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LAND USE COMMISSION
STATE OF HAWAI'I
Hearing held on June 9, 2021
Commencing at 9:00 a.m
Held via ZOOM by Interactive Conference Technology

I. Call to Order

II. Adoption of Minutes

III. Tentative Meeting Schedule

IV. Minutes/Transcripts
To Consider using the Transcripts in Lieu of
The Minutes (HRS 92-9)

V. ACTION
SP06-400 Pohakea Quarry (Maui)
To Consider Hawaiian Cement Pohakea Quarry
Application for 15-year Time Extension Request
For Special Use Permit to Continue Operation of
Pohakea Quarry in the State and County
Agricultural Districts at Ma'alaea, Island of
Maui, Hawaii; TMK (2)3-6-004:007 (SUP1
2006/0001) (CUP 2006/0001)

VI. ACTION
SP21-411 AES O'ahu Solar, LLC (O'ahu)
To Consider Special Use Permit Application No.
2020/SUP-6 AES West O'ahu Solar, LLC for
Construction and Operation of a 12.5-MW Solar
Photovoltaic and 50-MWh Battery Energy Storage
System on Land Owned by UH. TMK
(1)9-2-002:2007;
To Consider Proposed Findings of Fact,
Conclusions of Law and Decision and
Order

VII. 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 LEE OHIGASHI (Maui)
6 ARNOLD WONG (Oahu)
7 DAWN CHANG (Oahu)
8 DAN GIOVANNI (Kauai)
9 GARY OKUDA (Oahu)

10 STAFF:

11 DAN 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 ALISON KATO, 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 MICHAEL HOPPER, ESQ.
24 JORDON HART, Deputy Director
25 Department of Permitting and Planning
For Maui County

BRYAN ESMERALDA
KARLYNN FUKADA
For Hawaiian Cement

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1 CHAIRPERSON SCHEUER: Aloha kakou. Good
2 morning.

3 This the June 9th, 2021 Land Use Commission
4 meeting which is being held using interactive
5 conference technology linking videoconference
6 participants and other interested members of the
7 public via the ZOOM internet conferencing program in
8 order to comply with the still-ongoing State and
9 County official operational directives during the
10 COVID-19 pandemic. Members of the public are able to
11 view the meeting via the ZOOM webinar platform.

12 For all meeting participants, I want to
13 stress to everyone the importance of speaking slowly,
14 clearly and directly into your microphone. Before
15 speaking, it is helpful if you identify yourself for
16 the record.

17 Please also be aware for all meeting
18 participants that this meeting is being recorded in a
19 digital record of the ZOOM meeting. Your continued
20 participation is your complied consent to be part of
21 the public record for this event. If you do not wish
22 to be part of the public record, you should exit the
23 meeting now.

24 This ZOOM technology allows the parties and
25 each individual remote access to the meeting via our

1 own personal digital devices. Due to that, please
2 know that due to matters entirely outside of our
3 control, one or more people may experience
4 disruptions during the meeting at any given time. If
5 such disruptions occur, please let us know and be
6 patient as we try to restore the audiovisual signals
7 to effectively conduct business during the pandemic.

8 If you are calling in by phone, and you
9 wish to testify on this meeting, when I call for
10 raising of hands, you can use the key sequence *9 to
11 virtually raise your hand, otherwise whether you're
12 accessing this by phone or desktop, ZOOM software,
13 there should be a raised-hand option. I will repeat
14 this when it comes time for public testimony on the
15 various matters before us.

16 I will also share with everybody now that
17 we will try to take breaks approximately ten minutes
18 every hour during the course of our proceedings.

19 My name is Jonathan Likeke Scheuer and I
20 have the pleasure and honor of serving as Land Use
21 Commission Chair at this time. Along with me
22 Commissioners Ed Aczon, Dawn Chang, Gary Okuda,
23 Arnold Wong, and our Executive Officer Dan Orodener,
24 our Chief Planner Scott Derrickson, our Chief Clerk
25 Riley Hakoda, our Deputy Attorney General for the day

1 is Dan Morris, our Program Specialist is Natasha
2 Quinones, our Court Reporter is Jean McManus, all are
3 on the Island of Oahu. Commissioner Lee Ohigashi is
4 on the island of Maui, Commissioner Nancy Cabral is
5 on Hawaii Island, and Commissioner Dan Giovanni is on
6 Kaua'i. We currently have eight seated Commissioners
7 of a possible nine.

8 Our first order of business is the adoption
9 of our minutes from April 28th and 29th meetings, and
10 our May 26 meeting.

11 Mr. Hakoda, has any written testimony been
12 submitted regarding adoption of the minutes?

13 CHIEF CLERK: Chair, no written testimony
14 has been received.

15 CHAIRPERSON SCHEUER: Are there any members
16 of the public who may wish to testify on the adoption
17 of the minutes from our April 28th and 29th meeting,
18 or May 26th meeting? If so, use the raise-your-hand
19 function on ZOOM. Seeing none.

20 Commissioners, could we have a motion to
21 adopt the Adoption of the April 28th ad 29th minutes?

22 Commissioner Okuda, do you wish to be
23 recused from both of these adoptions?

24 COMMISSIONER OKUDA: This is Gary Okuda.

25 Yes, Mr. Chair, I would like to abstain

1 because I was not present because I recused myself
2 from the matters that were considered at the
3 meetings. So I would like to abstain.

4 CHAIRPERSON SCHEUER: Thank you. Sorry for
5 stating it was recusal. Your abstention is noted.

6 Is there a motion to adopt the minutes?

7 Commissioner Cabral.

8 VICE CHAIR CABRAL: I'll make a motion to
9 adopt both sets of minutes, and I also would like to
10 make note to thank the staff for the excellent job
11 they do taking those minutes.

12 CHAIRPERSON SCHEUER: Is there a second?

13 Commissioner Wong.

14 COMMISSIONER WONG: Commissioner Wong. I
15 second.

16 CHAIRPERSON SCHEUER: A motion has been
17 made to adopt both sets of minutes. Is there any
18 discussion? Seeing none, Mr. Orodener, why don't
19 you poll the Commission?

20 EXECUTIVE OFFICER: Thank you, Mr. Chair.

21 The motion is to adopt the minutes.

22 Commissioner Cabral?

23 VICE CHAIR CABRAL: Yes.

24 EXECUTIVE OFFICER: Commissioner Wong?

25 COMMISSIONER WONG: Aye.

1 EXECUTIVE OFFICER: Commissioner Aczon?

2 VICE CHAIR ACZON: Yes.

3 EXECUTIVE OFFICER: Commissioner Chang?

4 COMMISSIONER CHANG: Aye.

5 EXECUTIVE OFFICER: Commissioner Giovanni?

6 COMMISSIONER GIOVANNI: Aye.

7 EXECUTIVE OFFICER: Commissioner Ohigashi?

8 COMMISSIONER OHIGASHI: Aye.

9 EXECUTIVE OFFICER: Commissioner Okuda?

10 COMMISSIONER OKUDA: Abstain.

11 EXECUTIVE OFFICER: Chair Scheuer?

12 CHAIRPERSON SCHEUER: Aye.

13 EXECUTIVE OFFICER: Thank you, Mr. Chair,
14 the minutes are adopted with one abstention.

15 CHAIRPERSON SCHEUER: Thank you.

16 Our next meeting Agenda item is the
17 tentative meeting schedule. Mr. Orodanker.

18 EXECUTIVE OFFICER: Thank you, Mr. Chair.

19 The tentative meeting schedule is quite
20 short. We are anticipating a number of filings, and
21 also anticipating possible changes to the Governor's
22 Emergency Proclamation. As a result, we only have
23 July.

24 Tomorrow we will be here to discuss HoKua
25 Place matter.

1 On June 22nd, we will be having meeting on
2 ZOOM for the Adoption of Order in the two matters on
3 today. July, the only thing scheduled so as far is
4 July 14th and 15th, the Kula Ridge matter on Maui
5 Order to Show Cause. And then, as I mentioned, the
6 rest of the calendar is in flux

7 CHAIRPERSON SCHEUER: Thank you, Mr.
8 Orodenker.

9 Commissioners, are there any questions?

10 If there's no immediate questions, Mr.
11 Orodenker, would you expand slightly on the potential
12 that the Governor's Executive Order and our meetings
13 might change?

14 EXECUTIVE OFFICER: Thank you, Mr. Chair,
15 our understanding is that the Governor is
16 contemplating suspending or not continuing the
17 current suspension of Chapter 92 which allows
18 (indecipherable) office to hold ZOOM. There is a
19 bill that has passed that would allow us legislature
20 amended Chapter 92 that will allow us to continue to
21 hold ZOOM meetings, however, that bill still has not
22 been signed by the Governor. It doesn't go into
23 effect until January 1, so meetings are held at the
24 end of July or August 8th through January 1 will have
25 to either be held in person or we will have to revert

1 to the old style of virtual meetings where
2 Commissioners on all islands will have to be in the
3 public location. And the Commissioners on Oahu will
4 have to go -- (indecipherable).

5 CHAIRPERSON SCHEUER: Sorry, Mr. Orodener,
6 two things. I want Commissioners asking questions,
7 I'll note whatever you guys tried to do to change the
8 microphone system, where you are is worse. I'm
9 having a very hard time hearing you.

10 Are there any questions from Mr. Orodener?
11 Commissioner Cabral.

12 VICE CHAIR CABRAL: Yes. Is there any
13 possibility or suggestion that we might as citizens
14 and Commissioners in our position write to the powers
15 to be and ask that this ability to be on ZOOM
16 continue until the law takes effect in January? It
17 one, lacks common sense to have us go back to live
18 meetings, and right now, although things are
19 immensely better than they were, we still, for those
20 of us who get to fly, it's a little paranoia to think
21 you're so close to so many people.

22 So I would like to encourage the Governor
23 to continue with this ability to meet on ZOOM. Even
24 then we would have an option to meet personally on
25 ZOOM. Of course, budgetary expenses too to go with

1 travel.

2 Can we find out if we can do something of
3 that nature? Or what's your suggestion?

4 EXECUTIVE OFFICER: I will discuss it with
5 the Governor's office and see if the Commissioners
6 can individually or how -- (indecipherable).

7 VICE CHAIR CABRAL: Thank you very much.

8 CHAIRPERSON SCHEUER: Anything further,
9 Commissioners?

10 If not, our next Agenda item, item IV, is
11 transcripts in lieu of the minutes to consider
12 whether we can use transcripts in lieu of the minutes
13 under HRS Chapter 92-9.

14 Mr. Hakoda, any written testimony on this
15 matter?

16 CHIEF CLERK: Mr. Chair, there has been no
17 testimony submitted on this.

18 CHAIRPERSON SCHEUER: Are there any members
19 of the public who wish to testify on this particular
20 matter which is a proposed action regarding
21 considering whether we use our full transcripts as
22 the record of our meeting rather than a set of
23 summarized minutes. Seeing none.

24 Mr. Orodener, please provide your
25 presentation.

1 EXECUTIVE OFFICER: Thank you, Mr. Chair.

2 This matter was to, in part,
3 (indecipherable) -- the circumstances associated with
4 our limited staff. One of things that takes an
5 inordinate amount of time to prepare or a lot of time
6 to prepare is the minutes for each meeting. And in
7 discussion with our attorneys general, whether or not
8 the full transcripts and recordings of the meeting
9 could be substituted for the minutes.

10 They provided us some information,
11 specifically 92-9 which requires support to record
12 minutes of all meetings, but then goes onto say full
13 transcript or recording of the meeting is not
14 required.

15 The minutes shall contain the data and time
16 and place of the meetings, members of the board
17 recorded as the presence or absence, and a record by
18 the individual member of any votes taken, and any
19 other information that member of the board request
20 included.

21 In 2017 that was amended to include a
22 retirement of a time stamp. Based on our discussions
23 with our attorneys general, we believe that the
24 transcripts can serve as the minutes.

25 I know they're a little more cumbersome to

1 review, however, it may allow us to devote staff to a
2 more efficient and useful -- basically makes staff
3 more efficient.

4 However, we wanted to bring this to the
5 Commission to get their approval on no longer
6 supplying minutes, but rather just supplying the
7 transcripts.

8 CHAIRPERSON SCHEUER: Sorry, was that the
9 end of your statement, Mr. Orodener?

10 EXECUTIVE OFFICER: Yes, it was, Mr. Chair.

11 CHAIRPERSON SCHEUER: Commissioners?
12 Commissioner Chang.

13 COMMISSIONER CHANG: I'll just -- I'll let
14 Commissioner Cabral speak first. I think she had a
15 comment.

16 VICE CHAIR CABRAL: Thank you, Commissioner
17 Chang.

18 Well, I very much enjoy the minutes. I
19 live in a world where minutes are very important, and
20 I like very much the summary of what took place. But
21 I can appreciate that they are undoubtedly very time
22 consuming, so I can appreciate that we can have staff
23 do better things. But I also read in my preparation
24 for today that the -- that that's taking place also
25 with Jean McManus, who has been our wonderful court

1 reporter for us for many years, that that position is
2 also changing in some different format.

3 Is that part of this whole entire plan, or
4 is that a separate act from the actual minutes
5 themselves?

6 EXECUTIVE OFFICER: That's actually
7 separate. Unfortunately, technology has caught up
8 with court reporters, and it is now possible and less
9 expensive, and maybe some increased efficiencies to
10 create the transcripts electronically.

11 VICE CHAIR CABRAL: Well, we will miss
12 Jean, if we ever get to meet again.

13 I like the minutes that the staff does do
14 for reading, but I can appreciate that we can use
15 them in better ways. So I'll go with that
16 recommendation, but I want to show my appreciation
17 for those nice summaries that I read all the time.
18 Thank you.

19 CHAIRPERSON SCHEUER: Commissioner Chang.

20 COMMISSIONER CHANG: Thank you.

21 My comment is, I do understand how time
22 consuming doing the minutes are, but in my view, I
23 would prefer if we could keep the minutes versus in
24 lieu of the transcripts. I think for both the public
25 and the Commission having to review the entire

1 transcripts, one, that would require all the
2 Commissioners to review the transcripts first to
3 determine its accuracy before the public, before it
4 becomes final.

5 I would suggest a recommend -- or recommend
6 that perhaps in lieu of the detailed minutes, perhaps
7 we can do a compromise of something less than that.
8 I know other boards, commissions have scaled down the
9 minutes, but I would continue to prefer to have
10 minutes in lieu of the transcripts being the record
11 for the Commission. That's just my own personal
12 feeling. Thank you.

13 CHAIRPERSON SCHEUER: Commissioner
14 Ohigashi.

15 COMMISSIONER OHIGASHI: I would -- I'm just
16 asking a question. How would the executive session
17 be handled? Will we have separate minutes for those?

18 EXECUTIVE OFFICER: Yes, that's correct.
19 We always have separate minutes for executive
20 sessions.

21 CHAIRPERSON SCHEUER: Mr. Orodener, to
22 follow up on the statement from Commissioner Chang,
23 we will have transcripts no matter what, correct?

24 EXECUTIVE OFFICER: That is correct.

25 CHAIRPERSON SCHEUER: So we will -- we

1 simply have multiple records of the meeting?

2 EXECUTIVE OFFICER: That's correct,
3 currently that's the way it works.

4 CHAIRPERSON SCHEUER: Commissioner Okuda.

5 COMMISSIONER OKUDA: Thank you, Mr. Chair.

6 Not to be too technical, even though I am
7 too technical, but one concern I always had about
8 having minutes is the question of what is the
9 official record of the proceeding. I think the
10 official record are the transcripts. And I don't
11 think this issue has ever been litigated, but I'm
12 sure some creative lawyer at some point in time might
13 claim that if the minutes stated something which is
14 contrary or in conflict to the transcript, that
15 creates some type of issue later on.

16 So, you know, me, just personally, I see
17 the benefit of providing summaries in minutes form
18 for the public, and we should be as transparent and
19 as easy to allow people to know what's going on, but
20 I think that's my concern about having minutes, that
21 there's a possibility of a conflict.

22 But, Mr. Chair, if I can just comment on
23 not having a live court reporter. And this is just
24 my own personal view based on knowledge of some bad
25 luck suggestions.

1 But, you know, having a human being
2 actually taking down the transcript, even though we
3 might have an electronic copy and a video copy, I
4 believe that ensures a more clear or accurate
5 transcript, and this is the reason why.

6 A machine or computer cannot really
7 determine ahead of time whether or not people are
8 speaking clearly, people are talking over each other,
9 or whether or not there's some type of technical
10 difficulty.

11 And, you know, there is a danger that if
12 for some reason we do not have a clear transcript
13 electronically, it just might create other issues
14 where we might have to redo the proceeding ahead of
15 time.

16 So I understand there's efficiencies of
17 going strictly electronic and eliminating, you know,
18 the actual human court reporter, but the human court
19 reporter brings an additional level of clarity and
20 security, and especially where we're acting, you
21 know, in a quasi-judicial setting where the record is
22 really important, especially oral testimony.

23 I think we should be careful not to
24 eliminate the human court reporter, even though it
25 adds to the cost of the budget.

1 And the final point is, this concern I have
2 about the sometimes frailty of electronics is based
3 on the fact that at the First Circuit Court, Probate
4 Court, for about one week Probate Court generally
5 does not have a physical court reporter there taking
6 down the transcript, probably because there's a
7 belief that a lot of stuff there is just routine and
8 non-controversial for the most part.

9 But what happened was the court clerks
10 thought that the court system was electronically
11 recording the proceedings, and a week later, court
12 staff found out, because somebody was asking to get a
13 transcript of something that was contested, they
14 discovered or publicly announced that the system did
15 not record about one week's worth of court
16 proceedings.

17 And so I would just urge a little bit of
18 caution here that, yeah, it's true that having a
19 court reporter does add to the cost, but I think
20 generally speaking the cost is probably worth it. So
21 that's just my comment, Mr. Chair. Thank you.

22 CHAIRPERSON SCHEUER: Thank you very much,
23 Commissioner Okuda.

24 EXECUTIVE OFFICER: Like to point out this
25 is an experiment. We have a one-year trial for this

1 type of court reporting.

2 CHAIRPERSON SCHEUER: Mr. Orodanker, just
3 to keep on to the Agenda, we're not actually
4 discussing the matter regarding court reporters on
5 this agenda, correct?

6 EXECUTIVE OFFICER: That's correct.

7 CHAIRPERSON SCHEUER: So were you hoping
8 for a motion or just a sense of the Commission at
9 this time?

10 EXECUTIVE OFFICER: If there is a consensus
11 on the Commission, I don't -- I wasn't really looking
12 for a motion, just wanted to discuss with the
13 Commissioners.

