

LAND USE COMMISSION
STATE OF HAWAII
Hearing held on April 14, 2021
Commencing at 9:18 a.m

Held via ZOOM by Interactive Conference Technology

I. Call to Order

II. Adoption of Minutes

III. Tentative Meeting Schedule

IV. ADOPTION OF ORDER
A18-806 Barry Trust (Hawaii)

V. STATUS REPORT

A11-790 Kula Ridge, LLC (Maui)

To consider the status of Docket No A11-790 in which the Commission granted the redesignation of approximately 34.516 acres of land from the Agricultural District to the Urban District and approximately 16.509 acres of land from the Agricultural District to the Rural District at Kula, Maui, Hawaii'i for a mix of residential, park and open space uses.

V. ACTION

DR21-71 ANDREW GRIER (Maui)

Petition for Declaratory Order that the number of dwellings allowed on properties in the Rural District can be more than one per one-half acre if allowed by County Zoning

VI. RECESS

Before: Jean Marie McManus, Hawaii CSR #156

1 APPEARANCES:

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

10 STAFF:

11 DANIEL A. MORRIS, ESQ.
12 Deputy Attorneys General

13 DANIEL ORODENKER, Executive Officer
14 RILEY K. HAKODA, Chief Clerk
15 SCOTT DERRICKSON, Chief Planner
16 NATASHA A. QUINONES, Program Specialist

17 BRYAN YEE, ESQ.
18 Deputy Attorney General
19 RODNEY FUNAKOSHI, Planning Program Administrator
20 AARON SETOGAWA, Planner
21 State Office of Planning
22 State of Hawaii

23 JEAN CAMPBELL, ESQ.
24 Deputy Corporation Counsel
25 JEFF DARROW, Deputy Planning Director
Planning Department
County of Hawaii

DEREK SIMON, ESQ.
Carlsmith Ball, LLP
For Petitioner A18-806
Barry Family Trust

THOMAS D. WELCH, JR., ESQ.
Mancini Welch & Geiger, LLP
305 E. Wakea Avenue, Ste. 200
Kahului, Maui 96732
For Kula Ridge

JAMES GEIGER, ESQ.
Mancini Welch & Geiger, LLP
305 E. Wakea Avenue, Ste. 200
Kahului, Maui 96732
For Andrew Grier

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1 CHAIRPERSON SCHEUER: Aloha mai kakou.
2 Good morning.

3 This is the April 14th, 2021 Land Use
4 Commission Meeting, which is being held using
5 interactive conference technology linking video
6 conference participants and other interested
7 individuals of the public via the ZOOM internet
8 conferencing program. We're doing this in order to
9 comply with State and County official operational
10 directives during the COVID-19 pandemic. Members of
11 the public are viewing the meeting via the ZOOM
12 webinar platform.

13 For all meeting participants, I would like
14 to stress to everyone the importance of speaking
15 slowly, clearly, and directly into your microphone.

16 This is really important. I really want to
17 stress to everyone the importance of speaking slowly,
18 clearly and directly into the your microphone. It
19 helps if before speaking, you state your name and
20 identify yourself for the record.

21 Please also be aware for all meeting
22 participants, you're being recording on the digital
23 recording of this ZOOM meeting. Your continued
24 participation is your implied consent to be part of
25 the public record for the event. If you do not wish

1 to be part of the public record, you should exit the
2 meeting now.

3 This ZOOM conferencing technology allows
4 the Parties and each participating Commissioner
5 individual remote access to the meeting proceedings
6 via their personal digital devices. Also please note
7 that due to matters entirely outside of our control,
8 occasional disruptions to connectivity may occur for
9 one or more members of the meeting at any given time.
10 If such disruptions occur, please let us know and be
11 patient as we try to restore the audio/visual signals
12 to effectively conduct business during the pandemic.

13 For members of the public wishing to
14 testify during the Public Witness portion of the
15 meeting and who are accessing this meeting by
16 telephone, rather than by smartphone or desktop
17 software, use *9 to virtually raise your hand and
18 then *9 to virtually lower your hand. You also
19 should use the *6 function to mute and then *6 to
20 unmute.

21 Also be aware that from time to time we
22 will take breaks.

23 My name is Jonathan Likeke Scheuer, and I
24 currently have the honor and pleasure of serving as
25 Land Use Commission Chair. Along with me,

1 Commissioners Ed Aczon, Dawn Chang, Gary Okuda, and
2 Arnold Wong, LUC Executive Officer Daniel Orodener,
3 Chief Planner Scott Derrickson, our Chief Clerk Riley
4 Hakoda, our Deputy Attorney General Dan Morris, our
5 Program Specialist Natasha Quinones are all on the
6 Island of Oahu. If you've been here since 9:00, you
7 know we are trying to be joined by our Court
8 Reporter, Jean McManus.

9 Commissioner Lee Ohigashi is on Maui, and
10 Commissioner Dan Giovanni is on Kauai, and Nancy
11 Cabral is on Hawaii Island. We currently have eight
12 seated Commissioners of a possible nine.

13 Our first order of business is the adoption
14 of the March 24th and 25th, 2021 minutes.

15 Mr. Derrickson or Mr. Hakoda, has there
16 been any written testimony submitted on this matter?

17 CHIEF CLERK: Mr. Chair, this is Riley. No
18 public testimony on the minutes.

19 CHAIRPERSON SCHEUER: Are there any members
20 of the public who are attending the meeting who wish
21 to testify on the minutes? I see nobody is calling
22 in by phone. If so, use the "raise-your-hand"
23 function on the ZOOM platform if you wish to testify
24 on the adoption of the minutes. Seeing none.

25 Commissioners, any questions or comments?

1 If none, a motion? Commissioner Cabral.

2 VICE CHAIR CABRAL: Make a motion to adopt
3 the minutes for the March 24th/25th meeting.

4 CHAIRPERSON SCHEUER: Thank you. Is there
5 a second?

6 COMMISSIONER WONG: Chair, Commissioner
7 Wong. I second.

8 CHAIRPERSON SCHEUER: Thank you,
9 Commissioner Wong.

10 We have a motion by Commissioner Cabral and
11 seconded by Commissioner Wong to adopt the March 24
12 and 25th minutes. Are there any comments or
13 discussions? If not, will all the Commissioners
14 please say "aye" and raise your hand to vote "yes".
15 Are any Commissioners opposed? If so, raise your
16 hand and vote "nay". Seeing none. The minutes are
17 adopted.

18 Our next agenda item is the tentative
19 meeting schedule. Mr. Orodener.

20 EXECUTIVE OFFICER: Thank you, Mr. Chair.
21 All meetings are by ZOOM unless we have a change in
22 the circumstances.

23 Tomorrow we will once again be meeting to
24 discuss the Maui Geiger Motion if we do not complete
25 that today, and again retake the HoKua Place matter.

1 On the 28th of this month we will be
2 meeting to discuss the Kamalani Motion to Extend
3 Time, and in the process of examining the Oahu IAL
4 submittal by the County.

5 And the 29th is also set aside for Oahu
6 IAL.

7 May 12th we will be taking up Special
8 Permit matter on Maui Pohakea SP06-400. That is also
9 scheduled for the 13th, and we will also be taking up
10 the IAL matter if necessary or the HoKua Place matter
11 again, if necessary.

12 On May 26th we will be taking up the AES
13 West Oahu Solar matter special permit, also if we
14 complete that matter in time to take up more of the
15 IAL matter, if necessary.

16 On the 27th we will also be doing the West
17 Oahu Solar matter and IAL, as well as any matters
18 associated with HoKua Place, if necessary.

19 On June 9th we will be taking up Kula Ridge
20 matter on Maui, and June 10th tentatively.

21 June 23rd and 24th we have set aside for
22 the HoKua Place matter, and that takes us to the end
23 of our scheduled calendar at this point. Everything
24 else is tentative.

25 CHAIRPERSON SCHEUER: Commissioners, any

1 questions for Mr. Orodener on our schedule? Seeing
2 none.

3 A18-806 BARRY TRUST (Hawai'i)

4 Our next agenda item, Adoption of the Order
5 for Docket A18-806 Barry Trust Hawaii Amended
6 Petition to Amend the Land Use District Boundary of
7 Certain Lands Situated at Keaau, Puna, County and
8 State of Hawai'i; Consisting of 0.51 Acres from the
9 Conservation District to the Agricultural District
10 Tax Map Key No. (3)1-5-059:059.

11 Mr. Hakoda, is there any written testimony
12 received on this matter?

13 CHIEF CLERK: Mr. Chair, this is Riley. No
14 written testimony on this matter.

15 CHAIRPERSON SCHEUER: Are there any members
16 of the public who are attending this meeting who wish
17 to testify on the adoption of this order? If so, use
18 the raise-your-hand function. Seeing none.

19 The Commission will now proceed to Adopt
20 the Order.

21 Before we take up any motion, I would like
22 to confirm, as the Chair, for record that all the
23 Commissioners and myself are prepared to participate
24 and deliberate in these proceedings.

25 Commissioner Chang?

1 COMMISSIONER CHANG: Mr. Chair, yes, I am
2 prepared. Thank you.

3 CHAIRPERSON SCHEUER: Commissioner Aczon?

4 VICE CHAIR ACZON: Yes, I am.

5 CHAIRPERSON SCHEUER: Commissioner Cabral?

6 VICE CHAIR CABRAL: Yes, I am.

7 CHAIRPERSON SCHEUER: Commissioner Okuda?

8 COMMISSIONER OKUDA: Yes, I am.

9 CHAIRPERSON SCHEUER: Commissioner Wong?

10 COMMISSIONER WONG: Yes, I am.

11 CHAIRPERSON SCHEUER: Commissioner

12 Ohigashi?

13 COMMISSIONER OHIGASHI: Yes.

14 CHAIRPERSON SCHEUER: Commissioner

15 Giovanni?

16 COMMISSIONER GIOVANNI: Yes.

17 CHAIRPERSON SCHEUER: The Chair is also

18 prepared to participate.

19 We will now consider Adoption of the Order.

20 Commissioners, before you for your consideration,

21 deliberation and adoption are proposed Findings of

22 Fact, Conclusions of Law, and Decision and Orders as

23 prepared by Staff at the last meeting on this docket.

24 Any discussion? Seeing none.

25 I will now entertain a Motion to Approve

1 the Form of the Order for Docket No. A18-806 Findings
2 of Fact, Conclusions of Law, and Decision and Order
3 for Barry Trust (Hawai'i) Amended Petition to Amend
4 the Land Use District Boundary of Certain Lands
5 Situated at Keaau, Puna, County and State of Hawai'i;
6 Consisting of 0.51 Acres from the Conservation
7 District to the Agricultural District Tax Map Key No.
8 (3)1-5-059:059.

9 Commissioners, what is your pleasure?

10 Commissioner Cabral.

11 VICE CHAIR CABRAL: I move that we adopt
12 A18-806 as stated by our illustrious Chair.

13 CHAIRPERSON SCHEUER: Is there a second?
14 Commission Ohigashi.

15 COMMISSIONER OHIGASHI: Second.

16 CHAIRPERSON SCHEUER: Motion has been made
17 to Adopt the -- Approve the Form of the Order by
18 Commissioner Cabral and seconded by Commissioner
19 Ohigashi. Any discussion, members?

20 Commissioner Cabral.

21 VICE CHAIR CABRAL: I would like to speak
22 to this motion, but more so, since it's not too
23 controversial, for some strange reason I reread all
24 55 pages of the information last night all about
25 this, and the summary, and I've got to say that it's

1 just amazing the amount of work that has gone into
2 this .51 acres of property. And the fact that this
3 has got to be -- I don't know -- the most documented
4 small piece of property I know of.

5 And the Barrys for their patience. And I
6 can't even imagine their expense in order to transfer
7 what they thought was going to be a regular lot among
8 8,835 other parcels of land that they could build a
9 house on, and instead they met bureaucracy to the nth
10 degree.

11 So I've got to say that I almost feel like
12 we should create a binder for these poor people and
13 let them know they've got the most documented piece
14 of property.

15 And also the fabulous job that everybody
16 has done in terms of our LUC Staff on providing
17 information to us. I now know more about their land
18 than I do my own.

19 Thank you very much to everybody.

20 CHAIRPERSON SCHEUER: Thank you,
21 Commissioner Cabral. Any further discussion?

22 Seeing none. Mr. Orodenker, please poll
23 the Commission.

24 EXECUTIVE OFFICER: Thank you, Mr. Chair.
25 The Motion is to Adopt the Order in this matter as

1 presented by Staff.

2 Commissioner Cabral?

3 VICE CHAIR CABRAL: Yes.

4 EXECUTIVE OFFICER: Commissioner Ohigashi?

5 COMMISSIONER OHIGASHI: Yes.

6 EXECUTIVE OFFICER: Commissioner Chang?

7 COMMISSIONER CHANG: Aye.

8 EXECUTIVE OFFICER: Commissioner Giovanni?

9 COMMISSIONER GIOVANNI: Aye.

10 EXECUTIVE OFFICER: Commissioner Aczon?

11 VICE CHAIR ACZON: Yes.

12 EXECUTIVE OFFICER: Commissioner Okuda?

13 COMMISSIONER OKUDA: Yes.

14 EXECUTIVE OFFICER: Commissioner Wong?

15 COMMISSIONER WONG: Aye.

16 EXECUTIVE OFFICER: Chair Scheuer?

17 CHAIRPERSON SCHEUER: Aye.

18 EXECUTIVE OFFICER: Thank you, Mr. Chair.

19 The Motion passes unanimously with eight affirmative
20 votes.

21 CHAIRPERSON SCHEUER: Thank you, Mr. Simon.

22 MR. SIMON: Thank you, Chair, thank you,
23 Commissioners. Thank you, Staff and Parties for all
24 your hard work on this. The Barrys and myself are
25 very appreciative.

1 CHAIRPERSON SCHEUER: Thank you very much
2 to you and your clients as well. We appreciate it.

3 I will take a one minute recess while we
4 all leave the virtual room and before we move onto
5 our next agenda item, one minute.

6 (Recess taken.)

7 A11-790 Kula Ridge, LLC (Maui)

8 CHAIRPERSON SCHEUER: We're back on the
9 record. Our next agenda item Docket A11-790 Kula
10 Ridge.

11 Will the parties please identify yourself
12 for the record?

13 MR. WELCH: Good morning, Chair and members
14 of the Commission. My name is Tom Welch, Mancini
15 Welch & Geiger, and I represent the Raymond M. Von
16 Tempsky Marital Trust, the present owners of the
17 property.

18 CHAIRPERSON SCHEUER: Thank you, Mr. Welch.
19 Maui County?

20 MR. HOPPER: Michael Hopper, Deputy
21 Corporation Counsel representing Maui County
22 Department of Planning. I have Deputy Planning
23 Director Jordan Hart on the line.

24 CHAIRPERSON SCHEUER: Welcome to both of
25 you.

1 Office of Planning?

2 MR. YEE: Bryan Yee, Deputy Attorney
3 General on behalf of Office of Planning. With me is
4 Rodney Funakoshi and Aaron Setogawa.

5 CHAIRPERSON SCHEUER: I believe we might
6 have our court reporter now. I think we have visual
7 contact perhaps. In any case, the meeting is being
8 recorded.

9 Let me now update the record.

10 On February 9th, 2021 the Commission
11 received Attorney inquiry letter from Mancini, Welch
12 & Geiger LLP.

13 On April 1st of this year the Commission
14 emailed the Meeting Agenda for April 14-15, 2021 to
15 Parties in this Docket, Statewide and County Lists.

16 On April 5, 2021, the Commission mailed the
17 Meeting Agenda to the Parties in this docket,
18 Statewide and County Lists.

19 Let me briefly go over our procedures.

20 First, I will recognize anybody who might
21 wish to testify on this matter. If anybody wishes to
22 testify on this matter, I will bring them into the
23 meeting room as a participant, swear them in, allow
24 them time to speak, the length of time which can be
25 cut short at the Chair's discretion, and then those

1 witnesses will be available for questioning, if any.

2 After the conclusion of questioning from
3 any public testimony, the Chair will call for status
4 report from the Petitioner.

5 I will then call on the County of Maui and
6 Office of Planning to speak to the status of this
7 docket.

8 At the conclusion of any presentation and
9 after any questions from the Commissioners and
10 answers to those questions, the Commission can
11 conduct deliberations on this matter.

12 For any members of the public who are
13 listening in, please be reminded the Commission in
14 this status update will not be considering the merits
15 of all of the Kula Ridge LLC Petition, but instead
16 just learning about the current state of activities
17 relating to this docket, including compliance with
18 any conditions LUC placed.

19 Any questions on our procedures for today
20 from the parties?

21 Mr. Welch?

22 MR. WELCH: I have know of questions.

23 Thank you.

24 CHAIRPERSON SCHEUER: County?

25 MR. HOPPER: No questions, Chair.

1 CHAIRPERSON SCHEUER: OP?

2 MR. YEE: No questions.

3 CHAIRPERSON SCHEUER: Mr. Hakoda, as of
4 yesterday, no written testimony on this matter. Is
5 there any that has been submitted?

6 CHIEF CLERK: This is Riley. Chair, no
7 further public testimony.

8 CHAIRPERSON SCHEUER: Are there any members
9 of the public who are attending this meeting in the
10 ZOOM webinar platform who wish to testify on this
11 matter? If so, please raise your hand using the
12 raise-your-hand function. Seeing none.

13 There's no public testimony on this matter.
14 And, Mr. Welch, you may proceed with your
15 presentation.

16 MR. WELCH: Thank you, Chair.

17 I represent the present owners of this
18 property. They have sold this property several years
19 ago to Clayton Nishikawa who planned to develop this
20 property through the Kula Ridge, LLC, which I believe
21 was the original Petitioner in the district boundary
22 amendment that was done several years ago, and
23 pursuant to Decision and Order dated February 21,
24 2012.

25 The project wasn't able to proceed after a

1 lot of effort, and the present owner took the
2 property, actually had financed by seller financing a
3 portion of the original purchase price, and on
4 January 7, 2020, last year, they took the property
5 back, ownership of the property back by deed in lieu
6 of foreclosure, so they're now again the owners of
7 this property.

8 Over the years since 2012, as I mentioned,
9 the Kula Ridge project did not go forward, and as far
10 as I know, none of the conditions of the Commission's
11 Decision and Order were satisfied.

12 I don't think the time period is quite over
13 yet, but I can assure you that there's no possible
14 way that it will be satisfied by the deadline.

15 So the owners, present owners desire that
16 the district boundary amendment from 2012 be reversed
17 and that the project -- excuse me, the land -- the
18 land use designation revert to Agriculture, both
19 lots, and that's our request.

20 CHAIRPERSON SCHEUER: Thank you very much,
21 Mr. Welch.

22 Commissioners, are there questions for Mr.
23 Welch?

24 Commissioner Okuda.

25 COMMISSIONER OKUDA: Thank you very much,

1 Mr. Chair.

2 Thank you, Mr. Welch, for being present. I
3 have a couple of questions.

4 Do you agree that the Land Use Commission
5 order creates covenants which run with the land?

6 MR. WELCH: Yes, I do, Commissioner Okuda.
7 It's recorded on the title and it runs with the land
8 as encumbrance that I believe encumbers the property
9 and obligates the owner of the property to comply
10 with them.

11 COMMISSIONER OKUDA: And when a person or
12 an entity receives title through a foreclosure
13 action, whether it's a commissioner's deed after a
14 judicial foreclosure, or a deed in lieu of
15 foreclosure, the grantee, whoever the grantee is --
16 it could be a new party, or it could be the owner, or
17 could be the party financing the transaction --
18 whoever is the grantee under a deed in lieu of
19 foreclosure, or as a result of foreclosure, would be
20 subject to those conditions; is that correct?

21 MR. WELCH: Yes, that's correct. The
22 reason is that when the D and O was recorded, it was
23 approved and executed and accepted by the then
24 present owners of the property, so it attaches to
25 title, and you could argue, I suppose, that if the

1 mortgagee didn't enter into or approve it, they might
2 be able to argue that it doesn't apply to them.

3 However, it does encumber the title, and it
4 makes it difficult for someone to accept clear title
5 to the property if it were to be sold.

6 So for all practical purposes, yes, I agree
7 with you.

8 COMMISSIONER OKUDA: I know there might a
9 debate in the law, meaning there may not be clear
10 precedent in Hawaii, to what extent a subsequent
11 grantee is personally obligated to perform the
12 condition, but let me ask you this.

13 Did any of the conditions that were
14 recorded as part of the D and O or recorded on title
15 require the building of affordable housing or housing
16 which was intended to benefit the residents of the
17 County of Maui?

18 MR. WELCH: The answer to that is "yes",
19 Commissioner Okuda. The D and O required the
20 construction of 70 units of affordable housing.

21 COMMISSIONER OKUDA: And based on I think
22 common knowledge, I don't want to say there's like
23 judicial notice here, but there still really is a
24 need for affordable housing in the County of Maui,
25 correct?

1 MR. WELCH: I would certainly agree with
2 that, Commissioner.

3 COMMISSIONER OKUDA: Whatever happens in
4 the future, it won't be decided here today. I'll
5 tell you what my concern is.

6 My concern is the Land Use Commission gives
7 these approvals for boundary amendments. A lot of
8 times the promises -- and I know it's not your client
9 that made the promises -- but the promises are made
10 to do certain things as a condition of getting the
11 boundary amendment. And for whatever reason,
12 sometimes, maybe many times, the conditions aren't
13 met. And there seems like there's no real
14 consequence for that except the only consequence is
15 to the community that might have had an expectation
16 that there would be, for example, affordable housing.

17 Many times the housing is really not cheap
18 housing, you know, it takes local residents to really
19 save to get in there. But even that type of housing
20 isn't produced.

21 And then applicants -- and I'm not
22 criticizing you, Mr. Welch, I can see why you're
23 bringing this report -- but the request is then
24 brought to the Land Use Commission to ask to be
25 relieved of a condition that was represented and

1 promised to get the boundary amendment in the first
2 place.

3 And you don't have to answer this question
4 today, but the question I have and probably will
5 continue to have in this case is, instead of a
6 reversion back to an agricultural boundary
7 designation, shouldn't one of the remedies be that
8 the County of Maui, or somebody with standing bring
9 an action for specific performance to require that
10 the conditions be performed?

11 You don't have to answer that today.
12 That's just a comment, and you answered the questions
13 I did have.

14 You can respond, if you want, but
15 otherwise, Mr. Chair, thank you. I have nothing
16 further to add or say.

17 CHAIRPERSON SCHEUER: Mr. Welch, did you
18 wish to respond to Commissioner Okuda's statement?

19 MR. WELCH: Briefly.

20 Commissioner Okuda, as a practitioner of
21 Maui, I share your sentiments completely about the
22 affordable housing commitment and need. And if
23 there's a way to do it, to pass this onto a developer
24 that could meet the conditions in the timeframe, I
25 think that would be a very good result.

1 One of the reasons, as I understand it, the
2 project couldn't go forward is that the
3 infrastructure, the County's infrastructure for water
4 and so forth was not able to be provided for various
5 reasons, and the project just wasn't able to go
6 forward. So I think -- and my clients are
7 disappointed that the project didn't go forward, but
8 they don't see that -- they don't have financial
9 ability to do it. And they don't have any possible
10 takers in the market to buy this and be able to
11 develop it. So I think we're stuck on this one.

12 CHAIRPERSON SCHEUER: Commissioner Chang.

13 COMMISSIONER CHANG: Thank you, Mr. Chair.

14 Thank you, Mr. Welch. I just have just a
15 few questions.

16 So it's my understanding the intention of
17 your client is essentially just to have the property
18 go back to what it was prior to the dba, and it would
19 just be kept in agricultural use; is that correct?

20 MR. WELCH: That is correct.

21 COMMISSIONER CHANG: Does your clients live
22 in the area?

23 MR. WELCH: It's a large family and some of
24 them do, but many of them don't.

25 COMMISSIONER CHANG: What is the current

1 use of the property?

2 MR. WELCH: Just vacant land. People may
3 do some grazing on it, but I don't believe it's being
4 used actively for any commercial purposes.

5 COMMISSIONER CHANG: And I guess I share
6 some of Commissioner Okuda's comments. I'm just
7 wondering, has your client explored -- and you may
8 have already answered this -- given the change of
9 zoning, or for another potential developer to come in
10 and do the development either as originally intended,
11 or presented to LUC or modified, but has your client
12 or the County -- and I'll ask the County the same
13 thing -- explored looking for an alternative
14 developer to do the project?

15 MR. WELCH: That's a good question. My
16 client has not. My client isn't in the land
17 development business or anything, and doesn't have
18 the financial resources to pursue it themselves.

19 I believe that Clayton Nishikawa, after
20 failing to move forward over some time, has tried to
21 come up with financing and other development options
22 and other possible developers that could take over
23 his position, so I think an effort has been made
24 along those lines. And I can't testify as to whether
25 he did a good job or not a good job on that process.

1 But I think my general understanding is
2 that the project can't go forward as a practical
3 matter, and we don't have people knocking on our door
4 to take it over and do it.

