that underpass or overpass  
6 is not built, based upon the representations, the  
7 school cannot open.

8                   So let me ask you this question. In your  
9 view, would a phased approach -- do the -- do the  
10 roundabout, open the school, Phase I; continue the  
11 updated studies for Phase II and have further  
12 discussions with the community about both the  
13 updated study and the roundabout or overpass, if  
14 that's necessary, and get legislative funding for  
15 Phase II of the opening. Would that be acceptable?

16                   **MR. BEERER:** I personally hold dear to a  
17 Land Use Commission condition, because once you  
18 remove a condition, your chances of ever getting it  
19 back are pretty nil. If there was a way to get the  
20 DOE to move forward with some studies and work  
21 collaboratively with our local engineers, I think  
22 you could find some solutions there. But the  
23 condition must remain until they do the due  
24 diligence and work that this condition requires.

25                   **COMMISSIONER CHANG:** So are you saying

1 that the condition means building an overpass or an  
2 underpass before the school opens, that there's  
3 nothing less -- that the community would not accept  
4 anything less than that?

5 **MR. BEERER:** At this point, correct.

6 **COMMISSIONER CHANG:** All right. Thank you  
7 very much for your candid answers. No further  
8 questions.

9 **MR. BEERER:** You're welcome.

10 **COMMISSIONER GIOVANNI:** Thank you.  
11 Commissioner Wong, did you have your hand up?

12 **COMMISSIONER WONG:** Yes, Chair. Thank you.  
13 Mr. Beerer, I got to -- sorry, I pressed the wrong  
14 button. Can't use this mouse well.

15 My question is two -- well, several  
16 questions. The first question I have is do you --  
17 you heard me talking to Councilmember King; correct?

18 **MR. BEERER:** Correct.

19 **COMMISSIONER WONG:** So we're going through  
20 a hypothetical situation, because we're not -- well,  
21 I'm not living on Maui. You know, I mean, we have  
22 Commissioner Ohigashi, but the rest of us live on  
23 different islands.

24 So do you -- do you think that the council  
25 and executive branch of Maui will have more ideas of

1 what should be in place in that location?

2 **MR. BEERER:** Well, that's a hypothetical  
3 question, but I think what I allude to is this has  
4 become a game of chicken where the Department of  
5 Education isn't doing any diligence and keeps  
6 bringing us back for these hearings. That brings us  
7 no closer to a solution.

8 What we're ultimately headed towards is a  
9 school that will be ready to open without a safe  
10 crossing that was a part of a nine-year-old Land Use  
11 Commission condition.

12 Now, what can we do in the meantime to  
13 speed up the process? We've been speaking against  
14 this for years, when they've had plenty of time.  
15 There's still time on the clock to start some  
16 serious studies. That's what needs to happen right  
17 now before we start talking about what could happen  
18 in two years when the school is open, and they're  
19 applying for occupancy permits.

20 Because I agree. It's going to be really  
21 tough to keep people out of a brand-new school. But  
22 at the same time, does waiting out the community and  
23 the Land Use Commission warrant squashing the wishes  
24 of the community and the safety of the students? It  
25 doesn't.

1           **COMMISSIONER WONG:** So, no, I just was  
2 wondering if you heard the hypothetical of what if  
3 the County of Maui and the city council decides not  
4 to give a certificate of occupancy and say that it's  
5 not part of the community plan, so you cannot open  
6 up.

7           So we see the Land Use -- again, the  
8 hypothetical is what if the Land Use Commission says  
9 right now build the roundabout plus add stuff to the  
10 community plan?

11           **MR. BEERER:** I -- I personally don't want  
12 to give up this condition. Like I said before -- I  
13 hate to repeat myself, but once you give up a  
14 condition, you're unlikely to see them again. As  
15 commissioners, you all know that very well.

16           **COMMISSIONER WONG:** Okay. Thank you.  
17 Thank you, Chair.

18           **COMMISSIONER GIOVANNI:** Thank you,  
19 Commissioner Wong. Any other questions for this  
20 witness from the commissioners? Seeing none, Mr.  
21 Beerer, thank you very much for your testimony.

22           **MR. BEERER:** Thank you for your time.  
23 Appreciate it.

24           **COMMISSIONER GIOVANNI:** Thank you. Mr.  
25 Derrickson, who's next?