14 CHAIRPERSON SCHEUER: My sense is there's
15 not a consensus at this time.

16 EXECUTIVE OFFICER: And that's my sense as
17 well. So we will continue to do the minutes until --
18 we're hoping that it's a temporary problem, because
19 we are hoping that we will hire have additional
20 staff. Once that occurs, we should become more --
21 given the sentiment of the Commission, we will
22 continue with minutes.

23 CHAIRPERSON SCHEUER: Thank you very much.
24 Anything else, Commissioners? Seeing none.

25 SP06-400 Pohakea Quarry (Maui)

1 Our next agenda item is Docket SP06-400
2 Pohakea Quarry (Maui) To Consider Hawaiian Cement
3 Pohakea Quarry Application for 15-year Time Extension
4 Request for Special Use Permit to Continue Operation
5 of the Pohakea Quarry in the State and County
6 Agricultural Districts at Ma'alaea, Island of Maui,
7 Hawai'i; TMK: (2-3-6-004:007, (Special Use Permit 1
8 2006/0001 and (CUP 2006/0001).

9 Will the parties please identify themselves
10 for the record?

11 MR. HOPPER: Chair, I don't see an
12 Applicant representative. You may want to allow him
13 in as a panelist. I do see an attendee raising their
14 hand, Bryan Esmeralda. I think he's the Applicant
15 representative. You may want to allow him in as --

16 CHAIRPERSON SCHEUER: I'm doing so right
17 now.

18 He is employed by Munekiyo Hiraga who did
19 the presentations.

20 Mic check and camera, Mr. Esmeralda.

21 MR. ESMERALDA: Chair, this is Bryan
22 Esmeralda.

23 CHAIRPERSON SCHEUER: And you are here on
24 behalf of the Applicant?

25 MR. ESMERALDA: That's correct.

1 CHAIRPERSON SCHEUER: Is there anybody else
2 from the Applicant who is here?

3 MR. ESMERALDA: Yes, Dave Gomes of Hawaiian
4 Cement also on the meeting this morning. He's
5 joining with Karlynn Fukuda of Munekiyo Hiraga.
6 They're together on Maui, so they may be under her
7 name.

8 CHAIRPERSON SCHEUER: If they will raise
9 their hands.

10 Mr. Hopper, is Paul Fasi also here?

11 MR. HOPPER: That's correct, and I think
12 Deputy Director Jordan Hart was here.

13 CHAIRPERSON SCHEUER: He is as well.

14 MR. HOPPER: I don't know if he will
15 necessarily need to speak but if you want to --

16 CHAIRPERSON SCHEUER: For appearances;
17 let's try this again. Let's do appearances, starting
18 with the Applicant and followed by Maui County, and
19 let's also register any appearances from the Office
20 of Planning, either Mr. Esmeralda or Ms. Fukuda.

21 Would you state who's here on behalf of the
22 Applicant?

23 MR. ESMERALDA: Chair, good morning. My
24 name is Bryan Esmeralda on behalf of Hawaiian Cement,
25 and Dave Gomes from Hawaiian Cement is also on the

1 call this morning.

2 CHAIRPERSON SCHEUER: Maui County?

3 MR. HOPPER: Michael Hopper, Deputy
4 Corporation Counsel representing Maui County
5 Department of Planning. With me are Deputy Director
6 Jordan Hart and Planner Paul Fasi.

7 CHAIRPERSON SCHEUER: OP.

8 MS. KATO: Good morning. Alison Kato,
9 Deputy Attorney General for the Office of Planning.
10 Also here for this matter are Rodney Funakoshi and
11 Aaron Setogawa from the Office of Planning.

12 CHAIRPERSON SCHEUER: Thank you very much.
13 Let me briefly update the record.

14 On June 4th, 2021 the Commission mailed the
15 Meeting Agenda for today's meeting to the Parties in
16 this docket, Statewide and County Lists.

17 On June 8th the Commission received the
18 Applicant's Partial Application for a 15-year Time
19 Extension Request for Special Use Permit.

20 Technically, the filings for this docket do
21 not strictly adhere to our Administrative Rules.
22 Despite difficulties in obtaining hard copies of the
23 application from Maui County Planning Department, the
24 Commission is proceeding with hearing this docket
25 contingent upon receipt of the promised documents

1 which are expected to be delivered to our office.
2 Fortunately, the digital copies were available for
3 our Commissioners and the public to review prior to
4 this hearing.

5 Let me now go over for the parties and
6 public our procedure for today.

7 First, I'm just going to note that written
8 testimony has been received in this matter. As of
9 earlier this morning, written testimony had been
10 received from the Sierra Club Maui Group, West Maui
11 Construction and Alpha, Inc.

12 I will also allow for any interested
13 members of the public to offer oral testimony. I
14 will do so allowing people who are attendees to use
15 the raise-their-hand function. If they raise their
16 hand, if you are calling in, it's done by dialing *9.
17 If you are via software, it is done by using the
18 raise-your-hand function.

19 I will bring you in. I will ask you to
20 limit your testimony to three minutes, at which time
21 you will then conclude and be available for
22 questioning, questions from the Parties and the
23 Commissioners.

24 Following that, completion of any public
25 testimony, we will allow the Applicant to make their

1 presentation. We will hear from the County of Maui,
2 and the State Office of Planning will be given and
3 opportunity to comment.

4 The Commission can then ask any final
5 questions of all of the parties. If I didn't make it
6 clear, the Commissioners will have an opportunity to
7 ask questions of parties after each presentation, and
8 then a round of final questions after all parties
9 will go, and then the Commission will potentially go
10 into deliberation.

11 And as I've announced before, from time to
12 time there will be short breaks taken, approximately
13 every 50 minutes.

14 Are there any questions for our
15 proceedings, Mr. Esmeralda?

16 MR. ESMERALDA: No, Chair. Thank you.

17 CHAIRPERSON SCHEUER: Mr. Hopper?

18 MR. HOPPER: No, Chair.

19 CHAIRPERSON SCHEUER: Ms. Kato?

20 MS. KATO: No questions, thank you.

21 CHAIRPERSON SCHEUER: I've noted the
22 written testimony. If there are people who wish to
23 deliver oral testimony on this matter, please raise
24 your hand. I recognize Antoinette de Naie. I
25 believe that is Lucienne de Naie. I will promote you

1 to be a panelist. If you would enable your audio and
2 video.

3 THE WITNESS: Good morning, Chair.

4 CHAIRPERSON SCHEUER: Good morning, Ms. de
5 Naie. I'll swear you in and ask you to state your
6 name and address for the record and ask you to
7 proceed with your testimony.

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

10 THE WITNESS: I do.

11 CHAIRPERSON SCHEUER: Okay. Name and
12 address for the record and then proceed.

13 ANTOINETTE LUCIENNE DE NAIE

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

17 DIRECT EXAMINATION

18 THE WITNESS: My name is Antoinnete
19 Lucienne de Naie. Somehow this computer picks up my
20 full name. My address is P.O. Box 610, Haiku, Hawaii
21 on the Island of Maui 96708.

22 I am testifying on behalf of the Sierra
23 Club Maui Group that reviewed this matter and took a
24 vote at our recent board meeting authorizing written
25 testimony to be sent.

1 As noted in the written testimony, Sierra
2 Club has tracked activities in this general area for
3 a number of years, and we have received comments and
4 concerns from members of the public who are familiar
5 with both, you know, the extent of Pohakea Stream
6 Gulch.

7 We asked to testify in essence because we
8 want to speak for this place. This is not an
9 erosional feature as is sometimes characterized in
10 reports. It is actually a stream gulch.

11 If you look at older USGS maps from the
12 1920s, even I think the 1950s. It was shown as a
13 blue line, because before our watersheds were
14 decimated by the process of growing sugar and taking
15 all the water from every elevation possible, this was
16 a free-flowing stream that flowed into Kealia
17 National Wildlife Refuge, what is now the Refuge.

18 There are endangered species of flora and
19 fauna that live in the gulch and in the vicinity of
20 the gulch. There are several rare and endangered
21 native plants that live in, have habitat in Pohakea
22 Gulch at higher elevations. And there also are
23 yellow-faced bees, which are an endangered species
24 that was listed a few years ago around 2016, and they
25 are found in the vicinity of the gulch.

1 I don't think surveys have been done of the
2 gulch itself, because of the private ownership of it,
3 but these are areas of concern.

4 The grading methods, it seems for the
5 expansion of the quarry, it's unclear just how near
6 to the gulch this grading is going to take it. So we
7 are asking that there be more documentation provided.

8 This gulch is a moku boundary on
9 traditional maps, even if you look in Elspeth
10 Sterling's Site of Maui, the moku of Wailuku, the
11 boundary of -- the most makai boundary in the south
12 is shown as Pohakea Stream Gulch.

13 It is also connected to the sacred spot of
14 Pu'u Hele, which has now been mined and destroyed,
15 but retains its sacred quality. Pu'u Hele is also
16 overlooking Pohakea gulch.

17 So we just want to speak for the fact that
18 there needs to be a very complete boundary survey
19 done of the area that is proposed before any new
20 grading permit is, for extensive time limit, is
21 given, so that it will be determined that there will
22 be adequate buffers for this gulch, and adequate
23 procedures to keep machinery as a collateral way of
24 impacting the gulch.

25 The bee habitat I will mention is very

1 nondescript. You don't see big beehives or anything
2 with these endangered native bees. They nest in
3 areas that are just like little piles of things. So
4 it's not like you would just walk up and down and
5 say, didn't see any beehives, we're good. There
6 really needs to be a diligent effort made.

7 And also we have received complaints that
8 there are abandoned machinery and equipment in the
9 gulch. This is a high fire risk area. It burns
10 every few years.

11 CHAIRPERSON SCHEUER: Ask you to start to
12 summarize your testimony, Ms. de Naie.

13 THE WITNESS: Anyway, we would like you to
14 request that all abandoned vehicles and machinery are
15 removed in the interest of public safety as well.
16 Thank you for your consideration.

17 CHAIRPERSON SCHEUER: Thank you. Are there
18 questions for Ms. De Naie? I'm going to start with
19 the Applicant.

20 MR. ESMERALDA: Thank you, Chair. I have
21 no questions for Ms. de Naie. Thank you.

22 CHAIRPERSON SCHEUER: Maui County?

23 MR. HOPPER: No questions, Chair.

24 CHAIRPERSON SCHEUER: OP?

25 MS. KATO: No questions, thank you.

1 CHAIRPERSON SCHEUER: Commissioners?

2 Commissioner Wong followed by Commissioner
3 Okuda followed by Commissioner Chang followed by
4 Commissioner Ohigashi.

5 COMMISSIONER WONG: Thank you, Chair.

6 First thing I wanted to ask, shouldn't we
7 swear in the Applicant because he's not an attorney?

8 CHAIRPERSON SCHEUER: Fair enough.

9 Mr. Esmeralda, Ms. Fukuda. Do you swear or
10 affirm the testimony you give is the truth?

11 MR. ESMERALDA: I do.

12 CHAIRPERSON SCHEUER: Ms. Fukuda?

13 MS. FUKUDA: Chair, I'm bringing in Dave
14 Gomes, who is in the office with me here, so I will
15 have him swear in also, but I do swear.

16 CHAIRPERSON SCHEUER: Thank you.

17 MR. GOMES: I do swear.

18 CHAIRPERSON SCHEUER: Thank you.

19 BRYAN ESMERALDA

20 KARLYNN FUKUDA

21 DAVE GOMES

22 Were all called on behalf of the Applicant, were
23 sworn to tell the truth, were examined and testified
24 as follows:

25

1 CHAIRPERSON SCHEUER: Commissioner Wong,
2 continue.

3 COMMISSIONER WONG: So I have just one
4 question.

5 Was this information that you gave to us
6 given to the County during their process?

7 THE WITNESS: I have no knowledge of
8 whether it was or not. There are several people
9 who -- people who gather in the area. I'm not at
10 liberty just to say who, what, when and why.

11 Also, you know, a part of our knowledge of
12 Pohakea Gulch is that we do service outings in the
13 area along Hanau Ridge, which is above the area of
14 the quarry higher elevation Mauna Kahalawai. So we
15 have seen the headwaters and the top part of the
16 gulch and know that it's quite a worthy biological
17 area.

18 COMMISSIONER WONG: The question I'm
19 asking, did the Sierra Club, as an organization, go
20 in front of the County during their time to speak
21 their concerns?

22 THE WITNESS: No, we missed that agenda
23 item.

24 COMMISSIONER WONG: So the question is, as
25 you know, we had this on the docket, how come we got

1 your letter so last minute?

2 THE WITNESS: Well, the Sierra Club in Maui
3 has no staff, and our actions need to be approved by
4 our Board of Directors. Our Board of Directors met
5 Monday, the letter was written on Tuesday for your
6 Wednesday meeting.

7 COMMISSIONER WONG: The other question I
8 have is, since the Sierra Club, as an organization,
9 did not send in anything to the County, did any one
10 individual of this organization send in their
11 concerns to the County during the County's process?

12 THE WITNESS: It is possible that someone
13 did, but they didn't necessarily let me know.

14 COMMISSIONER WONG: Thank you, Ms. De Naie;
15 thank you, Chair.

16 CHAIRPERSON SCHEUER: Thank you,
17 Commissioner Wong.

18 Commissioner Okuda followed by Chang,
19 followed by Ohigashi.

20 COMMISSIONER OKUDA: Thank you, Mr. Chair.
21 Thank you for your testimony, Ms. de Naie.
22 My question is for clarification.

23 Is the Sierra Club or the chapter that you
24 speak for absolutely against quarry use in the area,
25 or is it you would be okay with quarry use provided

1 that they're reasonable protections placed there even
2 though we might argue what would be those reasonable
3 protections; but is it absolutely no quarry use, or
4 is it that quarry use would be okay provided there
5 would be reasonable protections or requirements or
6 conditions?

7 THE WITNESS: That's an excellent question,
8 Commissioner.

9 We did talk a little bit about this at our
10 meeting, and our overall feeling was that the quarry
11 operation there does provide, you know, a service for
12 the community, as do other quarry on Maui as, of
13 course, we all need gravel for our roads and things
14 like that.

15 However, it appears that there had been
16 kind of lax oversight from what we have gotten from
17 members of the public who did contact us, that
18 there's been lax oversight over the years in this
19 location.

20 So we would support there being more robust
21 oversight, including archaeological review, and not
22 just sending out monitors from archaeological firms
23 that never find anything. This is why we suggest in
24 consultation with the Aha Moku Council that does know
25 which monitors are really doing a sound job.

1 COMMISSIONER OKUDA: So in other words, the
2 testimony you are giving on behalf of the Sierra
3 Club, I would be misconstruing that testimony if I
4 took it to mean your organization's position is
5 absolutely no quarry? That that's not what you're
6 saying, correct?

7 THE WITNESS: No, that's not what our
8 testimony said.

9 COMMISSIONER OKUDA: Thank you very much
10 for that clarification. Appreciate your testimony
11 and the clarification.

12 Thank you, Mr. Chair.

13 CHAIRPERSON SCHEUER: Thank you,
14 Commissioner Okuda.

15 Commissioner Ohigashi -- sorry, Chang, I
16 believe whichever one of you wants to go next.

17 COMMISSIONER CHANG: Thank you, I'll go.
18 Thank you.

19 Good morning, Ms. De Naie, thank you for
20 being here. I would just like to ask you, has there
21 been any community engagement on this permit request
22 that you are aware?

23 THE WITNESS: Not that I'm aware of. No
24 one reached out to Sierra Club. We just saw the item
25 on the Agenda of the Land Use Commission, and we

1 obviously missed it when it was being considered by
2 Maui County. We do the best we can to look at
3 agendas, but it's not one person's responsibility
4 without staff. So, yeah.

5 COMMISSIONER CHANG: And I thought I heard
6 you say that there were some -- you wanted cultural
7 monitors, or that there are cultural resources.

8 Are you aware of specific cultural
9 resources that may be part of this project area?

10 THE WITNESS: Well, we have been told --
11 and this is from not someone on our board, but we
12 have been told by members of the community that
13 kupuna stories have confided to them that there were
14 remains of ceremonial sites which would be very
15 consistent with having a moku boundary, you would
16 have sites along a moku boundary, and you could have
17 sites on either side of the moku boundary.

18 Of course, the Wailuku side where the
19 quarry is a very important moku, and has numerous
20 ceremonial sites still extant and ones that have been
21 impacted.

22 So we are taking this at face value that
23 kupuna have said that in that vicinity where the
24 quarry is, not the immediate quarrying area, but I
25 believe immediately perhaps above it, are the remains

1 of ceremonial sites that have never been properly
2 surveyed and given their due respect.

3 So we recommend that surveying do take
4 place, and with an archeologist that is approved by
5 the Aha Moku Council for Wailuku active in these kind
6 of matters.

7 COMMISSIONER CHANG: Do you know who any of
8 the cultural descendants may be from this area?

9 THE WITNESS: You know, I could find out.
10 I know Hokua Pelegrino has written extensively about
11 this particular moku, and he has noted a number of
12 families that had claims.

13 And I believe there were actually claims in
14 Pohakea itself, and they're not at the tip of my
15 tongue, but he wrote an excellent cultural impact
16 assessment that is publicly available as part of the
17 application for the Waikapu Town.

18 COMMISSIONER CHANG: That's all the
19 questions I have. Thank you very much for your
20 testimony.

21 CHAIRPERSON SCHEUER: Thank you,
22 Commissioner Chang.

23 Commissioner Ohigashi, thank you for your
24 patience.

25 COMMISSIONER OHIGASHI: Hi, Lucienne, I'm

1 going to ask you about this letter that was sent to
2 us.

3 On the first page, second paragraph from
4 the bottom says that:

5 We believe that Maui County Planning
6 Department also expressed concerns in 2019, comments
7 to the Commission.

8 Are you aware of those concerns?

9 THE WITNESS: I saw it in the record that
10 there was a letter dated 2019 that said not enough
11 documentation was available, I believe, in order to
12 approve the permit, and that they couldn't support it
13 at that time.

14 So I don't know if that documentation --
15 Mr. Hopper, I'm sure, could inform you whether that
16 documentation has been provided, but it showed to me
17 that the T's have not been crossed as the permits
18 have been sought.

19 COMMISSIONER OHIGASHI: You understand that
20 in order to make a decision today, we can only rely
21 upon the record that is on file? In your review --
22 that is why I brought that up.

23 I was concerned whether or not these issues
24 that you have brought up in your letter have been
25 brought up to the Maui Planning Commission in a

1 previous proceeding that may be included as part of
2 the record.

3 THE WITNESS: I do not believe that we
4 testified when this went before the Maui Planning
5 Commission, and I don't know if other members of the
6 public did. I did not attend that meeting. As I
7 said, being a busy volunteer, sometimes you miss a
8 few things. So I appreciate you clarifying how you
9 make your decisions.