5 COMMISSIONER CHANG: It just seems
6 unfortunate, given the expense, if the land is
7 reverted back to Agriculture, and in the future some
8 developer decides to do a similar development in this
9 area, then have to go through the dba process and all
10 the regulatory requirements all over again. Okay.

11 Perhaps the County will -- I'll ask them
12 whether they know of any other developer. And if
13 there were, would your client be open to negotiating
14 something with a perspective developer to complete
15 the project?

16 MR. WELCH: I haven't discussed that with
17 them, but I can raise it with them if the situation
18 requires.

19 COMMISSIONER CHANG: Okay. Thank you.
20 You've answered my question, thank you.

21 CHAIRPERSON SCHEUER: Thank you,
22 Commissioner Chang.

23 Commissioners, further questions for Mr.
24 Welch at this time?

25 Commissioner Aczon.

1 VICE CHAIR ACZON: Thank you, Chair.

2 Good morning, Mr. Welch. I'm just kind of
3 wondering what is your client's motivation or plan
4 when they purchase, or when they take over this
5 property, knowing that there are efforts to develop
6 it and still your clients decided to take it over?

7 MR. WELCH: I understand that they would
8 probably sell it.

9 VICE CHAIR ACZON: Very expensive land to
10 just live on it, there's got to be something that
11 motivate or reason for your client to purchase this.
12 Cannot just be just, you know, sit on it. I'm just
13 kind of wondering the motivation on this one.

14 MR. WELCH: Well, if I could respond to
15 that. They took the property back essentially in
16 foreclosure because Kula Ridge, LLC, Clayton
17 Nishikawa was in full default in paying his financial
18 obligations for the original purchase price of the
19 property. And so by taking the property back by deed
20 in lieu of foreclosure they were protecting their
21 financial interest.

22 And particularly in light of the fact that
23 the possibility of Clayton proceeding with his
24 development or selling it to another developer seemed
25 impossible at this point.

1 So they took the property back, and now
2 they own it and they have got to deal with it.

3 VICE CHAIR ACZON: I understand that Mr.
4 Nishikawa made a lot of effort on trying to develop,
5 talking to other developers. But what kind of
6 efforts your client did once taken over the property?
7 And with that, just kind of wondering if there is a
8 possibility -- I know they tried already -- there's a
9 possibility another developer can take it over or
10 developer wants to develop it. And Commission
11 extend -- I know you had some concerns about the
12 deadline, trying to meet those orders.

13 If there is somehow a developer willing to
14 take it, would it be better to just ask for
15 extension?

16 MR. WELCH: If the County were able to
17 supply this property with water service, then it
18 could be developed. But as I understand it, the
19 infrastructure and utilities available to this
20 property are not sufficient without a substantial
21 additional investment that would render affordable
22 housing project financially not feasible. That's
23 what I understand.

24 I haven't looked at the numbers, but that's
25 my general understanding of what happened.

1 VICE CHAIR ACZON: I guess the other
2 question for the County. I know Maui, like Oahu, has
3 real need of affordable housing. I'm just kind of,
4 you know, hate to see this just, you know, go down to
5 nothing. And perhaps maybe the County or the State,
6 you know, can do something to develop this property,
7 for example, by the County moving forward for any
8 infrastructure needed for this property to develop.

9 Is there any conversation with the State or
10 government agency, like the County of Maui, about
11 possible partnership or possible working relationship
12 trying to make this happen?

13 Let me rephrase that. Has your client had
14 conversation with any agency, County, HUD or any
15 government agencies to see if they can give you some
16 possible options to make this affordable housing a
17 reality?

18 MR. WELCH: My client is not in the
19 development business. It's a family trust, and
20 they're just not in that business. I don't think
21 they would know what questions to ask or how to even
22 approach it. It would need a third-party developer
23 with knowledge and experience and financial resources
24 to come in and be able to proceed with a project of
25 this kind on this land.

1 correctly -- let me put it this way. Just growing up
2 here and knowing the known reputation of the Von
3 Tempsky's family, it would appear that they're not
4 seeking to, like so many other people, seeking to get
5 rich themselves on the obtaining of the Land Use
6 Commission designation. And I think that if you
7 cannot develop it, I'm glad that the Von Tempsky
8 family is looking to return it to Agriculture.
9 That's my comment.

10 CHAIRPERSON SCHEUER: Thank you,
11 Commissioner Ohigashi.

12 Commissioners, is there further discussion
13 or questions for Mr. Welch at this time?

14 If I can briefly, Mr. Welch.

15 The property was entitled by the Land Use
16 Commission after Maui County had already passed its
17 changes to County ordinance that are popularly known
18 as "show me the water" rule. Is that correct?

19 MR. WELCH: I wasn't involved at that
20 stage, but I know that I remember from general
21 understanding of the community that Clayton Nishikawa
22 was planning to develop a water system with a well
23 for this and another property that he had also bought
24 from another group of Von Tempskys nearby. Whether
25 that went forward or whether it was successful or

1 not, I don't know, but -- and I wasn't around and
2 wasn't involved, so I don't know how he satisfied the
3 "show me the water".

4 CHAIRPERSON SCHEUER: But my question is
5 that, could be specific conditional of the D and O,
6 makes specific reference to the "show me the water"
7 rule, so the fact that the water would be required
8 for this development, and that the developer had an
9 obligation to show that it was required is not a new
10 development post entitlement, but actually something
11 that was known at the time; correct?

12 MR. WELCH: I think that's correct.

13 CHAIRPERSON SCHEUER: Thank you.

14 MR. WELCH: But if I could amend that, as I
15 understand it, it's a financial commitment that
16 burdens the property and the development. And the
17 question is, can you spend the money, develop the
18 water system, and complete the project in a way where
19 you're not going to go bankrupt.

20 CHAIRPERSON SCHEUER: Thank you.

21 Can I ask you -- most of my questions have
22 already been asked by Commissioners.

23 Did your client receive some payments from
24 the original petitioner, Mr. Nishikawa, as part of
25 this transaction?

1 MR. WELCH: I expect they received
2 interest. I haven't asked them that question, so I
3 can't answer it specifically.

4 CHAIRPERSON SCHEUER: They may have
5 received some financial benefit?

6 MR. WELCH: Yes.

7 CHAIRPERSON SCHEUER: And I'm interested in
8 whether the amount of financial benefit they received
9 was related to the LUC entitlement of the property.

10 MR. WELCH: The property was sold prior,
11 and the promissory note was signed prior to Kula
12 Ridge LLC proceeding with the Land Use Commission to
13 change the land use designation.

14 So the price that they received and the
15 interest on that debt would not have benefitted from
16 the fact of the Land Use designation having been
17 changed, because it wasn't changed until after the
18 note was executed and the purchase of the property
19 was completed.

20 CHAIRPERSON SCHEUER: And there was no way
21 in which the sale was reversible or conditioned upon
22 entitlement with the Land Use Commission?

23 MR. WELCH: No, it was a deed, a final
24 deed. And it was, a promissory note was provided,
25 and a note was secured by a first mortgage on the

1 property to secure the repayment of the note.

2 CHAIRPERSON SCHEUER: And the date of that
3 is what date, do you know?

4 MR. WELCH: The date of the sale?

5 CHAIRPERSON SCHEUER: Yes.

6 MR. WELCH: Let me look. I think I can
7 tell you quickly. It was 2005, October 12, 2005.

8 CHAIRPERSON SCHEUER: Thank you very much,
9 Mr. Welch. I have nothing further at this time.

10 Anything further, Commissioners?

11 If not, it's 10:03 A.M., and while we did
12 get a slightly late start, I would like to take a
13 ten-minute break prior to continuing with the
14 presentation from County of Maui. We will reconvene
15 at 10:13.

16 (Recess taken.)

17 CHAIRPERSON SCHEUER: We are back on the
18 record.

19 Mr. Hopper, how are you?

20 MR. HOPPER: Good morning, Chair.

21 CHAIRPERSON SCHEUER: Nice to see you. It
22 is definitely still morning. We have an hour and
23 46 minutes in which we can question you. Why don't
24 you proceed.

25 MR. HOPPER: Thank you, Chair.

1 We do not really have a presentation in
2 this situation. We had access to the same
3 information that the Commission had, the letter from
4 the current landowner was February 4th, so still
5 relatively recently, and have access to the annual
6 reports, so I think we have the same information that
7 you have, at least the Planning Department does. So
8 we don't have much to add to what the current
9 landowner has provided.

10 We are here to get that information as
11 well. If there is additional information that the
12 County of Maui, not just the Planning Department, but
13 other departments could provide, I think we can look
14 at doing that if there's questions that you have as
15 part of this docket.

16 But otherwise, we're getting, I think, the
17 information at the same time, to the same extent that
18 you are from the developer or landowner and their
19 current plans for the property.

20 Right now we don't have much to add to the
21 record other than we're here to listen and understand
22 where the project is at right now.

23 CHAIRPERSON SCHEUER: Thank you, Mr.
24 Hopper, Mr. Hart.

25 Any questions for the County?

1 Commissioner Chang.

2 COMMISSIONER CHANG: Thank you, Mr. Chair.

3 Sorry, I have a barking dog in my
4 background.

5 CHAIRPERSON SCHEUER: The things that ZOOM
6 has brought to us.

7 COMMISSIONER CHANG: You're absolutely
8 right, Mr. Chair.

9 Mr. Hopper, I'm going to have -- probably
10 going to have a much longer speech than a question.
11 But first question, has the County relied on any of
12 the conditions in the original D and O for any of
13 your County planning matters?

14 You know, have you relied upon anticipating
15 that this developer was going to increase the water
16 capacity so that the County would be able to build,
17 you know, to build -- build more things up in Kula?
18 That's the first question.

19 Have you relied on any of the conditions in
20 this docket in making Maui County's planning
21 decisions related to this area?

22 MR. HOPPER: Commissioners, I do not
23 believe so. We could check with Department of Water
24 Supply and the current owner, but my understanding
25 that there were -- you read the Decision and Order --

1 there were several options that the landowner could
2 have undertaken to develop water. One of them was if
3 they develop their own well, they could get credits
4 and the County would potentially use that well for Up
5 Country water meter, but there were other
6 possibilities too.

7 One was to just get on the Up Country water
8 meter list and have County water. And so I don't
9 think from reading the annual reports any of those
10 options were completed, because it was my
11 understanding that there's not been a subdivision
12 approval yet, and prior to that the water
13 conservation, or the water plan would have to have
14 been set forth.

15 So to my knowledge, no, with specific to
16 water anyway, there hasn't been anything like that,
17 because when I read the decision and order there were
18 a variety of options. As far as what was discussed
19 with the Department, I don't have specific
20 information on that, but there were a variety of
21 options, and the developer was not successful in
22 completing any of those because of the challenges
23 with developing water Up Country.

24 COMMISSIONER CHANG: And this is going to
25 be where I'm going to give my own little speech here

1 but I do have a question at the end.

2 In my view, a change of boundary
3 designation, especially from Ag to Urban or Rural is
4 a privilege. And we as Land Use Commissioners have
5 an obligation to ensure that, one, the conditions are
6 met; and that the decisions are really in the best
7 interest of the community, because this is public
8 land.

9 And over the last several, you know,
10 different dockets, I have been dismayed by several of
11 the petitions that have come in to change or modify
12 amendments to the original D and O because developers
13 have subsequently determined that they're unable to
14 do what was originally planned, and in many
15 circumstances, the land has gone through numerous
16 owners.

17 So the Petitioner that comes before us
18 today may not be the original developer.

19 So my question is, in the future if we
20 included in our land use, in our -- as a condition
21 for boundary amendment, the condition that the
22 developer pay a performance bond, in particular for
23 the infrastructure, to ensure that if the
24 infrastructure is not built, at least in this case,
25 the County would have a source of funds to do some of

1 that infrastructure development.

2 I see that there's value in the change of
3 designation, and that value is because you're able to
4 do a lot more with the land when it's changed to
5 either Urban or Rural from Agriculture.

6 Too often I have seen developers come in,
7 do some of the marketing, the development portion
8 that provides them a very quick revenue, and then
9 they leave. So a lot of the conditions, affordable
10 housing infrastructure are not completed.

11 So my question to you, the County is:
12 Would the County find it -- would you be in support
13 of the Land Use Commission including in the condition
14 the payment of a performance bond to ensure that
15 those infrastructures are either developed or that
16 there's revenue for the counties to develop those
17 particular infrastructures?

18 That's my question to you, Mr. Hopper and
19 Mr. Hart.

20 MR. HOPPER: I think the idea of a bond
21 is -- I think the County entitlements is something
22 that's looked at. As far as the bond then having the
23 County build the infrastructures where maybe -- is a
24 little difficult to me, because you know, then would
25 the County be responsible for developing the

1 remainder of the project? And obviously if we just
2 built the infrastructure, then the rest of the
3 project couldn't be developed, when you have roads
4 and things that wouldn't be -- so conceptually, I can
5 check with the department. That would have to come
6 up in other dockets obviously because this one is
7 already completed, but we could look at something
8 like that, like I said -- like I said, this is
9 something that the County, I think, does have that as
10 part of its change in zoning as an option to have
11 bonds for items like that, but I think the idea is
12 not necessarily that the County would complete the
13 project, but that a bonding company would then,
14 either through performance bond or payment bond pay
15 for those infrastructures to be built.

16 Who would build them? I don't think it
17 would be the County necessarily building them, but we
18 can look at something like that, and I can check with
19 my client directly on that and see for future
20 dockets.

21 COMMISSIONER CHANG: And I may have made a
22 wrong assumption having the County build it. It's
23 more having a source of funds for the County or an
24 appropriate governmental body to determine the best
25 use of those funds. Especially in the case of water,

1 would it be to upgrade the water system? Would it be
2 to improve particular roadways? But there is, you
3 know, government lacks sources of funds to do
4 necessary infrastructure.

5 And it may -- while you may not be doing
6 the development, having a source of funds to put in
7 some of this infrastructure may better equip the
8 government whether it be the State, the County, or
9 making the land much more attractive for a County to
10 do like a HUD housing project or something. I don't
11 know.

12 My only point is, is to hold this developer
13 financially responsible for its commitment when we do
14 a boundary amendment, because at this point in time
15 there really is no hook other than reversion, or they
16 walk away from the project because they can't do it.

17 So I would just like you to think about it,
18 because that is something that, for me, I will
19 continue to inquire about, and possibly make it as a
20 condition on future boundary amounts.

21 Thank you, Mr. Hopper.

22 CHAIRPERSON SCHEUER: Thank you,
23 Commissioner Chang.

24 Commissioner Ohigashi.

25 COMMISSIONER OHIGASHI: Mr. Hopper, my

1 understanding is that the Land Use Commission is
2 limited in its abilities in this matter, and our only
3 remedy in this type of case is a reversion.

4 So I'm going to ask you some ideas about
5 substantial commencement. Were there any offsite
6 improvements required by the County of Maui and that
7 was done or completed by previous developer, because
8 my recollection was something about a waterline up in
9 Kula going to Hawaiian Homes during that period of
10 time. I'm not sure if they contributed to it or
11 didn't contribute to it.

12 So and if you don't have it, I'm sure that
13 you can find out about it before the next --

14 MR. HOPPER: Yes, I'm sorry, Member
15 Ohigashi. I don't have that information right now.
16 If there has been -- well, the specific question as
17 to that upgrade, I don't have that. I do have the
18 status reports and the response to almost all of them
19 is that we will comply with the condition, but really
20 with nothing specific done.

21 So my understanding, and perhaps Petitioner
22 has additional information, is that really not much
23 has been done as far as building the infrastructure,
24 and obviously the landowners' position appears to be
25 that there has not been substantial commencement that

1 the State requested.

2 But I understand your question, and I can
3 check with water supply specifically, or if there is
4 any other agencies I can check with Public Works to
5 see if there is anything been built, but my
6 understanding from annual reports and Petitioner's
7 letter, really nothing has been done as far as
8 developing infrastructure, but there may have been
9 something, so we can check into that.

10 COMMISSIONER OHIGASHI: Hypothetically, I'm
11 going to ask you this hypothetical question.

12 Assuming that we do not revert these kinds
13 of cases, does the County of Maui have a mechanism to
14 enforce the terms and conditions of the Land Use
15 Commission's D and O? And if so, what are they?

16 MR. HOPPER: Well, it's certainly difficult
17 if the landowner's position is that they have neither
18 the financial capability to do it, nor the
19 wherewithal, but the code, the the State law I should
20 say, allows for fines and they could be issued a
21 violation, but I mean I think again, that can be
22 difficult in the situation if, you know, if there's
23 no capacity to develop.

24 I mean, you're bringing a lawsuit or fining
25 somebody, and I don't know, I mean you could be

1 fining somebody a certain amount per day, but the
2 cost of the infrastructure could be substantially
3 more than that. So there could be challenges there.

4 I think under the law there's an
5 opportunity to fine somebody who is not in
6 compliance, but I do think reversion is in the
7 statute, the mechanisms that the Commission anyway
8 would use to enforce if there is not substantial
9 commencement. So there is some options as far as
10 enforcement in addition to that, though which
11 includes fines and potential legal action, but again,
12 that can be difficult if there is no possibility for
13 the project to be built.

14 COMMISSIONER OHIGASHI: Just curious. Who
15 made that decision in the County?

16 MR. HOPPER: I think under the code or
17 under the State statute, the Planning Department has
18 enforcement authority for Land Use Commission docket.

19 COMMISSIONER OHIGASHI: Thank you, Mr.
20 Hopper.

21 CHAIRPERSON SCHEUER: Anything further,
22 Commissioners?

23 Commissioner Okuda.

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

1 Mr. Hopper, if this matter proceeds to a
2 further hearing at some point in time, just I would
3 be interested to know what the County believes would
4 be in the best interest for the residents of the
5 County from a general planning matter.

6 You know, I know that if there's no
7 substantial commencement of the use of the property
8 in accordance with the representations, the Land Use
9 Commission can simply revert the property without
10 complying with the standard under Chapter 205, but I
11 would still be interested to know what the County,
12 from a long-term planning standpoint, would think
13 it's in the County's best interest.

14 So maybe you can make a note of that on the
15 side.

16 And related to that, you know, a couple of
17 questions I have -- and you don't have to answer it
18 today -- is whether or not the County believes that
19 in the appropriate case it would have, as a remedy, a
20 lawsuit for specific performance.

21 As we all know, specific performance is
22 getting a court order to order somebody to do
23 something, usually what they promised to do, and if
24 they don't do it, there could be court sanctions, and
25 sometimes it might even rise to the level of contempt

1 of court with all the sanctions that involve contempt
2 of court, which might even be more than a simple
3 fine. And I'm not sure if just because you transfer
4 title out through a deed in lieu of foreclosure you
5 can escape the reach of the court for specific
6 performance.

7 So at some point in time if you can make a
8 comment regarding that.

9 And the other thing at the appropriate
10 time, if you can make a comment about whether or not
11 there are sanctions that could be imposed for people
12 who file status reports with the Land Use Commission
13 where they knew or should have known some of those
14 statements, or maybe a lot of the statements being
15 made in the status reports are either not true or
16 omit material facts.

17 For example, I know many status reports say
18 we will comply, we will comply, we will comply with
19 certain conditions. But it seems that oftentimes
20 these statements are made when the person who signed
21 the status report knew or should have known that that
22 really wasn't the case. There was really no
23 intention to comply with the condition, or no ability
24 to comply with the condition.

25 So my question is whether or not the County

1 believes there's some type of sanction that can be
2 imposed or involved regarding that type of situation
3 with status reports -- look, I'm not suggesting
4 criminal prosecution, and I really haven't really
5 done criminal law, but I think there is this crime
6 called unsworn falsification to government entity or
7 official.

8 So if you can just keep those questions or
9 points in mind as we proceed further.

10 Thank you, Mr. Chair. No further
11 questions.

12 CHAIRPERSON SCHEUER: Thank you,
13 Commissioner Okuda.

14 Mr. Hopper, did you want to respond at all?

15 MR. HOPPER: Again, there are three
16 questions that I got there, one about the County's
17 long-term position, another lawsuit on specific
18 performance, and other possible sanctions for filing
19 status reports.

20 And I appreciate Commissioner Okuda
21 recognizing we may not have the answers to those
22 immediately.

23 As far as long-term planning issue, I need
24 to check with my client, Planning Department, on that
25 to see if they have got additional thoughts on that

1 before -- it sounds like we are going to have another
2 meeting on this in a couple of months, so we can look
3 at that issue.

4 And we can think about the other items that
5 you raised and, you know, provide our thoughts on
6 those as well.

7 CHAIRPERSON SCHEUER: Thank you.

8 Commissioners, anything further for the
9 County?

10 Commissioner Wong.

11 COMMISSIONER WONG: Just one question for
12 the County. I just wanted to reaffirm that this was
13 a 201H project, is that correct?

14 MR. HOPPER: That's correct.

15 COMMISSIONER WONG: Is there a timeline for
16 201H?

17 MR. HOPPER: I can check the resolution for
18 that. I don't know if they put in a deadline on that
19 or not, but there was a 201H Resolution, and we can
20 check that.

21 My recollection was that this was done
22 prior to the Land Use Commission's approval, but
23 would also potentially be at issue here if there is
24 no plans to develop further. But I don't know if
25 that had any timelines on it like the Land Use

1 Commission's ten-year infrastructure deadline.

2 COMMISSIONER WONG: I just thought 201H has
3 a specific time that you have to build affordable
4 housing.

5 That's all, I just wanted to know if the
6 County's statutes --

7 MR. HOPPER: It would be the State law.
8 And, again, I can check the resolution.

9 COMMISSIONER WONG: That's no problem.
10 That's all I needed to ask.

11 Thank you, Chair. Thank you, Mr. Hopper.

12 CHAIRPERSON SCHEUER: Commissioners,
13 anything further?

14 If there is none, let's hear from the
15 Office of Planning.

16 MR. YEE: Office of Planning has nothing do
17 add on this matter. Happy to answer questions.

18 CHAIRPERSON SCHEUER: Commissioners,
19 questions for the illustrious Mr. Yee?

20 Commissioner Chang.

21 COMMISSIONER CHANG: Sorry, I lost my
22 "raise hand".

23 Mr. Yee, I'm hoping you heard the line of
24 questioning that I had for Mr. Hopper.

25 Do you have an opinion on that?

1 MR. YEE: I think we're developing a more
2 formal position, and perhaps if it would be helpful
3 we can offer some additional thoughts.

4 The issue of bonding is problematic on a
5 practical level. The Land Use Commission -- it may
6 be more appropriate for the County to impose bonding
7 requirements when they're much closer to
8 construction, and the reason is because of the time
9 period that can be involved.

10 The Land Use Commission occurs very early
11 in the land use process, and the time of
12 construction, and more importantly the sale of units
13 which the project can generate income often is quite
14 far down the line.

15 So the requirement of a bond at the Land
16 Use state would significantly deter, we think, any
17 ability to get developers to move forward.

18 We also think that the enforcement
19 mechanism is uncertain to us. The Office of Planning
20 is certainly not going to enforce the bond. We are
21 not going to construct developments. The County
22 doesn't intend to do it either.

23 And at a certain point you do have to be
24 careful of the "takings" question. So when you
25 require an obligation which exceeds the impact which

1 the applicant causes, the conditions as imposed are
2 supposed to be reasonably related to the impact
3 caused by development. If there is no development,
4 what is the impact that's being resolved by the bond,
5 or what is the impact being mitigated through the
6 bond?

7 It could be different if the development
8 proceeds. You build everything, but they don't put
9 in the traffic infrastructure, at that point I
10 understand there could be a bonding requirement, and
11 it could survive a constitutional takings challenge.

12 But if they don't construct, and a
13 requirement to build infrastructure would be to
14 mitigate impact which doesn't exist from the
15 development, and that could create then -- there is
16 no relationship between the mitigation and the impact
17 and the amount of the requirement it would be
18 arguably out of proportion to the amount of the
19 impact.

20 So we think there are -- at least this is
21 just conceptual proposal, we haven't seen what it
22 would actually look like. When would the bond be
23 required to be paid? Who would have to enforce it?
24 These are issues that haven't been fully fleshed out.

25 But I think we have some initial concerns

1 about how it could work, given the fact that Land Use
2 Commission occurs so early in the land use process,
3 and that there is a County process still to go, so
4 that it does appear to us that the County may be the
5 forum for bond to be imposed, since they're so much
6 closer to conclusion. Thank you.

7 COMMISSIONER CHANG: I greatly appreciate
8 your thoughtfulness in taking that seriously.

9 I hadn't thought about the "taking" issues,
10 but these are some of my comments in response.

11 One, I think that there is -- there needs
12 to be some kind of acknowledgment that there is
13 reliance on the part of the community and on the part
14 of the Land Use Commission when representations are
15 made by a developer that this is their proposed
16 project.

17 In my view, I think the developer, they
18 present to us a set of facts that may not necessarily
19 represent the true cost of the development, and the
20 community is asked to have this land use designation
21 changed. They are bearing the burden of increased
22 traffic, of increased use of water, sewer, all of the
23 infrastructure, they are having to bear that burden.