1           **MR. DERRICKSON:** Representative Wildberger  
2 being promoted to panelist now.

3           **COMMISSIONER GIOVANNI:** Excellent.

4           **REPRESENTATIVE WILDBERGER:** Aloha,  
5 commissioners. And Vice Chair, thank you for your  
6 time and your service and attention to this  
7 incredibly important matter. I'm back with you again  
8 on this issue to oppose the DOE's request to drop  
9 this requirement.

10           **COMMISSIONER GIOVANNI:** Can I quickly have  
11 you --

12           **REPRESENTATIVE WILDBERGER:** Oh, yes. I'm  
13 sorry. Representative Tina Wildberger. I live at  
14 2710 Kauhale Street in Kihei, and I attest to tell  
15 the truth today.

16           **COMMISSIONER GIOVANNI:** Very good. Imua.

17           **REPRESENTATIVE WILDBERGER:** Thank you. For  
18 over a decade, KCA has been working to realize this  
19 vision of Kihei. It's really difficult to understand  
20 that we're here again on this issue that has already  
21 been decided twice very judiciously in a careful  
22 consideration by this very commission in 2013 and in  
23 2019.

24           The community's demand for safe GSPC has  
25 not changed. Residents want a walkable, bikeable

1 community. Without safe crossing to a new center of  
2 our community, this goal is not attainable. Students  
3 crossing Piilani Highway twice a day during a shift  
4 change where thousands of drivers are commuting  
5 through Kihei to Wailea resorts will destroy the  
6 daily commute.

7 Like O'ahu right now, commuters sit  
8 through multiple cycles at other intersections,  
9 trying to traverse Kihei. That's already happening  
10 when the charter school on Lipoa gets out.

11 The first student pedestrian traffic  
12 fatality will be on the hands of those choosing to  
13 put kids in traffic. I implore and beseech the LUC  
14 commissioners today to once again uphold the  
15 requirement for pedestrian separated crossing for  
16 Kihei High School. Mahalo.

17 **COMMISSIONER GIOVANNI:** Thank you. And  
18 thank you for your written testimony that you've  
19 submitted as well.

20 **REPRESENTATIVE WILDBERGER:** Thank you.

21 **COMMISSIONER GIOVANNI:** So, petitioner, do  
22 you have any questions for Representative  
23 Wildberger?

24 **MR. FUJIOKA:** No. Thank you.

25 **COMMISSIONER GIOVANNI:** Thank you. Mr.

1 Hopper?

2 **MR. HOPPER:** No, Chair.

3 **COMMISSIONER GIOVANNI:** Ms. Kato?

4 **MS. KATO:** No, thank you.

5 **COMMISSIONER GIOVANNI:** Thank you.

6 Commissioners, what's your pleasure? Let's start  
7 with Commissioner Okuda.

8 **COMMISSIONER OKUDA:** Thank you very much,  
9 Mr. Chair. Thank you, Representative Wildberger. I  
10 read your -- and I read all the testimony, believe  
11 it or not, but I read your very detailed testimony  
12 with citations to studies and other pieces of  
13 evidence.

14 After you submitted your testimony which  
15 appears as part of the public record on the Land Use  
16 Commission website, did anyone from the executive  
17 branch, including the Department of Education or  
18 Department of Transportation, contact you to discuss  
19 the specific studies or specific data that you  
20 included in your testimony, including the  
21 photographs that you included and the arguments you  
22 made? Did anyone from the executive branch contact  
23 you?

24 **REPRESENTATIVE WILDBERGER:** No,  
25 Commissioner.

1           **COMMISSIONER OKUDA:** Okay. Oh, okay, Mr.  
2 Chair. Thank you very much. I have no further  
3 questions.

4           **COMMISSIONER GIOVANNI:** I can see you're  
5 not accustomed to a simple yes or no answer to your  
6 questions, so that's -- that's fine. Commissioner  
7 Chang, you had a question?

8           **COMMISSIONER CHANG:** Yes. I did. Thank you  
9 so much. And thank you, Representative Wildberger. I  
10 appreciate you being here again. Obviously, this is  
11 a very important issue for your community.

12           I just have one question, and I -- and I  
13 don't follow the legislative budget process, but I  
14 was wondering have you put in money? Have you put  
15 in, requested on behalf of Kihei community any  
16 budget for an underpass and overpass?