10 COMMISSIONER OHIGASHI: Thank you.

11 THE WITNESS: Thank you.

12 CHAIRPERSON SCHEUER: Commissioners,
13 anything further for this witness?

14 Ms. De Naie, if I may. You mentioned
15 yellow-faced bees.

16 THE WITNESS: Yes.

17 CHAIRPERSON SCHEUER: I just want to
18 clarify your testimony.

19 I believe you said they were listed as
20 threatened or as endangered in 2016?

21 THE WITNESS: Yes, as an endangered
22 species, they were listed around I believe 2016.

23 CHAIRPERSON SCHEUER: So that is
24 subsequent -- that is since the last time that this
25 permit came in front of --

1 THE WITNESS: Oh, yeah, yeah, yeah. That
2 last permit was what? Back in 2010 or something like
3 that.

4 CHAIRPERSON SCHEUER: I know you are not an
5 attorney, but I know you do extensively appear in
6 front of public bodies.

7 Do you think that it's -- since it's a
8 renewal of a special permit, do you think that
9 they're required to look at potential impacts,
10 including a newly listed species when a permit is
11 renewed?

12 Do you think our body or Maui County has a
13 duty to look at those kinds of things?

14 THE WITNESS: I believe so. Under your
15 duty to protect the natural and cultural resources,
16 you know, under our constitution. This is a very
17 rare native species that is found no place else on
18 earth except Hawaii, and this is one of the places
19 where it's found.

20 So I would think that you would have a duty
21 to ask the Applicant to conduct a survey and
22 determine if their activities would have any impact
23 on the habitat of the bees.

24 As I said, they're kind of shy creatures,
25 so their habitat is not always very visible. But we

1 have them at Wailea 670, so I'm relatively familiar.

2 CHAIRPERSON SCHEUER: Did you have a chance
3 to review the administrative record coming from the
4 County that has been posted to our website?

5 THE WITNESS: I didn't look at all of it.
6 It was all kind of a rush. But I don't think there
7 was -- I didn't see any consultation with Fish and
8 Wildlife, with State Fish and Wildlife, or U.S. Fish
9 and Wildlife. I may be wrong, but that was my
10 impression. So I don't think anyone has reached
11 out --

12 CHAIRPERSON SCHEUER: You anticipated the
13 question that I was going to ask you, and I will ask
14 the Applicant.

15 I don't have anything further.

16 Commissioners, anything further for Ms. De
17 Naie?

18 Thank you very much for your testimony.
19 I'm going to move you back into being an attendee.

20 Is there any other members of the public
21 who wishes to testify on this matter? If so, raise
22 your hand using the raise-your-hand function or *9 if
23 calling in by phone.

24 As I did previously, I do note for the
25 record that Maui Construction and Alpha, Inc., both

1 sent in testimony, also received yesterday in support
2 of issuance of the permit.

3 There being no further public testimony on
4 this matter, it's 9:50 A.M. I'm going to call for a
5 ten-minute break, and when we resume at 10:00 A.M.,
6 we will begin with the presentation by the Applicant
7 with questions for the Applicant from the Commission.
8 Ten-minute recess, resume at 10:00 A.M.

9 (Recess taken.)

10 CHAIRPERSON SCHEUER: It's 10:00 A.M.
11 We're back on the record.

12 We concluded public testimony on this
13 matter and closed it. We are now going to hear from
14 the Applicant.

15 Do you have a presentation, Mr. Esmeralda?

16 MR. ESMERALDA: Yes, Chair, I have an oral
17 presentation to give.

18 CHAIRPERSON SCHEUER: Okay, you've been
19 sworn in, please proceed.

20 MR. ESMERALDA: Thank you, Chair. Again,
21 for the record, my name is Bryan Esmeralda. We are
22 here representing the Applicant Hawaiian Cement in
23 its request for a Time Extension on the State Special
24 Permit.

25 Again, joining me today is Dave Gomes and

1 also Karlynn Fukuda of Munekiyo Hiraga. I'd also
2 like to note that Mike Dega of Scientific Consultant
3 Services is also on, and can answer any questions
4 relating to archaeology if there are any from the
5 Commissioners.

6 In terms of background, Hawaiian Cement
7 currently operates a rock quarry and base course
8 operation and concrete recycling facility on
9 approximately 79.2 acre portion of Tax Map Key
10 (2)3-6-004:007.

11 The property is owned by Pohakulepo
12 Recycling, and it's located approximately 1000 feet
13 west or mauka of Honoapi'ilani Highway in Waikapu.

14 In terms of a brief optional and some
15 permitting history, the landowner received approval
16 from the Maui Planning Commission in 1997 for a State
17 Special Permit authorizing the facility on a 14.8
18 acre portion of the property.

19 At this time the facility was also
20 permitted by a County Conditional Permit issued by
21 the County Council.

22 In 2004 the landowner and Hawaiian Cement
23 signed a lease agreement which provided Hawaiian
24 Cement with a license to operate the facility.

25 Two years later in 2006, Hawaiian Cement

1 requested that the original 14.8 acre area be
2 consolidated with the 64.4 acre expansion area,
3 making the total area for the operation 79.2 acres.
4 This is the current acreage of the facility.

5 At this time the facility was also covered
6 under a new single consolidated SUP for the total
7 79.2 acre area.

8 In addition, a County Special Use Permit
9 was also obtained at this time.

10 So currently the facility operates under
11 three permits: The State Special Permit, County
12 Conditional Permit and a County Special Use Permit.

13 Most recently in 2010 and 2011 this body,
14 as well as the Maui County Council and Planning
15 Commission approved time extension requests for all
16 three of the permits until December 15, 2019.

17 CHAIRPERSON SCHEUER: Mr. Esmeralda, I'm
18 just going to interrupt you for one second because
19 I've had this exact same problem. Your microphone is
20 touching the edge of your collar.

21 MR. ESMERALDA: Sorry, is that better?

22 CHAIRPERSON SCHEUER: Yes. It's a very
23 small thing, but for the purpose of recording.

24 Sorry to interrupt you.

25 MR. ESMERALDA: Thank you, Chair.

1 In June of 2019 the Applicant filed time
2 extension requests for all three of the permits. The
3 Maui County Planning Commission at its meeting of
4 November 24th, 2020, recommended approval of the SUP
5 to the Land Use Commission of the time extension
6 request, as well as approved the time extension for
7 the County Special Use Permit until December 15,
8 2035.

9 The Department of Planning also approved
10 the Conditional Permit also until December 15, 2035.

11 The quarry and concrete recycling
12 operations have been ongoing for approximately
13 20 years at this site, and at this time the Applicant
14 is requesting that the State Special Permit be
15 extended also until December 15, 2035 to be
16 consistent with the Conditional Permit and County
17 Special Use Permit.

18 I would like to note that the request at
19 this time is limited to a time extension. The
20 permits, including the SUP, already cover all the
21 lands planned for quarrying, so no further expansion
22 is being requested for the facility.

23 In terms of the amount of quarrying that
24 has occurred already since the granting of the last
25 time extension request in 2010 and 2011, Hawaiian

1 Cement has accessed approximately ten acres of the
2 79.2 acres for quarrying purposes.

3 Hawaiian Cement estimates, based on current
4 construction demand and operations, that there's
5 approximately 26 years or 20 acres of rock quarrying
6 remaining at Pohakea.

7 I would also like to note that the
8 Condition No. 14 of the SUP does require Hawaiian
9 Cement to maintain a buffer from the southern
10 boundary of the property, which includes the area of
11 Pohakea Stream. The Applicant is in compliance with
12 this.

13 The quarry area, the delineated quarry area
14 is approximately 50 feet at its closest point to the
15 area of the stream, and there are no plans to access
16 the southern portion of the property.

17 In addition to time extension request that
18 we're seeking today, in regards to Conditions 10 and
19 16 of the Special Permit regarding archaeological
20 preservation, like to note that an archaeological
21 inventory survey and monitoring plan were prepared
22 for the expansion area in 2008. Remember this is
23 when the original quarry site was expanded to the
24 current 79.2 acre area, so these reports covered the
25 entire proposed expansion area.

1 The reports were submitted to the State
2 Historic Preservation Division for review, and have
3 both been accepted.

4 As such, as part of this request Hawaiian
5 Cement is also requesting that Conditions 10 and 16
6 of the SUP be removed as they have been fulfilled to
7 the satisfaction of SHPD and are no longer considered
8 applicable.

9 I would like to note that this request was
10 considered by the Maui Planning Commission in 2020,
11 and is also part of the recommendation to the Land
12 Use Commission today.

13 With that, that concludes my remarks.
14 Thank you for your time. And, again, members of the
15 team are available and to answer any questions.

16 CHAIRPERSON SCHEUER: Thank you.

17 Commissioners, are there questions?

18 Commissioners Ohigashi, Chang and Cabral.

19 I'm going to take notes this time so I get it in
20 order.

21 COMMISSIONER OHIGASHI: Mr. Esmeralda, you
22 indicated that there would be 26 years of additional
23 lifetime in this quarry.

24 THE WITNESS: That's correct, based on
25 current quarrying operations and demand. So

1 approximately 26 years, or 20 acres.

2 COMMISSIONER OHIGASHI: But does that mean
3 that you do not want to go above the 20 acres? In
4 other words, more than the 20 acres?

5 THE WITNESS: Yeah, I believe that's the
6 estimation on available land where quarrying is
7 feasible.

8 I can see if the Applicant has any other
9 information that they would like to add. However,
10 that's the estimated amount of lands on the property
11 that's actually quarryable is the remaining 20 acres.

12 COMMISSIONER OHIGASHI: And what is the
13 remaining 50-somewhat acres being used for?

14 THE WITNESS: There is some lands reserved
15 for the facilities, offices and whatnot. Then also
16 the southern portion of the property where the
17 Applicant cannot access, because they're required to
18 maintain a buffer from the stream, which runs along
19 the southern portion of the property. So that area
20 of the property is unaccessible to Hawaiian Cement.

21 COMMISSIONER OHIGASHI: How much of that
22 area is for structures?

23 THE WITNESS: I believe the structures are
24 limited to about an acre or so.

25 COMMISSIONER OHIGASHI: When you say

1 26 years, do you mean from 2020, or 2019 or 2021?

2 THE WITNESS: I believe that was from the
3 last time extension request in 2010. However, Mr.
4 Gomes can correct me if I'm mistaken, but I believe
5 it's from 2010.

6 COMMISSIONER OHIGASHI: If it is from 2010,
7 then that would mean that 2036, is that what you're
8 looking at? Is that why you come up with a 15-year
9 extension?

10 CHAIRPERSON SCHEUER: I'm going to
11 recognize Ms. Fukuda.

12 MS. FUKUDA: Thank you, Chair.

13 Karlynn Fukuda from Munekiyo Hiraga,
14 Commissioner Ohigashi's question, I did
15 confirm with Mr. Gomes that the 26 years would be
16 from 2020, that timeframe.

17 So likely there would need to be another
18 time extension request following this one. But,
19 again, there are variables that can be controlled in
20 terms of demand.

21 CHAIRPERSON SCHEUER: Thank you, Ms.
22 Fukuda, for following my initial direction to
23 identify yourself before speaking. It's really
24 appreciated.

25 Continue, Commissioner Ohigashi.

1 COMMISSIONER OHIGASHI: That raises my next
2 question. How long do you expect to conduct
3 operations on this quarry?

4 MR. ESMERALDA: So as I mentioned, they
5 anticipate approximately 26 years left, as Ms. Fukuda
6 corrected me, that's from 2020.

7 COMMISSIONER OHIGASHI: And the initial
8 permits were granted in 1997; is that right?

9 MR. ESMERALDA: Correct. That initial
10 approval was for an area less than 15 areas in size.

11 COMMISSIONER OHIGASHI: Prior to 1997,
12 would it be correct to say that you were operating
13 without permits on that site?

14 THE WITNESS: I don't believe -- I don't
15 believe that the operation was occurring prior to
16 receiving permits.

17 COMMISSIONER OHIGASHI: Do you know when
18 the actual quarrying began on that site?

19 THE WITNESS: I'm going to see if maybe Mr.
20 Gomes can respond to that.

21 CHAIRPERSON SCHEUER: Is Mr. Gomes
22 available?

23 MS. FUKUDA: Karlynn Fukuda from Munekiyo
24 Hiraga.

25 So to clarify, the original permits were

1 granted to Pohakulepo Recycling, which was a separate
2 owner, and actually the landowner for the property.
3 I want to say it was in early 2000, and we can
4 confirm that, but about Hawaiian Cement did come to
5 agreement with Pohakulepu Recycling to actually lease
6 the quarry site.

7 So Hawaiian Cement took over the operations
8 at that time. There were transfers of permits, et
9 cetera.

10 So to Mr. Ohigashi -- or Commissioner
11 Ohigashi's question on when did quarrying begin, I
12 don't know that we have the answer to that today,
13 because it was done by a separate entity or started
14 by a separate entity.

15 COMMISSIONER OHIGASHI: I would assume that
16 it was prior to 1997, because I have some small
17 recollection in my mind that it was done, that these
18 permits were developed because there was an existing
19 quarry going on there.

20 But besides the point, I just wanted to
21 note that because I've always been skeptical of
22 special use permits, especially when they last
23 50 years.

24 Is your client, Mr. Esmeralda, is he
25 committed to reform upon completion or upon

1 termination of activities, what is he going to do
2 with the property? Does he have to repatriate it,
3 fix it up, what?

4 MR. ESMERALDA: Thank you, Commissioner,
5 for that question.

6 As part of the lease agreement with the
7 landowner, Hawaiian Cement is required to return the
8 land to conditions prior to quarrying.

9 COMMISSIONER OHIGASHI: Was it leased while
10 it was quarrying, so the question is, what do they
11 have to return it to?

12 MR. ESMERALDA: Maybe we can see if Mr.
13 Gomes -- I don't have that agreement in front of me.

14 COMMISSIONER OHIGASHI: Is there any part
15 of the permit or any permits that require you, by
16 County or the State, require you to require the
17 Applicant to return the property -- the property to
18 its existing condition at the end of the use; or at
19 the end of the SUP or end of --

20 CHAIRPERSON SCHEUER: Mr. Esmeralda?

21 MR. ESMERALDA: Thank you, Chair. I'm just
22 looking over the conditions of the various permits.
23 I know it's part of the lease agreement.

24 Sorry, Condition 12 actually of the SUP
25 states that: Upon cessation of the quarry,

1 Applicant, including the owner, shall prepare a
2 closure plan to revegetate the site, and other
3 measures to reduce erosion.

4 So that the condition of the SUP is to
5 remediate the site.

6 COMMISSIONER OHIGASHI: Would that be to
7 just prepare a plan, or would that be to repatriate
8 the site?

9 MR. ESMERALDA: It's to prepare a plan and
10 submit for approval, I'm guessing, this plan to
11 revegetate the site following the quarrying
12 operations.

13 COMMISSIONER OHIGASHI: So would they be
14 repatriating the site or just preparing a plan,
15 that's my question?

16 MR. ESMERALDA: So this is a condition of
17 the SUP. So as you know, we do need to submit annual
18 compliance reports. So it would be my guess that
19 this report would be submitted for review.

20 COMMISSIONER OHIGASHI: I don't think you
21 answered my question.

22 Is there anybody else who can answer it?
23 The condition seems to read only that they provide a
24 plan.

25 The question in my mind is there a

1 condition that requires them to actually do the
2 repatriation and follow up? And who's going to pay
3 for it? Is there any condition that's in there?

4 CHAIRPERSON SCHEUER: The question has been
5 posed to the Applicant, and can be answered by Mr.
6 Esmeralda, Ms. Fukuda, or Mr. Gomes.

7 MS. FUKUDA: Chair, if I may. Karlynn
8 Fukuda, Munekiyo Hiraga.

9 To Commissioner Ohigashi's question, I
10 believe that the answer is that Hawaiian Cement, the
11 Applicant, has to do both. They have to prepare the
12 plan, because it's a condition, as Mr. Esmeralda
13 pointed out, in the SUP. There is also a similar
14 condition on the County's Special Use Permit to
15 submit the plan for closure.

16 And then secondly, they actually have to
17 implement the plan, because it is a condition of
18 their lease agreement with the landowner.

19 So there's not a County or State
20 requirement right now in terms of actual
21 implementation, but Hawaiian Cement will have to do
22 that because it's part of their lease agreement with
23 the landowner.

24 COMMISSIONER OHIGASHI: Somehow that
25 doesn't comfort me that there is a -- the landowner

1 has a lease agreement, and that is a requirement.

2 However, I'll move on.

3 You said there are several structure on the
4 property. What are those structures right now?

5 MR. ESMERALDA: Thank you, Commissioner
6 Ohigashi.

7 There is a shop building, scale house,
8 truck scale, and I believe an office structure.

9 COMMISSIONER OHIGASHI: Is there any plans
10 to have additional structures placed on --

11 MR. ESMERALDA: Not at this time, no.
12 There's no plan to have additional structures built.

13 COMMISSIONER OHIGASHI: What procedures did
14 you go through to have those structures on the
15 property? In other words, what County permits and
16 State Land Use permission was required to get those?

17 THE WITNESS: So, again, in addition to the
18 State Special Permit there is a County Conditional
19 Permit and a County Special Use Permit, which permits
20 the facility; and of course, building permits would
21 have to have been obtained for those structures as
22 well.

23 MS. FUKUDA: If I may, Chair.

24 Commissioner, I also confirmed with Mr.
25 Gomes that those structures were already in place by

1 the previous operator Pohakulepo Recycling, so those
2 were part of the lease agreement.

3 But, yes, we understand the building
4 permits were received for those structures as Mr.
5 Esmeralda noted.

6 COMMISSIONER OHIGASHI: And during the
7 testimony of statements of Lucienne de Naie, has the
8 Applicant a response to any of those statements?

9 MR. ESMERALDA: So as noted earlier, you
10 know, there is a condition of the State Special
11 Permit that the Applicant needs to maintain a buffer
12 from the southern boundary of the property, which
13 includes the area of the stream.

14 So there's no plans for the activities to
15 encroach upon the stream or that southern area of the
16 property, and when the facility was expanded to its
17 current area in 2008, there were archaeological
18 inventory survey and monitoring plan that were done
19 at that time.

20 COMMISSIONER OHIGASHI: No further
21 questions.

22 CHAIRPERSON SCHEUER: Thank you,
23 Commissioner Ohigashi.

24 Commissioner Dawn Chang.

25 COMMISSIONER CHANG: Thank you, Mr. Chair.

1 Good morning, Mr. Esmeralda. I just have a
2 few questions.

3 First, I'm going through the record. What
4 is the current status of the SUP? Has it expired?
5 My understanding, since it was valid to December 15,
6 2019; is that correct?