24 And this is all based upon representations
25 made by developers that they are going to improve the

1 infrastructure that they are potentially impacting
2 based upon the environmental impact statement.

3 I would ask you if you're going to be
4 rendering a more substantial opinion, that if you do
5 not have -- if you don't think that the bond is the
6 right approach, I think you obviously know how I
7 feel. I would ask you to come up with some
8 alternative suggestions.

9 How do we ensure that the developers are
10 going to do what they say they are going to do
11 because, you know, it really, it weighs very heavy on
12 me when communities come in ten, 20 years later after
13 the developer has developed their market property and
14 then they left. And these communities are held
15 holding -- you know, and they have made substantial
16 concessions to have this developer to come in.

17 So, again, my only request to you is if you
18 find the performance bond not to be an appropriate
19 tool for the Land Use Commission, knowing what my
20 concerns are, I would appreciate some alternative
21 options for the Land Use Commission to consider as it
22 weighs these dba's.

23 Thank you very much, Mr. Yee. I greatly
24 appreciate it.

25 MR. YEE: If I can just give one -- there

1 may be a difference in our view what can be done to
2 remedy construction development which occurs to
3 comply with the mitigation requirements versus the
4 case in which no development occurs.

5 The second one is the more difficult issue,
6 we think, on this question. So we will be a happy to
7 address those too.

8 COMMISSIONER CHANG: And I would agree with
9 you, but in my view there is value given for the
10 change of designation. There has been probably
11 reliance on the part of the community for that change
12 in designation. There may even be reliance on the
13 part of the Counties in their future planning based
14 upon those representations.

15 So even though the development is not done,
16 and so when there is an issue of reversion, there may
17 still be some injury to the community in light of the
18 fact that the developer ten, 20 years later says we
19 can't do it.

20 So just think about that as well. There
21 may be different remedies for different stages of the
22 process. Thank you again.

23 CHAIRPERSON SCHEUER: Anything further,
24 Commissioners?

25 Commissioner Okuda.

1 COMMISSIONER OKUDA: Thank you, Mr. Chair.

2 Mr. Yee, if this matter continues further,
3 if you can also provide us the Office of Planning's
4 input as far what would be the best planning decision
5 with respect to use of this property whether, you
6 know, reversion to Agricultural designation is a
7 better planning decision, or is it better to leave it
8 in the Urban District with perhaps modification of
9 conditions? If you can do that.

10 To a large extent also, I kind of echo and
11 agree with Commissioner Chang's concern, and to that
12 end, if you wouldn't mind, if the Office of Planning
13 in fact is going to go and make a more formal
14 presentation on the issue of taking, I would ask you
15 to go and look at the Bridge Aina Lea case. I'm not
16 going to repeat the quote or the paragraph I think I
17 read word for word in the last -- or in two prior
18 proceedings, but the Hawaii Supreme Court seems to
19 recognize that a boundary designation change to Urban
20 itself has consequences, there is consequences
21 beneficial to the landowner or applicant in the
22 increase in value just because of the boundary
23 designation, and there is a detriment to the
24 community if representations made by the applicant or
25 developer are not kept.

1 So I'm not really sure if the
2 constitutional taking issue really applies here,
3 because if certain additional conditions are placed,
4 a performance bond, you know, it's not as if value is
5 being taken away from what the applicant had right
6 before the applicant got the boundary amendment.

7 So I think that's an issue that needs to be
8 fleshed. And if you also at some point in time don't
9 mind giving us your input, because we value your
10 input and Office of Planning's input a lot about,
11 number one: There seems like there are far too many
12 status reports where statements are being made where
13 material facts are being omitted.

14 And as you probably are aware there is a
15 Hawaii Supreme Court called *AIG vs Bateman* where the
16 Hawaii Supreme Court said omission of a material fact
17 to a tribunal -- the Supreme Court didn't just limit
18 to the court, they said tribunal material omission of
19 or an omission of a material fact to tribunal is the
20 same thing as affirmative misrepresentation.

21 So if at some point in time you can comment
22 on whether or not the appropriate people or agencies
23 need to take a harder look at status reports that are
24 being submitted to the Land Use Commission which omit
25 material facts, because perhaps faith in the

1 government might be held if we make sure everybody
2 who is dealing with the government, and all of us in
3 government also deal with everything honestly without
4 any omissions.

5 So thank you very much, Mr. Chair, that's
6 basically all the questions I have.

7 CHAIRPERSON SCHEUER: Thank you.

8 Anything, Mr. Yee?

9 MR. YEE: Just briefly, just to be clear.
10 Regarding taking to Commissioner Chang's comment was
11 with respect to imposition of new condition
12 presumably against the agreement of the Petitioner.
13 So the question was not whether the Land Use
14 Commission would commit a taking if it enforced
15 existing conditions. The question was would there
16 be -- takings question if the LUC were to impose a
17 condition that the Petitioner was not agreeable to,
18 and then try -- and in a particular circumstance.

19 CHAIRPERSON SCHEUER: Mr. Yee, just so you
20 know, your audio kind of cut out a couple times. We
21 got the vast majority of it, but there seems to be
22 something going on with your connection.

23 Commissioner Ohigashi.

24 COMMISSIONER OHIGASHI: Mr. Yee, are we
25 able to modify the existing D and O regarding this

1 matter to include any type of requirement for bond?

2 MR. YEE: Well, I guess the question would
3 be would it be with the agreement of the Petitioner.
4 If so, then no one could appeal it. If not, then
5 there could be.

6 I mean, the general question, of course, is
7 can you amend a decision that is already issued?
8 Technically, yes, but the devil is in the details
9 about the particular amendment.

10 COMMISSIONER OHIGASHI: If we were to amend
11 it, would it require us to have a hearing on this
12 matter?

13 MR. YEE: There are a variety of issues
14 that would come up if you try to amend the Decision
15 and Order without the agreement of the Petitioner,
16 including put aside the taking issue I addressed with
17 Commissioner Chang, the other issue if you impose
18 additional conditions on land in which the owner has
19 a vested interest, are you taking away a right
20 without just compensation?

21 So it's done, right? And you're finished.
22 And then so many years later you come back and say,
23 okay, now I want you to also provide a park that was
24 not originally required. Arguably a new condition.

25 COMMISSIONER OHIGASHI: Mr. Yee, it's a

1 simple question. The question I'm trying to get at,
2 the point I'm trying to get at, I don't know if a
3 status hearing and discussion of this matter in
4 regard to whether or not you move to OSC would
5 contemplate us being able to -- assuming that we go
6 to OSC hearing, contemplate us being able to amend
7 the document to include a condition, should we decide
8 not to revert? Amend the order to --

9 MR. YEE: I think that's almost a Sunshine
10 question, in which I think if you have -- so I don't
11 think you can do it today. Only thing on your agenda
12 is status conference. You're coming to this issue
13 again on the Order to Show Cause question.

14 If you add it to that, consider an order to
15 show cause or amendment to the D and O, then you
16 looking back at your rules. Your rules do allow for
17 an amendments at the decision of the Land Use
18 Commission.

19 I have to tell you there are a lot of
20 different issues that come up in a specific issue.

21 COMMISSIONER OHIGASHI: Before you go into
22 that, I just wanted to know what --

23 MR. YEE: Not today.

24 COMMISSIONER OHIGASHI: And who would be
25 the person that would petition the Land Use

1 Commission to include such an amendment into the D
2 and O?

3 MR. YEE: In your scenario probably be at
4 the motion of the Commission itself. I mean, any of
5 the parties, Petitioner could ask to amend.
6 Presumably they're not. If you were to amend it
7 would be at the Land Use Commission's own motion
8 which then brings up the issue of notice.

9 COMMISSIONER OHIGASHI: The last question I
10 have -- not the last question, but the question I
11 have is, in such a scenario, who would bear the
12 burden to establish if such a condition can be or
13 should be attached to the D and O?

14 MR. YEE: Because it's at the motion in
15 this particular scenario at the Land Use Commission's
16 own motion, the Land Use Commission would need to
17 find by preponderance of the evidence that there is a
18 basis for the amendment. Getting into the specifics
19 of what you require, need to determine what the
20 specific amendment is.

21 COMMISSIONER OHIGASHI: So the Land Use
22 Commission would have to call its own witnesses to
23 make sure that our decision or our decision is
24 supported?

25 MR. YEE: I don't know in which the

1 Commission ever amended an order requiring a factual
2 determination, so I suppose the Commission could if
3 it involves state witnesses. I'm sure the Office of
4 Planning would assist you in getting witnesses, but
5 you know, I guess if you needed a factual that what
6 would you have to do, the Land Use Commission is a
7 little limited in its logistical ability to do some
8 of these things, because it's not a party and doesn't
9 contemplate that kind of role to be taken. You have
10 authority, really not a process by which you would
11 pursue these things.

12 COMMISSIONER OHIGASHI: Mr. Yee, I was
13 curious about the process.

14 My second comment is, under the terms of
15 the existing statute and law, would you say that
16 there is insufficient showing that there is reason to
17 believe that the property, or that the conditions
18 imposed on the D and O would not be complied with or
19 not be performed in that there is sufficient basis to
20 move to an Order to Show Cause hearing in this
21 matter?

22 MR. YEE: You know, given the fact that
23 your only option is to revert, and that the
24 Petitioner has asked that the property be reverted, I
25 don't know why you need to go to Order to Show Cause

1 at all. I think you could move straight to the
2 reversion.

3 COMMISSIONER OHIGASHI: I assume that we
4 would have to go into executive session to determine
5 if our own attorney general would agree to that?

6 MR. YEE: Absolutely.

7 COMMISSIONER OHIGASHI: No further
8 questions.

9 CHAIRPERSON SCHEUER: Thank you,
10 Commissioner Ohigashi.

11 Commissioner Chang.

12 COMMISSIONER CHANG: Thank you, Mr. Chair.

13 I just want to clarify, because I can see
14 Mr. Welch getting a little anxious, that my comments
15 regarding performance bond is not related to this
16 particular docket, it would be in the context of a
17 brand new dba.

18 I do not believe that, one, there is a
19 basis to seek a performance bond in this case, and I
20 would agree with you, I don't think that we would
21 after the fact designation require a new condition
22 unilaterally without the consent of the Petitioner.

23 I just want to clarify that my comments or
24 questions regarding performance bond were more
25 hypothetical in the context of a brand new dba, but

1 not in the context of this particular case.

2 CHAIRPERSON SCHEUER: Thank you,
3 Commissioner Chang, for that that clarification. I
4 was wondering, as Chair, whether you were trying to
5 apply the comments to the agenda at hand, or
6 hypothetical case.

7 Given your clarification, I would like us
8 to move on and return more strictly to the agendized
9 item before us.

10 Any other questions or comments for Mr.
11 Yee?

12 Commissioner Aczon.

13 VICE CHAIR ACZON: I just had one question
14 for Mr. Yee.

15 I don't know, you mentioned that our other
16 resource is to revert the property to original
17 designation. What if the Commission doesn't do
18 anything on this one, and just let it go?

19 MR. YEE: Meaning stays Agriculture?

20 VICE CHAIR ACZON: That nothing really
21 happened. There's no, what you call this,
22 substantial commencement, construction on this one.

23 MR. YEE: If you did nothing, then at a
24 certain point in time the Petitioner will presumably
25 be in violation of the conditions.

1 If you are to construct in between years of
2 date of Decision and Order, assuming no one enforces,
3 so neither County nor Land Use Commission moves on
4 this matter, then the land stays in its Urban and
5 Rural classification with its zoning, but its
6 inability to comply with the conditions, as a
7 practical matter, this would probably make it
8 difficult to sell the property, as any sale would
9 have to inform the buyer of the existing cloud based
10 upon the violation of the Land Use Commission
11 decision. But it does -- I mean that's what would
12 happen.

13 So the land, it would be difficult to
14 develop the land. Presumably it would stay fallow.
15 I'm not sure how the County would then deal with any
16 request to use the land for agriculture --

17 VICE CHAIR ACZON: In case somebody came
18 and miracle happened, somebody interested, then the
19 Petitioner, or whoever is going to take over can file
20 a Motion to Amend?

21 MR. YEE: They could. So simple question,
22 if there was a buyer who said I'll buy this property.
23 I'm prepared to develop it. I need ten more years to
24 development it.

25 They could approach the owners and say I'm

1 willing to enter into a conditional sales agreement
2 in which, if the LUC amends the Decision and Order, I
3 will pay this much money.

4 I will say as a practical matter,
5 particularly a question, that is are you going to get
6 a developer who will enter into the due diligence
7 that's required to do this, because that's still
8 money to determine, right, whether or not you even
9 wanted to enter into a conditional sales agreement,
10 whether you will get the developer before you amend
11 the D and O.

12 So which has to happen first? Amend the D
13 and O first to give them ten more years, or you get
14 the developer and then get it. But there are
15 problems both ways. On one hand you're less likely
16 get developers if you don't amend it first, on the
17 other hand if you just amend it, we always have
18 problems with lands that are just sort of laying
19 there, nothing being done and no obligation to do
20 anything. That was the original reason we came up
21 with ten years requirements, 15 years and, for
22 example, previously there was no requirement to
23 construct within any time.

24 So you have to pick your poison as to which
25 you prefer and what would work for any particular

1 situation.

2 VICE CHAIR ACZON: I don't think it's going
3 to make a difference because the Petitioner saying
4 that they don't intend to do anything about the
5 property, going to remain fallow no matter what, if
6 the Petitioner's intention not to do anything on the
7 property.

8 CHAIRPERSON SCHEUER: Was that it,
9 Commissioners Aczon?

10 VICE CHAIR ACZON: Yes, thank you.

11 CHAIRPERSON SCHEUER: Commissioner Cabral.

12 VICE CHAIR CABRAL: Thank you.

13 All of this discussion has brought me right
14 back to my first thought in reviewing this
15 information is, we have done it already since I've
16 been on the Commission where somebody has done
17 nothing, done nothing, done nothing, we stepped in
18 and said you are not in a position to do anything, so
19 we have reverted them back to the Ag.

20 So now we've got the exact opposite where
21 the actual evolved generally in those cases it was
22 again some property in foreclosure and reality of
23 life has taken place.

24 I guess one of my thoughts is, because I am
25 in real estate, once you get your designation, does

1 the lot taxes suddenly go on up from agriculture,
2 which can be very low if you are working the
3 agriculture benefits, to what is your Urban or Rural
4 tax base charges are much higher, that might be a
5 question for Mr. Hopper.

6 But, again, thank you, Mr. Yee, my thought
7 was that what you said is verifying I think my
8 understanding, and you verify that. They're asking
9 to revert back to Ag for whatever reasons, otherwise
10 our option is to force them to go back to Ag at
11 another hearing at another time.

12 So the other question is, as Commissioner
13 Aczon has said, do we want to let them float in this?
14 But if there is no tax deficit or no consequences to
15 it, then maybe some future buyer.

16 I would think again if you're in a better
17 value, if you're in a higher and better use potential
18 for the land, the real estate should sell for higher
19 and more, however, it does come with that obligation,
20 and if you can't get water, then I can send some over
21 from Hilo, but until we get that worked out, I don't
22 know whether that land can ever get developed.

23 My understanding is I don't know what we
24 are all talking about here. Let's get practical.
25 They can't afford to do it, let's it go, otherwise

1 get together in another year and force them to
2 revert. I don't know.

3 Am I missing something, Mr. Yee, since
4 you've become the expert on the stand right now?

5 MR. YEE: This is the person on the hot
6 spot. If the Petitioner wants to revert the
7 property, our view is let the Petitioner revert the
8 property.

9 VICE CHAIR CABRAL: That's my feeling.
10 Thank you very much for verifying my common sense
11 point of view.

12 CHAIRPERSON SCHEUER: Commissioners, is
13 there anything further? Seeing none.

14 Mr. Welch, thank you for your patience on
15 this matter. Do you have any final comments or
16 rebuttal you wish to make?

17 MR. WELCH: No, thank you, Chair. This is
18 the first time I've been before the Commission. I
19 think the discussion was very good, and thank you for
20 hearing me out on this, and I appreciate your
21 efforts.

22 CHAIRPERSON SCHEUER: You're welcome. I
23 will say that even if you appeared before the Land
24 Use Commission in previous years, this is, as I'm
25 fond of saying, not your daddy's Land Use Commission,

1 we really engage in issues.

2 Commissioner Ohigashi.

3 COMMISSIONER OHIGASHI: I'm not sure if I'm
4 supposed to -- are you going to call --

5 CHAIRPERSON SCHEUER: I'm about to. I was
6 seeing if there was any final questions for Mr. Welch
7 after he concluded.

8 Commissioners, we now can enter
9 deliberations on this matter. As a reminder,
10 pursuant to Hawaii Administrative Rules Section
11 15-15-93(b), "whenever the Commission shall have
12 reason to believe that there has been a failure to
13 perform according to the conditions imposed, or the
14 representations or commitments made by the
15 petitioner, the Commission shall issue and serve upon
16 the party or person bound by the conditions,
17 representations or commitments, an order to show
18 cause why the property should not revert back to its
19 former land use classification or be changed to a
20 more appropriate classification, and set the matter
21 for a hearing.

22 I will now entertain a motion.

23 Commissioner Ohigashi.

24 COMMISSIONER OHIGASHI: I move that we set
25 this matter for an OSC hearing based upon the

1 statements from Mr. Welch and the record on file
2 indicating that there is reason to believe that there
3 would be a failure to perform in this matter.

4 CHAIRPERSON SCHEUER: Thank you,
5 Commissioner Ohigashi.

6 Commissioner Okuda.

7 COMMISSIONER OKUDA: Mr. Chair, I second
8 that motion.

9 CHAIRPERSON SCHEUER: Thank you.

10 Does the movant or seconder wish to speak
11 to the motion before I open it up for general
12 discussion?

13 COMMISSIONER OHIGASHI: I just want to say
14 that I think that Mr. Yee's opinion is a practical
15 one, however, I believe that it is incumbent on the
16 Land Use Commission to follow its rules and to make
17 sure that we do the proper thing according to our
18 statute. According to our statute we would be remiss
19 if we do not send this matter to an OSC process.

20 CHAIRPERSON SCHEUER: Commissioner Okuda.

21 COMMISSIONER OKUDA: Thank you, Mr. Chair.

22 I agree with what Commissioner Ohigashi has
23 stated as far as our duties to inquire. Also I
24 believe this situation is distinguishable from the
25 other OSC's we have had, but what I would like to see

1 is additional information from the County and the
2 Office of Planning as far as what they believe would
3 be in the best interest, especially of the residents
4 of the County of Maui, as far as what future use of
5 this property should be.

6 And so I think a further hearing is the
7 appropriate way to have the full and complete record
8 that's necessary.

9 And my questions do not indicate any
10 predisposition one way or the other regarding this
11 matter.

12 Thank you, Mr. Chair.

13 CHAIRPERSON SCHEUER: Is there further
14 discussion on the motion to proceed to an Order to
15 Show Cause?

16 Commissioner Cabral.

17 VICE CHAIR CABRAL: Thank you, Chair. I'm
18 going to support this motion, and I kind of want to
19 take this opportunity, because I'm so involved with
20 housing and, of course, really all we asked about was
21 what about affordable housing. What about the
22 obligation on affordable housing? Because affordable
23 housing is clearly the buzz word of the century or
24 the decade here.

25 And yet I see this over and over again, not

1 just with us and what we are doing with LUC, but also
2 at every level in government and private business. I
3 mean, no one is worried about what's going to happen
4 to the multi-million dollar homeowners without them
5 having another house, but that we need to recognize
6 that we, I think we need to better look at this, and
7 of course this all started years ago with a different
8 petitioner and a different landowner in a sense, but
9 everybody, including in a sense, the County of Maui,
10 you know to say yes, let all these happen, but the
11 County you have a housing shortage in this case, now
12 we are not going to have these affordable housing or
13 any additional housing, I mean it's supply an demand,
14 and if you had tons of housing, all the prices would
15 come down, but the County needs to understand in this
16 very case, the reason it can't happen and didn't
17 happen before, and obviously now is not cost
18 effective to have somebody else in the future if
19 there is no water. So what's it going to take? Is
20 it completely impractical, or what is the County
21 doing to try to develop more sources of water? Every
22 year we have the flood, then the drought. So what is
23 it going to take in our environment that we can
24 capture that water in some way, shape or form? What
25 is it it going to take to have the infrastructure

1 available to provide the developers and then develop
2 housing that will include affordable housing for our
3 citizens? And I think that this past attitude just
4 pushing on the developer to have to pay for
5 everything is clearly not currently cost effective
6 for the developer, and obviously hasn't been in the
7 past.

8 So I just wanted to scold everybody in the
9 system for being part of the problem of why we have
10 not enough of affordable housing in our State.
11 That's my soapbox. Thank you.

12 CHAIRPERSON SCHEUER: Thank you for the
13 scolding, Commissioner Cabral. Anything further,
14 Commissioners?

15 I will vote in favor of the motion. It's
16 the appropriate procedural method we need to go
17 through, even though I note the comments of Mr. Yee.

18 I'll just say if I may I scold or comment
19 for a moment.

20 I've increasingly reacted to the references
21 from a cultural perspective or ecological
22 perspective, I've recently been reacting to the
23 references of parcels as "vacant". That's not a
24 cultural perspective necessarily. A land that is
25 vacant from sort of a capital perspective might be

1 simply lacking or not seeing certain relationships
2 that exist on the property whether ecological or
3 cultural. So I would like to suggest we start to
4 reframe our thinking about what land is.

5 With that, anything further, Commissioners?
6 If not, Mr. Orodenker, please poll the Commission.

7 EXECUTIVE OFFICER: Thank you, Mr. Chair.
8 The motion is to proceed to an Order to Show Cause
9 hearing on this matter.

10 Commissioner Ohigashi?

11 COMMISSIONER OHIGASHI: Aye.

12 EXECUTIVE OFFICER: Commissioner Okuda?

13 COMMISSIONER OKUDA: Yes.

14 EXECUTIVE OFFICER: Commissioner Aczon?

15 VICE CHAIR ACZON: Aye.

16 EXECUTIVE OFFICER: Commissioner Cabral?

17 VICE CHAIR CABRAL: Yes.

18 EXECUTIVE OFFICER: Commissioner Chang?

19 COMMISSIONER CHANG: Aye.

20 EXECUTIVE OFFICER: Commissioner Giovanni?

21 COMMISSIONER GIOVANNI: Aye.

22 EXECUTIVE OFFICER: Commissioner Wong?

23 COMMISSIONER WONG: Aye.

24 EXECUTIVE OFFICER: Chair Scheuer?

25 CHAIRPERSON SCHEUER: Aye.

1 EXECUTIVE OFFICER: Thank you, Mr. Chair.
2 The motion passes with eight affirmative votes.

3 CHAIRPERSON SCHEUER: Thank you, Mr.
4 Orodenker. I expect the staff will prepare the order
5 for my signature.

6 EXECUTIVE OFFICER: That is correct. Just
7 for your knowledge, the Motion for Order to Show
8 Cause requires some different noticing of the hearing
9 and some notification in newspaper and some different
10 time frames, but we will prepare the order for your
11 signature.

12 CHAIRPERSON SCHEUER: Thank you.
13 Based on the information today, the
14 Commission anticipates hearing the Docket on A11-790
15 Order to Show Cause on June 9th and 10th, 2021.

16 With that, it is now 11:30. We have gone
17 60 minutes exactly.

18 We will take a recess until -- well, let's
19 see. Our next item is the Grier motion. Let's --
20 Commissioner Wong.

21 COMMISSIONER WONG: Can we go take a break
22 until 12:30?

23 CHAIRPERSON SCHEUER: And take our lunch
24 break now?

25 COMMISSIONER WONG: Yes, please.

1 CHAIRPERSON SCHEUER: Do any of the
2 Commissioners have an issue with that, or does -- Mr.
3 Geiger, are you speaking to the Grier motion?

4 MR. GEIGER: No, we do not oppose the
5 Commission taking a break.

6 CHAIRPERSON SCHEUER: Mr. Hopper?

7 MR. HOPPER: Just real quick. Kristin
8 Tarnstrom from our office will be joining in this
9 item. She is still listed as attendee. If it's
10 possible to work with staff to have her as a
11 participant?

12 CHAIRPERSON SCHEUER: We will promote her.
13 Many would consider it a demotion. I will consider
14 it a promotion.

15 With that, let's recess until 12:30.

16 Was that the request, Mr. Wong?

17 COMMISSIONER WONG: Yes, Chair.

18 CHAIRPERSON SCHEUER: Banker's lunch hours
19 today, 12:30, and we will resume proceedings.

20 Thank you very much, Mr. Welch. Thank you
21 to all the parties, and we will recess.

22 (Noon recess taken.)

23 DR21-71 ANDREW GRIER (Maui)

24 CHAIRPERSON SCHEUER: Our next agenda item
25 is Docket DR21-71 Andrew Grier (Maui) Petition for

1 Declaratory Order that the number of dwellings
2 allowed on properties in the Rural District can be
3 more than one per one-half acre if allowed by County
4 Zoning.