17           **REPRESENTATIVE WILDBERGER:** I have not.

18           **COMMISSIONER CHANG:** Okay. Thank you very  
19 much.

20           **COMMISSIONER GIOVANNI:** Thank you.  
21 Commissioners, any further questions? Commissioner  
22 Ohigashi?

23           **COMMISSIONER OHIGASHI:** On the same lines  
24 as Commissioner Chang, I seem to recall the last  
25 time we were here, a long time ago when we talked



1 about this, is that the -- there was concern as to  
2 the cost of an underpass being in excess of \$30  
3 million by the DOT if it's built up to their prior  
4 specifications.

5 And I had the impression here that DOT  
6 would be seeking guidance from the legislature as to  
7 whether or not they would take funding for those,  
8 that provision.

9 Have you -- have you any idea, one,  
10 whether or not the budget or the budgetary amounts,  
11 if there is available money, the existing  
12 appropriation for such an underpass; and number two,  
13 whether or not they have sought specific guidance  
14 from the legislature with regard to whether or not  
15 to secure such funding?

16 **REPRESENTATIVE WILDBERGER:** Thanks,  
17 Commissioner. I have not had any conversations with  
18 the DOT or the DOE regarding funding about the  
19 underpass. I found the deputy director's estimate  
20 really high, because he seemed to think that he  
21 would need to raise the bridge, which would quickly  
22 cost millions.

23 **COMMISSIONER OHIGASHI:** I'm sorry,  
24 Representative Wildberger. I'm just trying to find  
25 out whether or not that you know if there is

1 sufficient moneys in existing appropriations to pay  
2 for that type of underpass because -- because that's  
3 what the impression I got, that they would check if  
4 they have, and they would seek legislative guidance  
5 on this matter. That's what my impression was with  
6 the last time we were here.

7 The second part was just some questions,  
8 whether or not they sought the same guidance,  
9 because -- if you know.

10 **REPRESENTATIVE WILDBERGER:** I don't think  
11 they have.

12 **COMMISSIONER OHIGASHI:** And what about the  
13 first question? Is there any funding available? Have  
14 you -- has the legislature conducted an inquiry as  
15 to what -- whether or not there's moneys available  
16 in existing appropriation or whether it's used up or  
17 pledged on?

18 **REPRESENTATIVE WILDBERGER:** I think for  
19 the underpass that the community is asking for, it  
20 would be very easy to allocate funding to that. It  
21 would not be a large change order at all in the  
22 scope of that project.

23 **COMMISSIONER OHIGASHI:** I understand. But  
24 I'm asking from the point of view in -- is there any  
25 money available in the existing appropriation that

1 you could repurpose that you know about?

2 **REPRESENTATIVE WILDBERGER:** I don't have  
3 any information about reappropriating funding.

4 **COMMISSIONER OHIGASHI:** Thank you.

5 **COMMISSIONER GIOVANNI:** Thank you. That's  
6 it, Commissioner? That's the end of it? Okay. Any  
7 other questions from commissioners for  
8 Representative Wildberger?

9 **COMMISSIONER WONG:** Chair?

10 **COMMISSIONER GIOVANNI:** Yes, Mr. Wong.  
11 Commissioner Wong, please proceed.

12 **COMMISSIONER WONG:** Thank you, Mr. Chair.  
13 Good afternoon, Representative. I got a question.  
14 This is legislatively dealing with this issue. Could  
15 the legislature do a -- I guess an info brief or  
16 something with the DOE to bring it up to the  
17 legislative level to -- you know what I'm saying?  
18 You know there's always info briefs or something  
19 that say, hey, DOE, come and inform us of what's  
20 happening, what you need, and why you're not doing  
21 it? So could the legislature do something like that?

22 **REPRESENTATIVE WILDBERGER:** Typically, the  
23 info briefings are held and conducted by the chairs  
24 of those committees. Representative Justin Woodson  
25 is the chair of the education committee, and that is

1 something that he certainly could do on our behalf.

2 **COMMISSIONER WONG:** Yeah. It's just that,  
3 you know, there is -- as we see, there's Phase I,  
4 Phase II, Phase III, I believe, for the Kihei High  
5 School.