7 MR. ESMERALDA: That is correct, yes.

8 COMMISSIONER CHANG: So you actually have
9 no permit to operate since December 15, 2019?

10 THE WITNESS: Right. So we filed the time
11 extension request prior to the expiration date, and
12 it has been in process since that time. But you're
13 correct, the expiration date of that permit was in
14 2019.

15 COMMISSIONER CHANG: And going to the
16 annual reports, it appears as if the Petitioner has
17 not -- at least the record that I'm reviewing, it
18 appears that -- is 2020 the first -- oh, I'm sorry,
19 I'm corrected on that.

20 So let me move on to the cultural issues.
21 There is Condition 10. I will tell you I was
22 confused by the record. There was an archaeological
23 inventory survey. There's a condition, and then
24 subsequently in 2008, SHPD sends a letter saying we
25 accept your archaeological inventory survey and your

1 monitoring plan.

2 And you're now asking that those conditions
3 be withdrawn from the SUP; is that correct?

4 MR. ESMERALDA: That's correct. Because
5 the AIS and A and P have been accepted, and there was
6 some further investigations done to the site that's
7 referenced in Condition 10, and that site was
8 declassified by the archeologist.

9 COMMISSIONER CHANG: So let me ask you this
10 question.

11 As I understand the SHPD's letter, it says
12 you're to have full-time monitoring during
13 excavation.

14 So after the AIS was approved, could you
15 describe what kinds of excavation work was done on
16 the site, and whether there was archaeological
17 monitoring, and what were the results of those
18 monitoring?

19 MR. ESMERALDA: If I may, however, Mike
20 Dega, Mike, as I mentioned from SCS, is on the line,
21 so he may be able to provide some information on
22 that.

23 CHAIRPERSON SCHEUER: Mr. Dega, would you
24 raise your hand if you are in the attendee room. If
25 you can enable your audio and video.

1 Dr. Dega, is it doctor? It's doctor.

2 THE WITNESS: Michael is fine.

3 CHAIRPERSON SCHEUER: For the record, do
4 you swear or affirm that the testimony you're about
5 to give is the truth?

6 MR. DEGA: I do.

7 MICHAEL DEGA

8 Was called as a witness by and on behalf of the
9 Applicant, was sworn to tell the truth, was examined
10 and testified as follows:

11 DIRECT EXAMINATION

12 CHAIRPERSON SCHEUER: Thank you.

13 Did you hear the question from
14 Commissioner Chang that Mr. Esmeralda asked you to
15 respond to?

16 MR. DEGA: Yes.

17 Michael Dega for SCS archaeology here.

18 Thank you, Ms. Chang. Good to see you.

19 We did start archaeological monitoring
20 full-time in early 2008, and after a month or two
21 finding nothing except large boulders and rocks, we
22 contacted SHPD, that was Patty Conte at the time.
23 Patty came out, did a field inspection of the quarry
24 area and where we had been monitoring, and agreed
25 with the cessation of monitoring at that point. She

1 said there is nothing else here to monitor.

2 So what we did from that point on was
3 conduct intermittent monitoring.

4 That meant we would go out one day a week
5 for several months and just to check to see where
6 they are, and what had been moved around during
7 monitoring.

8 COMMISSIONER CHANG: Good morning, Mike.
9 Nice to see you as well. Thank you for that
10 clarification.

11 So you have been conducting intermittent
12 monitoring since 2009?

13 MR. DEGA: We did for several years, Ms.
14 Chang, and not since then.

15 COMMISSIONER CHANG: Several years goes
16 until when?

17 MR. DEGA: 2010, 2011. I will have to look
18 at my records; somewhere in that ballpark.

19 COMMISSIONER CHANG: And after you stopped
20 monitoring, did Hawaiian Cement continue doing
21 excavation?

22 MR. DEGA: I believe they continued their
23 quarrying activity, yes.

24 COMMISSIONER CHANG: And in your opinion,
25 did you conduct the archaeological inventory survey?

1 MR. DEGA: I was principle investigator,
2 but we had four of our crew conduct the AIS.

3 COMMISSIONER CHANG: And based upon your
4 review of the findings in the AIS, you were confident
5 that the continued excavation, even without
6 intermittent monitoring, they were not going to
7 expose any archaeological or historic sites?

8 MR. DEGA: I was confident, and the State
9 Historic Preservation Division was also confident,
10 because they did conduct several field investigations
11 with us during that time period, and agreed that
12 there were just quarrying rocks.

13 COMMISSIONER CHANG: And is there -- I did
14 not see a letter from SHPD confirming the cessation
15 of the archaeological monitoring in the record.

16 Is there something to confirm that?

17 MR. DEGA: I do have a letter, and I can
18 send it to Bryan or Karlynn to include that in the
19 record if you like.

20 COMMISSIONER CHANG: Because that to me was
21 an outstanding condition in Condition 10, it was the
22 archaeological monitoring, and if SHPD has
23 subsequently provided confirmation that
24 archaeological monitoring is no longer required, that
25 to me is critical to removing that condition.

1 Now, Mike, I don't know if you heard the
2 testimony of Lucienne de Naie, who indicated that
3 there -- she's been told kupuna stories about
4 cultural resources on the site.

5 Can you confirm, was there a cultural
6 impact assessment prepared for this project?

7 MR. DEGA: I don't believe there was. I
8 believe we did just the archaeological inventory
9 survey. And I did hear her testimony, of course, and
10 there were four studies, actually archaeological
11 studies that took place within this project area
12 starting from Paul Rosendahl in 1988, Joe Kennedy
13 1991, again in '97 and us in 2006.

14 Ours and the 1980 study were very focused
15 on the quarry area. The other studies, like Kennedy
16 in '91 was conducted north of this area where he
17 found 18 sites, 74 features that did include
18 traditional agriculture, habitation burials and
19 ceremonial sites. So I think that's probably what
20 she is referring to.

21 North of this area would contain those kind
22 of sites, not within project this area.

23 COMMISSIONER CHANG: I'm assuming -- have
24 you walked the site?

25 MR. DEGA: I've been out there, yes.

1 COMMISSIONER CHANG: Based upon your
2 personal review of the site and the documentation to
3 date, are you confident in saying that the cultural
4 resources, if there were any, are not on this site
5 but may be more north?

6 MR. DEGA: I would say I'm confident they
7 are not on the site, because they may have been
8 destroyed in the past, or they occurred to the north
9 of the site, yes.

10 COMMISSIONER CHANG: Do you know what the
11 site was prior to the quarrying? What did they use
12 the site for?

13 MR. DEGA: You've got sugarcane lands
14 previous to this. As you can see on the bottom side,
15 the east side, the Waine'e Ditch was built. It goes
16 right on the bottom of the project area, all the way
17 towards the 'Iao side. So this was cane land, and
18 this is part of the crown land. There are no LCAs in
19 this project area.

20 COMMISSIONER CHANG: That's helpful to
21 know.

22 Okay, thank you, Mike. I appreciate the
23 clarifying testimony, especially on the
24 archaeological monitoring.

25 So your archaeological monitoring revealed

1 no historic or cultural resources, and SHPD concurred
2 with the cessation of archaeological monitoring both
3 on-site as well as intermittent?

4 MR. DEGA: That's correct.

5 COMMISSIONER CHANG: All right. Thank you,
6 Mike. I don't have any further questions for you.
7 So thanks again. I appreciate you coming on the
8 call.

9 MR. DEGA: Thank you, Dawn. It's good to
10 see you.

11 COMMISSIONER CHANG: You too.

12 Mr. Esmeralda, I just have one final
13 question for you.

14 Have you done any community engagement on
15 this application?

16 THE WITNESS: Not as part of this
17 application, no, Commissioner.

18 COMMISSIONER CHANG: Have you done any
19 community engagement for this site, even outside of
20 this application?

21 THE WITNESS: We have not, no, not to my
22 knowledge.

23 COMMISSIONER CHANG: Okay. Thank you very
24 much. I have no further questions.

25 CHAIRPERSON SCHEUER: Thank you,

1 Commissioner Chang.

2 Commissioner Cabral.

3 VICE CHAIR CABRAL: Yes, thank you. Thank
4 you to my fellow Commissioners Ohigashi and Chang who
5 asked several of my questions.

6 I think my question now that I understand
7 Mr. Dega's expertise might be better addressed by
8 him.

9 My questions are, there was a reference
10 that the quarry has a setback of 50 feet from the
11 river; and yet I think there was an earlier reference
12 from Ms. de Naie that maybe the river is being
13 damaged or altered by the quarry.

14 Are you aware of the river having been
15 affected by the operations of the quarry, or has it
16 been altered because of the quarry activities that
17 you're aware of?

18 MR. DEGA: This is a question for me?

19 VICE CHAIR CABRAL: Yes, to you.

20 MR. DEGA: I'm not a hydrologist. I'm an
21 archeologist. I did not see or focus on impact to
22 the stream or the river or the drainage.

23 VICE CHAIR CABRAL: Then -- and I don't
24 know whether you can answer this one, because I don't
25 know what kind of expert -- there was a reference

1 about the bees being there, and I think the reference
2 was that they're at a very high elevation.

3 Are you aware of any of the bee activity,
4 and what elevation? Or are you aware may be better
5 yet, of the quarry, is the quarry activities going to
6 a high elevations also, or is it at lower elevations
7 on the property?

8 CHAIRPERSON SCHEUER: Mr. Esmeralda.

9 VICE CHAIR CABRAL: Okay, that might be the
10 better question. Thank you.

11 MR. ESMERALDA: Thank you, Commissioner
12 Cabral.

13 I believe the reference was that the
14 activity was higher than the quarry. I don't believe
15 I'm qualified to answer that question, though.

16 CHAIRPERSON SCHEUER: Do you have anybody
17 with you, Mr. Esmeralda, who can comment on the
18 possible occurrence of yellow-faced bees in the area
19 of the special permit?

20 THE WITNESS: I don't believe we do, Chair,
21 unless -- I'm not sure if Mr. Gomes has seen
22 anything. I don't think we have any qualified
23 experts to respond to that question.

24 VICE CHAIR CABRAL: Okay. Well, we will
25 see if that comments up. Thank you very much.

1 CHAIRPERSON SCHEUER: Ms. Fukuda.

2 MS. FUKUDA: Just to Commissioner Cabral's
3 question, in terms of where the quarry activity takes
4 place. Again, I'm not saying that I'm an expert into
5 where the bee habitat may be, if it exists out there,
6 but I will say that the quarry activities do happen
7 on the lower elevations.

8 It's less than a mile from the intersection
9 of Honoapi'ilani Highway and Kuleana Highway where
10 the quarry operation is.

11 So it's not up in the mountainous area,
12 just to provide some context.

13 VICE CHAIR CABRAL: Thank you very much.

14 CHAIRPERSON SCHEUER: Anything further,
15 Commissioner Cabral?

16 VICE CHAIR CABRAL: No, thank you very
17 much, Chair.

18 CHAIRPERSON SCHEUER: Commissioners,
19 further questions?

20 Commissioner Okuda.

21 COMMISSIONER OKUDA: Thank you very much,
22 Mr. Chair.

23 Mr. -- Dr. Vega (sic), just so that we have
24 a complete record, can you briefly provide a summary
25 of your educational background and professional

1 activities, please?

2 MR. DEGA: Mike Dega for SCS Archeology.

3 Yes, I got a B.A. from University of Puget
4 Sound, M.A. in archaeology, University of Hawaii at
5 Manoa; and I got my Ph.D. from UH Manoa in 2001.

6 I've conducted, I don't know, over a 1000
7 projects probably in Hawaii, Micronesia, Southeast
8 Asia, India and part of the Middle East.

9 I've been working in Hawaii specifically
10 for 30, 29, 30 years, something like that.

11 COMMISSIONER OKUDA: Thank you very much.
12 I just wanted the record complete on that.

13 And I have an overarching question for Mr.
14 Esmeralda, if I can ask this question.

15 I'm going to read a provision of the Hawaii
16 State Constitution, and I'm going to ask you after I
17 finish reading whether you agree or disagree that
18 this provision is one of the guiding lights, so to
19 say, as far as what standard or approach the Land Use
20 Commission must take.

21 And this is specifically from the Hawaii
22 State Constitution Article XI, Section 1, and if I
23 can just read it, and it starts like this:

24 Quote: "For the benefit of present and
25 future generations, the State and its political

1 subdivisions shall conserve and protect Hawaii's
2 natural beauty and all natural resources, including
3 land, water, air, minerals and energy sources, and
4 shall promote the development and utilization of
5 these resources in a manner consistent with their
6 conservation, and in furtherance of the
7 self-sufficiency of the State. All public natural
8 resources are held in trust by the State for the
9 benefit of the people." Close quote.

10 Mr. Esmeralda, to the best of your
11 knowledge, did I accurately read the Hawaii State
12 Constitution Article XI, Section 1?

13 THE WITNESS: Yes, Commissioner, to the
14 best of my knowledge.

15 COMMISSIONER OKUDA: Can you please, just
16 in summary form, tell us how the granting of the
17 permit that you're asking for complies with this
18 section of the Hawaii State Constitution?

19 THE WITNESS: Thank you, Commissioner.

20 I guess I would say that the request that
21 we're seeking today is for a time extension of a
22 permit that has been approved in the past. We're not
23 seeking any new uses or any expansion of the quarry
24 area, just simply a time extension of something that
25 has been approved for acreage that has been approved

1 for this use previously.

2 COMMISSIONER OKUDA: Well, how does the
3 time extension comply with the promotion of the
4 development and utilization of the resources in a
5 manner consistent with their conservation, and in
6 furtherance of the self-sufficiency of the State?

7 How does the time extension comply with
8 that requirement of the Hawaii State Constitution?

9 THE WITNESS: I would state that the
10 operations that are occurring at the site provides
11 for materials used in construction in Hawaii such
12 that it doesn't need to be imported from elsewhere,
13 and that Hawaii is being self-sufficient in that
14 regard.

15 Again, there's no new uses that we're
16 requesting. I would like to just emphasize that
17 point.

18 COMMISSIONER OKUDA: Okay, thank you very
19 much. You answered my questions.

20 CHAIRPERSON SCHEUER: Ms. Fukuda, you had
21 something you wanted to offer in response?

22 MS. FUKUDA: No, Mr. Esmeralda provided the
23 thoughts that I was going to share as well.

24 CHAIRPERSON SCHEUER: Thank you.

25 Commissioners, further questions for the

1 Applicant? If not, I have a few.

2 And, you know, so on special permits we're
3 relying on the record that is before us from the
4 County.

5 So to the degree if you can point to where
6 in the record responses to my questions exist or do
7 not exist it would be helpful.

8 Prior to quarrying operations, what was the
9 use of this site?

10 THE WITNESS: I think, as Mr. Dega
11 mentioned earlier, it was used for agricultural
12 purpose, so sugarcane, pineapple, perhaps.

13 CHAIRPERSON SCHEUER: So going to
14 Commissioner Ohigashi's questions, the nature of a
15 Special Use Permit is that it's a temporary use at
16 which time the land will be returned to its prior
17 use.

18 What agricultural activities -- is there
19 anything in the record indicating what kind of
20 agricultural activities will be possible on this site
21 at the cessation of quarrying activities? Is there
22 anything in the record as to that effect?

23 THE WITNESS: I don't believe we specified
24 a specific agricultural use that would occur
25 following the quarrying use.

1 CHAIRPERSON SCHEUER: You believe that's
2 actually one of the requirements of receiving a
3 Special Use Permit, that the use is temporary?

4 THE WITNESS: Yes. I understand that the
5 use is temporary. And we did mention there's an
6 estimated life span of the quarry left.

7 CHAIRPERSON SCHEUER: So at the end of
8 operations, what is the agricultural use?

9 MS. FUKUDA: Chair, if I may.

10 Again, Hawaiian Cement leases the property
11 from the landowner, so I think it's the landowner's
12 decision to determine what, if any, agricultural
13 operation they would like to do with the land, you
14 know, once the lease ends.

15 Hawaiian Cement doesn't have any
16 jurisdiction, if you will, over the property.

17 CHAIRPERSON SCHEUER: But, Ms. Fukuda,
18 isn't it required under the nature of a Special Use
19 Permit that the land would then presumably still be
20 suitable for agricultural at the end of the
21 permitting period?

22 MS. FUKUDA: Again, I think there is a
23 requirement under both the State Special Use Permit
24 and the County Special Use Permit that the Applicant
25 provide a remediation plan or cessation plan to the

1 various entities for review and approval.

2 CHAIRPERSON SCHEUER: I don't think you're
3 answering my question, Ms. Fukuda. If you can try
4 and answer my question.

5 Should the land be suitable for agriculture
6 at the end of the Special Use Permit, period?

7 MS. FUKUDA: Yes, it's a simple answer, I
8 guess.

9 CHAIRPERSON SCHEUER: So are you able to
10 identify anything in the record that suggests what
11 agricultural uses the land will be suitable for at
12 the end of the Special Use Permit period, if granted?

13 MS. FUKUDA: I don't know that there is
14 anything in the record, Chair, but --

15 CHAIRPERSON SCHEUER: Thank you. That's
16 sufficient.

17 We have from Ms. de Naie, and I think I
18 heard Ms. de Naie's testimony slightly differently
19 than perhaps Commissioner Cabral did.

20 Ms. De Naie, I think, testified that she
21 had done service work on areas mauka of the quarry.
22 But that yellow-faced bees have been observed in the
23 immediate area of the quarry.

24 I'm at least familiar with the yellow-faced
25 bees existing in coastal areas of Hawaii.

1 The bee was listed as endangered, according
2 to Ms. de Naie's testimony, in 2016.

3 Was a review for any additional endangered
4 species that have been listed since, endangered or
5 threatened, since the previous permit was issued part
6 of your firm's preparation of the Special Use Permit
7 application, or your time extension application?

8 THE WITNESS: No, Chair, it was not.

9 CHAIRPERSON SCHEUER: You did not go
10 through and see if there were any changed
11 environmental conditions, specifically new or
12 endangered species that we need to make sure might be
13 on this property, there was no review of that?

14 THE WITNESS: No, there was no review of
15 any additional species.

16 CHAIRPERSON SCHEUER: So then it would
17 follow that there's been no consultation with the
18 Division of Forestry and Wildlife or the U.S. Fish
19 and Wildlife Service in that regard?

20 THE WITNESS: I believe the time extension
21 application was made available for comment, but I can
22 confirm.

23 CHAIRPERSON SCHEUER: If you would.

24 And can you tell me, you indicated that
25 before the application -- before the existing permit

1 expired in 2019, an application was made for the time
2 extension.

3 Can you give me those two dates when the
4 application, new application was filed, and when the
5 expiration happened?

6 THE WITNESS: So the expiration was
7 December 15th, 2019. And we filed the application
8 for time extension in June of 2019.