5 Will the Petitioner please identify
6 themselves for the record?

7 MR. GEIGER: Good afternoon, Chair,
8 Commissioners, James Geiger. I am the attorney for
9 Andrew Grier. Andrew is also present with me,
10 although you cannot see him on camera.

11 CHAIRPERSON SCHEUER: We continue to have
12 with us representatives from the County of Maui and
13 the Office of Planning.

14 MS. TARNSTROM: Good afternoon, Chair,
15 Kristin Tarnstrom. I'm the Deputy Corporation
16 Counsel working with Department of Planning, and
17 Michele McLean is with me who you will see as she
18 moves in and out of the room.

19 CHAIRPERSON SCHEUER: Mr. Yee.

20 MR. YEE: Good afternoon, Bryan Yee, Deputy
21 Attorney General. With me is Rodney Funakoshi and
22 Aaron Setogawa from the Office of Planning.

23 CHAIRPERSON SCHEUER: I'll note that
24 technically in matters of declaratory orders,
25 Petitioner is actually the only true party, but we

1 will allow for public testimony by the County and the
2 Office of Planning and offer them a chance to provide
3 further testimony before we begin.

4 Before we begin, however, let me update the
5 record.

6 On February 11th, 2021, The Commission
7 received the Petition for Declaratory Order, Exhibits
8 A and B, Verification of Andrew Grier, Certificate of
9 Service and the \$1000 filing fee.

10 On February 26, the Commission received
11 DR21-71 County of Maui's Department of Planning
12 Response, Appendices "A" through "D".

13 On April 1, 2021, the Commission emailed
14 the Meeting Agenda for April 14-15, 2021 to Parties
15 in this Docket, Statewide and County Lists.

16 On April 5, 2021, the Commission mailed the
17 Meeting Agenda to the Parties in the Docket, and our
18 Statewide and County Lists.

19 On April 6, 2021, the Commission received
20 OP's Response to Petition for Declaratory Order and
21 Respondent Department of Planning, City of Maui's
22 Response to Petition for Declaratory Order.

23 Let me now go over our hearing procedure
24 for this docket.

25 First, I will give the Petitioner the

1 opportunity to comment on the Commission's Policy
2 governing reimbursement of hearing expenses.

3 I will then recognize any written testimony
4 that's been provided.

5 Following that I will provide the
6 opportunity for any interested members of the public
7 who are attending this meeting to provide oral
8 testimony in the manner that I previously described
9 bringing them into this meeting. If anybody is
10 attending by phone, they should press *9 to raise
11 their hand virtually, otherwise use the raise-hand
12 function in the software for the ZOOM webinar
13 platform.

14 Following the completion of any public
15 testimony, I will call on County and State to provide
16 testimony on this docket.

17 And following that, I will allow the
18 Petitioner to make presentation. Following the
19 Petitioner's presentation, I will hear any questions
20 or comments from the Commissioners.

21 If there is additional time available, I
22 will allow additional time for County and Office of
23 Planning.

24 Finally based on the information received
25 today, the Commission will determine further action.

1 Mr. Geiger, any questions about our
2 procedures today?

3 MR. GEIGER: Just to be clear, you do not
4 wish to hear from me until after the public testimony
5 is closed, correct, other than the fee and cost
6 issue?

7 CHAIRPERSON SCHEUER: I'm going to keep the
8 public testimony open for purpose of continuing to
9 hear from the Office of Planning and the County of
10 Maui.

11 MR. GEIGER: So you want to hear from me
12 before they talk, correct?

13 CHAIRPERSON SCHEUER: To be clear, in a
14 declaratory ruling, technically there is only one
15 party. However, due to the very integral nature of
16 the Office of Planning and the County, and the
17 respective counties to our proceedings, I'm going to
18 offer them the opportunity to provide public
19 testimony on this, then hear from you. And also
20 supply additional opportunity to them to comment
21 after you have presented to which you may choose
22 to -- (indecipherable).

23 MR. GEIGER: Thank you.

24 CHAIRPERSON SCHEUER: And, Mr. Geiger, have
25 you reviewed HAR 15-15-45.1 with regard to the

1 reimbursement of hearing expenses? If so, what is
2 your position?

3 MR. GEIGER: Yes, we have. We waive
4 reimbursement.

5 CHAIRPERSON SCHEUER: Mr. Hakoda, has there
6 been any written public testimony submitted on this
7 matter since it's been agenda'd?

8 CHIEF PLANNER: This is Scott Derrickson.
9 No, no public testimony on this matter has come in.

10 CHAIRPERSON SCHEUER: Are there any of the
11 attendees who are attending this meeting wishing to
12 provide public testimony on this matter? If so, use
13 the raise-your-hand function. Seeing none. No
14 general members of the public.

15 I would like to now actually hear from the
16 County, followed by the Office of Planning, and then
17 we'll hear from the Petitioner.

18 MS. TARNSTROM: Thank you, Chair.

19 The County of Maui has submitted a full
20 response in writing to Petitioner, and we mainly rely
21 on that submission for the Commissioners'
22 consideration.

23 But I would just like to add our position
24 is, generally speaking, that if we are applying this
25 law incorrectly, we just want to know, which is part

1 of why we fully support the Commission citing this
2 matter so they can provide clarification for the
3 department going forward.

4 We don't believe we have been applying it
5 wrong, obviously. This case is truly about the
6 confluence of 46-4(c) and 205 Hawaii Revised
7 Statutes, and it very much turns on your
8 interpretation of 46-4(c) and that statute is a
9 general statute. It applies to all counties. It
10 applies to all districts, and it applies in all
11 circumstances where a dwelling is already allowed.

12 On a lot where a dwelling is already
13 allowed, the counties allowed to make specific rules
14 and regulations to allow two dwellings on that lot,
15 and basically where one exists, the County is
16 empowered for there to be two under certain
17 circumstances, and that's the nature of Ohana Zoning
18 in and of itself to provide a dwelling unit with an
19 ohana unit.

20 Where more than one dwelling is already
21 allowed, 46-4(c) has limited utility as it applies to
22 the number of dwelling units.

23 So on Petitioner's two-acre lot, or
24 approximately two-acre lot, he's already allowed to
25 have multiple dwellings, he's already allowed to have

1 four under the state statute, and in that case ohana
2 zoning and 46-4(c) doesn't apply, because there is
3 more than one dwelling unit already allowed. And
4 what it allows is for the County to make one dwelling
5 unit essentially into two.

6 That is supported as briefed by the context
7 of the statute, legislative history as well as the
8 plain language of that statute.

9 Petitioner reads 46-4(c) quite differently.
10 They essentially argue that the County can allow as
11 many additional dwelling units as is reasonable on a
12 lot. And in order to get to that point, you have to
13 rewrite the statute. You would have to change the
14 very specific wording that it's two dwelling units,
15 and you would have to change that into a reasonable
16 number of dwelling units and make other changes to
17 the statute.

18 Additionally, to adopt this interpretation
19 it would be aggregate all of the density requirements
20 for Rural zoning that is considered under State
21 statute.

22 All of this is under the State level zoning
23 which has to direct how far the County is allowed to
24 go in its own. At the County level, as we read,
25 should it not have been State Rural or there was a

1 different State Urban and it was just County density
2 requirements that were considered, Petitioner would
3 be allowed to have six dwelling units and be allowed
4 to have four single family and than two -- but that
5 isn't the case here. 205 is relevant. It does limit
6 the number of dwelling units that are allowed on
7 that. County zoning is not actually very relevant in
8 this case.

9 Also just generally speaking, it says,
10 State has is its own land use requirements and
11 regulations, and the County has its own land use
12 requirements and regulations, and as Office of
13 Planning pointed out in their brief, County is
14 limited and it cannot expand upon unless expressly
15 set forth in the State statute, and it doesn't. It
16 adopts the limitations provided in the State statute
17 in the County code.

18 I intended to stop there and take questions
19 whenever appropriate or now if that's the Chair's
20 prerogative.

21 CHAIRPERSON SCHEUER: I normally -- our
22 procedure is after public testimony, which this is
23 falling under, you will be available for questioning
24 from the Commissioners. Are you ready for that?

25 MS. TARNSTROM: Yes.

1 CHAIRPERSON SCHEUER: Commissioners,
2 questions?

3 Commissioner Okuda.

4 COMMISSIONER OKUDA: Thank you, Mr. Chair.

5 I thought I promised some people I would
6 try to keep my mouth shut.

7 Let me ask a question on the standard and
8 procedure that we are to apply in deciding this case,
9 and my question deals with whether or not, similar to
10 the short-term vacation rental issue that we faced
11 with the County of Hawaii ordinance, whether the
12 standard of looking at both the State and County
13 requirements have to be looked at, and the Land Use
14 Commission has to adopt or follow or actually what
15 everybody should follow is the more stricter standard
16 law or ordinance.

17 What I would like to do first is just read
18 a very short paragraph from the Hawaii Supreme Court
19 case Save Sunset Beach Coalition versus City and
20 County of Honolulu. That's found at 102 Hawaii 465
21 at page 482, the Pacific 3d citation is 78 Pacific
22 3d, page one at page 18, that's a 2003 Hawaii Supreme
23 Court case.

24 What I plan to do, if it's okay, I would
25 like to read that paragraph. After I finish reading

1 the paragraph, I will ask you whether that's an
2 accurate statement of the law; and then number three
3 after that, whether or not that rule is, or that
4 statement of law is applicable to how we should
5 evaluate this case.

6 And frankly, I'm going to ask the same
7 question to the other parties also.

8 So let me start, quote.

9 "In Hawaii's land use system the
10 legislature's statutory districts constitute more of
11 a general scheme, and presumably by delegating
12 authority to zone to the counties, the legislature
13 intended that specific zoning be enacted at the
14 county level. We believe that the, quote,
15 'Consistency Doctrine' enunciated in Gatri is
16 somewhat instructive in the instant case. Because
17 the uses allowed in country zoning are prohibited
18 from conflicting with the uses allowed in a State
19 Agricultural District, only a more restrictive use as
20 between the two is authorized. By adopting a dual
21 land use designation approach, the legislature
22 envisioned that the counties would enact zoning
23 ordinances that were somewhat different from, but not
24 inconsistent with the statute." Close quote.

25 So my question is, do you agree that that

1 is an accurate statement of the law?

2 MS. TARNSTROM: Yes, we do agree that's an
3 accurate statement of the law.

4 COMMISSIONER OKUDA: And is that the
5 standard, one of the standards we must apply in this
6 case?

7 MS. TARNSTROM: Yes, we believe so.

8 COMMISSIONER OKUDA: So if you look at the
9 County of Maui's ordinance in total, as you have
10 described it, and let's say the Petitioner's
11 interpretation of how or what the State Land Use law
12 says, which would be more restrictive?

13 MS. TARNSTROM: In this instance, given
14 these set of circumstances where the property is
15 zoned County Rural.5 and State Rural, the State
16 statutes are more restrictive than the County
17 statutes under the circumstance.

18 COMMISSIONER OKUDA: And I'm going to ask
19 also this question to all parties. And if you don't
20 know, you can just say you don't know, or you are not
21 aware of it. But I'm going to ask the same question.

22 Can you point to anything in Chapter 205 or
23 anywhere else in the Hawaii Revised Statutes which
24 gives the Land Use Commission subject matter
25 jurisdiction to determine the scope and effect of a

1 County ordinance or County policy?

2 MS. TARNSTROM: I'm not aware of that
3 existing. I don't think it's required in this case
4 to interpret the County ordinances.

5 COMMISSIONER OKUDA: Thank you very much.
6 I don't have any further questions.

7 CHAIRPERSON SCHEUER: Thank you very much,
8 Commissioner Okuda.

9 Commissioner Ohigashi.

10 I see a virtual hand and not you. There we
11 go.

12 COMMISSIONER OHIGASHI: One of the problems
13 I have in this case is that this is one lot, but
14 condominium into four separate condominiums. My
15 question is this: If there was a subdivision and
16 each lot was 5.5 acres, how many structures, or how
17 many houses would the County allow?

18 MS. TARNSTROM: I can have the Director
19 confirm this. This is a bit of a word problem for
20 me, but I believe that under the circumstance two
21 acres subdivided into half acres, the applicant or
22 whoever owned that land, each half acre would be
23 allowed a dwelling unit as well as -- I'm not sure
24 what that square footage is -- but they would be
25 allowed an accessory dwelling according to the County

1 code. Allowed one accessory dwelling, each of those
2 lots would be a total of eight, I suppose.

3 COMMISSIONER OHIGASHI: The next question I
4 have is in regard to that, does the County view a
5 condominium as a subdivision?

6 MS. TARNSTROM: No, we do not consider a
7 condo -- we don't consider that a subdivision. It is
8 still one lot as far as the County is concerned. And
9 that's how we view it from land use.

10 COMMISSIONER OHIGASHI: And the last
11 question I have is this. I notice in your filings
12 and in the Petitioner's filings, a comment that if
13 property is under 7,500 square feet or above 7,500
14 square feet that they would be permitted for less
15 than an acre, they would be permitted two dwelling
16 units. In other words, a regular home and with
17 accessory homes.

18 MS. TARNSTROM: That's the County Code
19 you're referencing?

20 COMMISSIONER OHIGASHI: Yes.

21 MS. TARNSTROM: Under County Rural zoning
22 it allows one house per half acre with accessory unit
23 as provided by the code. The code and Chapter 205.

24 COMMISSIONER OHIGASHI: Is that more
25 restrictive or less restrictive than the requirements

1 in 205?

2 MS. TARNSTROM: The County ordinance adopts
3 205 and accepts its limitations if they apply. And
4 the County Code itself, if 205 weren't in place the
5 County Code, yes, would allow two with accessory
6 units and four dwellings on this property. I hope
7 that answers your question.

8 COMMISSIONER OHIGASHI: Let me ask you it
9 this way. Let's say it was subdivided into the three
10 lots, each containing, I guess that would be about
11 three quarters of an acre, right, about .6 something
12 of an acre. And on each of those lots, how many
13 dwellings would be --

14 MS. TARNSTROM: Under this circumstance
15 where you have State Rural and County Rural you would
16 be allowed one dwelling home and one accessory unit.

17 COMMISSIONER OHIGASHI: Is that more
18 restrictive or less restrictive than the State?

19 MS. TARNSTROM: That is, if it was
20 subdivided I think that it's the same, because the
21 State and County Codes are both applying in that
22 circumstance.

23 MS. McLEAN: If I could add. When you talk
24 about what the requirement is, or how restrictive
25 State law is, we are looking at 205 which says

1 density of one home per half acre in State Rural, but
2 we also have to be mindful of HRS 46-4 which says you
3 have to allow two dwellings where a dwelling is
4 allowed.

5 So while 205 is more restrictive, and only
6 one dwelling, HRS 46-4 says we have to allow the two,
7 and that's what County zoning allows.

8 CHAIRPERSON SCHEUER: If I may, I think I
9 need to swear you in.

10 CHAIRPERSON SCHEUER: Do you swear or
11 affirm the testimony you just gave is the truth?

12 MS. McLEAN: Yes, I do.

13 MICHELE McLEAN

14 Was called as a witness by and on behalf of the
15 County of Maui, was sworn to tell the truth and
16 testified as follows:

17 CHAIRPERSON SCHEUER: Please continue, Mr.
18 Ohigashi.

19 COMMISSIONER OHIGASHI: Does 46-4(c)
20 mandate two dwellings on each property, or does it
21 create a procedure where the County can legislate
22 having two dwellings?

23 MS. TARNSTROM: The 46-4(c) gives the
24 County power to adopt several standards to allow two
25 dwellings.

1 COMMISSIONER OHIGASHI: So I'm going to
2 take the Planning Director's statement being her
3 impression of what it was rather than what the law
4 says. Is that right?

5 In other words, it doesn't mandate two
6 dwellings.

7 MS. McLEAN: Thank you for the correction,
8 Commissioner Ohigashi.

9 COMMISSIONER OHIGASHI: That's all I have.

10 CHAIRPERSON SCHEUER: Commissioner Chang.

11 COMMISSIONER CHANG: Thank you, Mr. Chair.

12 I just have some factual confirmation from
13 the County.

14 One, the Petitioner came in and applied for
15 a building permit for the dwelling, and the County
16 subsequently denied it; is that correct?

17 MS. TARNSTROM: Thank you, Commissioner. I
18 believe Mr. Geiger can comment on this in his
19 presentation. I believe the facts show that it was
20 really the fifth or sixth building permits that were
21 initially reviewed as acceptable by the Planning
22 Department when it was asked to review the planning
23 of Public Works Department, but upon further review,
24 before they were ultimately granted, when they
25 realized the error, and informed Public Works that it

1 was not consistent with zoning, those two building
2 applications.

3 COMMISSIONER CHANG: So it was fifth and
4 sixth. And do you recall who the Applicant was for
5 those fifth and sixth building permits?

6 MS. TARNSTROM: It's not part of the record
7 that was submitted, but I believe Mr. Grier can
8 discuss that. It's my understanding that the
9 Petitioner itself submitted all building permits.

10 If I may, I actually remember now, it was
11 the fourth and fifth building permit I think that he
12 requested. He was granted the fourth and then the
13 fifth -- I'll rely on Jim's representation on that.

14 COMMISSIONER CHANG: Upon the denial of the
15 permit of the fifth dwelling, did the Petitioner file
16 an appeal with the circuit court?

17 MS. TARNSTROM: Again, not part of the
18 record so far. But from my understanding, that
19 hasn't received final review. So it hasn't fully
20 been decided yet. It is still pending final review
21 at this time.

22 COMMISSIONER CHANG: What is pending final
23 review?

24 MS. TARNSTROM: That would mean that the
25 Public Works Department who processes these

1 applications is still reviewing the applications, but
2 they have gotten planning comments on it, but still
3 haven't issued a final decision. From what I
4 understand, that could be appealed.

5 COMMISSIONER CHANG: So there is still --
6 the County has not finalized its determination on
7 that building permit, but the Petitioner has come
8 before LUC on the basis or the assumption that the
9 County is going to deny that permit; is that correct?

10 MS. TARNSTROM: You would have to ask the
11 Petitioner that exactly. I think that's technically
12 true, however, I think there is still a conflict
13 between the Department and Petitioner that satisfies
14 the requirements to seek a decision from the court.

15 COMMISSIONER CHANG: So it may not be ripe
16 to go to the court, but the Petitioner is coming
17 before the Land Use Commission?

18 MS. TARNSTROM: I'm not certain about
19 ripeness. I think there is a conflict between our
20 interpretations, and I think that this body -- it was
21 our position that this body would -- we benefit from
22 having it and an interpretation from these statutes,
23 and I think the circuit court would back that as well
24 upon review of this. I'm not certain if it's ripe or
25 not.

1 COMMISSIONER CHANG: But there has been no
2 final decision made by the County?

3 MS. TARNSTROM: I think it's fair to say
4 there has been a final decision on the application of
5 these statutes, but not a final decision by the
6 Public Works Department on whether or not the status
7 of the application of those building permits.

8 COMMISSIONER CHANG: It's not really clear
9 in my mind how that distinction for purposes of -- I
10 mean could the County change its determination and
11 still find a decision has been rendered on the
12 application?

13 MS. TARNSTROM: The Director has reminded
14 me there is other grounds potentially that the
15 building permits may be denied upon. So -- but in
16 terms of the question about whether or not the denial
17 was correct, they, yes, could appeal that.

18 I think you raise a good question. I do
19 think the Planning Department has final position on
20 this, and has issued it in its form of comments on
21 the building permit application, but there is no
22 final decision on the building permit.

23 COMMISSIONER CHANG: Thank you very much.

24 CHAIRPERSON SCHEUER: Thank you,
25 Commissioner Chang.

1 Commissioners, further questions for the
2 County? Seeing none, let's hear from the Office of
3 Planning, Mr. Yee.

4 MR. YEE: With respect we would like to
5 defer comments until after presentation by the
6 Petitioner. With the respect to the question though
7 of Commissioner Okuda, we will let him know we agree
8 with the responses from the County.

9 CHAIRPERSON SCHEUER: Any questions from
10 the Commissioners for Mr. Yee at this time?

11 Commissioner Okuda.

12 COMMISSIONER OKUDA: Thank you very much,
13 Mr. Chair.

14 Mr. Yee, do you have any comment to
15 Commissioner Chang's question about the Doctrine of
16 Exhaustion of Administrative Remedies, which
17 basically is you got to finish off your fight in the
18 agency, or that chain that you're dealing with before
19 you go somewhere else to bring an appeal or to
20 challenge it. I'm mean, I'm really roughly defining
21 that.

22 MR. YEE: I'm addressing it a little
23 differently, and I don't have the rules out in front
24 of me, but I believe in declaratory petitions the
25 Commission is allowed to refuse to take up

1 declaratory petition if it believes it's the subject
2 of pending order or administrative action.

3 So you may choose not to answer the
4 question, not because of a finality issue, simply
5 because the Land Use Commission has discretion not to
6 get involved in issuing decisions that are the
7 subject of other proceedings.

8 I don't know the finality issue is quite
9 the same but it's a similar concept.

10 COMMISSIONER OKUDA: Is the standard to be
11 applied regarding the Doctrine of Exhaustion of
12 Administrative Remedies, is the standard that's
13 applied in a court of law the same as the standard
14 that's to be applied by an administrative agency like
15 the Land Use Commission?

16 MR. YEE: I don't think that there is
17 specifically an exhaustion of remedy requirements,
18 because it is a discretionary choice by the Land Use
19 Commission. It really goes more to the question of
20 whether the Land Use Commission wants to take up the
21 question other than an obligation that would prevent
22 the Land Use Commission from taking it if it wanted
23 to do so. There is a difference.

24 COMMISSIONER OKUDA: My final question is,
25 is it appropriate for us to look at case law

1 regarding the rule regarding Exhaustion of
2 Administrative Remedies as applied in court to decide
3 whether we should exercise discretion whether to take
4 up this issue or not take up this issue, or should we
5 avoid looking at the rules that apply in court
6 because that's a different situation?

7 MR. YEE: I would say if the Land Use
8 Commission wanted to use those cases as instructive,
9 I think that's perfectly fine. I think to the extent
10 LUC uses them as being obligatory on them, I think
11 that would be an incorrect statement.

12 COMMISSIONER OKUDA: Thank you very much.

13 CHAIRPERSON SCHEUER: Commissioner Chang.

14 COMMISSIONER CHANG: Thank you,
15 Commissioner Okuda.

16 Mr. Yee, that is sort of my issue here is
17 there's been no final decision. We're being asked
18 essentially to render an advisory opinion or
19 declaratory action, but on a set of facts that may
20 change. And shouldn't we be cautious in exercising
21 that kind of discretion when the set of facts before
22 us may not be final, as well as the Petitioner may
23 have other remedies in court, as opposed to coming to
24 the Land Use Commission to answer the declaratory
25 action?

1 MR. YEE: You may want to ask the
2 Petitioner this, but let me -- a response might be
3 that this declaratory petition, although based upon a
4 set of facts currently before the County, is not
5 dependent upon those facts, that is he's asking for
6 an explanation of the law, and how the law applies,
7 more generally to counties.

8 So it could be argued that this is simply
9 request for interpretation of State law, and, in
10 fact, you don't even need to look at any particular
11 County law for its determination as to how it would
12 necessarily be applied in anyone, including his
13 particular case. So you're not asked to say how many
14 units are specifically allowed on his two-acre lot,
15 or whether or not the County ordinances, how those
16 are to be interpreted or not. They're simply asking
17 could the County to allow for more than one dwelling
18 unit on a half acre lot in the Rural District, and
19 that is not necessary dependent on a particular set
20 of facts.

21 COMMISSIONER CHANG: But isn't it --
22 shouldn't the Land Use Commission be cautious about
23 interpreting a set of facts or interpreting the
24 statute, when my fear is rendering this sort of
25 advisory opinion all the time on interpretation, and

1 it concerns me that we are being asked to do that
2 based upon that kind of explanation.

3 MR. YEE: I think you're right to be
4 cautious. I think whether or not you decide to
5 proceed or not may depend upon whether or not
6 different facts require different results. So if
7 there is just a clear simple legal response, I don't
8 think it's necessarily a problem in issuing a
9 declaratory ruling.

10 Where that declaratory ruling will change,
11 depending on the particular facts of the case, then I
12 think you're right, it's more important to either
13 require the specific facts be brought out and rule
14 only on those specific facts or decline to provide
15 interpretation. So it depends on the particular
16 matter before you.

17 COMMISSIONER CHANG: Thank you, Mr. Yee.
18 No further questions.

19 CHAIRPERSON SCHEUER: Commissioner Okuda.

20 COMMISSIONER OKUDA: Thank you, Mr. Chair.

21 Mr. Yee, as a followup to Commissioner
22 Chang's questions, what is your response to this
23 situation?

24 Let's assume that the State law and the
25 County ordinance are equivalent. In other words, one

1 is not stricter than the other, but the County's
2 interpretation and enforcement of its ordinance is
3 stricter than State law.