6 And I think at one of our hearings, we say  
7 don't do -- there's appropriated money already in  
8 Phase II or Phase III. Reappropriate it for this  
9 issue and put it part of the info brief and then  
10 talk to Chair Luke and say, hey, we want to do this,  
11 can we do this. Something like that.

12 **REPRESENTATIVE WILDBERGER:** Thank you.  
13 It's an excellent suggestion.

14 **COMMISSIONER WONG:** Yeah. That's all.  
15 Thank you, Representative. Thank you, Chair.

16 **COMMISSIONER GIOVANNI:** Thank you,  
17 Commissioner Wong. Okay. One more time. Any follow-  
18 up questions from any commissioners for  
19 Representative Wildberger?

20 Seeing none, thank you, Representative,  
21 for being with us today and for your testimony.

22 **REPRESENTATIVE WILDBERGER:** Thank you all  
23 for your time and careful consideration. We  
24 appreciate it so much.

25 **COMMISSIONER GIOVANNI:** Thank you. Mr.

1 Derrickson, anybody left with their hands up?

2 **MR. DERRICKSON:** There's no one else in  
3 the audience with the hands up.

4 **COMMISSIONER GIOVANNI:** Okay. This will be  
5 the last chance for anybody to raise their hand. I'm  
6 going to give it five seconds. If not, we'll close  
7 public testimony, so counting down in my head.

8 Anybody raise their hand?

9 **MR. DERRICKSON:** No.

10 **COMMISSIONER GIOVANNI:** Okay. So we will  
11 close public testimony for this docket. I again want  
12 to reaffirm the commission's appreciation for the  
13 written testimony and the volume of that testimony  
14 that came in on this docket. We take that very  
15 seriously, so thank you.

16 So we'll now move to the petitioner's  
17 presentation, Mr. Fujioka, recognizing we've got  
18 about 17 minutes on the clock before the targeted  
19 deadline. Do you have -- what is -- what is your  
20 pleasure? How would you like to proceed?

21 **MR. FUJIOKA:** I wanted to share one of our  
22 exhibits, the PowerPoint presentation, but I'm  
23 having difficulty sharing screen, so I'm wondering  
24 if I should get that resolved and then perhaps  
25 resume tomorrow with our presentation, since it's,

1 like, a quarter to three already.

2 **COMMISSIONER GIOVANNI:** It's a quarter to  
3 three. So are you basically saying that you've got  
4 nothing meaningful to present in the time available  
5 to you at this time?

6 **MR. FUJIOKA:** I wanted to present through  
7 the PowerPoint, and I don't know if my screen will  
8 share. I can try checking, because I could -- is my  
9 screen up now?

10 **COMMISSIONER GIOVANNI:** Yup. And we see a  
11 PowerPoint.

12 **MR. FUJIOKA:** It says Kihei High School  
13 LUC Docket?

14 **COMMISSIONER GIOVANNI:** Yeah. So how long  
15 will it take you to go through this PowerPoint?

16 **MR. FUJIOKA:** I hope less than 15 minutes.

17 **COMMISSIONER GIOVANNI:** Okay. Proceed.

18 **MR. FUJIOKA:** Okay. Since it's been a  
19 while that we were here to address this issue, I  
20 wanted to go through a little bit of the history of  
21 what has happened from the petitioner's point of  
22 view. So I think it's -- everybody knows that we're  
23 trying to have the grade-separated pedestrian  
24 requirement removed from the boundary amendment so  
25 that the school can open for the 2022-23 school

1 year.

2           Some things that have happened since the  
3 filing, or this most current filing, is now we have  
4 a principal. Her name is Halle Maxwell. She used to  
5 be -- until August 1st, she was the principal of  
6 Kihei Elementary School. She's invested in the  
7 community. She's been living here, I think, at least  
8 20 years.

9           And there's going to be a later slide that  
10 shows she -- that confirms that she's committed to  
11 meeting once a month with the community. She's  
12 already started so, you know, I think that's very  
13 encouraging in terms of trying to get the school up  
14 and running on schedule.

15           There were -- I know the -- there are some  
16 of them critical of traffic and pedestrian studies  
17 that have been done. But, you know, there have been  
18 a number of them.