9 CHAIRPERSON SCHEUER: Is it your
10 professional experience that six months is a
11 sufficient period of time for the Maui Planning
12 Commission and the State Land Use Commission to take
13 actions on these matters?

14 MR. ESMERALDA: That was considered timely.
15 If I may point to the Planning Commission's minutes,
16 the Planning Director did state that it's been a
17 practice of the department, and perhaps Deputy
18 Director Hart can speak to this, but in the minutes
19 of the Planning Commission meeting it states that
20 it's been a practice of the department that as long
21 as a time extension is filed, that they allow a grace
22 period for the activity to continue, so we are in
23 compliance with that.

24 CHAIRPERSON SCHEUER: That wasn't my
25 question.

1 MR. ESMERALDA: Okay, maybe if I can point
2 to Condition 1 of the SUP states that time extension
3 should be filed at least 120 days prior to
4 expiration, and we're in compliance with that
5 condition with the filing of the application in June.

6 CHAIRPERSON SCHEUER: Thank you very much
7 for that.

8 Nothing further from me at this time.
9 Commissioners Ohigashi.

10 COMMISSIONER OHIGASHI: Just a little
11 concerned with the response to one of the Chair's
12 questions about responsibility of returning to ag or
13 whether or not what agricultural activities.

14 It appeared that the Petitioner seemed to
15 say, and you can correct me if I'm wrong, that the
16 type of activity would be up to the landowner because
17 they're the landowner and we're the lessees.

18 Is that what Petitioner is saying?

19 CHAIRPERSON SCHEUER: The statement you're
20 referring to is from Ms. Fukuda.

21 MS. FUKUDA: Commissioner Ohigashi, I guess
22 I'm not sure, or maybe I didn't understand the
23 question correctly, but I did want to make it clear
24 that Hawaiian Cement, the Applicant in this State
25 Special Use Permit, has a lease agreement with the

1 landowner.

2 They are not the landowner of this
3 property. So their lease agreement is relative to
4 the quarrying operation that they have. And
5 following the completion of the quarrying operation,
6 the land, according to the lease agreement, I
7 believe, would be returned back to the landowner.

8 So Hawaiian Cement's interest in the
9 property is relative to the quarry operation.

10 Agricultural operation following the
11 quarrying operation is not something that Hawaiian
12 Cement may be in the business of.

13 And I apologize if I'm misunderstanding the
14 question.

15 COMMISSIONER OHIGASHI: I'm just asking you
16 to clarify it for me. The reason why I'm asking you
17 to clarify, I'm not trying to hide anything, is that
18 it concerns me that the response to return of
19 the land -- can't think of the word -- repatriation,
20 triggered a response about that you're only leasing
21 the property, and the landowner -- I'm just concerned
22 that Hawaiian Cement would be the responsible party
23 under the terms of this Special Use Permit.

24 We are not talking about the lease, we're
25 talking about the Special Use Permit. And if the

1 Petitioner can say it's not my responsibility, I'm
2 only interested in quarrying and not the repar -- the
3 return of the land to its agricultural use, then I
4 don't know why I have a problem --

5 CHAIRPERSON SCHEUER: Restoration is
6 perhaps the word you're searching for.

7 COMMISSIONER OHIGASHI: Right.

8 Anyway, so shouldn't then -- we're missing
9 a party here. Shouldn't we have the owner as a party
10 so that we can make sure that our SUP is complied
11 with? That's just a comment.

12 CHAIRPERSON SCHEUER: Thank you for the
13 comment.

14 Commissioner Okuda.

15 COMMISSIONER OKUDA: Thank you, Mr. Chair.

16 Following up on the Chair's question and
17 Commissioner Ohigashi's question, this is actually
18 more than a comment.

19 Can any of you point to any assurance in
20 the record that at the end of this Special Use
21 Permit, the Land Use Commission or any other
22 government entity will have legal standing to force
23 the restoration of the property so that we avoid
24 having something like a big hole in the ground or a
25 bare hillside, or something that frankly will not

1 support the type of reasonable agriculture that can
2 make money?

3 I mean, can you point to anything in the
4 record that indicates right now there's that
5 assurance? In other words, something more than a
6 lease covenant? Because the only party that has
7 standing to enforce a lease, which is a contract, are
8 the parties to a contract.

9 Where is that assurance in the record that
10 we're not going to leave this property in not so good
11 condition with respect to agriculture?

12 CHAIRPERSON SCHEUER: Mr. Esmeralda, who
13 will respond for the Applicant?

14 MR. ESMERALDA: I can note that as part of
15 the condition of the County Special Use Permit, it
16 states that the plan to revegetate the site should be
17 reviewed and approved by the Planning Department.

18 COMMISSIONER OKUDA: But it goes back again
19 to Commissioner Ohigashi's question as far as who
20 under that condition has a duty, a legal duty to
21 implement the plan?

22 Does your client, the Applicant, concede or
23 agree that it would have a legal duty itself to
24 implement the plan?

25 CHAIRPERSON SCHEUER: Ms. Fukuda?

1 MS. FUKUDA: Thank you, Commissioner Okuda.

2 I think if you're asking if there is a
3 governmental body that currently has standing to
4 enforce that condition, to Mr. Esmeralda's point, the
5 language that's in the County Special Use Permit as
6 well as the current condition on the State Special
7 Use Permit are only relative to providing a plan for
8 review and approval. It does not include language
9 relative to implementation.

10 However, as I previously noted the
11 Applicant does have that requirement separately with
12 its private lease agreement with the landowner.

13 COMMISSIONER OKUDA: Well, excluding the
14 lease, because, again, as I stated the only parties
15 with standing to enforce the lease are parties to the
16 contract. And we might be -- we are talking about
17 something in addition or broader to that.

18 So excluding the lease, does the Applicant,
19 does your client agree that it has a duty independent
20 of the lease, independent of the lease, to implement
21 and carry out the restoration plan?

22 MS. FUKUDA: Not at this time.

23 COMMISSIONER OKUDA: Would your client
24 agree or disagree that the Land Use Commission has
25 the authority or power to require that duty as a

1 condition to extend or give you the relief you're
2 asking for in your Application or Petition here?

3 In other words, do you folks agree that the
4 Land Use Commission has the authority to make that a
5 condition?

6 CHAIRPERSON SCHEUER: The answer can be
7 yes, no, or I don't know. Mr. Esmeralda or Ms.
8 Fukuda.

9 MR. ESMERALDA: I believe, yes, it does.

10 COMMISSIONER OKUDA: Would you disagree
11 that one of the basis for the Land Use Commission to
12 require such a condition would be in the Land Use
13 Commission's obligation to implement the provisions
14 of Article XI, Section 1 of the Hawaii State
15 Constitution, which I read to you earlier?

16 MS. FUKUDA: Chair.

17 CHAIRPERSON SCHEUER: Proceed.

18 MS. FUKUDA: So to Commissioner Okuda's
19 question, I think, yes, there's a two-way street
20 relative to this project. There is the protection I
21 think that the Commission has been talking about
22 relative to the return for agricultural purposes.

23 There is also the public good. I think
24 that's provided by the materials that are provided by
25 the facility, by the quarry itself.

1 I would also note that the landowner would
2 have the opportunity to come before the State Land
3 Use Commission to request a district boundary
4 amendment at any time as well. As well as change in
5 zoning and community plan amendments for the use of
6 the property in the future.

7 CHAIRPERSON SCHEUER: I'm just going to
8 interject, Ms. Fukuda, indeed that is the exact
9 point, that if there is no intention to have the land
10 go back to agriculture, why is a dba not being sought
11 now rather than a Special Use Permit extension?

12 MS. FUKUDA: Hawaiian Cement doesn't own
13 the property, and I don't know that the landowner has
14 any plans for the property.

15 I was just merely stating that that's -- as
16 a private landowner, you have the right to apply for
17 these requests in the future.

18 We have no knowledge of the landowner
19 wanting to do anything future with the property at
20 this point in time.

21 COMMISSIONER OKUDA: Anyway, Chair, thank
22 you very much. My questions have been answered.
23 Thank you, no further questions.

24 CHAIRPERSON SCHEUER: Thank you, sorry for
25 my interjection.

1 Commissioner Aczon.

2 VICE CHAIR ACZON: Thank you, Mr. Chair.

3 I'm kind of little bit slow, so I just want
4 to kind -- I'm kind of confused about the
5 conversation. I don't have a question but just a
6 comment.

7 We are discussing time extension, and I
8 believe the questions that are being asked to the
9 Petitioner should have been addressed during the
10 Special Use Permit, and should have been part of the
11 conditions.

12 And at that point I agree with Commissioner
13 Okuda that perhaps the landowner should have been
14 here to answer those questions. And I don't believe
15 that the Petitioner right now, Hawaiian Cement, is
16 capable of answering on behalf of the landowner.

17 I wouldn't even answer any questions on
18 behalf of the landowner. That's what, you know, I'm
19 kind of trying to grapple with, you know, no matter
20 how many questions we ask to the Petitioner that they
21 cannot answer, because they're not legally
22 responsible in answering the question.

23 And so perhaps, you know, agree with
24 Commissioner Okuda, the landowner should have been
25 here.

1 Again, those questions, I believe, should
2 have been answered or addressed during the Special
3 Use Permit proceedings, which dictate all the
4 conditions during that proceedings, and the request
5 for extension is kind of -- doesn't change the use of
6 the -- doesn't change the use of the property. It's
7 just extending the timeline, and all those conditions
8 should have been addressed during the Special Use
9 Permit.

10 Thank you, Mr. Chair.

11 CHAIRPERSON SCHEUER: Thank you very much,
12 Commissioner Aczon, for those comments.

13 It is 11:00 A.M. We need a break. Let's
14 take a ten-minute break -- or, Mr. Esmeralda, before
15 we do, are you done with your presentation?

16 THE WITNESS: Yes, Chair, thank you.

17 CHAIRPERSON SCHEUER: We will take a
18 ten-minute break, reconvene at 11:10, and we will
19 hear from Maui County.

20 (Recess taken.)

21 CHAIRPERSON SCHEUER: Let's go back into
22 session. It is 11:12 A.M.

23 We are back on the record. Mr. Hopper are
24 you ready?

25 MR. HOPPER: Yes, I am.

1 CHAIRPERSON SCHEUER: Please proceed.

2 MR. HOPPER: Thank you, Chair. I will try
3 to be brief.

4 First off, I just wanted to check on the
5 Commission on a procedural issue. I know that you
6 very much take the position on these special permits
7 that you're sort of confined to the record.

8 You did have, however, public testimony,
9 and I think a potentially considered evidence from
10 that testimony as evidence. That to my knowledge, I
11 know there was a reference to 2019 letter, the only
12 2019 letter that we could find was not a Planning
13 Department letter, it was from the Land Use
14 Commission to the Planning Department expressing
15 concerns about the application which I think
16 primarily focused on annual reports.

17 But I think since that letter, that issue
18 was addressed, at least at the Planning Commission
19 level.

20 So I don't know if you need to check with
21 your AG on to what extent you can consider testimony
22 after the Planning Commission has had a public
23 hearing on the item after that, and then rely on that
24 as evidence, including the fact that it is a
25 contested case.

1 We've had issues with that with the
2 Planning Commission, with testimony being considered
3 in contested cases as a general matter, but I don't
4 know if you need to consult on that issue.

5 As I understand it, it looks like that
6 letter was the first time that those concerns were
7 raised. And the letter itself does talk about sort
8 of general allegations, but not a lot of specifics on
9 who, what, where, when. So I think it's maybe
10 difficult for the Applicants to respond to that, so
11 just raising that as procedural issue --

12 CHAIRPERSON SCHEUER: So noted.

13 MR. HOPPER: The other issue is with
14 respect to the so-called repatriation. I know that
15 this has come up in special permits before. I do
16 think under your rules 15-15-95(c) that goes over the
17 criteria for determining whether a given application
18 is a, what they call an unusual and a reasonable use.

19 Number one is, the use shall not be
20 contrary to the objectives sought to be accomplished
21 by Chapter 205 and Chapter 205A in the rules of the
22 Commission.

23 So I think that's where you may get the
24 requirement to restore the land back to agriculture
25 use, however, subsection (5) of that same set of

1 requirements states that this is -- the following
2 guidelines are established in determining an unusual
3 and reasonable use.

4 Number (5) is the land upon which the
5 proposed use is sought is unsuited for the uses
6 permitted within the district.

7 So it seems to suggest that the special
8 permit can be granted if the uses of the property are
9 unsuited for agricultural uses. And that factor
10 would weigh in favor of granting the special permit.

11 So you may want to recheck your rules to
12 see if the fact that the use is -- if the land is
13 unsuited for agricultural uses, that's actually a
14 basis to grant a special permit, because that's what
15 subsection (5) seems to say.

16 If you've got clarification on that, I
17 think we would welcome that. But the County also
18 uses that at the County level for deciding whether to
19 grant County Special Permits sometimes that are under
20 15 acres. So that's one that's sort of been
21 interesting, because I think we do look for
22 consistency with agricultural purposes with
23 subsection (1), but subsection (5) seems to suggest
24 if the land is unsuited, that's a factor that weighs
25 in favor of granting special permit, that's what the

1 rules appear to say.

2 So that's been an issue with us going
3 forward, and I think with this permit that would be
4 something to consider.

5 The County's position on this is that it
6 does support the granting of the time extension. The
7 Planning Commission did vote to approve the granting
8 of the time extension, and subject to the appropriate
9 conditions.

10 And we did not have -- if there's specific
11 questions that need to be answered by the department,
12 I think we do have Mr. Hart present to answer those
13 further if we need to go into more detail. But I do
14 think the department staff report in its letter to
15 you did outline the department's position with
16 respect to granting the permit.

17 The only other thing to address, I think,
18 was -- I do think that if the Commission wanted to,
19 it could make a condition requiring what's already
20 asserted in the record with respect to repatriation
21 of the land, and make that applicable. I suppose you
22 could do that to the Applicant, its successors and
23 assigns, or something along those lines. I do know
24 you've done that -- not necessarily that specific
25 condition, but your conditions have been made to the

1 point where, regardless of the property owner, they
2 are required to do what's in the condition. And I
3 think that's something to consider.

4 But I do believe the Commission does have
5 the authority to do that. Again, maybe that's a
6 matter you would want to confer with your AG on, but
7 I think because that's an item that is more
8 restrictive than perhaps the County's conditions, I
9 think that's something you can add onto your
10 conditions in order to fulfill that requirement.

11 I do think the Commission has the ability,
12 as long as it is based on the record, to add more
13 restrictive conditions. I don't think it would, for
14 example, eliminate the condition that the Planning
15 Commission approved, but I think it could add
16 additional conditions that are more restrictive.

17 But, again, I would defer to your legal
18 counsel on that, your authority to do that.

19 And I think that's all I had for now. I
20 just wanted to address those several points in the
21 record, because I thought that it was important to do
22 so.

23 CHAIRPERSON SCHEUER: Mr. Hopper, before we
24 proceed to questions, before we actually went back
25 into session, one of your client representatives, Mr.

1 Fasi, indicated he wanted to say something.

2 MR. HOPPER: I think we did discuss that.
3 We can respond to questions that I think -- Mr. Hart,
4 I think we wanted to just have -- to make it as easy
5 as possible to have it through one line of
6 communication.

7 CHAIRPERSON SCHEUER: Thank you.
8 Commissioners, questions for Maui County?
9 Commissioner Wong.

10 COMMISSIONER WONG: Thank you, Chair.
11 Mr. Hopper, a couple questions.

12 First is, the public witness, or the Sierra
13 Club, or any of their members, did they ever come in
14 front of the Planning Commission in your guy's
15 docket?

16 MR. HOPPER: I looked back. I didn't see
17 them listed as a public testifier or even written
18 testimony.

19 I read the transcript beforehand, and I
20 think there was one testifier at the Commission
21 level, unless I'm missing -- it's a lengthy record.
22 And I don't know if they contacted the Applicant
23 prior to the Commission meeting, that's possible as
24 well.

25 So I don't want to guarantee that there's

1 nothing in the application or the record, but not
2 that I could find when I did a look.

3 Again, this testimony I just saw today when
4 I came forward for this meeting, and had a chance to
5 read it today. So that's the first time I think I
6 had heard of it. I don't know if the Applicant has
7 more information, but that's my knowledge of the
8 situation.

9 COMMISSIONER WONG: Another question I had
10 is, you talked about the record in terms of the
11 suitability of the ag land for the Applicant. So is
12 there something in the County's record that states
13 that issue?

14 MR. HOPPER: I think the County record
15 looked at the condition of the way of being restored
16 based on the condition that was placed on the County
17 Special Permit. That was discussed at the Planning
18 Commission level.

19 The issue with the rule, I only raise that
20 as that's coming up with the Commission, because, I
21 mean your rules -- I don't think your rules
22 necessarily preclude you from granting a special
23 permit, only if there can be agricultural uses after
24 the special permit's done. Because subsection (5)
25 says one of the factors in favor of granting the

1 special permit is that the land is not suited for
2 agricultural purposes. So just based on this rule, I
3 wanted to raise that question, because, you know,
4 that rule has always been sort of a mystery to me, to
5 be quite honest, but it says what it says and should
6 be considered there.

7 COMMISSIONER WONG: Just wondering, because
8 I don't remember seeing anything in the record saying
9 this land will be unsuitable at the end of its life.

10 MR. HOPPER: I didn't mean to add that in
11 as testimony that it wouldn't be, because I think
12 that -- because I think that if they've got a
13 restoration plan and that's a condition, I think
14 that's all something that you can consider.

15 But my point was I don't think you're
16 precluded from granting a permit because the land,
17 there would be difficulty in returning it back to
18 agricultural lands based on the subsection of the
19 rule, that's all.

20 COMMISSIONER WONG: So the other question I
21 have, that I think Ms. Fukuda brought up, was
22 something that just perked my ears up was about a dba
23 for this piece of property. Did the Planning
24 Commission ever thought about that?

25 MR. HOPPER: I don't think that's in the

1 record as a request. I mean, again, this was a time
2 extension request, and I think the Commission knew
3 what was before it. I think that would have been a
4 separate issue that we didn't look into. I don't
5 remember seeing that in the record.

6 COMMISSIONER WONG: Just because I was
7 thinking about if they thought about this it would be
8 spot zoning to me, because the area around it is all
9 ag, correct?

10 MR. HOPPER: I suppose. I guess you could
11 say that about almost all special permits, if you
12 wanted to go down that line, that would be the
13 concern I would raise.

14 COMMISSIONER WONG: It's just that I guess
15 I know some of the members of this Commission have
16 concerns about the length of this special permit that
17 went for how many years so far? And how come you
18 didn't just come back with a dba? That's just a
19 statement. Nothing else.

20 The other question I have is the permit
21 itself, I guess they brought up about the timing of
22 this permit, request for extension. And, you know,
23 how I guess it's past its due.