4 In other words, the County's actions are
5 being stricter than the requirement of State law.
6 Are we required then, under the Save Sunset Beach
7 case to defer to the County's interpretation of their
8 ordinance because their conduct is stricter than
9 State law?

10 MR. YEE: I think there are several
11 different issues in that question. On the one hand
12 you're right, under Save Sunset Beach, the more
13 restrictive requirement applies.

14 Two, I think the Land Use Commission's
15 authority, as you indicated previously, extends the
16 State law, not County law. So LUC would not
17 interpret County law, that's not within your purview
18 or jurisdiction.

19 So if you have a circumstance in which you
20 have two identical requirements, one is State
21 statute, the other County ordinance, Land Use
22 Commission could interpret that State statute, but
23 not interpret identical County ordinance, and I think
24 does not initially need to rule on whether or not the
25 County ordinance, County interpretation is or isn't

1 correct. That's not within your jurisdiction. You
2 could only be asked to rule on meaning and
3 interpretation of the State statute.

4 So with that in mind, you then get to the
5 question of so should you rule if there is a more
6 restrictive County interpretation. Then you get into
7 discussion that you had with Commissioner Chang under
8 what circumstances do you issue decisions as a
9 declaratory petition.

10 So I think you would have the jurisdiction
11 to rule on interpretation of State statute, and only
12 State statute, but whether or not you decide to
13 exercise that authority would be up to you and
14 dependent on a number of circumstances.

15 You could, for example, simply say, here's
16 our interpretation of the State statute, we express
17 no decision and defer to the County's interpretation
18 of the County statute; or you could say, the County's
19 already determined that the County statute means
20 this. We're not going to second guess it, and
21 therefore whether it's less restrictive under State
22 statute is moot, and so we're not going to take up
23 the case at all.

24 Those are two different results you can
25 obtain -- (indecipherable).

1 COMMISSIONER OKUDA: Would we be clearly
2 erroneous to use the phrase that the appellate court
3 might take in trying to slap us down if we chose a
4 third alternative which is along the line of what
5 Commissioner Chang was questioning, which is right
6 now to really make the determinations that you, Mr.
7 Yee, have gone over, we really should wait to see
8 what the final appealable or final unappealed
9 judgment or final judgment after appeal is when all
10 of the procedures that are taking place before the
11 County have been sorted out and it's really final, so
12 we know exactly the question that we're called on
13 rule on?

14 I mean, that wouldn't be clearly erroneous
15 where the supreme court would slap us down and
16 reverse that we exceeded our authority or done
17 something stupid, right?

18 MR. YEE: It seems unlikely. The Office of
19 Planning has always been protective of LUC's
20 discretion, even when we disagree with the ultimate
21 decision. So is it clearly erroneous, the Office of
22 Planning would argue, no, it's within the LUC's
23 discretion.

24 COMMISSIONER OKUDA: To basically say that
25 this is something that belongs at the County level,

1 and if somebody is aggrieved, either the County or
2 Applicant, they should take it up with the court, the
3 judiciary circuit court through an agency appeal,
4 maybe intermediate court of appeals, maybe a petition
5 of certiorari, and then come back to us when all of
6 that is sorted out?

7 MR. YEE: Well, I don't know --
8 (indecipherable) -- at that point, I don't know that
9 there's anything to come back to. In other words, if
10 they argued and it went all the way up to the supreme
11 court, they should have argued the issue of the
12 interpretation of State statute, that was an element
13 to their case at that point, should not at that point
14 come back to the LUC after they had their appellate
15 appeals done.

16 COMMISSIONER OKUDA: So in fact, actually
17 the more -- if our interest is in judicious economy
18 or just doing this in an efficient way, it may be
19 better just to leave it down through the
20 administrative process, Chapter 91 or 92 appeal, and
21 there is just one chain of litigation, not two?

22 MR. YEE: That's the concept behind the
23 provision in your rules that the LUC may not take up
24 matters that are the matter of other proceedings.

25 COMMISSIONER OKUDA: Thank you very much, I

1 appreciate very much your thoughtfulness in this
2 case.

3 Thank you, Mr. Chair.

4 CHAIRPERSON SCHEUER: Thank you,
5 Commissioner.

6 Further questions for Mr. Yee?

7 If not, Mr. Geiger, let's hear from you.

8 MR. GEIGER: Thank you very much. Thank
9 you Commissioners.

10 Some very interesting questions that have
11 been asked, so it's going to change a little bit on
12 how I was going to give my presentation.

13 I think I want to focus initially on the
14 issue that was raised by Commissioner Okuda earlier
15 on. I think it's important to note that the
16 Commission is tasked to interpret Chapter 205. The
17 Commission is not tasked to interpret Chapter 46.
18 The Commission has jurisdiction over 205. The
19 Counties and State court have jurisdiction over 46.

20 But what the County has done, or what we
21 asked for is a very specific and very general
22 question. The question was, does Chapter 205 limit
23 the County's ability to allow Ohana Zoning in the
24 Rural District? That was the question we asked.
25 Nothing more.

1 The County has come back in and says no,
2 no, you have to interpret Chapter 46 with that. We
3 disagree. We think that is a more specific question
4 which then gets beyond the jurisdiction of the Land
5 Use Commission. Why do we say that? Well, for two
6 reasons.

7 If you look at 205-5A, the very first part
8 of that statute provides, except as provided herein,
9 the powers granted to the Counties under section 46-4
10 shall govern the zoning within the districts.

11 That is a clear statement as to you as
12 Commissioners that you do not respond, you do not
13 interpret 406. That is for County's to interpret.

14 The second clear statement is in the
15 legislative history of 205-2(c). The important
16 language that we're all focusing on here, or that was
17 focused on here was the addition in 1989 in 205-2(c)
18 of the following phrase:

19 Except as provided by County ordinance
20 pursuant to 46-4(c).

21 The reference was to allow one unit, one
22 dwelling unit per half acre, except as allowed under
23 46-4(c).

24 If you look at Act 5, which is attached as
25 Appendix C to the County's Position Statement, you

1 will see that the first section of that, the 1989
2 amendment, it states very clearly the purpose of that
3 amendment. And the only thing that was amended in
4 that Act was the addition of the language "except for
5 as provided by County ordinance pursuant to 46-4(c).

6 What did the legislature tell all of us?
7 The legislature said: The intent of the legislature
8 was that ohana zoning remain an option for Hawaii's
9 people.

10 An unforeseen and undesired effect of the
11 1988 amendment, which was to Chapter 46(c), was that
12 the ohana zoning was arguably prohibited by Sections
13 205-2 and 205-5 in the Rural District lands.

14 That's precisely what we're talking about
15 here, ohana zoning in the Rural District lands.

16 The legislature went on to state:

17 As the law now stands, even if any County
18 were to adopt reasonable standards allowing ohana
19 zoning as mandated in Section 46-4(c), Sections 205-2
20 and 205-5 would still supercede those standards and
21 prohibit ohana zoning.

22 That's precisely what the County is arguing
23 to you here today. They're arguing that 46-4 tells
24 you that they can only have ohana zoning on rural
25 properties that are half an acre or less. That is

1 clearly not what the statute says.

2 And the legislative intent was very clear.
3 In fact, the legislature finished by stating:

4 The effect is manifestly contrary to
5 legislative intent, and is therefore, corrected by
6 this Act.

7 It is telling you that by the addition of
8 the "except as provided for", the Land Use Commission
9 doesn't weigh in on what the County chooses to do.

10 That is uniquely the subject of a different
11 jurisdiction, a different venue.

12 Now, there is some confusion out here as to
13 why administrative remedies weren't exhausted, or why
14 we're here as opposed to somewhere else.

15 I hope I can clean it up a little bit.

16 Number one: We have no right to seek a review until
17 there is a final determination on the building
18 permit. There has been no final determination on the
19 building permit.

20 Number two: Because there was no final
21 determination of the building permits, we filed a
22 declaratory action before the circuit court asking
23 the circuit court to weigh in and tell us what does
24 46-4(c) really mean, which is uniquely where the
25 jurisdiction lies, because that is a County zoning

1 ordinance. That's the ordinance, or the statute
2 rather, that provides jurisdiction, the authority to
3 the counties to act.

4 It's not the Land Use Commission, and as
5 the legislature made clear in the 1989 amendment,
6 that really isn't where you folks should be going.
7 So that's why our declaratory action here is just a
8 very general, very, very general, very specific
9 declaratory request.

10 We are saying that 205 allows the County to
11 give you a more dense zoning in the Rural District if
12 they adopt reasonable statutes. We are not asking
13 you guys to determine whether it's reasonable, not
14 asking you guys to tell us how many units we can
15 build, all we are asking you guys to do is to say,
16 yes, 205 says that the County can make a more dense
17 determination, or it can have more dense housing in
18 the Rural District.

19 There was an additional argument State
20 Office of Planning made, and I'm glad they brought it
21 up, which I want to address. They argued and pointed
22 out that the Administrative Rule 15-15-63 provided
23 that the counties could impose additional
24 restrictions to lower density or to further restrict
25 uses to this Rural District. And in general that is

1 a reasonable proposition consistent with Save Sunset
2 Beach, or Sandy Beach -- Save Sunset Beach Coalition,
3 I apologize.

4 But there is a difference here, and again,
5 the difference is in the amendment that the
6 legislature adopted in 1989 to 205-2(c) because they
7 were very specific in what the purpose of that
8 amendment was. And, again, purpose of that amendment
9 was not to limit the County's ability to restrict,
10 but rather to expand the County's ability to increase
11 density.

12 You know, earlier cases here today, you
13 folks commented on how housing is important. We
14 agree. Housing is incredibly important. But if you
15 adopt the position of the County in this case, you're
16 restricting rather than increasing housing
17 opportunity.

18 And I would submit to you that while you
19 might have the ability to do it in other cases, in
20 this particular situation, based upon what the
21 legislature did in 1989, you do not have that
22 ability.

23 Finally, just for Commissioner Chang's
24 information. The building permit application that
25 are pending are for the fourth dwelling and one

1 accessory dwelling, just so you're clear. And, yes,
2 initially they were passed, and then the Planning
3 Department came out and rescinded the approval
4 previously given.

5 But because there was not a final decision
6 on the building permit, we could not appeal that
7 decision.

8 For Mr. Ohigashi, just to be clear for the
9 record, this happens to be a five-unit condominium
10 project instead of four. I don't think it makes any
11 difference, but just for the record so it's clear.

12 With that, if there are any questions, I'll
13 be happy to answer.

14 CHAIRPERSON SCHEUER: Thank you, Mr.
15 Geiger. Commissioners?

16 Commissioner Wong.

17 COMMISSIONER WONG: Thank you. Thank you,
18 Chair.

19 Good afternoon, Mr. Geiger. You know, in
20 my other life, in my other job, other hat that I
21 wear, I'm supposedly a lobbyist. So I have to keep
22 track of a lot of bills, house and senate bills.

23 One of the bills that is going around the
24 house right now is HB502, house draft 2, senate draft
25 2. The title is related to Rural Districts.

1 Do you know anything about this?

2 MR. GEIGER: No, I do not.

3 COMMISSIONER WONG: So with your
4 indulgence, let me read this to you. It's dealing
5 with Section 205-2 Hawaii Revised Statute is as
6 amended as follows:

7 By amending Section (a) to read:

8 "(a) There shall be four major land use
9 districts in which all lands in the State of Hawaii
10 shall be placed: urban, rural, agricultural and
11 conservation. The land use commission shall group
12 contiguous land areas suitable for inclusion in one
13 of these four major districts. The commission shall
14 set standards for determining the boundaries for each
15 district provided that" -- blah blah blah.

16 I'm going to Section (c), which is little
17 bit more about what we're talking about and what you
18 were talking about.

19 They're amending Section (c) to say this:

20 "(c) Rural districts shall include
21 activities or uses as categorized by low density
22 residential lots of not more than one dwelling house
23 per" -- and they're erasing the one-half acre to
24 "one-quarter acre", to continue to one-quarter acre.

25 "and provided that each dwelling house

1 shall be consistent with the County general plan and
2 community development plan."

3 So it appears that 205(c), which you were
4 talking about, they're changing it to one-quarter
5 acre instead of one half.

6 So why would the legislature change this to
7 a quarter-acre, while your interpretation was little
8 bit different?

9 So I think there's sort of conflict here.
10 So could you explain that to me, please?

11 MR. GEIGER: Again, I have not seen the
12 draft, but based upon what you read, it sounds like
13 the legislature is also taking out the language that
14 we're talking about here which is, "except as
15 provided by County ordinance pursuant to Section
16 46-4(c)", and they're changing it to one per
17 one-quarter acre, which means to increase the
18 density, which I presume means to increase housing.

19 If that, in fact, passes, the decision you
20 folks make may be simply moot. It's going to change
21 the entire game.

22 COMMISSIONER WONG: Yeah. So it seemed
23 like right now -- this is my opinion -- but because
24 of this issue at the State capital, that, you know,
25 it's hasn't come to bear, this DR, you know, in terms

1 of should we even deal with it until we know what's
2 happening at State level, the legislature level?

3 I mean, that's my opinion. Because we have
4 to see what the State -- it's going through the
5 process, and it appears like it's going to
6 conference, and then going to more than likely it's
7 going to go to the governor for signature.

8 What I'm trying to say, I'm thinking,
9 should we even act on this or just hold off? I'm
10 questioning this right now. That's what I'm trying
11 to say, Mr. Geiger. I don't know if I made it clear.

12 MR. GEIGER: Do you wish comment?

13 COMMISSIONER WONG: Sure, please.

14 MR. GEIGER: Yes, you made it very clear,
15 and I understand exactly what you're saying. And I
16 can certainly understand why the Commission would
17 feel it prudent to defer action, because as
18 Commissioner Chang pointed out, you don't want to get
19 out and make basically advisory opinions on something
20 that they have absolutely no impact on the future.

21 However, having said that, I'm not sure
22 it's going to resolve this particular dispute we have
23 with the County, because I believe that that will be,
24 again, a dispute concerning the County's ordinance
25 and 46-4(c) which we will be taking up in circuit

1 court as opposed to before you.

2 COMMISSIONER WONG: So the question is, if
3 you are going to take it to court, I mean, why should
4 we even talk about it? That's my feeling. I mean,
5 you know, we should let it go to the court system for
6 them to interpret it.

7 MR. GEIGER: If I may, we did file
8 declaratory action in the Circuit Court of the Second
9 Circuit on this.

10 The County indicated that they strongly
11 believe that the Land Use Commission's interpretation
12 would assist the circuit court. It seemed prudent to
13 go ahead and get your interpretation. At the time
14 the County -- the circuit court proceeding is stayed
15 until May 15th, or approximately May 15th when we
16 anticipate it will be going back to the circuit
17 court.

18 COMMISSIONER WONG: It's just, again, using
19 my other hat, "sine die" is April 26, I believe. So,
20 you know, all these things are pretty much moving at
21 some sort of resolution by itself. So I'm just in my
22 mind is like should we even work on it? What if, you
23 know, the legislature says, you know what, we moving
24 it to quarter acre, then everything else is moot to
25 me.

1 MR. GEIGER: It certainly makes the issue
2 before you moot.

3 COMMISSIONER WONG: Okay, that's it. Thank
4 you, Mr. Chair.

5 CHAIRPERSON SCHEUER: I recognize both
6 Commissioner Chang and Commissioner Okuda would like
7 to ask questions, but we've been going for a whole
8 hour, I would like to call for a ten-minute break.
9 It is 1:30. We will reconvene at 1:40.

10 (Recess taken.)

11 CHAIRPERSON SCHEUER: We are back on the
12 record.

13 Commissioner Chang, questions for the
14 Petitioner followed by Commissioner Okuda.

15 COMMISSIONER CHANG: Thank you, Mr. Chair,
16 and thank you, Mr. Geiger.

17 You did clarify one question I have
18 regarding the status of the dec action filed in
19 circuit court. So it was an agreement between the
20 County and your client to stay the proceedings in
21 circuit court pending declaratory action before the
22 Land Use Commission; is that correct?

23 MR. GEIGER: Yes.

24 COMMISSIONER CHANG: Were there any other
25 parties to that action?

1 MR. GEIGER: No.

2 COMMISSIONER CHANG: And I appreciate
3 Commissioner Wong's bringing to your attention that
4 pending bill. How fortuitous.

5 But wouldn't you agree that it may be in
6 your client's best interest, one, not to have a
7 ruling by LUC at this point in time, and maybe not
8 even to have a ruling by the circuit court pending
9 the outcome of this proposed legislation?

10 I would suspect there would be a time
11 issue. You may have to withdraw your building permit
12 application, because I'm assuming you would fall
13 under the old statute; and so if you want, assuming
14 that the bill passes and appropriate changes are made
15 to the law, you may get a better outcome waiting for
16 that pending legislation to pass.

17 And I guess that's just me speaking out
18 loud, but wouldn't you agree it may be in your
19 client's best interest to at least wait until after
20 the outcome of this legislation to seek a final
21 decision by either LUC or the circuit court?

22 MR. GEIGER: Well, two things.

23 Number one: I have not seen the
24 legislation, so I don't know exactly what it says
25 (indecipherable).

1 Number two: It's really up to the
2 Commission as to whether it chooses to act or not.
3 We brought this to you requesting a determination of
4 law as it exists today.

5 If the law changes, then you've issued a
6 ruling which will have affectively no application.
7 So it may actually be to the Commission's interest to
8 defer action more so than to my client.

9 COMMISSIONER CHANG: Or it could be in the
10 interest of those other landowners whose County's
11 interpretation -- who the County, based upon their
12 interpretation, acted accordingly, because if in some
13 way our interpretation is contrary to the County's
14 interpretation, then doesn't that potentially put at
15 risk all of the County decisions based upon that
16 determination?

17 MR. GEIGER: I don't think it puts at risk
18 prior decisions, I think it may have impact on
19 future. But, again, we're here on a general
20 question, not specific to my client's property.

21 We are here on a general question that I
22 think the Commission could answer. But as
23 Commissioner Wong has pointed out, if there is new
24 legislation that passes, it may make this answer
25 meaningless for everyone.

1 COMMISSIONER CHANG: And I think you would
2 appreciate sort of my general, you know, most
3 administrative and judicial bodies would prefer to
4 take an action that's been fully developed, the
5 record is clear, rather than rendering advisory
6 opinions.

7 Wouldn't you agree with that?

8 MR. GEIGER: I do, but as Mr. Yee pointed
9 out, this isn't as much advisory opinion as it is
10 request for interpretation of existing law.

11 COMMISSIONER CHANG: Thank you very much,
12 Mr. Geiger. I have no further questions.

13 MR. GEIGER: Thank you.

14 CHAIRPERSON SCHEUER: Thank you,
15 Commissioner Chang.

16 Commissioner Okuda, followed by
17 Commissioner Cabral.

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

20 Thank you very much, Mr. Geiger, for being
21 present here. I'm glad the Chair said we don't have
22 to disclose relationships with witnesses. I know you
23 and I do not have any business or social
24 relationship. I think our only connection is, we are
25 dinosaurs just like Commissioner Ohigashi, a member

1 practicing law in Maui in the old court house before
2 Hoapili Hale was built.

3 But getting back to business here and not
4 reminiscing about the old days when dinosaurs roamed
5 the earth.

6 I read that quotation from the case Save
7 Sunset Beach Coalition versus City and County of
8 Honolulu. Do you believe that what I read is an
9 accurate statement of the law, without getting into
10 whether or not that statement applies, but do you
11 agree that what I read is an accurate statement of
12 the law?

13 MR. GEIGER: You accurately read the case.
14 I do disagree that the case has applicability under
15 the facts before us, but you accurately read the
16 case.

17 COMMISSIONER OKUDA: Can you please tell us
18 why you believe the case is not applicable to the
19 matter before us?

20 MR. GEIGER: Because, again, it relates to
21 legislative history that was specifically stated with
22 regard to the language that is being reviewed.

23 The "except for as provided in 46-4(c)."
24 If the legislature had not been so clear in saying
25 that the purpose of the amendment was to allow the

1 counties to adopt reasonable zoning ordinances
2 concerning the Rural District, then I would have been
3 exactly with you and said, yes, Commissioner Okuda,
4 the other general proposition, which is, if you have
5 stricter, more generally you go with the stricter.

6 But because the legislature was so specific
7 in this one amendment, it is very clear to me that
8 the legislature is saying with regard to rural
9 properties, the counties can do something other than
10 what is in the 205, specifically, they can make it
11 more dense than what is in 205.

12 COMMISSIONER OKUDA: Can I ask you a
13 similar or same question that I asked Mr. Yee?

14 If the County's interpretation and conduct
15 is stricter than the plain language of the State
16 statute, are we required to defer to the stricter
17 application of the County's interpretation of their
18 ordinance?

19 And if your answer is no, we are not
20 required to defer to the stricter application, what
21 is your legal authority for that answer?

22 MR. GEIGER: I don't think you're required
23 to defer to the County. In fact, I think your
24 jurisdiction ends, and you don't even weigh in on
25 whether the County's ordinance is appropriate or

1 inappropriate, is consistent with the law or
2 inconsistent with the law.

3 Again, because of how the legislature
4 amended 205-2(c), I believe it tells the Commission
5 that you don't have authority to speak to the County
6 ordinance.

7 COMMISSIONER OKUDA: And my final question
8 is this. I'm going to quote from the intermediate
9 court of appeals case. This goes to Commissioner
10 Chang's questions about exhaustion of administrative
11 remedies. I thought it would be good to at least
12 have a statement of what the rule is just so that we
13 all are kind of, you know, have some definition.

14 The case is Leone, L-E-O-N-E, versus County
15 of Maui, an ICA case found at 128 Hawaii Reports 183,
16 Pacific 3d citation is 284 Pacific 3d, 956. It's a
17 2012 case. And let me quote from the case.

18 Quote: "Although perhaps less explicitly,
19 Hawaii case law is in accord under the Exhaustion
20 Doctrine if an administrative remedy is provided by
21 statute, a claimant must seek relief first from the
22 administrative body before judicial relief is
23 available."

24 And there's a citation to a case, Williams,
25 W-I-L-L-I-A-M-S, versus Aona, A-O-N-A, 121 Hawaii

1 Reports page 1, at page 9, and then there is Pacific
2 3d citation, and I continue on:

3 "In such cases in the interest of judicial
4 economy, quote, 'the Doctrine of Exhaustion
5 temporarily divests a court of jurisdiction'" close
6 quote.

7 And that last sentence bears a citation of
8 -- no, let me withdraw that. There is just a quote
9 at that point in time.

10 Does that sound like an accurate statement
11 of what the Doctrine of Exhaustion of Administrative
12 Remedies basically is?

13 MR. GEIGER: I would agree with that, but I
14 don't believe it's applicable to the issue that we
15 are presenting here.

16 COMMISSIONER OKUDA: You read my mind.

17 Why is that not applicable?

18 In other words, why wouldn't this be in the
19 interest of economy, judicial or otherwise, given all
20 the things that have been talked about here,
21 including what Commissioner Wong, you know, told us
22 about what's pending down at the legislature, which
23 may or may not pass, but it's still down there also?
24 Why would it not be in the interest of overall
25 economy and efficiency that we don't take this up

1 right now?

2 MR. GEIGER: I think there are two
3 different questions being asked there.

4 As far as the exhaustion of administrative
5 remedies, that would be accurate if we were
6 complaining about the building permit and it not
7 being issued, or being issued or being denied.

8 We're not complaining about that, because
9 we don't know what the County is going to do about
10 that. What we are doing is we are asking for an
11 interpretation of the Chapter 205 before this body,
12 Chapter 46 before the circuit court to get an
13 understanding of how this body and the court would
14 look at interpreting those statutes.

15 Now, whether that will be applied later on
16 in the administrative proceeding with building
17 permits, I don't know. But that's with the
18 exhaustion of administrative remedies.

19 What I think you're pointing out with
20 Commissioner Wong is that the Commission may be
21 rendering -- and I think I spoke with this to
22 Commissioner Chang -- I think the Commission may be
23 rendering a Declaratory Order on its interpretation
24 of the statute, which may no longer be in existence
25 in four months, and should the Commission defer, wait

1 to see what happens, what the legislature does, I
2 can't tell you that the Commission, that it would not
3 be wise to defer.

4 In fact, if I were a Commissioner, I think
5 I would vote to defer to see what's going to happen.

6 Because as you point out, it does no one
7 any good to issue declaratory rulings or orders
8 interpreting a statute that no longer exists.

9 So I don't know if that answers your
10 question, but I see it as two separate things.

11 COMMISSIONER OKUDA: And, Mr. Geiger, I
12 appreciate what you said.

13 At the old courthouse I always appreciated
14 the legal discussions with you at that time, and here
15 we are almost 40 years later, and I still appreciate
16 the discussions. So thank you very much for your
17 answers.

18 Thank you, Mr. Chair. No further
19 questions.

20 MR. GEIGER: If I could, as do I.

21 CHAIRPERSON SCHEUER: Thank you.

22 Commissioner Cabral.

23 VICE CHAIR CABRAL: Thank you, Chair.

24 Regards to dinosaurs, I think I'm older
25 than all of you. I'm not necessarily appreciating

1 that.