19           Back in 2011 and 2012, there was the  
20 traffic impact report, including a traffic signal  
21 warrant study. We recently submitted this as Exhibit  
22 38 in one of the supplements. This was one of the  
23 earlier ones -- or actually, I think it's the  
24 earliest. It was done for Wilson Okomoto, or by  
25 Wilson Okomoto, the original engineers.

1 Then there was a Kihei High School  
2 pedestrian and bicycle analysis. That's the Stantec  
3 report. We submitted that one a while ago as Exhibit  
4 26. That one was from 2012. So these two studies  
5 actually preceded the Findings of Fact and  
6 Conclusions of Law and Order which were filed on  
7 July 29, 2013, and the DOE is seeking to have  
8 amended currently.

9 Then in 2014, WALC, Walkable and Livable  
10 Communities, issued this Safe Routes to Kihei High  
11 School, that pedestrian route study from 2014.  
12 Initially, it was submitted as an exhibit -- as  
13 Exhibit 2, and then when Commissioner Okuda made his  
14 request for additional reports, this was one of  
15 them. So now in its entirety, it's included as  
16 Exhibit 42.

17 And at that point, the Department of  
18 Transportation had not approved the pedestrian route  
19 study, so additional work was done, and this Fehr &  
20 Peers report of October 25, 2016, which is Exhibit  
21 4, that was done in 2016.

22 Subsequently, in 2017, that's July 18,  
23 that's when the DOT approved the -- the traffic  
24 study. One of the important conclusions there was  
25 that the grade-separated crossing warrants were not



1 met. The Department of Transportation letter is  
2 Exhibit 5.

3 And then subsequently, notwithstanding  
4 that, the commission issued its declaratory order  
5 April 25th, 2019, reaffirming the grade-separated  
6 pedestrian crossing requirement. Subsequently, Fehr  
7 & Peers did a study, August 1, 2019. And that's in  
8 as Exhibit 11. And that one, I believe, concluded  
9 that the grade-separated crossing was not warranted.

10 And after that, there's been some  
11 additional work. July 28, 2020, WSP did a roundabout  
12 evaluation. That's Exhibit 8. So there's been quite  
13 a bit of work done on the necessity for -- necessity  
14 of grade-separated crossings and the desirability of  
15 a roundabout.

16 So it came a point where the roundabout  
17 became the most viable solution recommended by the  
18 Department of Transportation. And even if the motion  
19 is granted, the preceding condition still requires  
20 further updates for traffic studies. DOE would still  
21 be required to do several more traffic impact  
22 analysis reports, first one to be one year after  
23 opening Phase I of the project, which would be the  
24 school.

25 There's been some confusion, because

1 there's phases in roman numeral, and there are  
2 construction phases in Arabic numerals. But Phase --  
3 I think Phase I is the opening of the school. So one  
4 year after that, there's going to be a TIAR. Then  
5 there's another one before Phase II can be occupied,  
6 and another one after Phase II is -- one year after  
7 Phase II is built out.

8           And meanwhile, if there's any delay over  
9 three years, the TIAR needs to be updated again. So  
10 it's going to be an ongoing process to carefully  
11 monitor whether the safety measures are adequate.

12           So these are some of the things  
13 procedurally that we've done. August 20, the motion  
14 was -- the current motion was filed. There were two  
15 hearings, September 10 and November 4. And granted  
16 at the strong urging of the commission, there was a  
17 meeting with Kihei Community Association October 27.

18           There was -- then after the October 4th  
19 hearing, DOE received a request dated November 10  
20 for additional information, so we -- that was  
21 submitted February 1. And in the meantime, January  
22 12, there was a virtual meeting with the DOE,  
23 Department of Transportation, and the community. One  
24 week later, DOE added some links and photos to its  
25 website.

1 And okay, so after that February 1  
2 response, construction updates were uploaded to the  
3 website. And then there was another DOE virtual  
4 meeting August 17, 2021. That's the one where the  
5 principal, Halle Maxwell, was also involved, as was  
6 the complex area superintendent, Kathy Dimino.

7 So this is what Phase II is anticipated to  
8 be. This is something that was obtained from page 7  
9 of this PowerPoint. The DOE's Assessment and  
10 Accountability Branch of the Office of Strategy,  
11 Innovation, and Performance was consulted.