24 So was there any statement in terms of,
25 hey, you should bring it up little bit earlier so --

1 MR. HOPPER: I think that there was, in the
2 condition, there was a timeframe, I think a timeframe
3 setting the latest that they could submit, and I
4 think they met that. I think if the Commission, I
5 mean, want to look at putting conditions of time
6 extensions that say, you know, you have to do it a
7 year before or something like that. The only issue
8 is that it can take agencies time to notice things in
9 the newspaper, have public hearings, and things like
10 that. And if the Applicant submits a timely
11 request -- in this case, I think roughly six months
12 before -- I think the department has generally
13 allowed the operation pending a decision on the
14 permit, to avoid telling the applicant they have to
15 shutdown their operation for the timeframe from the
16 closure date to the date that the agencies act on
17 those permits.

18 And I think that's been consistent with,
19 again, special permits that have gone to the
20 Commission for time extensions. I don't think this
21 has been the first one that's had that issue, but if
22 we need to for Land Use Commission permits, if the
23 Land Use Commission is not satisfied with that, I
24 suppose we could look at conditions that say you have
25 to submit a greater time prior and go with the

1 interpretation that if the action isn't taken prior
2 to the expiration date, that you do have to cease
3 operation, even if you have a complete application
4 pending.

5 But I do believe -- I've been working since
6 2006 that that's been pretty consistent from the Land
7 Use Commission and the County, that if you get your
8 timely request in, that is submitted prior to the
9 expiration, to continue during that expiration, but
10 if that's something the Commission has an issue with,
11 maybe we can address that comprehensively.

12 COMMISSIONER WONG: My last question.

13 So Commissioner Aczon brought up a
14 statement prior to us going into recess about this is
15 just an application for time extension, and some of
16 the Commissioners have some issues about, you know,
17 filling up the whole reclamation portion and some
18 other issues, the bees, so this is just gunshot, what
19 is your feeling about us just sending it back to the
20 County to work on those issues?

21 MR. HOPPER: Well, I mean, the bee issue, I
22 don't know of any evidence other than the oral
23 testimony today that suggested the presence of that
24 particular endangered species. So we would want
25 evidence in the record that would show, yeah, that's

1 something that you needed to do as part of your due
2 diligence.

3 As far as the restoration, I do think that
4 was an issue that was discussed at the Commission.
5 So if you want to be more restrictive than the
6 Commission's conditions, I think you can consider
7 that as a condition if you do not feel that the
8 current conditions adequately address that concern.

9 So, you know, I think my view on that is
10 that the Commission has the ability to do what it
11 would like, certainly, but I don't think there would
12 be a need to remand for that issue, the issue of the
13 inadequate restoration, because I do think the
14 Commission can put appropriate conditions on that
15 based on the record.

16 COMMISSIONER WONG: Because the other
17 statement that was brought up was the SHPD letter
18 that Mr. Dega -- he had that document, that was it
19 received or was it part the record? So, you know,
20 that's another question I have, a statement.

21 You don't need to answer that. Just going
22 to say that's an issue that to me is not in the
23 record, so I just wanted to say that.

24 Thank you, Mr. Hopper.

25 MR. HOPPER: If the Chair would allow, when

1 that issue came up that is something I looked at. I
2 don't know if under your rules, it's 15-15-63,
3 subsection (k) it says:

4 The Commission may take official notice of
5 matters as may be judiciously noticed by the courts
6 of State of Hawaii.

7 I'm not sure if you can take official
8 notice of something like a SHPD document. That's,
9 again, maybe something you could consider, but wanted
10 to raise that if it was something that I think was
11 discussed, the issues were discussed. So if it is an
12 actual government document, I don't know if that's
13 something maybe you can take notice of. But I defer
14 to certainly your staff on what you can consider as
15 evidence.

16 COMMISSIONER WONG: Thank you, Mr. Hopper.
17 Thank you, Chair.

18 CHAIRPERSON SCHEUER: Thank you Commission
19 Wong.

20 Commissioner Ohigashi followed by
21 Commissioner Chang. Was that --

22 COMMISSIONER CHANG: Yes, thank you, Mr.
23 Chair. I'll wait until after Commissioner Ohigashi.

24 CHAIRPERSON SCHEUER: Ohigashi then Chang.

25 COMMISSIONER OHIGASHI: Couple things I

1 wanted to ask you about.

2 Those structures apparently were on the
3 property, were there prior to the distance or prior
4 to Hawaiian Cement taking over this SUP or doing this
5 SUP.

6 Does the County have procedures of how it
7 would add structures, and whether or not the use of
8 those structures would entail a change of the --
9 require a change of the conditions of the SUP?

10 MR. HOPPER: I think if the structures were
11 included in the original application is something
12 that would be -- if the land area is allowed to be
13 used, that would cover that.

14 COMMISSIONER OHIGASHI: Talking about new
15 structures.

16 MR. HOPPER: If something was built after,
17 I mean, the use would be allowed on the property, and
18 I think what would most likely happen was the
19 structure would come up and would ask for a permit
20 for use, and if that use is consistent with what the
21 special permits allow that it would be permitted.

22 COMMISSIONER OHIGASHI: I'm going to give
23 you an example. This example, these areas are
24 generating gravel and rocks and structures relating
25 to that particular SUP, then they decide, well, we

1 want to be able to ready mix cement on the property.
2 And we're going to have a structure placed on it
3 regarding cement.

4 Does that change the SUP? I mean, that
5 structure modified in terms of the SUP requiring a
6 new SUP to be issued?

7 MR. HOPPER: I think I understand where
8 you're going and the concern there. I suppose you
9 could add a condition that would say no additional
10 structures other than those existing could be allowed
11 or something like that.

12 There could be a scenario where building
13 certain structures could be considered going beyond
14 the scope of a permit in a certain case. I mean, I
15 could see that as a concern.

16 COMMISSIONER OHIGASHI: So would that be
17 the responsibility of the County to enforce, during
18 the building permit side, to enforce that particular
19 limitation or that condition?

20 MR. HOPPER: I think if you did place a
21 condition that says no additional structures, there's
22 nothing in the representation showing that they plan
23 on building additional structures --

24 COMMISSIONER OHIGASHI: Maybe you don't
25 understand my question.

1 My questions, as it exists now, there's no
2 permission against additional structures. I was just
3 curious whether or not the County, in its review of
4 the building permits, would take a look at what the
5 use would be and whether or not they would match it
6 up with the SUP and determine whether a new SUP or
7 amended SUP should be issued?

8 MR. HOPPER: That's a good question.

9 I would maybe want to ask Jordan Hart how
10 the department would review that if he's okay with me
11 being supplemental answer, because I think they deal
12 with reviewing of those permits on a more day to day
13 basis.

14 I understand your concern that if someone
15 could build a massive structure that wasn't part of
16 the SUP permit that would substantially change the
17 purpose of that application, or what's on the ground.

18 So that may be something -- I don't know if
19 Mr. Hart would be comfortable asking how that's done
20 on a daily basis.

21 The best I can do now, if you've got a
22 clear condition on that that could be enforced, but
23 as of right now, I do think that there could be
24 concerns with building a structure. And, again, if
25 this is a hypothetical, I don't know. If we are

1 dealing with this project specifically, I think we
2 can deal with that issue by condition.

3 CHAIRPERSON SCHEUER: Hold on. Was Mr.
4 Hart going to respond?

5 MR. HART: Chair, I could respond directly
6 to Commissioner Ohigashi's question.

7 CHAIRPERSON SCHEUER: Let me swear you in.
8 Do you swear or affirm that the testimony
9 you're about to give is the truth?

10 JORDAN HART

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

14 DIRECT EXAMINATION

15 MR. HART: Chair, so basically the first
16 part of Mr. Hopper's response was consistent with the
17 way we review Special Use Permit applications and
18 building permits that come in. Basically, if the
19 permit is consistent with the representations that
20 were previously made about what the special use is,
21 then the building permit could be granted; or at
22 least the Planning Department could approve our
23 portion of the building permit review that's of issue
24 by Public Works.

25 With regard to something like concrete

1 batching or the structures associated, that would be
2 a different use. The Planning Department would
3 currently view that as requiring a County Conditional
4 Use Permit, and that an Amendment to Special Use
5 Permit would be required.

6 And after that was all completed
7 successfully, building permits could be approved
8 associated. Thank you.

9 COMMISSIONER OHIGASHI: Mr. Hopper, I
10 recall, and this is just because I'm an old man, that
11 there was talk several years ago about an expansion
12 between Waikapu and Ma'alaea residential use in that
13 area.

14 Have those plans been indicated in the
15 Community Plan Area?

16 MR. HOPPER: Again, maybe Mr. Hart would
17 assist, but I mean if you're talking about -- there's
18 a Waikapu Country Town that was approved. That's
19 pretty substantial. That hasn't been built yet, but
20 I understand has zoning entitlements too. I'm not
21 sure exactly where the project is, but that got LUC
22 and County approval. So that's a pretty substantial
23 project.

24 I think Ma'alaea did discuss doing, I
25 think, an agricultural subdivision, but the County

1 Council I think did not approve that, so that's still
2 in flux. And that would have been about 30 homes, or
3 20 or 30 lots, I think.

4 But, you know, I -- this is my personal
5 knowledge, so I don't want to go beyond to say that
6 that's the whole picture. So I don't know if Mr.
7 Hart has anything in addition, or if there is
8 additional information that we could provide.

9 That's my knowledge of a couple of major
10 projects that have been discussed in the area.

11 COMMISSIONER OHIGASHI: I'm just concerned
12 to make sure that what we're approving today does not
13 necessarily affect the ability the County and joint
14 landowners of that area has create additional
15 residential housing for people.

16 So that's just the essence of my question
17 is that has there been an analysis as to whether or
18 not future development will be moving into this area
19 and how would that affect that development?

20 MR. HOPPER: I don't know if Mr. Hart has a
21 more comprehensive question on that. Because, again,
22 I'm not privy to all of the developments in that
23 area, just a couple that I know of.

24 So if he has something to add, I think that
25 may be helpful.

1 MR. HART: So basically the Waikapu Country
2 Town is fully entitled and is moving towards
3 development.

4 The Ma'alaea Mauka project did go in for
5 some adjustments to their project plan, and I believe
6 they're currently exploring other options with
7 council right now. But that plan does remain on the
8 Community Plan Map; and we are in our South Maui
9 Community Plan update process.

10 So what will be on the upcoming or
11 forthcoming map is to be determined with the
12 community, but, you know, the question of whether or
13 not that location is appropriate for dense
14 residential has been a subject of significant
15 discussion and conversation and potentially concern
16 over the past several years.

17 COMMISSIONER OHIGASHI: Is the extension
18 consistent with the Community Plan for that
19 designated area?

20 MR. HART: I believe the development feels
21 that way. We recommended approval to the Maui
22 Planning Commission in that effect.

23 COMMISSIONER OHIGASHI: And you base that
24 on the fact that the Community Plan will be changing;
25 is that the reason why?

1 MR. HART: No, I wouldn't say that that was
2 the basis for it. I don't think that there is any
3 reason for the Planning Department to expect that
4 these future potential uses could not co-exist, at
5 least for the term that the special permit may exist.

6 COMMISSIONER OHIGASHI: And how long did
7 you game that out? In other words, how long can they
8 co-exist?

9 MR. HART: I wouldn't say that the Planning
10 Department did some sort of analysis of years of how
11 long. I think that more in the context of whether or
12 not there is any expectations that the existence of
13 this quarry would produce use or, you know, outputs
14 that were no noxious to potential uses around that
15 they would be completely inappropriate or couldn't
16 coexist.

17 Basically in that context, I don't believe
18 that the Planning Department felt there was any
19 reason not to recommend the continuation of the
20 lease.

21 COMMISSIONER OHIGASHI: But you do
22 anticipate a time when they cannot?

23 MR. HART: In the context of a Special Use
24 Permit, I do anticipate a period where it does not
25 exist.

1 COMMISSIONER OHIGASHI: Do you have any
2 analysis, or is there anything in the record that
3 show how long these guys have to conduct their
4 activity, Petitioner has to conduct their activity
5 before they have to cease because they cannot
6 coexist?

7 MR. HART: I believe the Applicant did
8 provide information on their intent for the life of
9 the facility.

10 COMMISSIONER OHIGASHI: And is it your
11 position or analysis that the 26 years would be okay
12 for it to be there and co-exist with the potential
13 development and Community Plan?

14 MR. HART: So that's a very complicated --
15 first of all, as far as impacts, I don't believe the
16 department's position is that the impacts that are
17 being produced by this facility are so inappropriate
18 that other uses surrounding couldn't emerge or
19 continue.

20 Separately, what was designated on the
21 Community Plan is not what's being pursued, and based
22 upon testimony at council meetings and various other
23 venues, doesn't appear to be broadly supported by the
24 community.

25 So they're basically looking at making

1 adjustments to that separate from the Community Plan
2 update.

3 And the final item is that the South Maui
4 Community Plan update is being initiated for update
5 by the department, and that is engaging the
6 community. There will a community advisory
7 community. There will be recommendations to the
8 Planning Commission and approval by council. So that
9 will be a completely independent fresh look at what
10 the appropriate use for projects on the maps in this
11 region are.

12 And based on possible past conversation, I
13 wouldn't expect that what is shown now will be what
14 will be proposed by the community in the future.

15 COMMISSIONER OHIGASHI: However, the law as
16 it exists now, what is applied here is the Community
17 Plan as it exists now?

18 MR. HART: I believe that the zoning
19 underlying the Ma'alaea Mauka project remains
20 agriculture largely, and so in the context of what
21 could be developed, there would need to be conformity
22 between the State Land Use District Community Plan
23 and County Zoning before any substantive development
24 could actually --

25 COMMISSIONER OHIGASHI: And that is the

1 existing Community Plan?

2 MR. HARD: Existing Community Plan.

3 COMMISSIONER OHIGASHI: Last question I
4 have is that, Mr. Hopper, isn't it correct that -- I
5 think that Mr. Dega indicated that the 1988, there
6 were initial studies done for a rock quarry. Would
7 the rock quarry be in existence prior to 1988?

8 MR. HOPPER: That's a question I can't
9 answer. I don't know if the rock quarry was in
10 operation prior to that.

11 COMMISSIONER OHIGASHI: My recollection was
12 that it was, and maybe, you know, when I was a
13 youngster.

14 So in some form or another we have had a
15 rock quarry there for 50 years, 60 years; is that
16 right?

17 MR. HOPPER: Again, I can't answer that
18 specifically. I think we can ask the Applicant that,
19 maybe the owners.

20 COMMISSIONER OHIGASHI: I asked the
21 Applicant. They said they don't know.

22 And then the owners aren't here because
23 they don't know. Mr. Hart is waking up, maybe he
24 knows.

25 MR. HART: Chair, there are building

1 permits associated with what appear to be the
2 Applicant's predecessor dating back to 1984 for
3 structures associated with what might be a similar
4 use. Whether or not it contained a full quarry
5 operation, I don't know the answer to that.

6 But there were utility-type buildings being
7 described in our building permit records from '84 era
8 into the '90s.

9 COMMISSIONER OHIGASHI: Thank you, Mr.
10 Hart.

11 I don't have any more questions.

12 CHAIRPERSON SCHEUER: Thank you,
13 Commissioner Ohigashi.

14 Commissioner Chang. I had recognized you
15 before. I want to go over sort of where we are at
16 and manage our schedule.

17 It's 11:45. My suggestion is that we go
18 through any questioning of the County up to 12:15.
19 If we are still on the County at 12:15 or just
20 finishing, we will take a lunch break for 45 minutes
21 from 12:15 to 1:00, and then hear any comments from
22 Office of Planning.

23 Obviously, if it goes faster with Mr.
24 Hopper, then we can end a little bit earlier than
25 that and still convene at 1:00. Does that make

1 sense, folks? Okay.

2 Commissioner Chang.

3 COMMISSIONER CHANG: Thank you, Mr. Chair.

4 Good morning, Mr. Hopper. As always, your
5 explanations are very helpful.

6 I just want to ask you, as a matter of law,
7 do you think the Land Use Commission can extend an
8 expired permit?

9 MR. HOPPER: I think that if they submit
10 within the timeframe contemplated by the condition,
11 that, yeah, the State Land Use Commission has a
12 condition that says:

13 A timely request for extension filed at
14 least 120 days prior to the expiration date.

15 So I think if the Commission provided that
16 timeframe, and they meet met that timeframe that,
17 yes, it could be.

18 It has been, I think, at least once --
19 looks like twice previously. But it's certainly not
20 the first special permit that I think that you looked
21 at extending beyond that time, but I think that you
22 can.

23 COMMISSIONER CHANG: Okay. Is the 120 days
24 the application to LUC, or to the Planning
25 Commission?

1 MR. HOPPER: I think it's the Planning
2 Commission, because after that it says:

3 If the appropriate Planning Commission
4 approves the LUC special permit, it shall forward its
5 approval to LUC for final determination.

6 So I think that condition contemplates
7 filing with the Commission, and then the Commission
8 subsequently, if they do approve it, sending it to
9 the LUC.

10 COMMISSIONER CHANG: Because I will tell
11 you, I do have a concern about the LUC reviewing
12 expired permits. And I'm assuming the County
13 proceeds as quickly as it does.

14 What is your normal procedures for
15 reviewing matters before the Planning Commission?
16 How long did it take you to address this?

17 MR. HOPPER: I think I want to -- on the
18 general process issue, I would want to see if Jordan
19 Hart can answer that. He works with the department
20 who is directly involved with the day-to-day
21 scheduling.

22 I do know in this case there were COVID
23 issues and things like that which were a bit
24 exceptional.

25 I think it's generally based on the

1 Commission's schedule, and these items do require
2 public hearings generally, so have to be posted in
3 the newspaper 30 days before the meeting, and public
4 notice is sent out, I believe, at least for the
5 County permits to go along with this to landowners
6 within 500 feet of the property.

7 So there is a process for it that can take
8 some time. But I can ask if Mr. Hart has anything to
9 add. He may be more directly involved in the permit
10 scheduling and issues like that.

11 MR. HART: I would just reiterate that it's
12 been a long-standing County process to basically we
13 receive the extension requests, and the permits are
14 treated as in effect until the final decision is made
15 even in the date lapses, the life of the permit
16 lapses after they had submitted.

17 Some ordinances provide specific dates,
18 days before the expiration date where submittals need
19 to be made or there could be conditions stating the
20 same things and provided that those are complied
21 with, that's our process.

22 Essentially the issue becomes, if we are
23 not able to have hearings or have the process
24 complete itself, including issues like going to
25 council for conditional permits that may be

1 intertwined with these other permits, that the
2 operators of these permits would have a difficult
3 time trying to conduct business or figure out when
4 they should file extension, not knowing actual
5 duration of the process.