2 But regardless, Mr. Geiger, you made
3 reference a little bit ago that this is the theory,
4 not necessarily the specifics of your client's
5 application for use of the land.

6 And I just have a question to you, because
7 I'm not a lawyer, and I'm not learned like my fellow
8 Commissioner Okuda and Chang and Ohigashi, but I do
9 understand condominiums and subdivisions, as I have
10 managed a few of them over my career.

11 So what I'm hearing is that a person owns
12 some land, and they chose to go down to Hawaii
13 Revised Statute 514B or A at the time, and develop it
14 as a condominium. So they develop it as a
15 condominium using that level of law to do what they
16 wanted to do, and those over here on the Big Island
17 that have done that are usually averting subdivision
18 law and requirements of the County, but I don't know
19 your situation there.

20 But anyway, so they do the condominium, and
21 then they come along a while later, and they don't
22 want to apply condominium laws, but now they jump
23 over and say, wow, the subdivision laws will allow us
24 to have an accessory dwelling for each of our
25 condominium units. And so now we want to not go to

1 what we originally would have developed to a 514B,
2 but we're going to jump over and use other land use
3 law.

4 Is that what you're saying, you think that
5 is an appropriate use of condominium law or the
6 zoning laws, is that what we are looking at here?

7 MR. GEIGER: The answer is no, that's not
8 what we are looking at here. We have a specific
9 request on a specific statute before the Land Use
10 Commission.

11 The development of this particular parcel
12 was done as a horizontal condominium 514B. So
13 created five separate spatial units on which, in
14 accordance with the laws for the property as zoned
15 and as classified, Mr. Grier determined that he could
16 have four main houses, and up to two with accessory
17 dwellings.

18 He chose to only have one with accessory
19 dwelling. So he applied for building permits, four
20 main dwellings on four of the units, and an accessory
21 dwelling on one of the condominium units.

22 So it's not an attempt to get multiple
23 accessory dwellings on a condominium unit, but rather
24 it was the ability to use the existing laws to
25 develop a parcel to have the amount of housing that

1 was allowed by the Maui County zoning code.

2 VICE CHAIR CABRAL: My question then is, my
3 understanding there is condominiums are developed --
4 and I don't develop on my own -- they are not really
5 a land division, they are a building division, so
6 most of the ones I've dealt with have always had a
7 structure on them when they're dividing up the land
8 over here. It's a permitted tool shed often, and
9 then the house is built later to match the tool shed.

10 So when your client did this to his four
11 condominium units, did he build -- already have the
12 houses built? What was he dividing? He wasn't doing
13 land; is that correct? He was really working with
14 improvements on the land that he condominiumized or
15 agreed to condominiumize when he got his permits for
16 his condominium?

17 MR. GEIGER: I think we are getting a
18 little far afield of the question before the
19 Commission, but in answer to your question, the way
20 the condominiums, at least, work here, is that
21 spatial units are created. And then after the
22 spatial units are created, the condominium is
23 created. The developer can go in and obtain building
24 permits to construct structures within the spatial
25 units. That's what happened in this case.

1 VICE CHAIR CABRAL: I'm not quite sure I'm
2 really far off of it. I feel like we are going to
3 use one set of laws to do what I want to do, then I
4 want to jump over to the other set of laws, but
5 again, there are smarter people in this group than
6 me. I'm very practical about it.

7 Thank you for your opinion. Thank you.

8 CHAIRPERSON SCHEUER: Thank you,
9 Commissioner Cabral.

10 Commissioner Ohigashi.

11 COMMISSIONER OHIGASHI: I dye my hair white
12 so I can charge more.

13 Besides that, I'm just concerned. The
14 first issue is that you claim to be an interested
15 party in a declaratory ruling. And in your
16 verification, you said -- Mr. Grier says that he's an
17 individual who owns property within the State of
18 Hawaii Rural District.

19 Can you just expand on that so we have
20 something in the record?

21 MR. GEIGER: Sure.

22 Mr. Grier owned the property that was
23 condominiumized. He then transferred the ownership
24 to actually his wife, who then transferred the
25 ownership to an entity. The entity is solely owned

1 by Mr. Grier. One of the condominium units is owned
2 by the entity. Mr. Grier also applied for each of
3 the building permits.

4 COMMISSIONER OHIGASHI: Technically he owns
5 the entity that owns the development?

6 MR. GEIGER: He owns the land. He then
7 transferred it to his wife, and one of the units was
8 transferred to an entity he owns.

9 COMMISSIONER OHIGASHI: I'm just curious
10 how this works, Mr. Geiger. I just was wondering.

11 You indicated that he was allowed two
12 accessory dwellings. Why is that a limitation?
13 Technically he should be able to get four units
14 following counties --

15 MR. GEIGER: Well, I'm not going to speak
16 for the County, but the way a condominium is treated,
17 it is treated as a single lot. So therefore he would
18 be entitled to, because the lot is greater than
19 7500 square feet, in the ordinance he would be
20 entitled to two accessory dwellings on that single
21 lot. He did not seek to put up two accessory
22 dwellings, he only sought to put up one.

23 But, again, if we are getting there, I
24 think we're getting beyond what the scope of what the
25 Commission can really rule on, opine about.

1 I think you're limited to 205, shouldn't be
2 going down the ordinance trail.

3 COMMISSIONER OHIGASHI: I was just curious
4 reading the County's and the State's memorandums,
5 that came into my mind.

6 The last question that I have. If we
7 limited to 205, interpretation under 205, wouldn't
8 that necessarily legitimize DR ruling under 46, say
9 that, yeah, County has to follow 46, County's
10 interpretation of rules must follow 46?

11 MR. GEIGER: I don't think you would be
12 going that far. I don't think there is an inference.
13 In fact, if I was on the Commission, I would tell
14 them that we make no determination on Chapter 46
15 because it's outside of our purview.

16 I think that you're limited to saying only
17 that the County can adopt an ordinance to allow ohana
18 zoning within the Rural District, period.

19 COMMISSIONER OHIGASHI: Doesn't that --
20 does the statute say that directly?

21 MR. GEIGER: The statute says that: Except
22 as provided in 46-(c)4 (sic). The legislative
23 history said that that amendment rule was adopted
24 solely for the purpose of allowing ohana zoning on
25 lands classified as Rural within the Rural District.

1 COMMISSIONER OHIGASHI: Let me get this
2 clear in my mind, because sometimes the dye affects
3 my brain.

4 The question I really have, is what are you
5 looking -- what exactly are you looking for us to
6 determine what you're actually ruling in this case?
7 In other words, give me what you want. Just say,
8 hey, the County -- is it that the County can pass an
9 ordinance regarding ohana zoning, is that what you
10 want?

11 MR. GEIGER: I wouldn't put it quite that
12 way. I think the Chair, when he initially called the
13 case, stated it succinctly and correctly, that the
14 issue is whether or not Chapter 205 limits the
15 density of structures on the Rural District one per
16 one-half acre, and your declaratory ruling is, no,
17 the limitation is subject to reasonable ordinances
18 concerning the zoning that have been adopted by the
19 County.

20 COMMISSIONER OHIGASHI: Or we could say,
21 yes, it limits it, however, we make no ruling on
22 Chapter 46.

23 MR. GEIGER: That's correct. That would be
24 the same. Actually, I think it's not that -- it does
25 not limit it, but you make the ruling.

1 COMMISSIONER OHIGASHI: No further
2 questions.

3 CHAIRPERSON SCHEUER: Thank you,
4 Commissioner Ohigashi.

5 Commissioner Cabral.

6 VICE CHAIR CABRAL: Yes, sorry. You keep
7 saying things that make me have more questions.

8 You said that there is three, but there
9 will be a fourth condominium unit on the property.
10 So are you saying that all of the land, the lawns
11 between the different structures are common area
12 owned jointly by everybody, and it's just the
13 building structures that are owned separately, or is
14 the land itself? Because each of those in
15 condominium law can be sold to a different person,
16 correct?

17 MR. GEIGER: There's a couple questions in
18 there. Let me try to go at it this way.

19 When you create a condominium, you have
20 basically two property parts. You have the common
21 elements, and you have the units or the apartments.

22 The way horizontal condominiums are created
23 is that you have the common elements, which is
24 usually a driveway or access area, and then separate
25 spatial units. And those spatial units are generally

1 identified as limited common elements usable by the
2 persons who buy those separate units.

3 Does that answer your question?

4 VICE CHAIR CABRAL: So you're saying that
5 the limited common element around my house, if I buy
6 that, is going to include how many square feet, and I
7 own it myself, and I can fence it myself per your
8 documents? I got the picture.

9 MR. GEIGER: That's correct.

10 VICE CHAIR CABRAL: Next question is, if I
11 add on accessory dwellings, then is that accessory
12 dwelling going to be subject to being able to be sold
13 to a separate entity, each accessory dwelling on my
14 limited common element, if I add accessory dwelling
15 to my limited common element, can I sell that to
16 somebody different as if it were a condominium
17 unit?

18 MR. GEIGER: The answer is no, unless the
19 condominium unit, the owners of the condominium agree
20 to amend the declaration to increase the number of
21 condominiums units. It simply would -- first of all,
22 I don't think you can get a building permit; and
23 secondly, I don't believe you could further
24 subdivide -- excuse me -- further condominiumize the
25 property.

1 VICE CHAIR CABRAL: Okay, that's what I'm
2 thinking too. Thank very much. It's an interesting
3 concept you have. Thank you.

4 CHAIRPERSON SCHEUER: Commissioners,
5 further questions?

6 Commissioner Wong.

7 COMMISSIONER WONG: Thank you, Chair.

8 Mr. Geiger, I got a question. You know,
9 from what I -- I know it's a little unusual for this
10 dec ruling in front of us, but what is -- why did --
11 I mean, your property that's being worked on, how
12 come you didn't go for subdivision?

13 MR. GEIGER: I can't answer that question
14 because I was not involved in that particular aspect.
15 I can only tell you that we have a 2.02 or 05 acre
16 parcel that was condominiumized into five units.

17 COMMISSIONER WONG: Whenever I hear
18 condominium, especially in Honolulu, I think
19 high-rises, high, not low density. When I think of
20 Ag or Rural, it's low density, almost nothing there,
21 you know, just say cows or horses or sheep or
22 whatever, or even yaks, so I'm just trying to figure
23 out what is this. I mean, what is your difference in
24 that condominium issue?

25 MR. GEIGER: First of all, remember that is

1 designated Rural zoning, not Ag land. So that allows
2 for residential units and increased density.

3 COMMISSIONER WONG: Okay. But isn't 205
4 dealing with more low density issue?

5 MR. GEIGER: Well, I would submit this is a
6 pretty low density issue.

7 COMMISSIONER WONG: In a two-acre parcel?

8 MR. GEIGER: In a two-acre parcel.

9 COMMISSIONER WONG: Okay, that's it. I
10 just needed that clearance in my head.

11 Thank you, Mr. Geiger; thank you, Chair.

12 CHAIRPERSON SCHEUER: Are there further
13 questions?

14 I have a few brief questions for Mr.
15 Geiger.

16 If I understood, first you should correct
17 me if I misunderstood you, but if I understood you
18 correctly, you said we can comment on 205, we can't
19 really comment on any other part of the Hawaii
20 Revised Statutes; we can't rule on it on how it's
21 interpreted, but really it seems like the crux of the
22 case has to do how this point of the Hawaii Revised
23 Statutes interacts with another part of the Hawaii
24 Revised Statutes.

25 Is there some kind of principle that you

1 suggest where we draw that line to answer these
2 questions if we choose to rule?

3 MR. GEIGER: I don't know that it is a
4 principle, but in this case, because of the
5 legislative history on the amendment that draws in
6 46-4(c), the legislature made clear that 205-2 and
7 205-5 should not prohibit reasonable ohana zoning
8 ordinances.

9 And so because the legislature made clear
10 that it was outside of 205-2 and 205-5, in this case,
11 particular case, I believe you should not weigh in on
12 the interpretation of 46. I think that uniquely goes
13 as part of County zoning ordinance and whether or not
14 the County's ordinance complied with it, which is the
15 issue that -- or one of the issues we have before the
16 circuit court.

17 CHAIRPERSON SCHEUER: But doesn't the
18 interpretation, or the understanding of that
19 legislative history depend on some interpretation of
20 what reasonable is?

21 MR. GEIGER: Reasonable in terms of a
22 zoning ordinance. This is not what is reasonable in
23 terms of the meaning of 205-2 or 205-5.

24 CHAIRPERSON SCHEUER: You don't think it
25 had anything to do in the same sentence with what's

1 reasonable? Because part of -- I tried to approach
2 some of these issues from like just a common sense
3 perspective. We have an Urban District; we have a
4 Rural District; we have an Agricultural District; and
5 we have a Conservation District.

6 Rural presumably means rural. I live in an
7 Urban District, 10,000 square foot lot, which is
8 basically a quarter acre. I don't live in a rurally
9 zoned State Land Use District.

10 Why wouldn't you look at reasonableness in
11 terms of 205? I don't understand how you interpret
12 that differently.

13 MR. GEIGER: Because, again, the
14 legislature specifically carved it out in the
15 legislative history. They said, we want to make sure
16 that ohana zoning is allowed in Rural District.
17 Therefore, we have this exception for ohana zoning in
18 the Rural District.

19 And after that, I think that the Commission
20 gets on thin ice if it starts to interpret whether or
21 not the County's ordinance is reasonable or whether
22 or not the County's interpretation is reasonable.

23 CHAIRPERSON SCHEUER: Even though the
24 legislative history discusses reasonableness?

25 MR. GEIGER: The legislative history, I

1 believe on the reasonableness, is more 46-4(c) rather
2 than 205.

3 CHAIRPERSON SCHEUER: I have nothing
4 further right now. Thank you.

5 Let's see, Commissioners, anything else for
6 Mr. Geiger right now?

7 If not, I said I would give the opportunity
8 for the County, and Mr. Yee wanted to give his main
9 presentation.

10 Anything more for Mr. Geiger at this time?
11 I'll give Mr. Geiger a chance to rebut.

12 MR. GEIGER: Just reserve the right to
13 comment on what the other --

14 CHAIRPERSON SCHEUER: Yes, I just said you
15 may rebut. You'll get the last word -- well, the
16 Commissioners get the last word, you get the second
17 to the last word.

18 MR. GEIGER: Or third. Thank you.

19 CHAIRPERSON SCHEUER: Commissioners,
20 anything further for Mr. Geiger at this time? If
21 not, Ms. Tarnstrom.

22 MS. TARNSTROM: Thank you, Chair.

23 We have several comments in response to
24 questions of Mr. Geiger.

25 First, Mr. Geiger identified this as a 205

1 question, wherein you didn't have to consider 46-4,
2 but that actually conflicts with exactly what was
3 written in his Petition.

4 In its Petition it says the issues
5 presented is whether HRS Chapter 205 and 46 restrict
6 the County's ability to provide for greater than.

7 I think it's incumbent upon this Commission
8 that they must be able to interpret how 46-4(c) is
9 enfolded into the 205 requirements.

10 205 explicitly adopts the exception of
11 46-4(c). You do not have to analyze the actual text
12 of it, if you don't want to. It's very clear. But
13 it does limit the State Rural density entirely based
14 on that section. So it is incumbent upon the
15 Commission to be able to review it on this question,
16 using more common sense perspective.

17 I guess there is no better body to answer
18 how many dwelling units are allowed on a lot of State
19 Rural land. This is the body that can clarify this
20 question. And, again, that goes to the nature of
21 this case. It's not an appeal. We don't have a
22 final decision.

23 We have the Petitioner and the County
24 essentially making a joint petition to ask this body
25 what does the law say. And in this circumstance, are

1 we correct or are they correct? It's not a joint
2 petition, but we bring this before you to hopefully
3 get clarification on what the law instructs us.

4 We had considered bringing a joint
5 petition. We had also considered just bringing one
6 on our own behalf, because obviously the department
7 has to interpret this on a daily basis. If it were
8 somehow wrong, it would have to change how it's
9 interpreting this for everyone it applies to.

10 As to the more jurisdictional question
11 also, there aren't any truly disputed facts in this
12 case. There's nothing that would occur that would
13 change how, in terms of the underlying facts of Mr.
14 Grier's circumstance. Nothing that's going to go
15 change the County of Maui, the department's, the
16 planning position on this.

17 The only thing that would change it is the
18 decision from the Commission.

19 And, again, the declaratory request, it's
20 not subject to appeal consideration, which I think
21 were discussed by Commissioner Okuda.

22 Again, yeah, it's just about this
23 Commission's role to help clarify what is not --
24 which is a clear question to the department, but
25 clearly it is subject to interpretation by those who

1 are (indecipherable).

2 The proposed bill identified by
3 Commissioner Wong is extremely relevant to all of us,
4 I think. However, I think that the underlying
5 question isn't mooted, especially from the
6 department's perspective, because while we are
7 dealing with one house per half acre in this case, in
8 the next case we might be dealing with another
9 Applicant who has a half acre and wants four houses,
10 only has two.

11 So it actually would really assist everyone
12 to have some clarification on the interplay of these
13 edges.

14 It isn't mooted if that bill, which is
15 obviously speculative at this point, but even if it
16 did pass, we would have greater clarity should it go
17 forward.

18 Again, the circuit court case, that was --
19 it wasn't brought as a declaratory action, it was
20 brought as a special petition, which the County had
21 procedural issues with anyway, and in discussions
22 with the Petitioner, I think we came, over
23 Petitioner's initial reluctance, to come to a point
24 where we would seek this body's advice on this very
25 question.

1 I don't think exhaustion of administrative
2 remedies is -- it's definitely interesting to
3 consider, but it's more of a circuit court
4 consideration, whether or not circuit court has
5 jurisdiction over a challenge to a director's action.

6 In this case, we kind of have, like we've
7 demonstrated, a request for clarification.

8 Maybe finally, but as to the legislative
9 history, or going back to the interplay of 205 and
10 46-4(c). Again, as I said, the statute very clearly
11 limits density, specifically except for the exception
12 in 46-4(c), thereby bringing that statute underneath
13 the Land Use Commission's purview for the limited
14 purpose to consider how it interplays with the land
15 use statutes.

16 And you cannot consider this question about
17 how much density is allowed in this circumstance and
18 in future circumstances without considering this
19 46-4(c). And like I said, the Petitioner spent much
20 of his time talking about 46-4(c). I don't know if
21 he ever talked a lot about the legislative history of
22 it, but doesn't actually just come right out and say
23 it.

24 The statute says each County may adopt
25 reasonable standards to allow for construction of two

1 single-family dwelling units on any lot where
2 residential dwelling unit is permitted.

3 It doesn't say there's an unlimited amount,
4 a reasonable amount of dwelling units. It says the
5 County can create reasonable restrictions and rules
6 to create two dwelling units where one is allowed.
7 Very specific.

8 So you don't have to interpret that statute
9 necessarily to apply to 205. It's very clear it is a
10 limitation adopted by 205. And as to the much
11 discussion made of the 1989 bill, that is Act 5
12 attached as Appendix C to the department's brief.

13 This reasonableness question is about the
14 reasonable standards to allow two houses where one
15 exists. That's the only portion where reasonable
16 comes in. There is no question. There is only two
17 that the County can create in place of one.

18 So to say that you can interpret this
19 petition and this question of 205, reading the text
20 of 46-4(c) C is simply taking the Petitioner's idea
21 of what it means, and not actually reading it and
22 applying it to the statute is incomplete.

23 The Commission clearly has jurisdiction
24 over that question. And that's essentially what
25 we're here to discuss.

1 I just want to check my notes to see if
2 there is anything additional I want to address.

3 CHAIRPERSON SCHEUER: Go ahead.

4 MS. TARNSTROM: Thank you.

5 I think that's it for now. I can take
6 questions.

7 CHAIRPERSON SCHEUER: I'll allow the
8 Commissioners to ask question. I do note I want to
9 take a break in five minutes at 2:30. Can I just do
10 a -- sorry, Commissioner Ohigashi. You're muted, so
11 I could not hear --

12 COMMISSIONER OHIGASHI: I was wondering if
13 we can take a break now.

14 CHAIRPERSON SCHEUER: Let me check.
15 Commissioners, how late can we go today? Who has
16 restrictions coming up? Commissioner Giovanni? Are
17 you trying -- Commissioner Cabral.

18 VICE CHAIR CABRAL: I would like to leave
19 at 4:00 or 4:30 if possible.

20 COMMISSIONER GIOVANNI: I'm good today.

21 CHAIRPERSON SCHEUER: It's 2:26. I would
22 like to take a slightly longer recess, take a
23 20-minute break rather than a ten-minute break. We
24 will reconvene at 2:46, and we will have questions,
25 final questions for the County. Thank you.

1 (Recess taken.)

2 CHAIRPERSON SCHEUER: We're back on the
3 record.

4 Questions for Maui County, starting with
5 Commissioner Chang.

6 COMMISSIONER CHANG: Thank you, Mr. Chair.

7 Ms. Tarnstrom, I guess I have one factual
8 question. Based upon the representation by Mr.
9 Geiger, they have submitted building permits for --
10 four building permits, and one accessory use, and the
11 County has denied -- has, after issuing the building
12 permit, then subsequently denied the permit, as far
13 as I understand, with accessory use for the fourth
14 permit.

15 I'm just trying to understand the facts
16 here. You had told me you had denied the fourth and
17 sixth building permit, and he said it was the fourth,
18 and reading through the documents, it's not really
19 clear.

20 Factually, I'm trying to understand what
21 exactly has been approved, and what has been denied.

22 MS. TARNSTROM: I understand the confusion
23 on that. I was definitely wrong. I would rely on
24 Mr. Geiger's representation.

25 From what I understand, there were three

1 building permits issued, and then two that were
2 applied for, but they have not been decided upon yet.
3 And at one point the fifth one, whichever one that
4 fifth one ends up being, is going to be one too many,
5 and only act upon four dwelling units on the land.

6 COMMISSIONER CHANG: That's my
7 understanding that the County will permit the
8 Petitioner four units on the property, on the
9 2.02 acres; is that correct?

10 MS. TARNSTROM: That is correct.

11 COMMISSIONER CHANG: And that what is in
12 dispute is dispute is that fifth building permit,
13 whether it's for with accessory use or for separate
14 building; is that correct?

15 MS. TARNSTROM: That is correct. Just to
16 explain a little further, the fifth building permit,
17 I think there is intended to be even a sixth, but
18 that fifth one falls outside the allowable number of
19 dwelling units as Maui County interprets the
20 interplay of the State statute.

21 COMMISSIONER CHANG: So based upon the
22 County's interpretation, they're only permitted four
23 buildings. And you define a building, whether it's
24 an accessory unit or the building, it is no more than
25 four, because this Rural District on half acre each,

1 and so there would be a maximum of four; is that
2 correct?.

3 MS. TARNSTROM: That is correct, yes.

4 COMMISSIONER CHANG: And Mr. Geiger's
5 client has applied for at least three, been granted
6 the three, and actually may have built units on the
7 three. The outstanding is the one application that
8 includes a building and with accessory use.

9 I'll ask Mr. Geiger. He's shaking his
10 head, so that must not be correct. I will ask him if
11 I am just confused.

12 So let me ask you the question for the
13 County. And I'm not suggesting I'm inclined to go
14 one way or the other, but if LUC acts on this
15 declaratory ruling, and decides in favor of Mr.
16 Geiger's interpretation and not the County's, what
17 impact does that have on the County beyond this one
18 petition?

19 MS. TARNSTROM: Given if the Commission
20 were to adopt Mr. Geiger's interpretation of the
21 interplay of these statutes, what it means to the
22 County -- and the director can correct me -- I
23 believe that would change, if we accepted the
24 decision and didn't appeal it, I believe that would
25 change any number of applicants who came in, and I

1 believe it would change the number of buildings that
2 we now would believe and understand to be allowed in
3 a State Rural District.

4 COMMISSIONER CHANG: Two questions. You
5 said if we agreed with Mr. Geiger's interpretation
6 and we didn't appeal it. So are you telling me that
7 you can appeal a declaratory action by the LUC?

8 MS. TARNSTROM: That's my understanding. I
9 think Mr. Geiger and I discussed that as we were
10 discussing the procedural mechanisms we can use. But
11 we don't -- at this time, it's uncertain whether we
12 would even appeal it. We just kind of want an
13 answer.

14 COMMISSIONER CHANG: What impact, if any --
15 let me ask you this.

16 I'm assuming you have in the past made an
17 interpretation of the two statutes in a way that Mr.
18 Geiger's interpretation would be contrary to actions
19 that you've previously taken.

20 MS. TARNSTROM: Any grievous case that's
21 closed and decided would be undisturbed. It would be
22 a matter of what applicants could request going
23 forward as we review building permit applications and
24 so forth.

25 COMMISSIONER CHANG: Based upon your

1 understanding of what Mr. Geiger is asking for, what
2 impact would that have on your interpretation?