12 And as of May 5th, 2021, which is towards  
13 the end of this school year, they look at all of the  
14 demographics, who's living in the area, who's going  
15 to middle school, where, and so forth. And what they  
16 came up with is for the target opening year, 2022-23  
17 school year, they're only expecting 167 ninth  
18 graders to enroll in Kihei High School.

19 A decision was made to start with ninth  
20 grade only, so we're looking at 167 ninth graders  
21 for the first year. Then the second year, they're  
22 going to bump up to 299, adding 10th graders. But in  
23 the fall of 2023, there's going to be that one year  
24 where another study has to be done. And then there  
25 will be further studies if we get to the point of

1 Phase II.

2 The other thing that this -- that's  
3 contained here is a slideshow that was shared with  
4 the community on January 12th of this year. This is  
5 the Department of Transportation's presentation, so  
6 I'm hoping that a little further on, we can get some  
7 assistance from a representative of DOT to clarify  
8 the slides here.

9 So I can -- I'll stop sharing this. And so  
10 that I just wanted to provide by way of update,  
11 because some of that stuff was review, and a few  
12 things have happened since. So --

13 **COMMISSIONER GIOVANNI:** Just a quick  
14 question to clarify.

15 **MR. FUJIOKA:** Yes.

16 **COMMISSIONER GIOVANNI:** That last part of  
17 your shared screen showed a different PowerPoint. I  
18 think you said it was DOT's PowerPoint. Is that an  
19 exhibit on the record in this matter?

20 **MR. FUJIOKA:** It's part of that same  
21 Exhibit 45, but it's something that I would want to  
22 review with the DOT representative.

23 **COMMISSIONER GIOVANNI:** Understood. But  
24 it's in the record is what my question was.

25 **MR. FUJIOKA:** Yes. Yes, it is. Thank you.

1           **COMMISSIONER GIOVANNI:** Thank you.

2 Continue.

3           **MR. FUJIOKA:** And so we -- we respect the  
4 input of the community, and it's hard to be in this  
5 kind of disagreement, but all of the studies that  
6 have been available have shown that the roundabout  
7 would be -- provide safe, I guess, pedestrian  
8 crossing and vehicular traffic.

9           And there's knowing that we're going to  
10 start -- or they're projected to start with a lot  
11 fewer students than originally anticipated.

12           I think it's -- if the motion is granted,  
13 starting with a roundabout, which was already being  
14 -- if it's not being constructed, the foundation has  
15 been laid for it -- and the school is ready to get  
16 up and running, I think it's time to just address  
17 this grade-separated pedestrian crossing in light of  
18 the availability of a roundabout, which wasn't  
19 considered before.

20           And the studies have told us that the  
21 underpass especially is not warranted, and it cannot  
22 be done safely. So those are the things that -- or  
23 the reasons we want to go ahead and proceed with the  
24 school, using the roundabout, safeguarding the  
25 initial 167 students, and mindful that additional

1 studies will need to be done. Thank you.

2 **COMMISSIONER GIOVANNI:** Commissioner  
3 Cabral, did you have a question?

4 **COMMISSIONER CABRAL:** Yes. And I know time  
5 is of the essence, but since the initial  
6 introduction -- and this is to Mr. Fujioka -- I'm  
7 not really -- I want to have a better understanding  
8 who you work for. You work -- are you employed by  
9 the government? What agency, state? Are you an  
10 attorney with Department of Education? I mean,  
11 exactly where do you fit in the large picture here?

12 **MR. FUJIOKA:** I am a deputy in the  
13 Department of the Attorney General. I work in the  
14 education division. So one of the main things we do  
15 is represent the Department of Education in  
16 education-related matters.

17 **COMMISSIONER CABRAL:** Okay. Thank you. And  
18 then my second question is, then, can you identify  
19 for me -- hopefully, it's simple; it surely is in  
20 business -- who is the decision-maker in this case?

21 **MR. FUJIOKA:** For the DOE?

22 **COMMISSIONER CABRAL:** DOE -- oh, I'm  
23 sorry. I was looking for a person. I mean, is this  
24 just the proverbial "the government made this  
25 decision"? I'm just concerned who -- who -- I mean,

1 there's got to be a person or a title. Is there a  
2 title? I mean, is -- DOE seems like an awfully big  
3 title to making a decision. I'm just kind of curious  
4 as of the -- I mean, I don't know. I'm looking for  
5 who. Who makes these decisions?