6 COMMISSIONER CHANG: I appreciate that. I
7 recognize that COVID has probably added some
8 additional restraints during this period of time.

9 In my view, it's incumbent upon the
10 Petitioner, notwithstanding what the time period is,
11 to ensure that their requests are being considered on
12 a valid permit, and if 120 days -- what is that six
13 months -- if six months is not going to be enough
14 time to process it through the County Planning
15 Commission as well as LUC, given those legal
16 requirements of publication and notification, in my
17 view, it should be incumbent upon the Petitioner,
18 notwithstanding what the time period is in the
19 permit, in the LUC conditions, to ensure that we are
20 reviewing a valid permit.

21 Many agencies, if your permit is expired,
22 you start all over again. So I appreciate the
23 explanation by both Mr. Hopper and Mr. Hart.

24 That's just sort of my own thought about
25 this. Okay.

1 Let me just ask you, Mr. Hopper, do you
2 have any objections to assuming that we legally can
3 do it, to add the SHPD concerns letter that
4 archaeological monitoring may stop?

5 MR. HOPPER: The official SHPD letter that
6 Mr. Dega had referenced?

7 COMMISSIONER CHANG: Right.

8 MR. HOPPER: I would not have any objection
9 to adding that to the record.

10 COMMISSIONER CHANG: I know that there is a
11 request by the Petitioner, and the County concurs
12 with that, but in my view without an official SHPD
13 concurrence on the archaeological monitoring, I'm
14 very uncomfortable about lifting that condition,
15 because archaeological monitoring is required until
16 we are officially noticed that it is no longer
17 required.

18 All right. Thank you very much. I
19 appreciate the responses.

20 CHAIRPERSON SCHEUER: Thank you,
21 Commissioner Chang.

22 Commissioners, are there further questions
23 for Maui County at this time?

24 Commissioner Cabral.

25 VICE CHAIR CABRAL: Yes, thank you. I was

1 waiting to the end to see if it got answered already.

2 I think my question would be to Mr. Hopper
3 and with Maui County, you did reference, and I had
4 questions about that, so you definitely held public
5 hearings over this past year plus on this matter; and
6 the public, in various areas, was notified that they
7 could submit information or come to a meeting.

8 How were you able to hold those meetings,
9 let's say it was during COVID? What was your method
10 of getting input from the public?

11 MR. HOPPER: I think, and Mr. Hart can
12 correct me if I am wrong, the requirement was a
13 published notice of the Planning Commission meeting.
14 I don't think there were any County meetings outside
15 of the Planning Commission meeting, but the Planning
16 Commission meeting for which you have a transcript
17 was published in the newspaper, and notice was sent
18 to -- again, Mr. Hart can correct me if I'm wrong --
19 to people within a 500-foot radius of the project.

20 So I think -- that's typical with the
21 permits that the County has. But I believe that was
22 the public notification that was done for this
23 project, and Mr. Hart can confirm that, I believe.

24 VICE CHAIR CABRAL: In that method,
25 especially with 500 feet, as well as in general to

1 the public, did you have opposition? Did people come
2 with questions and/or opposition as, or concerns as
3 was stated earlier from the Sierra Club?

4 MR. HOPPER: Again, Mr. Hart can correct me
5 if I am wrong. I did not see -- there was oral
6 testimony from Mr. Ulu (phonetic). I can perhaps go
7 through the staff report of the record. I don't
8 recall -- I definitely do not recall any public from
9 the Sierra Club, or specifically dealing with those
10 issues.

11 I don't know if there was other public
12 testimony. That's usually noted in the staff report
13 that I'm looking at now, that perhaps Mr. Hart, if he
14 knows offhand, whether there was written testimony
15 received.

16 But there was a public hearing, one person
17 testified orally. I believe we have a transcript of
18 that meeting, and the only other thing to confirm --
19 and, again, the other thing that was done was there
20 were seven State and County agencies that were sent
21 for comments, and they got either no response or no
22 comment. So there were the opportunity given for
23 agency comments as well for the permit.

24 VICE CHAIR CABRAL: Thank you.

25 Also in your folks examination on the

1 County level of the relationship between the
2 landowner and the actual Petitioner, the quarry, are
3 you aware of any the terms of that rental agreement
4 or lease agreement that they have that would obligate
5 the quarry to return to assume that obligation that
6 we're questioning of the landowner to return the
7 lands to the condition it was prior to becoming a
8 quarry?

9 Are those terms in that lease agreement, do
10 you know?

11 MR. HOPPER: I don't know. The application
12 was like 200 pages, and so I don't know if the lease
13 was included in that application.

14 But, again, I do agree that that's private
15 agreement. I think it was represented this is our
16 obligation. But there is a condition on the County
17 permit on that, and if we need a stronger condition,
18 I think that's something the Commission can consider.

19 We do recognize, I think, Member Okuda had
20 stated the County -- or the LUC wouldn't have the
21 authority to enforce the terms of that lease.

22 We would have the authority to enforce the
23 terms of the conditions. So if the restoration plan
24 is something that is of importance to the Commission,
25 such that the existing conditions don't cover that, I

1 do think that's something that should be covered in
2 the condition.

3 VICE CHAIR CABRAL: Thank you very much for
4 the added information or reinforced information.

5 Thank you, Chair.

6 CHAIRPERSON SCHEUER: Thank you,
7 Commissioner Cabral.

8 Commissioners, are there further questions
9 for Maui County?

10 I have a series of questions for Mr.
11 Hopper, but I want to make sure if there are
12 questions from others.

13 I guess I'm going to start by thanking
14 Commissioner Aczon for his statement prior to our
15 break that we are limited to the record, his
16 understanding that we are limited to the record that
17 Mr. Hopper brought up in his statements to us.

18 Mr. Hopper, when you were responding to
19 questions from Commissioner Ohigashi regarding the
20 surrounding land uses, were you referring to parts of
21 the record?

22 MR. HOPPER: No. I mean, again, I guess we
23 would could have objected and said that goes beyond
24 the record and not answer it. I think, again, the
25 Community Plan, existing Community Plan, the fact

1 Land Use Commission has approved in a docket for a
2 specific project, I think those are --

3 CHAIRPERSON SCHEUER: It was just a simple
4 question, Mr. Hopper.

5 MR. HOPPER: I think that the previous
6 decisions of the Land Use Commission in the existing
7 Community Plan are matters of record for the
8 surrounding area.

9 I don't think the Commission has to remand
10 and then have all of that in there, but I suppose it
11 could.

12 CHAIRPERSON SCHEUER: Is this hearing today
13 a contested case hearing?

14 MR. HOPPER: Yes, I believe it is.

15 CHAIRPERSON SCHEUER: The contested case
16 hearing was held at County level, and now we are on
17 review of that record?

18 MR. HOPPER: I think you are considering
19 the rights, duties and privileges of specific
20 parties, who is the landowner, to have their permit
21 considered after an opportunity for an agency
22 hearing. This is a hearing that is required by law,
23 and so I think under E&J Lounge this would be
24 considered a contested case, even though there's only
25 one -- no intervenor, but there's only one party.

1 But I would believe this is a contested case hearing
2 and would be subject to those requirements.

3 CHAIRPERSON SCHEUER: All of the
4 requirements for a contested case hearing?

5 MR. HOPPER: Yes.

6 CHAIRPERSON SCHEUER: But not the
7 introduction of new evidence, which is generally
8 allowed in contested case hearing?

9 MR. HOPPER: Well, you've got the odd
10 procedure of the contested case hearing where the
11 Commission's statement -- again, I don't see this
12 verified in case law -- but I know it's what the
13 Commission does, is that evidence needs to be
14 introduced at the Planning Commission for it to be a
15 matter of record.

16 I would love to have this clarified because
17 I don't necessarily see restrictions on introducing
18 additional evidence. But as has been pointed out to
19 us multiple times that that's a limitation.

20 So I believe that you're in a contested
21 case, that it appears that the opinion of the AG and
22 the Commission is that you're in a contested case
23 where essentially in the evidentiary portion of the
24 hearing is closed, and that the parties orally
25 discussing the record already are limited to that

1 record and have to refer to that record.

2 But I don't see how you get away from E&J
3 Lounge conclusion that this is not a contested case.

4 If there is other case law or other things
5 like that that would confirm this is not a contested
6 case, I can certainly look at it. But I do believe
7 that it's a contested case based on the case law on
8 that issue.

9 CHAIRPERSON SCHEUER: So not that I agree
10 with your interpretation that we are in a contested
11 case right now, so would you interpret 15-15-10 Part
12 B our of Hawaii Administrative Rules, then I guess
13 how would you interpret that?

14 And I will just read it for you. Part B
15 governing LUC meetings says:

16 "The Commission shall allow all interested
17 persons an opportunity to submit data, views,
18 arguments, or present oral testimony on any agenda
19 item in open meeting. The Commission may provide for
20 the recordation of all oral testimony. The
21 Commission may impose limitations on the submission
22 of data views, arguments or oral testimony in the
23 interest of preserving due process concerns of the
24 contested case proceeding."

25 What is your interpretation of 15-15-10 (b)

1 in relationship to your contention that we shouldn't
2 essentially allow oral testimony?

3 MR. HOPPER: I raise -- the Commission,
4 Planning Commission as well as this Commission, I
5 believe generally has contested case hearings and
6 allows public testimony as part of these those
7 hearings.

8 You allow the parties to cross-examine the
9 testifiers. And you allow the Commission to ask
10 questions, and you have the testifier sworn in.

11 I think that that's a fine process. I
12 think that's consistent with the contested case
13 process.

14 There are others, perhaps Mr. Chipchase,
15 who disagrees, and believes the public testimony can
16 never be relied upon by a Commission in a contested
17 case for its decision-making. I do not agree with
18 that.

19 My only thing to point out was to check
20 with your AG on whether oral testimony can be
21 accepted at this stage in the proceeding. If it can
22 be, then I would question whether preventing parties
23 from introducing additional evidence at this stage
24 would be appropriate as well. Because we are always
25 told you have to refer to the record only at the

1 Planning Commission.

2 Maybe that's not the case, maybe we can all
3 introduce new evidence now, and I wouldn't object to
4 that necessarily. But we are repeatedly told at this
5 stage, there's no new evidence allowed, you have to
6 have it all at the Planning Commission. And maybe
7 that's not the case.

8 And, again, I wouldn't necessarily say that
9 that is the case when the first time I came before
10 the Commission years ago on a special permit, I was a
11 bit surprised when the new position was taken that if
12 it's not in the record, you have to remand to the
13 Planning Commission to establish that record, and
14 then come back before the Commission.

15 So I don't necessarily agree with that, but
16 it's been consistently the Commission's process. So
17 if you can consider the oral testimony for the first
18 time on these issues raised at the Land Use
19 Commission level, and that's the precedent that
20 you're going to set with respect to that, then I
21 suppose, you know, go ahead and proceed with that.

22 I just raise that as an issue because I
23 know that that has been raised as a concern by the
24 Commission in the past. I'm not necessarily making a
25 formal objection to hearing that testimony, but, you

1 would, know you want to consider whether it's
2 consistent with the Commission's process of not
3 allowing testimony that's not a part of record as
4 evidence when you are considering a special permit
5 that has been recommended for approval by the
6 Commission.

7 CHAIRPERSON SCHEUER: I didn't hear you
8 when I mentioned the two written testimonies have
9 been submitted, people supportive of this action.
10 The County didn't object, right?

11 MR. HOPPER: Well --

12 CHAIRPERSON SCHEUER: I didn't miss an
13 objection from you?

14 MR. HOPPER: I think that's probably if you
15 are not considering testimony that was not provided
16 to the Commission, that would also be testimony that
17 would --

18 CHAIRPERSON SCHEUER: I didn't miss an
19 objection from the County, Mr. Hopper, at that time,
20 did I?

21 MR. HOPPER: No.

22 CHAIRPERSON SCHEUER: And I didn't miss one
23 when Ms. De Naie was sworn in and offered testimony,
24 did I?

25 MR. HOPPER: No, we didn't make an oral

1 objection on that.

2 CHAIRPERSON SCHEUER: I want to go to your
3 discussion about agriculture uses of the land. And
4 particularly the standards that we have to consider
5 under Special Use Permit.

6 I might be misunderstanding your
7 interpretation of the law. I do agree that the fifth
8 part suggests that lands unsuitable for use in the
9 Agricultural District is something to be considered.

10 But are you suggesting that if, in the
11 course of issuing a Special Use Permit, the land goes
12 from land that could be used for agriculture to no
13 longer being able to be used for agriculture, that is
14 now a qualification for receiving a Special Use
15 Permit?

16 MR. HOPPER: No. I think the Commission
17 rule on that is that if the land is not suitable for
18 the uses permitted, like, I guess, it's particularly
19 rocky, or if the soil classification is poor for
20 agricultural use, something like that. That that's a
21 factor in favor of having it being used as special
22 permit for something other than agriculture. I think
23 that's the intent of that rule.

24 CHAIRPERSON SCHEUER: Because I did ask --
25 well, before I ask my questions of the Applicant, I

1 said I want to refer to the record, not trying to get
2 new evidence. And I asked Mr. Dega what the prior
3 use was, and he indicated that it was used for
4 sugarcane. So I was relying on that statement,
5 which I assume was in the record, when I was asking
6 my questions, that it's being transformed.

7 The last thing from me for right now.

8 You mentioned agencies were consulted. Was
9 the Division of Forestry and Wildlife, and State
10 Department of Natural Resources, and/or the United
11 States Fish and Wildlife consulted during this
12 process?

13 MR. HOPPER: I read that from the staff
14 report. I'd want the department to specify what
15 agencies was sent -- we can find it in the record. I
16 just don't know the answer offhand.

17 CHAIRPERSON SCHEUER: Mr. Hart?

18 MR. HART: I'm going to need to double
19 check the list of agencies who were consulted.

20 CHAIRPERSON SCHEUER: I guess related to
21 that is -- Mr. Hopper, would you agree that the 2006
22 Decision and Order from the Commission is part of the
23 record on this?

24 MR. HOPPER: Yes, I think previous
25 Commission decisions. And, in fact, that's 2011. I

1 think it may have been attached -- the 2011 permit
2 was attached to the staff report. I don't know if I
3 see the 2006. It may actually specifically be there.

4 CHAIRPERSON SCHEUER: It is.

5 MR. HOPPER: I'm trying to find it. But if
6 it was in the documents transmitted, yeah, that's in
7 the record.

8 CHAIRPERSON SCHEUER: So when the
9 Commission made a finding that no endangered species
10 were there at that time, if that's no longer the
11 case, isn't that something that somewhere in this
12 process we should be concerned about?

13 MR. HOPPER: Well, I mean, it's a bit
14 difficult. The only evidence of that, if you are
15 going to consider it as evidence, was oral testimony
16 today from a member of the Sierra Club, and that's --
17 unless the Applicant or the department has any other
18 record of that, for the first time at your Land Use
19 Commission proceeding that issue was raised. And
20 it's very difficult to respond to whether or not
21 there is a presence of potentially an endangered
22 species in the area.

23 So as of now, we would want to know any
24 ways the evidence the Commission is basing it on, on
25 the concern that there may be endangered species, I

1 think that's generally what we would look at.

2 If it's going to be the oral testimony, and
3 that raises sufficient concern for the Commission,
4 then I suppose the Commission can weigh that as they
5 would like.

6 But it's, I think, probably difficult for
7 the Applicant and the County to respond to that if
8 for the first time it's being raised in oral
9 testimony at the Land Use Commission level for that
10 situation. So that's a tough point to respond to.

11 CHAIRPERSON SCHEUER: I do think the
12 Applicant stated, in response to a question from me,
13 that there was no additional review of the property
14 because -- for any newly listed species.

15 So aside from the oral testimony of Ms. de
16 Naie, the Applicant did state that it was not part of
17 their process to look for endangered species that may
18 have been listed since the previous issuance of a
19 special use permit.

20 MR. HOPPER: Yes, that's correct.

21 CHAIRPERSON SCHEUER: I don't have anything
22 further. Mr. Hopper, I appreciate your responses.

23 Mr. Hart?

24 MR. HART: I need to clarify my statements
25 to Commissioner Ohigashi regarding building permits.

1 I had a moment to take little better look at that.

2 The permits for the '80s appear to be
3 associated with other uses. This appears to have
4 been a much larger parcel, and only permits related
5 to the '90s might be associated with this type of
6 use. Thank you.

7 CHAIRPERSON SCHEUER: Did you have a
8 followup for that, Commissioner Ohigashi? No.

9 MR. HOPPER: Mr. Chair.

10 CHAIRPERSON SCHEUER: Mr. Hopper.

11 MR. HOPPER: I just realized, I wanted to
12 clarify something.

13 These were time extensions, and I believe
14 that they were definitely sent out for public
15 hearing, but I just want to confirm with the
16 department if the mail-out happened also, mail-out to
17 individuals within 500 feet.

18 I know that's standard practice of
19 applications, but I want to confirm that that
20 happened with respect to the amendments, because it
21 occurs to me that it may not have.

22 So I just want to confirm that with the
23 department that the 500-foot radius notice was, in
24 fact, mailed. I want to correct that for the record.

25 CHAIRPERSON SCHEUER: Please, Mr. Hart.

1 Not that -- since I'm familiar enough with that
2 place, there is not a lot within 500 feet.

3 MR. HART: I'm going to need to dig through
4 the file for that. I dismissed Mr. Fasi from the
5 meeting.

6 MR. HOPPER: I think whatever process was
7 required was followed, but I didn't want that to be
8 our there if it didn't happen, but I think your point
9 is taken, Chair.

10 CHAIRPERSON SCHEUER: Is there anything
11 further, Commissioners?

12 Commissioner Ohigashi.

13 COMMISSIONER OHIGASHI: I was just going to
14 suggest that when we come back from the recess, that
15 Mr. Hart can inform us whether or not notice was
16 sent.

17 CHAIRPERSON SCHEUER: If it's possible
18 during the lunch break, Mr. Hart, that would be
19 appreciated.

20 Anything further, Commissioners, at this
21 time?

22 Commissioner Giovanni.

23 COMMISSIONER GIOVANNI: Just wanted to tell
24 the Chair I'm unavailable from 3:00 P.M. today.

25 CHAIRPERSON SCHEUER: Hopefully we will get

1 through this and our other matters.

2 Anything further? If not, it is 12:10.

3 Let's recess for lunch, and we will reconvene at
4 1:00 P.M. At that time we will receive comments from
5 the Office of Planning and any additional information
6 regarding this question from Mr. Hart.

7 (Noon recess taken.)