3 MS. TARNSTROM: Well, it's -- you mean
4 what is the conflict between our interpretation?

5 COMMISSIONER CHANG: I want to know a
6 practical matter.

7 MS. TARNSTROM: The way the County is
8 viewing this is that the State Land Use statutes
9 prohibit the County from allowing additional with
10 accessory dwelling. So the way we interpret it,
11 State Land Use statutes requires there only be four
12 dwellings on this two-acre plot of land.

13 If Mr. Geiger's interpretation or
14 Petitioner's interpretation is that State Land Use
15 allows four, and County zoning allows four buildings
16 on it, but given the application of 46-4(c), we
17 believe that that section, we believe it's a very
18 limited exception that doesn't apply here, but he
19 believes that exception incorporates the County law
20 which allows two additional dwellings. And in that
21 case, he would be permitted to have six dwellings on
22 his two acres.

23 So we believe that you don't even get to
24 County with accessory dwellings, because the State
25 puts a cap on it. And Mr. Geiger believes 46-4(c)

1 basically pierces that and allows you to kind of get
2 to -- allows the County to decide how many accessory
3 dwellings are allowed on a rural lot.

4 I hope I explained it in a way that made
5 sense.

6 COMMISSIONER CHANG: What is your response
7 to Mr. Geiger's interpretation that 46-4(C) that is
8 an exception to 205 that would permit, in the case of
9 ohana zoning, would permit the County to exceed the
10 limitation of two dwellings per acre?

11 MS. TARNSTROM: That's a great question,
12 thank you.

13 So 46-4(c) definitely applies under 205 and
14 in rural zoning. Our belief is that it's a very
15 limited exception. And that it only applies when
16 there's one house that's allowed on the lot. And in
17 that case, under 46-4(c) where only one house, the
18 County can allow a second house.

19 And under Mr. Geiger's interpretation, he's
20 saying 46-4(c) applies generally speaking to allow
21 the County to allow any number of reasonable number
22 of additional dwellings on the lot, which we
23 disbelieve that's not at all what it says.

24 COMMISSIONER CHANG: So I'm trying to
25 understand the County's position. 205 refers to

1 acreage. You have an acre, you can have two
2 dwellings. On each dwelling now for the County, when
3 205 applies to one acre, 2 dwellings. Do you define
4 the dwelling as a lot?

5 MS. TARNSTROM: No. That's a good
6 question. So 205 allows one house per half acre.
7 And we believe that the exception under 46-4(c) only
8 applies in that very limited sense. If you have one
9 acre of land, you're allowed to already have two
10 houses on that land, therefore 46-4(c) doesn't apply,
11 because you're already allowed two houses. And then
12 if you have an acre and a half, you're allowed three
13 houses, and 46-4(c) only pertains to one house on the
14 land, so forth.

15 Does that is answer your question?

16 COMMISSIONER CHANG: I'm not clear on the
17 County. What is your limited exception? How do you
18 define that?

19 MS. TARNSTROM: I don't blame you for not
20 being entirely clear, because it's complicated.

21 The limited exception 46-4(c) says the
22 Counties can create reasonable standards to allow two
23 houses anywhere a dwelling is allowed on a lot, and
24 that applies everywhere, residential, urban,
25 everywhere. As it applies to Rural Districts, Rural

1 Districts allow multiple houses based on how large
2 your land is.

3 So in our opinion, since the exception only
4 allows us to make two houses where one was before, it
5 only applies in a Rural District on a small half acre
6 to one acre, less than an acre plot of land where
7 you're only allowed one house. That's the narrow
8 exception it applies to.

9 Any time you're allowed more than one
10 dwelling on a lot, 46-4(c) doesn't come into play,
11 because it only allows two dwellings where one was.

12 COMMISSIONER CHANG: And as I understand --
13 I'm trying to understand the County's position.

14 You're saying if there's one acre, they're
15 allowed two dwellings, no dispute; do you agree with
16 that?

17 MS. TARNSTROM: Absolutely.

18 COMMISSIONER CHANG: If it is less than one
19 acre, so let's say it's a half an acre. So they're
20 allowed, under 205 they're allowed one dwelling.
21 Explain to me, so how does the County apply -- what
22 is the limited exception when it's less than one
23 acre, what is your interpretation?

24 MS. TARNSTROM: Is that under the
25 circumstances where it's a half an acre, and you're

1 allowed one dwelling, then the exception comes in and
2 allows the County to give you another house. But
3 if you already (indecipherable) -- and then if you
4 have one acre, you already have two dwellings, we're
5 only allowed to turn one into two, not allowed three
6 into four, or five into six, or six into ten.

7 We can only allow -- the ohana zoning
8 allows us to make one into two. So it's only
9 relevant in State Rural zoning where only one house
10 is allowed, and that's only where you have a small
11 lot that is less than one acre. Otherwise it doesn't
12 apply.

13 COMMISSIONER CHANG: Okay. So your limited
14 exception, 205 relates to acreage, two homes per
15 acre. Your limited exception applies to where
16 there's less than an acre, and they're only permitted
17 one dwelling, then under that circumstance the County
18 says that's when that exception is triggered where
19 you can allow more than one house on that half acre.

20 Is that what you're saying?

21 MS. TARNSTROM: That is absolutely what
22 we're saying.

23 COMMISSIONER CHANG: So are you telling me
24 that within that half acre, the County can permit how
25 many houses, and that's when the reasonableness comes

1 in.

2 So does that mean that you can allow --
3 what does the County consider reasonable on a half
4 acre?

5 MS. TARNSTROM: Our position is that there
6 is no word "reasonableness". That's irrelevant.
7 We're only allowed two houses where one once. Mr.
8 Geiger's position is that the County can decide what
9 is reasonable and allow what it wants in any
10 circumstance under 46-4(c), and we're arguing our
11 limitation. We are saying we are limited by the
12 State law, and if -- but if we are limited, which we
13 believe we are, there is no question of
14 reasonableness, there's just that stretch to where
15 one was.

16 COMMISSIONER CHANG: So when it says each
17 County may adopt reasonable standards to allow
18 construction of two-single family dwellings, the
19 County of Maui's position is, reasonableness is not
20 the number of dwellings, there's other -- that
21 applies to other standards. The only thing that
22 you're allowed to do is you can allow two dwellings
23 on less than an acre, on a half acre, you can
24 allow -- let's say you have 10,000 square feet.
25 Could you allow two dwellings?

1 MS. TARNSTROM: I don't know how big an
2 acre is.

3 COMMISSIONER CHANG: One quarter acre.

4 MS. TARNSTROM: I believe there would be no
5 homes allowed on that lot, too small.

6 Yeah, you can get two.

7 COMMISSIONER CHANG: So on a half acre, the
8 County would permit two dwellings?

9 MS. TARNSTROM: Yes.

10 COMMISSIONER CHANG: On A quarter of an
11 acre, the County would allow two dwellings?

12 MS. TARNSTROM: Correct.

13 COMMISSIONER CHANG: So long as it is less
14 than an acre, the County will allow a maximum of two
15 dwellings?

16 MS. TARNSTROM: Yes.

17 COMMISSIONER CHANG: And you believe Mr.
18 Geiger's position is that 46 allows the County to
19 allow more than two dwellings on less than a half
20 acre?

21 MS. TARNSTROM: I believe that that is the
22 logical conclusion of what he's arguing, even though
23 he's not specifically saying that. He's saying it
24 gives the County power to allow a reasonable number
25 of accessory dwellings. Whereas we don't think it

1 says a reasonable number with accessory dwellings, we
2 think we're only allowed to have two dwellings where
3 there was one. (Indecipherable).

4 COMMISSIONER CHANG: Now, I think I
5 understand the county's position. Reasonableness is
6 not the number of dwellings, but it may be related to
7 other building standards, the maximum number of
8 dwellings that the County believes they can permit.
9 Under 46 if it's less than an acre is two dwellings.
10 And in the county's position is -- so they could --
11 so in one acre you cannot have more than two
12 dwellings; that's the maximum?

13 MS. TARNSTROM: For a lot size that is one
14 acre, yes, but that's because the exception doesn't
15 apply, that's just based on they're being allowed a
16 dwelling per half acre.

17 COMMISSIONER CHANG: And that's how the
18 County has been interpreting this limited exception,
19 only applying to lots less than an acre where there's
20 only one house permitted, you believe that the County
21 has been interpreting it where you can permit up to
22 two dwellings?

23 THE WITNESS: Yes.

24 COMMISSIONER CHANG: I think understand.

25 CHAIRPERSON SCHEUER: Thank you.

1 MS. TARNSTROM: If you would like to look,
2 we have attached Exhibit D, Appendix D. That's a
3 graphic that was created by the department to kind of
4 help identify how we interpret it.

5 COMMISSIONER CHANG: I will take a look,
6 thank you.

7 CHAIRPERSON SCHEUER: Thank you,
8 Commissioner Chang.

9 Commissioner Ohigashi.

10 COMMISSIONER OHIGASHI: Thoroughly
11 confused. I'm trying to keep my questions simple.

12 Are you saying then that your request is
13 that we establish that there be a limit of one house
14 per 500 -- one house per half acre on any lot?

15 MS. TARNSTROM: That is what 205-2,
16 205-5 --

17 COMMISSIONER OHIGASHI: That is your
18 position.

19 Second question is, is that are we required
20 or are we -- isn't it correct that Chapter 46, and
21 its implication, and how it affects 205 is not within
22 our purview?

23 MS. TARNSTROM: I would disagree with
24 that.

25 COMMISSIONER OHIGASHI: Could you tell me

1 the basis and try and lay out if you have any
2 authority or anything?

3 MS. TARNSTROM: I didn't anticipate it, and
4 wasn't briefed, so I don't have legal authority for
5 this apart from what is understood in interpretation
6 of the Land Use statute, and that's 205. And in 205
7 they adopt a limitation or an exception identified as
8 46-4.

9 And so as it pertains to 205, that statute
10 can be interpreted as it's interplaying with 205.
11 That's our position.

12 You can't just bring an action before you
13 and say interpret 46-4 right now, tell us what it
14 means. But we can bring an action saying 46-4 is
15 adopted into 205, so can you tell us how this
16 interplay, because this is Land Use statute, and you
17 guys can give us answers to that. So that's how we
18 see it.

19 COMMISSIONER OHIGASHI: Just for the
20 record, is that you didn't file any documents or you
21 didn't file your own petition in this matter; is that
22 right?

23 MS. TARNSTROM: That is totally correct.
24 We did not file our own petition.

25 COMMISSIONER OHIGASHI: Has the Chair

1 indicated to you that there is only one party in this
2 case, that would be Mr. Geiger's client?

3 MS. TARNSTROM: Absolutely.

4 COMMISSIONER OHIGASHI: And, therefore, I'm
5 not sure if you have even appeal rights in this
6 matter; is that right?

7 MS. TARNSTROM: I think we may, because we
8 are and interested party that submitted and
9 participated --

10 COMMISSIONER OHIGASHI: I'll leave it up to
11 the Supreme Court to decide that.

12 But so what I'm trying to get at is that if
13 we accept your determination or your argument,
14 wouldn't it be indirectly approving the County
15 ordinances that you're trying to protect here or
16 trying to enforce here?

17 MS. TARNSTROM: No, actually, we are not --
18 it's the Petitioner, Mr. Geiger, who is trying to
19 enforce the County ordinances and bring them into
20 this case.

21 All the County is trying to do is properly
22 interpret the limitations placed on the County by the
23 State Land Use statute.

24 And so we believe that we have been limited
25 in what we can apply in this circumstance. We don't

1 think the County codes are at all relevant in this
2 case.

3 COMMISSIONER OHIGASHI: Can you direct my
4 attention in your filing, just trying to look at
5 where in the County code that you cite limited
6 exception that you have articulated concerns this
7 matter.

8 MS. TARNSTROM: It's not in the County
9 code. It's in 205. 205 says that there can be one
10 dwelling unit per half acre, except as provided in
11 46-4, and so we're just interpreting 205-2 and 205-5,
12 and that interpreted this exception.

13 COMMISSIONER OHIGASHI: There is a County
14 code that says essentially that you can have -- if
15 you're 7500 square feet, you can have -- or more --
16 you can have two accessory dwellings, right?

17 MS. TARNSTROM: Yep, yeah.

18 COMMISSIONER OHIGASHI: Did that indicate,
19 or did that have an indication on its application to
20 one acre, two acre, three acre, four acre lot? Is
21 there some kind of limitation contained in your own
22 County code?

23 MS. TARNSTROM: Sure. In County zoning if
24 we are looking at County zoning and not State level
25 zoning, if you're looking at County zoning, you can

1 look at my brief. It's cited on page three. So
2 independent of any State level zoning, just looking
3 at County zoning under County law, not limited by the
4 State, it says you can have one-single family
5 dwelling per half acre, under 19.29.030, and the
6 County doesn't limit -- the County would allow two
7 additional with accessory dwellings, purely under
8 County code.

9 And that is identified in Section
10 19.35.050. So if there were no State Land Use
11 limitation, the County law would allow six dwellings.
12 But the County law also adopts and recognizes the
13 limitation of 205 as they apply, and we believe they
14 apply in this instance.

15 So State zoning says -- we believe State
16 zoning limits it to four, and if State zoning
17 applies, we have to limit it to four under County
18 code, but if none of that applied --

19 COMMISSIONER OHIGASHI: What you're saying
20 there is nothing in the County code that refers to
21 any State limitation in this matter, that you're
22 relying upon purely our determination of the State
23 law that's saying 205 says one unit for 500?

24 MS. TARNSTROM: Basically only one point
25 that I would argue, that there is under rural County

1 zoning, Rural District, it states accessory dwellings
2 are allowed pursuant to the County code with
3 accessory zoning, which is two, but also pursuant to
4 205.

5 So under the County code in adopting
6 limitations in 205, which apply in this case, yes,
7 County code identifies 205 can limit the number of
8 accessory dwellings.

9 COMMISSIONER OHIGASHI: I just wanted to
10 understand your position.

11 The last question I have, assuming that the
12 statutory amendments is passed, that we -- what
13 Commissioner Wong has indicated, on this particular
14 property would it be correct that eight dwellings
15 units would be applicable?

16 MS. TARNSTROM: If I understand that
17 proposed statute, I think that, yeah, it would be
18 eight, because it would be -- you would be allowed as
19 many houses per quarter acre in that, two times four
20 I think is eight. So yeah, eight units.

21 So in this case -- this case might be
22 mooted, depending on what the Petitioner wants on
23 their land, but --

24 COMMISSIONER OHIGASHI: However, again, the
25 department didn't file a petition in this matter. So

1 we are under no obligation to give the department
2 declaratory ruling concerning the department.

3 MS. TARNSTROM: Absolutely.

4 COMMISSIONER OHIGASHI: No further
5 questions.

6 CHAIRPERSON SCHEUER: Commissioners,
7 anything more for the County?

8 If I may, in the hope of making a complex
9 confusing issue further confusing and complex, I
10 want -- I was starting to think about how the various
11 different interpretations of relationship of 205 to
12 46 might impact the LUC's public trust
13 responsibilities, particularly when it comes to the
14 consideration in Hawaii Supreme Court rulings of the
15 existence of traditional customary rights on lands
16 less than fully developed.

17 And at what point when you start to add
18 units onto a Rural lot might the land start to go
19 from being less than fully developed to fully
20 developed, Ms. Tarnstrom?

21 MS. TARNSTROM: I think putting dwelling
22 units on a plot of land depending on how you're
23 defining development, under, say, SMA it wouldn't be
24 developed, but if you're using that term very
25 broadly, any time you're building anything in open

1 land you are developing it. And I think it would be
2 essentially incumbent upon, from what I understand
3 from Hawaii Supreme Court's ruling, incumbent upon
4 the Petitioner to establish that they are not
5 infringing upon traditional and customary rights if
6 they are in fact disturbing -- if it does qualify as
7 a development under any statute or code.

8 CHAIRPERSON SCHEUER: Well, I guess what
9 I'm trying to get at is, by essentially by having
10 interpretation of your County ordinance in
11 relationship 205, you are limiting density, correct?

12 MS. TARNSTROM: I would just clarify, we
13 don't think our County ordinances are at all relevant
14 in this. Just interpreting State statutes. And we
15 believe that the State statutes limit density and
16 that we cannot go beyond what the State statute tell
17 us we can do.

18 CHAIRPERSON SCHEUER: I'm fine with that
19 restatement of your position. But that position
20 would actually act to limit density.

21 MS. TARNSTROM: Yes.

22 CHAIRPERSON SCHEUER: And perhaps serve as
23 a mechanism for possibly protecting that traditional
24 and customary rights in the Rural District, that
25 might -- (indecipherable).

1 MS. TARNSTROM: I think that that's fair.
2 I think any limitation on development has a more
3 potential to protect traditional customary practices.

4 CHAIRPERSON SCHEUER: Thank you. Anything
5 else?

6 Commissioner Cabral.

7 VICE CHAIR CABRAL: Just to complicate
8 things more. 514B, as Mr. Geiger said, all of that
9 land is now being seen as limited common element
10 under condominium statute, so that would have to be
11 (indecipherable) -- various nature, entities that
12 they maybe vote and make that change, but I think
13 that's -- (indecipherable).

14 CHAIRPERSON SCHEUER: Commissioner Cabral,
15 you're cutting in and out a little bit.

16 VICE CHAIR CABRAL: I'll talk into my
17 computer.

18 Just concerned that because as he's
19 indicated, you are under 514B condominium law, and
20 that land that we are all discussing is really, he
21 said, limited common element under the description of
22 how they set up that property. So they can vote to
23 maybe change that, but I think that's a whole other
24 can of worms for this property, legally speaking.
25 I'm not the lawyer, I'm the condominium person. It's

1 a mess.

2 CHAIRPERSON SCHEUER: Thank you,
3 Commissioner Cabral. Anything further?

4 MS. TARNSTROM: For me or from --

5 CHAIRPERSON SCHEUER: The Commission. But
6 if you have something more, I would allow --

7 MS. TARNSTROM: It's really hard to break
8 this down and put it on paper and understand it, but
9 if you step back from it, it's really just about what
10 limit State law is putting on this plot of land, and
11 does the exception of 46-4(c), does it mean the
12 County can give whatever amount of accessory
13 dwellings, or does it limit it? It's all very
14 complicated.

15 CHAIRPERSON SCHEUER: Thank you. Let's
16 move on to Mr. Yee.

17 MR. YEE: Thank you.

18 So let's first recognize that I think all
19 of the parties agree that the more restrictive of the
20 requirements apply, whether State or County. To
21 start with the first question I think Commissioner
22 Okuda asked.

23 If the State requirements are more
24 restrictive, they must apply regardless of what the
25 County says. County allows more units. If the State

1 statute restricts the number, then that is what has
2 to apply.

3 This is also reflected, by the way, not
4 only in the Sunset Beach, but also in the Hawaii
5 Administrative Rules of Land Use Commission 15-15-23.

6 Start with that. And then what is the
7 question before you today? We have discussed a
8 number of things, but I think we start with the
9 question that Petitioner presented on page five of
10 his brief, which says:

11 The Petition presents a single issue for
12 determination whether HRS Sections 205-5(c),
13 205-2(c), and 46-4(c) restrict the County's ability
14 to provide for greater density in the Rural Districts
15 one dwelling per one half acre. That's the question
16 before you.

17 It isn't necessarily whether this
18 particular application should be granted, it asks the
19 general legal question.

20 And although I understand that there has
21 been some confusion about what is -- about how to
22 analyze this issue, from the Office Planning's view,
23 it's relatively simple.

24 Chapter 205 says that the density in the
25 Rural District is one dwelling per one half acre

1 unless otherwise allowed by Section 46-4(c), that's
2 the density. It's one dwelling per one half acre,
3 and there's an exception.

4 So then you look at the exception. The
5 exception says, the County may have reasonable
6 ordinances that may allow an accessory dwelling on a
7 lot where there is a dwelling unit. That's the
8 exception.

9 And so the question arises, if you have a
10 lot with two dwelling units, are you allowed to have
11 an accessory dwelling, and the answer is no, because
12 you don't have a dwelling on the lot as specified in
13 46-4(c), you have two dwellings. You already have
14 multiple dwellings, therefore, 46-4(c) does not
15 apply.

16 Part of the confusion arises, I think,
17 because Chapter 205 sets density limits. These are
18 density requirements. 46-4(c) is not per se density
19 requirement, there's an impact, but it is not
20 specifically a density requirement.

21 So let me give you an example to hopefully
22 show the difference.

23 Let's suppose you have one acre lots. On
24 that lot you have one house in the Rural District,
25 you're fine. Or if you want a second house, you may

1 ask for an accessory dwelling unit. Only one house
2 on it. You qualify under 46-4(c). You may be
3 allowed an additional accessory dwelling unit, and
4 satisfy the requirements for accessory dwelling
5 units. Or you could CPR it. It's in the Rural
6 District, one acre. You could go through the process
7 for CPR, and also be allowed to have two dwelling
8 units. Or you could do a full subdivision request
9 and subdivide one acre into two acres. You could
10 then have one dwelling unit on each of those lots
11 that are created because they meet the requirements
12 of 205.

13 You reach the exact same results three
14 different ways, although they each have to go through
15 a different process, and that's up to the individual
16 landowner and their individual circumstance to decide
17 which way they want to do it.

18 We note that -- there was sort of a
19 question of what is the difference between a CPR and
20 a subdivision. I think Commissioner Cabral addressed
21 this very well. And she asked the question, and I
22 don't have exact wording, but so I'm going to
23 paraphrase, but she asked I believe the Petitioner,
24 are you asking whether you can get multiple units
25 through the CPR to avoid possible subdivision

1 requirements, and then ask to get the benefits of a
2 subdivision by asking for with accessory dwelling?
3 And the Petitioner said, no.

4 From the Office of Planning's view, the
5 answer is absolutely yes. That is exactly what is
6 being proposed, and that's important, because a CPR
7 is not a subdivision. A CPR is simply a means or
8 method of ownership of the property. It is not a
9 land use approval. A subdivision is part of the land
10 use process. So if you go through a subdivision,
11 quite frankly, it's harder. You have to answer more
12 questions. You have to analyze more things. You
13 have to provide more information. And that's why
14 it's important in this case to make that distinction
15 between a piece of land that has been CPR'd to allow
16 multiple units, in which you are not allowed then to
17 have with accessory dwelling pursuant to 46-4(c)
18 because you're not going through the land use process
19 of a subdivision, with all the requirements in
20 analyzing impacts of a subdivision, until it makes a
21 substantive difference making sure the counties
22 retain that control over their land use process when
23 someone comes in and asks for an exception to the
24 density requirements under 46-4(c), because you are
25 not going through the land use process on the

1 subdivision.

2 So if you have a one-acre piece of property
3 and you CPR into two dwelling units for that one
4 acre, that's fine; but you cannot then ask for, or
5 not entitled to then get the with accessory dwelling
6 through the with accessory dwelling process. You had
7 to go through the much lengthier, or at least
8 lengthier and more robust analysis of a subdivision.

9 And that gives then the County more control
10 in analyzing then how the land is being used, and
11 then being aware that that subdivided piece of
12 property would then be entitled to with accessory
13 dwelling unit, and that could then be part of the
14 County process.

15 So this interpretation that the Office of
16 Planning is proposing to you is then consistent with
17 the larger land use processes that exist,
18 subdivision, CPR's, et cetera.

19 Commissioner Wong -- and by the way,
20 Commissioner Wong asked why not go through the
21 subdivision. That's the reason, because it's more
22 difficult.

23 We join in, I think, the comments and
24 answers by Maui County's counsel on this,
25 particularly also the term "reasonableness". The

1 term "reasonableness" does not refer to number of
2 units. It doesn't matter whether the County
3 ordinance is reasonable or not, they cannot allow
4 more than one accessory dwelling on a lot where there
5 is a dwelling unit. That's all that they are allowed
6 to do under 46-4(c), whether the ordinance is
7 reasonable or not, they're still restricted on what
8 they're allowed to do.

9 Now, they could put in other reasonable
10 requirements that you're only allowed to do it under
11 certain circumstances, or you have to make a certain
12 showing of proof or something or the other. You may
13 have to do public trust analysis, whatever the other
14 standards that apply, the County can certainly impose
15 additional restrictions before it allows with
16 accessory dwelling unit.

17 This is restricted, I think, in the
18 legislative history, which it doesn't require the
19 with accessory dwelling. It allows the County to do
20 with accessory dwelling and gives the County that
21 authority to establish reasonable standards. But it
22 never changes the County's authority to allow greater
23 density, greater number of units. It's still only
24 one additional unit on a lot where there is a
25 dwelling unit.

1 So I think substantively, that's I think
2 the answer from the Office of Planning.

3 You have asked a variety of questions
4 regarding whether the Land Use Commission should even
5 decide this matter. Let me try to briefly discuss
6 those issues.