6 **MR. FUJIOKA:** You mean the decision to  
7 request removal of the grade-separated crossing?

8 **COMMISSIONER CABRAL:** Well, that would be  
9 a current decision. And then a few years back, the  
10 decision to somewhat ignore what the LUC said, et  
11 cetera. I mean, is there a title of who makes these  
12 decisions?

13 **MR. FUJIOKA:** I was not involved at the  
14 time, and I don't know who actually made the  
15 decision, whatever that decision was to. I don't  
16 think it was totally ignoring what the order was,  
17 but in terms of traffic control and railways and  
18 crossings and so forth, the DOE does have to defer  
19 to the Department of Transportation.

20 **COMMISSIONER CABRAL:** So it's just sort of  
21 the government in general, various, and then the  
22 legislature funds or doesn't fund you as -- you  
23 know, I've got a concern here. I mean, thank you to  
24 the government.

25 I've been to several seminars in my time

1 at the Land Use, and I've got to tell you the entire  
2 direction that -- that communities and urban and  
3 people are being -- looking at is instead of  
4 sprawling out all over the land, is consolidating so  
5 that people can walk to school, that they can walk  
6 to work, that they can bicycle places.

7           And so meanwhile, eight, nine years ago,  
8 LUC said, yeah, this is a lot of land, based on  
9 allowing people to walk and to bicycle to school.  
10 And because knowing -- if I knew then, if I was on  
11 the LUC then and I knew that this requirement was  
12 going to be decided against or ignored, as the case  
13 may have been, I would have said make it a 10-story  
14 building somewhere in the middle of where the  
15 community is.

16           If necessary, buy this five acres or  
17 something and set up a massive -- and have -- have  
18 an elevator and have kids be able to get there  
19 safely. Because part of these decisions is trying to  
20 build a community, in addition to having children be  
21 safe.

22           I mean, I'm concerned as to who makes the  
23 decision and at what point -- when the body count  
24 gets at some point -- do you look at those decisions  
25 again?



1 So anyway, Mr. Fujioka, if you're at all  
2 able to find out what title or what person makes  
3 those kind of decisions, I'd truly appreciate it.  
4 Thank you.

5 **COMMISSIONER GIOVANNI:** So, Mr. Fujioka,  
6 we're going to cut. I'm going to move to adjournment  
7 here shortly, and we'll resume tomorrow with your  
8 presentation and Q&A on your presentation of your  
9 case.

10 Let me encourage you to have  
11 representatives from DOE and DOT in attendance, if  
12 you can. That would be helpful.

13 **MR. FUJIOKA:** Yes.

14 **COMMISSIONER GIOVANNI:** Let me also say  
15 that in terms of the agenda for tomorrow, we're  
16 obligated to take up the Maui Solar matter first, so  
17 we would resume on this docket following the  
18 completion of that agenda item. Does everybody  
19 understand that?

20 **MR. FUJIOKA:** So it would be kind of like  
21 today?

22 **COMMISSIONER GIOVANNI:** Kind of like  
23 today. I can't predict how long the Maui Solar  
24 docket will -- I mean, I think it's an O'ahu solar  
25 project -- will take, but it'll be first. Okay?

1           **MR. FUJIOKA:** Okay. Thank you.

2           **COMMISSIONER GIOVANNI:** Understood?

3           And so with that, I'm going -- do I have a  
4 motion for adjournment for today? Or do I need a  
5 motion? I don't need a motion, so I'm going to  
6 adjourn the meeting for today. Thank you very much.  
7 And we'll see you all -- I will see the fellow  
8 commissioners and participants at 9:00 tomorrow.  
9 Thank you.

10           **COMMISSIONER CHANG:** Good job.

11           **(The meeting was adjourned at 3:04 p.m.)**

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1 CERTIFICATE

2

3 I, Davilyn Payne, do hereby certify that the

4 proceeding named herein was professionally transcribed on

5 the date set forth in the certificate herein; that I

6 transcribed all testimony adduced and other oral

7 proceedings had in the foregoing matter; and that the

8 foregoing transcript pages constitute a full, true, and

9 correct record of such testimony adduced and oral

10 proceeding had and of the whole thereof.

11

12 IN WITNESS HEREOF, I have hereunto set my hand this

13 24th day of September, 2021.

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19 Davilyn Payne

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