7 You raise the issue of legislation. There
8 is legislation that is considering whether or not to
9 change the density to apply from a half acre to
10 quarter acre. If that happens, it is possible that
11 Mr. Grier will be satisfied, because he doesn't
12 want -- assuming he doesn't want to create more than
13 16 units on his -- or eight units, I guess, on his
14 property. He's clearly allowed to put in the six
15 that he's asked if that law passes. But it doesn't
16 answer the question, the general question, which is
17 in this declaratory petition, which the County is
18 asking, and as phrased by Mr. Grier in his petition.

19 So it might deal with the particular issue,
20 but doesn't deal with the question presented to you.

21 And well, okay, leave it there.

22 And there's the issue of 15-15 -- I think
23 it's 90 -- I'm sorry -- 100, which allows the
24 Commission to refuse a petition, to deny a petition
25 basically, won't consider the question for a variety

1 of reasons, one of which is speculative, and does not
2 involve an existing situation or one which may
3 reasonably be expected to occur.

4 So that was a discussion that I had with
5 Commissioner Chang as to how clear do the facts have
6 to be; is it a purely legal question? You think it's
7 going to be factual, and therefore just speculating
8 on what the answer might be because it's going to
9 change the facts, you certainly don't have to answer
10 the question.

11 I think in this case the question is purely
12 legal. What is the authority of the County? You
13 don't have to decide whether or not the ordinances
14 are reasonable, just can they pass a reasonable
15 ordinance to allow more than one dwelling unit -- I'm
16 sorry, to allow a dwelling an additional accessory
17 dwelling on a lot which already has multiple
18 dwellings.

19 I think that's a purely legal question
20 which, as the County says, comes up to them every so
21 often.

22 There is the issue of whether -- and I did
23 misspeak a bit, I think, the precise language of your
24 rules is, you may deny the petition for the issuance
25 of the declaratory order may adversely affect the

1 interest of the State, the Commission, or any of the
2 officers or employees in any litigation which is
3 pending or may reasonably be expected to arise.

4 So there is a slight difference in that,
5 the County -- actually private individuals are not
6 actually included within that rule, but I accept the
7 idea of expeditious and efficient undertakings and a
8 desire not to have repetitive proceedings.

9 So I think I would say that the Commission
10 has the authority to defer or refuse to consider this
11 issue if it's already pending, and you have chosen
12 not to answer the question.

13 I don't think, however, that exhaustion of
14 administrative remedies though is the right term to
15 use. And I think a simple way to think of this is,
16 the court in the second circuit could look at this
17 and say, well, you haven't finished your declaratory
18 proceedings before the Land Use Commission yet. Go
19 an exhaust your administrative remedies.

20 Different than the Land Use Commission
21 looks at the court proceedings and says, well, you
22 haven't exhausted your judicial remedies. Go and
23 exhaust those before you come back and ask us.

24 So I don't think that's the right term to
25 use. Although I understand the idea of simply trying

1 to make sure there is simply one forum in which
2 decisions are reached.

3 And so it's a bit of chicken or egg
4 question. I do note, however, that all the parties
5 here before you, that is both Mr. Grier and the
6 County have come to you and asked you to make a
7 decision. So it's not as if there are different
8 parties and some want you to make a decision and some
9 don't. Both have come to you and have asked you to
10 make a call.

11 Then there is the question of whether it's
12 within your jurisdiction to interpret the 46-4(c).
13 Mr. Geiger says, well, that's not within your
14 jurisdiction, I haven't asked you to do it. But to
15 be quite honest, when I read the Petition, that's
16 exactly what I thought he wanted you to decide. And
17 I think that's a reasonable understanding of the way
18 he framed the question and then proceeded to spend
19 three pages of a 14-page brief on this 46-4(c).

20 So 46-4(c) does not seem to be, you know --
21 or put it differently, let's suppose you don't
22 interpret 46-4(c). What are you being asked. 205-2
23 and 205-5 says the density is one dwelling per
24 one-half acre, unless otherwise allowed by 46-4(c).
25 The answer would be, what? You are allowed to have a

1 higher density if allowed by 46-4(c). That frankly
2 seems a little bit -- not sure what words to use.
3 It's such an obvious restatement of the law, it
4 doesn't seem logical to me that that would be the
5 subject of a dispute, or the subject requiring any
6 kind -- any party coming to the LUC to ask for
7 clarification. Clarification is what does 46-4(c)
8 mean? That's the clarification. And I think that's
9 within your jurisdiction because it affects the
10 density requirements in Chapter 205.

11 Chapter 205 is clearly your jurisdiction.
12 It's clearly land use, so are ohana dwellings. They
13 are also land use, and they deal with the question of
14 what can be done on lands in the Rural District,
15 which is squarely within, I think, the purview of the
16 Land Use Commission.

17 So from the, Office of Planning's viewpoint
18 we think you can issue a ruling on this matter and
19 clarify this for the parties.

20 I'm open to any questions.

21 CHAIRPERSON SCHEUER: Thank you very much,
22 Mr. Yee.

23 Commissioner Chang followed by Commissioner
24 Okuda.

25 And let's see, actually it's 3:40, we've

1 gone 54 minutes. How extensive is your questioning
2 going to be, Commissioner Chang and Okuda?

3 COMMISSIONER CHANG: Just one question.

4 COMMISSIONER OKUDA: Two questions, Chair.
5 I hope to keep it to three minutes, not counting
6 response.

7 CHAIRPERSON SCHEUER: Mr. Geiger, how long
8 do you think you need for rebuttal or closing?

9 MR. GEIGER: I would keep it fairly short,
10 maybe five minutes maximum.

11 CHAIRPERSON SCHEUER: Let's try and finish
12 up with Mr. Yee, then we will take a break and hear
13 final from Mr. Geiger.

14 COMMISSIONER CHANG: Thank you, Mr. Chair.

15 Thank you, Mr. Yee. As always I greatly
16 appreciate your presentation.

17 Let me just ask one clarifying question,
18 because as you were describing what the County --
19 what the options are, you talked about a subdivision.

20 So based upon your position, could the
21 County -- could the Petitioner come in to do a
22 subdivision, and then put more than four dwellings on
23 the two acres?

24 MR. YEE: Yes, if the County approved the
25 subdivision of a two-acre lot into four different

1 lots, each lot may be allowed to have one dwelling
2 unit on it pursuant to 205-2, then each lot may be
3 allowed to have with accessory dwelling pursuant
4 46-4(c).

5 COMMISSIONER CHANG: Isn't that contrary to
6 205, not more than one lot per half an acre?

7 MR. YEE: More than one dwelling unit per
8 half acre except as allowed by 46-4(c).

9 COMMISSIONER CHANG: And so you're saying
10 the subdivision, that's contrary to what the County
11 is saying. You're saying that under the subdivision,
12 the County can exceed the four dwellings, because the
13 County is saying under no circumstances can they
14 exceed four.

15 MR. YEE: I think there might have been a
16 misunderstanding. I'll let the County answer that
17 question.

18 MS. TARNSTROM: Would you like me to
19 answer?

20 The County's position was not under
21 circumstances of a subdivision. It was only if it
22 was not subdivided. So under subdivision we fully
23 agree with Mr. Yee (indecipherable).

24 COMMISSIONER CHANG: So even within rural
25 designation, if there is a subdivision, more than

1 four lots per two acres, that's your position, both
2 the County and OP?

3 MR. YEE: No, no. Let me be very clear
4 about this.

5 CHAIRPERSON SCHEUER: We are just
6 questioning Mr. Yee right now.

7 COMMISSIONER CHANG: My apologies.

8 MR. YEE: On a two-acre lot you could
9 subdivide it it as small as four half-acre lots in
10 the Rural District. Each lot you may have one with
11 accessory dwelling. I'm sorry, on each lot you may
12 have one dwelling unit. And then after you have
13 subdivided each lot, which is a half acre, you will
14 be allowed to have one with accessory dwelling. You
15 don't subdivide it with more -- you don't subdivide
16 with more than four units. You subdivide it in four
17 units and then each lot --

18 COMMISSIONER CHANG: So under your
19 scenario, the subdivision would permit four dwellings
20 and four with accessory units, so there could be
21 eight?

22 MR. YEE: Well, assuming there are four
23 separate lots that are created, and each lot is
24 one-half acre each.

25 COMMISSIONER CHANG: There could be a

1 maximum of eight?

2 MR. YEE: Yes.

3 COMMISSIONER CHANG: So there's a maximum
4 of four?

5 MR. YEE: Yes.

6 COMMISSIONER CHANG: Thank you.

7 CHAIRPERSON SCHEUER: Commissioner Okuda.

8 COMMISSIONER OKUDA: Very quickly, Mr. Yee.

9 I find your explanation very persuasive.
10 My question goes to limiting the inadvertent damage
11 we, as a Commission, might do.

12 As a legal matter, if this matter is just
13 litigated through the second circuit court on Maui,
14 then the ruling really affects only the County of
15 Maui, and if there is an appeal, the appellate court,
16 the other counties can perhaps file amicus, or what
17 you would call advisory briefs to the appellate
18 court, but generally speaking, the ruling would be
19 Maui specific.

20 But if the Land Use Commission makes a
21 ruling here, there is a very good argument that the
22 DR order we enter would have statewide effects.

23 Wouldn't that be kind of unfair to like the
24 County of Kauai, the City and County of Honolulu, the
25 County of Hawaii or Hawaii Island that they might

1 suddenly be taken aback by a ruling coming from us
2 which they really didn't participate in? Wouldn't
3 that be a concern, and the specific legal point I'm
4 making is maybe we don't have a sufficient record to
5 do this right now.

6 Would I be totally wrong to have that
7 concern?

8 MR. YEE: There is legal, and then there is
9 practical. So let me distinguish those two things.

10 Legally under your administrative rule
11 15-15-104 which speaks to the applicability of
12 declaratory order. The declaratory order is
13 comparable to the specific set of facts as delineated
14 by the Land Use Commission. So that's within your
15 purview to determine how narrow or broad you want to
16 draft your declaratory order.

17 Practically speaking, and actually let me
18 just note that for a court order, I think you're
19 right that a court order, especially at circuit court
20 level, is only applicable to parties present. Like I
21 said, unless -- (indecipherable).

22 So that's legally correct. But on both
23 cases, there is the practical effect of if there is a
24 court order on the meaning of State statute that will
25 be persuasive to a number of different entities and

1 counties, we are not looking to litigate, right?
2 Just want to follow the law as it's best understood.

3 So whether it comes from the LUC or comes
4 from the court, the practical effect is actually, I
5 think, very similar, if not the same, depending on,
6 again, how the order in each jurisdiction is framed.

7 COMMISSIONER OKUDA: Thank you.

8 CHAIRPERSON SCHEUER: Anything further,
9 Commissioners? If not, it's 3:47. We can do a
10 couple of things.

11 One would be we hear from Mr. Geiger,
12 stretch a little past a full hour and then call it a
13 day and then come back to deliberate tomorrow.

14 Or we take a break, hear from Mr. Geiger,
15 and go into deliberations.

16 COMMISSIONER OKUDA: Chair, this is Gary
17 Okuda. May I request the indulgence of everyone. If
18 we can do this, because tomorrow morning I have to be
19 in probate court at 9:00 o'clock, sorry.

20 CHAIRPERSON SCHEUER: Any concerns with
21 that? If not, then people said we could go until at
22 least 4:30. So take a break --

23 VICE CHAIR CABRAL: Let's not take a break
24 and let's power through.

25 CHAIRPERSON SCHEUER: I have to keep in

1 mind our court reporter, and basic biological needs
2 of our fellow Commissioners. So we will take a break
3 until 4:00 o'clock.

4 (Recess taken.)

5 CHAIRPERSON SCHEUER: We are back on the
6 record. Mr. Geiger.

7 MR. GEIGER: Thank you very much. Thank
8 you, Chair; thank you, Commissioners for paying
9 attention. It's been a long afternoon, and we do
10 appreciate very much. I'm going to keep my remarks
11 very short. Just one point I wish to make.

12 As has been recognized, but I've had cases
13 with Bryan before and I've always appreciated Bryan's
14 comments, because I find them usually spot on, but I
15 do not always agree with Bryan, and in this case I do
16 not agree with Bryan.

17 And the reason I don't agree with Bryan is
18 because if the legislature had intended to do that
19 which the County and Office of Planning is saying, it
20 would have been very simple for them to have amended
21 205-2(c) to state: Except for one ohana dwelling and
22 one half acre or less rural lots.

23 Because that's the effect of what they're
24 asking you to determine. But the legislature didn't
25 say that, not in the legislative history, not in the

1 statute. The legislature said for rural lots of
2 whatever size, you can have ohana zoning as permitted
3 or as allowed by the County.

4 The legislature said, leave it up to the
5 County if they wish to have a higher density on rural
6 lots, then the default of one per one half acre.

7 And so I believe that for the Commission to
8 go beyond the statute and find anything beyond that
9 the County can adopt an ordinance allowing for
10 greater density would be in violation and contrary to
11 the legislative history. And with those comments, I
12 want again to thank the Commission, Commissioners and
13 the Chair and as well as the Commission Staff for
14 everything with regard to this hearing. Thank you.

15 CHAIRPERSON SCHEUER: Thank you, Mr.
16 Geiger.

17 Final questions for Mr. Geiger? If not --
18 Commissioner Chang.

19 COMMISSIONER CHANG: I do apologize. I'm
20 going to try to keep this really short.

21 Mr. Geiger, the day has been very long. So
22 if I understand your position, 205 says no more than
23 one dwelling per half acre. So 205 says, except as
24 otherwise permitted by the County. And it's your
25 position that the Counties can authorize in excess of

1 the four dwellings, that they can actually authorize
2 potentially up to eight, a dwelling and an accessory
3 unit?

4 MR. GEIGER: Counties can authorize
5 additional ohana dwellings, whatever the Counties
6 choose that to be based upon the particular
7 circumstances of the land use that the County is
8 addressing.

9 COMMISSIONER CHANG: So if in your case the
10 Counties have determined that there is -- that the
11 maximum is four for each half acre, one dwelling per
12 half acre, are you questioning the County's
13 determination?

14 MR. GEIGER: Yes. Because the County is
15 saying that's the limitation imposed by Chapter 205.
16 The County ordinance allows for a greater number or
17 density than allowed by 205, which they are entitled
18 to do under Chapter 46, and so we are only asking
19 that the County's ordinance would be enforced. But
20 that issue is not before the Commission, and we are
21 not asking you to weigh in on that issue.

22 COMMISSIONER CHANG: All right. Thank you
23 very much.

24 CHAIRPERSON SCHEUER: Anything further,
25 Commissioners?

1 If not -- Commissioner Okuda? No.

2 If not, I'll remind everyone and the
3 audience that this is a hearing on a request for a
4 Declaratory Ruling. As such, the decision of the
5 Commission will be made on the written briefs on file
6 and posted to our website. This is not an
7 evidentiary hearing. Any oral presentation made
8 today will be considered in the Commission's
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, issue
15 a declaratory order, or set the matter for hearing as
16 provided in Section 15-15-103 of the Commission
17 rules. In addition, Section 15-15-102 of the
18 Commission rules provides that the Commission, for
19 good cause, may refuse to issue a declaratory order
20 by giving specific reasons.

21 The Commission may so refuse where:

22 (1) the question is speculative or purely
23 hypothetical and does not involve existing facts, or
24 facts that can be expected to exist in the near
25 future;

1 (2) the petitioner's interest is not of the
2 type that would give the petitioner standing to
3 maintain an action if the petitioner were to seek
4 judicial relief;

5 (3) the issuance of the declaratory order
6 may affect the interests of the commission in a
7 litigation that is pending or may reasonably be
8 expected to arise; or

9 (4) the matter is not within the
10 jurisdiction of the Commission.

11 So we may now go into conduct formal
12 deliberations on this matter.

13 I will note for the Parties, or the Party
14 and the County and Office of Planning that
15 deliberations are not to entertain additional input,
16 unless those entities or individuals are specifically
17 requested to do so by me.

18 I'm going to go through and just make
19 sure -- Commissioner Okuda?

20 COMMISSIONER OKUDA: No.

21 CHAIRPERSON SCHEUER: I want to confirm
22 that each of the Commissioners have reviewed the
23 record and are prepared to deliberate on the subject
24 docket today.

25 Commissioner Aczon?

1 VICE CHAIR ACZON: Yes.

2 CHAIRPERSON SCHEUER: Commissioner Cabral?

3 VICE CHAIR CABRAL: Yes.

4 CHAIRPERSON SCHEUER: Commissioner Chang?

5 COMMISSIONER CHANG: Yes, I am.

6 CHAIRPERSON SCHEUER: Commissioner

7 Giovanni?

8 COMMISSIONER GIOVANNI: Yes.

9 CHAIRPERSON SCHEUER: Commissioner

10 Ohigashi?

11 COMMISSIONER OHIGASHI: Yes.

12 CHAIRPERSON SCHEUER: Commissioner Okuda?

13 COMMISSIONER OKUDA: Yes.

14 CHAIRPERSON SCHEUER: Commissioner Wong?

15 COMMISSIONER WONG: Yes.

16 CHAIRPERSON SCHEUER: The Chair is also

17 prepared to deliberate on this matter.

18 Commissioners, what is your pleasure?

19 Commissioner Okuda, I believe this is why

20 you raised your hand.

21 COMMISSIONER OKUDA: Thank you, Mr. Chair.

22 Pursuant to HAR 15-15-100(a)(1), I move

23 that the Petition be denied.

24 CHAIRPERSON SCHEUER: Is there a second?

25 Commissioner Ohigashi.

1 COMMISSIONER OHIGASHI: I'll second.

2 CHAIRPERSON SCHEUER: I'm going to ask you
3 speak to the motion and speak to the second.

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

6 I found all the legal presentations top
7 notch, well prepared, well briefed and well
8 presented, but based on what was presented, the
9 reason why I have made the motion is, I believe that
10 under the specific situation that we face here today,
11 the matter is speculative, as that term is used in
12 HAR 15-15-100(a)(1)(A).

13 The reasons why the situation is
14 speculative include the fact that there is a pending
15 action, as been represented to us in the second
16 circuit court dealing with the County of Maui and the
17 Petitioner, and so these issues still have a forum
18 where they need to be, and can be litigated where a
19 full record can be prepared on all the issues and
20 where such full record can be appropriately reviewed.

21 My reasons also include the fact that we
22 have to be mindful of what the Hawaii Supreme Court
23 ruled in Save Sunset Beach Coalition case, which is
24 basically that if the counties are taking a stricter
25 view, or stricter ordinances or ordinances which are

1 more strict than the State Land Use law, then the
2 stricter ordinance or requirement prevail under the
3 dual system of zoning that we have in this State.

4 That frankly explains the reason why HAR
5 100(a)(1)(D) essentially restricts the Land Use
6 Commission from issuing declaratory rulings on
7 interpretations of ordinances or other types of rules
8 which the Land Use Commission does not have the power
9 to administer or is otherwise not charged with
10 interpretation.

11 I understand the argument that Mr. Geiger
12 has made. However, in considering all the arguments
13 that were presented, and the briefs that were
14 submitted, it's clear that the ruling also hinges
15 upon what the County of Maui believes its ordinances
16 and rules require, and their interpretations of those
17 rules and ordinances.

18 This ruling, of course, has nothing do with
19 whether or not the County is appropriately enforcing
20 their rules, whether there may or may not be due
21 process issues, but those are issues for litigation
22 between the parties before the second circuit and not
23 something the Land Use Commission has subject matter
24 jurisdiction, because we all know subject matter
25 jurisdiction cannot be waived.

1 So for those reasons and other good cause
2 in the record, I ask that the motion be granted.

3 CHAIRPERSON SCHEUER: The Motion to Deny be
4 granted?

5 COMMISSIONER OKUDA: Yes.

6 CHAIRPERSON SCHEUER: Commissioner
7 Ohigashi.

8 COMMISSIONER OHIGASHI: I don't have any
9 comments really to add to Commissioner Okuda's
10 statement. However, I would note that much confusion
11 in trying to facilitate or obtain the necessary facts
12 that would support this issue for declaratory ruling,
13 therefore, I support Commissioner Okuda's rendition
14 or motion -- actually his motion that he made.

15 CHAIRPERSON SCHEUER: Commissioners, we are
16 in discussion. There is a motion before us to deny
17 the Petition.

18 Commissioner Chang. Have you run out of
19 words at this hour?

20 COMMISSIONER CHANG: You know, Commissioner
21 Okuda's and Commissioner Ohigashi's comments have
22 said it all. I have really nothing more to add.

23 I think that we've had a robust discussion
24 today on the facts, the legal issues, and based upon
25 all of that, I support the denial of the Petition for

1 Declaratory Ruling.

2 That is all that I have to say. Thank you
3 very much.

4 CHAIRPERSON SCHEUER: Commissioners?

5 Commissioner Cabral. You're muted.

6 VICE CHAIR CABRAL: No, I agree. I'm going
7 to vote in favor of the Motion to Deny. I feel that
8 it's -- I'm confused about it still, but I don't
9 think it's our place to work on what I would consider
10 diverting the law with zoning. Thank you.

11 CHAIRPERSON SCHEUER: Commissioners
12 Giovanni or Aczon?

13 COMMISSIONER GIOVANNI: I have been swayed
14 by Commissioner Okuda, as usual, and will support the
15 motion.

16 CHAIRPERSON SCHEUER: Commissioners Wong or
17 Aczon?

18 VICE CHAIR ACZON: I have nothing else to
19 add.

20 CHAIRPERSON SCHEUER: Chair will also be
21 voting in favor of the motion, joining with the
22 arguments with Commissioner Okuda and Ohigashi.

23 If nothing further, Mr. Orodenker, please
24 poll the Commission.

25 EXECUTIVE OFFICER: Thank you, Mr. Chair.

1 The motion is pursuant to Section 15-15-100(1)(a) --
2 (a)(1), sorry, Petition be denied.

3 Commissioner Okuda?

4 COMMISSIONER OKUDA: Yes.

5 EXECUTIVE OFFICER: Commissioner Ohigashi?

6 COMMISSIONER OHIGASHI: Yes.

7 EXECUTIVE OFFICER: Commissioner Giovanni?

8 COMMISSIONER GIOVANNI: Aye.

9 EXECUTIVE OFFICER: Commissioner Chang?

10 COMMISSIONER CHANG: Aye.

11 EXECUTIVE OFFICER: Commissioner Cabral?

12 VICE CHAIR CABRAL: Yes.

13 EXECUTIVE OFFICER: Commissioner Aczon?

14 VICE CHAIR ACZON: Aye.

15 EXECUTIVE OFFICER: Commissioner Wong?

16 COMMISSIONER WONG: Aye.

17 EXECUTIVE OFFICER: Chair Scheuer?

18 CHAIRPERSON SCHEUER: Aye.

19 EXECUTIVE OFFICER: Thank you, Mr. Chair.

20 The motion passes with eight affirmative votes.

21 CHAIRPERSON SCHEUER: I would like to
22 sincerely thank Mr. Geiger, Ms. Tarnstrom and Mr. Yee
23 for their presentation today. And we appreciate it
24 very much. Very helpful.

25 MR. GEIGER: Thank you, Chair. Thank you,

1 Commissioners.

2 CHAIRPERSON SCHEUER: Before I declare
3 recess until 9:00 A.M. tomorrow, I want to briefly go
4 over our schedule, having dispensed with this item,
5 we will move on to return to the HoKua Place matter,
6 however, I want to confirm that we have quorum to
7 proceed.

8 Commissioner Okuda will be absent from
9 9:00 A.M. possibly to 10:00 A.M.

10 Commissioner Giovanni will be absent from
11 9:00 A.M. to 10:00 A.M.

12 Commissioner Chang will depart at 10:30
13 A.M.

14 CHAIRPERSON SCHEUER: Commissioner Aczon.

15 VICE CHAIR ACZON: Chair, I may have to
16 leave for an hour around 11:30, but I'm trying to get
17 out of it.

18 CHAIRPERSON SCHEUER: If you need me to
19 write a note, I can.

20 Mr. Orodener, how many -- can we proceed
21 if we have two absent Commissioners?

22 EXECUTIVE OFFICER: We can, Chair. As long
23 as we have six -- actually, as long as we have five
24 we can proceed, but six is more comfortable.

25 CHAIRPERSON SCHEUER: Is there any further

1 business today?

2 VICE CHAIR CABRAL: I want to thank Mr. Yee
3 for affirming that I'm not crazy about condominium
4 requirements. Thank you.

5 CHAIRPERSON SCHEUER: Chair will note that
6 affirming that you're not crazy only pertains to
7 condominium requirements and not any other matter.

8 There being nothing more, I declare this
9 meeting in recess until 9:00 A.M. tomorrow morning
10 April 15, 2021.

11 (The proceedings recessed at 4:16 P.M.)

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CERTIFICATE

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

4 I, JEAN MARIE McMANUS, do hereby certify:

5 That on April 14, 2021, at 9:18 a.m., the
6 proceedings contained herein was taken down by me in
7 machine shorthand and was thereafter reduced to
8 typewriting under my supervision; that the foregoing
9 represents, to the best of my ability, a true and
10 correct copy of the proceedings had in the foregoing
11 matter.

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

15 Dated this 14th day of April, 2021, in
16 Honolulu, Hawaii.

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