8 CHAIRPERSON SCHEUER: It is 1:02. We're
9 back on the record.

10 When we start -- Mr. Hart, were you able to
11 find out the answer to that question from
12 Commissioner Ohigashi prior to --

13 MR. HART: Chair, thank you.

14 For the extension of special permits, the
15 department -- when no changes are proposed, the
16 department treats those as communication items with
17 the Maui Planning Commission for the various planning
18 commissions that we're dealing with, and so the
19 noticing requirement for that is the publishing of
20 the agenda at the clerk's office and on the Planning
21 Commission's website. But there's no requirement for
22 direct mail to abutting neighbors in that context.

23 CHAIRPERSON SCHEUER: Thank you.

24 Mr. Hopper.

25 MR. HOPPER: I just want to apologize for

1 my misstatement on that issue. There wasn't a
2 newspaper notice, or the notice to neighbors within
3 500 feet. There was a public meeting held, but with
4 posted agenda which is on the County's website, and
5 is mailed to those people that generally get those
6 agendas.

7 But I want to apologize for the
8 misstatement on that.

9 CHAIRPERSON SCHEUER: Thank you so much,
10 Mr. Hopper, very much appreciated.

11 Ms. Kato.

12 MS. KATO: Thank you, Chair. My comments
13 are fairly brief.

14 The Office of Planning recommends approval
15 of the 15-year time extension request from Hawaiian
16 Cement, as recommended by the Maui Planning
17 Commission.

18 This includes the recommendations to delete
19 Conditions 10 and 16 from the Special Permit.

20 And please note that the Office of Planning
21 did not have sufficient time to seek consultations
22 with state agencies, so this recommendation is based
23 solely on the Office of Planning's review of the
24 submission.

25 The Office of Planning believes the current

1 uses on the site, including the rock quarry
2 operation, constitute unusual and reasonable uses
3 that are appropriately allowed with a special use
4 permit.

5 As Mr. Hopper noted, one of the guidelines
6 for granting the special use permit is whether the
7 land is unsuited for uses permitted within the
8 district. And in this case, the soils of the project
9 site have been classified by the Land Study Bureau as
10 having overall productivity rating of E, so they are
11 generally of poor quality and unsuitable for
12 agricultural uses, or the reasons that are currently
13 permitted within the district.

14 The Office of Planning recommends that the
15 important needs of the Maui construction industry
16 (indecipherable).

17 Also based on the record that OP reviewed,
18 the current uses will not adversely impact the
19 surrounding properties or public resources.

20 Regarding the deletion of Conditions 10 and
21 16, as clarified by the Applicant, they are no longer
22 applicable due to the results of the archaeological
23 inventory survey and the archaeological monitoring
24 plan that was prepared in 2008 and accepted by SHPD,
25 and also the Applicants subsequent efforts.

1 Specifically we understand that the
2 temporary site T9 was determined not to be an
3 archaeological site, and did not warrant any
4 additional measures. As such, the conditions related
5 to site T9 can be removed.

6 For those reasons the Office of Planning
7 recommends approval of the 15-year time extension
8 request and the deletion of those conditions,
9 Conditions 10 and 16.

10 Thank you. That's all my comments.

11 CHAIRPERSON SCHEUER: Questions for Ms.
12 Kato, Commissioners?

13 Commissioner Chang.

14 COMMISSIONER CHANG: Thank you, Mr. Chair.

15 Ms. Kato, Condition No. 10, as I understand
16 it, SHPD's letter requires full-time archaeological
17 monitoring.

18 We heard from their consultant that they
19 are not doing full-time monitoring because SHPD has
20 concurred with the cessation of monitoring given that
21 it was just rock.

22 But there's nothing in the record to say
23 that. The only thing we have in the record is SHPD'S
24 April 2008 letter, which requires full-time
25 monitoring.

1 So do you have any objections to entering
2 SHPD's letter that modifies the full-time monitoring
3 to permit the cessation of archaeological monitoring?

4 MS. KATO: Well, generally I do not, as
5 that does clarify it; but at the same time, I do have
6 an issue with possibly -- there is a question of
7 whether new evidence can be brought that isn't
8 already in the record.

9 We haven't reviewed it. I'm not sure to
10 what extent it can be put in the record at this point
11 to consider.

12 COMMISSIONER CHANG: Then the question for
13 me to you is, how can you withdraw that condition if
14 it is not -- if, based upon the record, it's not --
15 the Petitioner is not doing archaeological
16 monitoring? How can you recommend withdrawal of the
17 condition?

18 MS. KATO: Well, our opinion is, our
19 recommendation is based on the presentations made by
20 the Applicant and the information from the Planning
21 Commission that this is no longer an issue and no
22 longer applicable.

23 COMMISSIONER CHANG: But the record that
24 you're relying upon is the April 2008 letter, which
25 requires archaeological monitoring.

1 So independent from what the Petitioner has
2 represented, how can you, Office of Planning, agree
3 to withdraw this condition if it is still an
4 outstanding condition?

5 MS. KATO: I think Aaron from Office of
6 Planning would like to say something.

7 CHAIRPERSON SCHEUER: Aloha, Aaron.

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

10 THE WITNESS: I do.

11 CHAIRPERSON SCHEUER: You might need to
12 speak up, you're muffled.

13 AARON SETOGAWA

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

17 DIRECT EXAMINATION

18 MR. SETOGAWA: Our reading of the
19 materials, our understanding is that monitoring plan
20 was based on T9 being a historic site, and that once
21 the determination was made that was not a site, the
22 conditional -- all the other conditions regarding the
23 that site were no longer applicable.

24 And so that's the basis of our
25 recommendation that Condition 10 and 16 be removed.

1 COMMISSIONER CHANG: I guess, Aaron, in all
2 due respect, I guess I would disagree with your
3 reading of that condition as SHPD -- it says subject
4 to clarification by SHPD, and their letter
5 specifically says: Full-time archaeological
6 monitoring for all areas being excavated.

7 The area had not been fully excavated at
8 that time, so it didn't only apply to T9, it applied
9 to the entire property.

10 So I disagree with your interpretation that
11 the monitoring was not only related to T9, that's
12 what the buffer was for, the fence was for. However,
13 the monitoring was because excavation was going to
14 occur on the rest of the property.

15 So I beg to differ with OP's interpretation
16 of that condition.

17 Ms. Kato, is that your response? You're
18 relying upon Mr. Setogawa's interpretation? I don't
19 mean to be so technical about this, but I don't
20 believe the record -- in the absence of that
21 clarifying letter from SHPD, they're not in
22 compliance, because they're not doing full-time
23 monitoring.

24 MS. KATO: I guess my understanding that
25 these conditions related to that site, T9.

1 COMMISSIONER CHANG: I have no further
2 questions, Mr. Chair.

3 CHAIRPERSON SCHEUER: Thank you,
4 Commissioner Chang.

5 Commissioner Okuda.

6 COMMISSIONER OKUDA: Thank you, Mr. Chair.

7 Ms. Kato, a followup question to what
8 Commissioner Chang was asking.

9 Would you have an objection accepting that
10 letter that was referred to, which Commissioner Chang
11 was describing, and if it turns out that that letter
12 does not say what the Applicant's archeologist has
13 testified that it said, that we could consider that
14 potentially element of a fraudulent testimony, and
15 then the Office of Planning would have the
16 opportunity, if it wished, to basically file a
17 petition to get us to reverse the decision or modify
18 the decision if that's really what the Office of
19 Planning wants to do?

20 I'm just trying to think of what -- not a
21 technical way or practical way of getting this done,
22 because I don't believe practicality should override
23 the requirements of law, but I think one way of
24 resolving this consistent with the law is, unless you
25 see some real present harm right now of allowing that

1 letter to supplement the record, you know, you'll be
2 free to review that document, to consult with
3 whichever agency or agencies or people you want to
4 consult with, and if it turns out that the
5 representations that were being made about what that
6 letter really says are false, you can ask for relief.

7 And that might be a better way than
8 requiring us to make a decision. And we'll make the
9 decision, but forcing us to maybe make a decision
10 which might not be -- you know, I don't want to say
11 won't amount to a real hill of beans, but that's kind
12 of what it might be, would that be an acceptable
13 alternative?

14 In other words, you allow the letter in,
15 reserving your right to file a motion to set aside
16 the decision if it turns out that somebody has lied
17 or misrepresented something here?

18 MS. KATO: Generally allowing this
19 additional evidence into the record, my understanding
20 is the LUC's practice is not to, and that the
21 evidentiary portion is over as of the Planning
22 Commission's time. That being said, I think the LUC
23 generally has discretion to waive or suspend rules
24 for good cause so --

25 COMMISSIONER OKUDA: I don't mean to

1 interrupt, but, you know, my view of what is allowed
2 at certain points -- and I will admit to you, I
3 haven't prepared my own internal memo with case
4 citation, but at this point in time I'm more
5 convinced with Mr. Hopper's analysis of some of these
6 issues than relying on what I was actually thinking
7 before.

8 In other words, just because there's been
9 past practice, unless it's shown that the practice is
10 consistent with the requirements of law, I mean, just
11 because we have done things a certain way doesn't
12 make it right or even reasonable.

13 I'm not saying we're wrong, but I'm just
14 trying to, again, look at, you know, would the Office
15 of Planning just not have an objection to this letter
16 being added to the record; reserving the Office of
17 Planning's right to seek further relief?

18 In other words, if the Office of Planning
19 thinks that there was some shenanigans going on here,
20 or some misrepresentations, you won't be precluded at
21 that point from raising the issue, and at that point
22 Office of Planning can also make independent judgment
23 whether it's really in the public interest to do so
24 or not?

25 I'm just trying to find a way of ending of

1 this docket expeditiously without having to burn up
2 everybody's time on something that may not make a
3 practical or legal difference in the end.

4 MS. KATO: Okay, I apologize. I think I
5 understand the issue, it's just because I have not
6 been in this position long, I'm not that fam -- I
7 haven't looked into that particular issue, but
8 generally if the LUC feels that it is okay, the
9 Office of Planning does not object.

10 COMMISSIONER OKUDA: Thank you very much.
11 Thank you, Mr. Chair. I have no further
12 questions.

13 CHAIRPERSON SCHEUER: Thank you,
14 Commissioner Okuda.

15 Commissioners, questions for Ms. Kato at
16 Office of Planning?

17 Ms. Kato, so you said there was limited
18 time, and you did not have the opportunity, as is
19 often the practice for the Office of Planning, to
20 consult with other agencies.

21 MS. KATO: That's correct.

22 CHAIRPERSON SCHEUER: So there was no
23 consultation necessarily with the Division of
24 Forestry and Wildlife?

25 MS. KATO: That's correct.

1 CHAIRPERSON SCHEUER: What do you think I
2 should do? What do you think we should do here
3 regarding -- somebody said on the record, whether
4 it's correct or not, we don't know -- whether it
5 should be considered as evidence is debated -- but
6 somebody said there might be the presence of
7 endangered species on this property.

8 If I understand the time extension
9 correctly, it's going to allow the full use of the
10 Petition Area, so potentially an impact.

11 Certainly the 2006 decision of the LUC
12 indicated there were no endangered species on the
13 area, but this species was not listed at that time.

14 MS. KATO: Well, the Office of Planning
15 just reviewed what was in the record and submitted
16 from the Planning Commission, and there was nothing
17 in it about the endangered species, as you mentioned.
18 And also the only indication from it has been from
19 oral testimony from the public.

20 And that, I don't think, can really be
21 considered evidence. It's not part of the record.
22 But if the LUC feels that there is some -- there's
23 enough there to make you think that there's something
24 substantially missing, and there's something from
25 this Application, then I guess the option would be to

1 remand it.

2 CHAIRPERSON SCHEUER: I was kind of hoping
3 now when they said, no, we didn't do anything extra
4 for any new species, you guys would be like? Oh, no.
5 Like we totally always do, we talked to DOFAW and
6 they're fine. But your response is the opposite, you
7 didn't?

8 MS. KATO: Well, we did receive -- my
9 understanding the application was not entirely
10 complete, and so last week -- and we only just
11 received it, I think, on the 21st.

12 So it takes time for us to review and then
13 to and prepare letters to send it to state agencies,
14 and then the state agencies need time to review it.

15 CHAIRPERSON SCHEUER: I'm not berating you
16 for lack of consultation, just to be clear. I'm sort
17 of like hearing this is where we are --

18 MS. KATO: Well, and at the same time, even
19 if the State agencies had received it, there was no
20 indication in the record that there were any
21 endangered species on the property. So that would
22 not have been --

23 CHAIRPERSON SCHEUER: That was because the
24 record wasn't updated to look for those, by the
25 Applicant's admission.

1 MS. KATO: That is correct. But at the
2 same time, it's unclear to what extent -- I mean,
3 there hasn't been any real evidence of this.

4 CHAIRPERSON SCHEUER: Correct.
5 Commissioner Ohigashi.

6 COMMISSIONER OHIGASHI: Just to followup to
7 Chair's question.

8 Your recommendation then is to ignore the
9 testimony?

10 MS. KATO: Not ignore, but I think just
11 generally to consider it in the decision as this was
12 oral testimony that was received, but not necessarily
13 taken as there are endangered species in the property
14 site.

15 COMMISSIONER OHIGASHI: What weight -- how
16 would you determine weight of such evidence, and
17 necessity of whether or not -- because, you know, it
18 is a big deal, an endangered species claim. And it
19 does have significant ramification.

20 How much weight do you think we should put
21 on it? Just asking your opinion.

22 MS. KATO: I just don't have the experience
23 to really say. I think that is up to the LUC's
24 discretion.

25 COMMISSIONER OHIGASHI: I'll give you the

1 hint, the guys sitting up here probably don't have
2 that kind of experience anyway.

3 In fact, you know, so that's the question I
4 have, and that's what I'm weighing in my mind, what
5 to do if this kind of stuff takes place, five years
6 down the line we're being accused of decimating a
7 habitat for a unique creature that is only in Hawaii?
8 I'm not sure what to do.

9 CHAIRPERSON SCHEUER: I mean, if I can
10 follow on your questioning, Commissioner Ohigashi --

11 COMMISSIONER OHIGASHI: Sure.

12 CHAIRPERSON SCHEUER: -- of Ms. Kato.

13 I don't think, just to be really clear on
14 the record, I don't think the operators or landowner
15 is like, yeah, let's wipe out an endangered species.
16 I think if they were given fair notice in the
17 approval process, if Maui County said, hey, you
18 should look for this, or their consultant had -- or
19 OP consulted with DOFAW, yeah, this newly listed
20 species, they would be like, oh, yeah, we will take a
21 look, see whether or not there is potentially any
22 impact. We'll hire the right experts. We'll then
23 see whether or not the County and the LUC want to put
24 a condition on so that we can continue our operations
25 in the course of doing this.

1 I don't doubt that they're working with
2 good intention, that what they're doing, they're
3 doing by benefit of Maui to provide construction
4 materials.

5 I don't doubt that the witness is -- I
6 mean, the witness said on the record they're not
7 trying to stop operation of the quarry, saying we
8 have certain concerns.

9 My problem is, you know, on the one hand,
10 we want to see stuff go forward not unreasonably, on
11 the other hand we don't want to inadvertently have
12 our approval cause harm to certainly, what I think to
13 be our public trust resources, endangered species.
14 But we don't have a good basis, we just like have,
15 huh, somebody said it's here.

16 MS. KATO: This was again raised for the
17 first time by a witness who wanted to testify, and
18 I'm not clear that they even reviewed the entire
19 application. So I'm just not sure to what extent
20 they have looked at this. And if it had been raised
21 sooner, we would have looked at it.

22 But, again, it wasn't looked at at the
23 County level, so it's not part of the record --

24 CHAIRPERSON SCHEUER: It was rushed when it
25 got to you.

1 Commissioner Giovanni.

2 COMMISSIONER GIOVANNI: So, Chair, I was
3 just listening to your comments. I was saving my
4 comments on this topic to deliberation, but are we
5 free to make comments on this topic at this point?

6 CHAIRPERSON SCHEUER: You certainly can. I
7 was trying to phrase mine in terms of a question for
8 the Office of Planning as to what the council thought
9 we should do. But go ahead.

10 COMMISSIONER GIOVANNI: I didn't hear a
11 question, so that's why I asked if I could comment.

12 I'm very concerned about the protocol that
13 we might be establishing when any public testifier
14 could come forward without any concrete basis, or
15 with concrete basis to lay a claim at this point of a
16 conversation or a petition going forward, and throw
17 it into a situation where we are seriously
18 considering remand of the petition back to the
19 beginning.

20 I just have a lot of concerns about what
21 precedent we might be setting, responding, what I
22 would call in my mind over -- kind of a reactionary
23 fashion. I mean, my understanding is if there are
24 endangered species that are threatened in any part of
25 our community, there are means for that to be raised

1 and considered in a more formal way. I'm not sure
2 this is the way to do it.

3 That's my comment. Thank you,

4 CHAIRPERSON SCHEUER: Thank you,
5 Commissioner Giovanni.

6 Did you have a reaction, Ms. Kato?

7 MS. KATO: I do agree that that is a danger
8 to this, because it's just based on statements made
9 by a member of the public with no verification or
10 evidence. And it hasn't really been considered, and
11 there is no discussion on it basically.

12 COMMISSIONER GIOVANNI: I think the key
13 thing you said, Ms. Kato, there's no verification, so
14 how are we to react any time somebody brings that
15 forward?

16 I can see in all future LUC petitions where
17 opening the door for somebody to -- not to intervene,
18 but just present public testimony raising concerns
19 from left field, unverified and throwing everything
20 into a turmoil. I just have a lot of concern about
21 that.

22 CHAIRPERSON SCHEUER: Commissioners,
23 further questions for Office of Planning?

24 Commissioner Aczon.

25 VICE CHAIR ACZON: I guess I have a quick

1 question. Let us say that nobody came forward and
2 something is there, then we approve the extension and
3 two, three years later, then, you know, evidence came
4 out. Then what happens?

5 MS. KATO: Well, LUC is considering whether
6 to approve this or not based on the record before the
7 LUC. And if it wasn't included, it never came up;
8 possibly it should have been raised, but if it
9 didn't, then it's not something that was considered.

10 VICE CHAIR ACZON: But that wasn't my
11 question.

12 My question is: If LUC approved this,
13 because they didn't have -- nobody raise it. No
14 evidence of it. But two, three years later somebody
15 came forward with evidence, then what is our recourse
16 or what should be done? Should it go back to LUC
17 or --

18 MS. KATO: In terms of the LUC's procedures
19 on this, I think there's LUC rules for appeal. I
20 don't know if that might be past the appeal period,
21 in which case I believe it would be too late, because
22 there is statute of limitation.

23 But I'm saying this off the top of my head
24 without having looked directly at it.

25 Perhaps the LUC's AG might know better

1 about this.

2 CHAIRPERSON SCHEUER: Commissioner Chang.

3 COMMISSIONER CHANG: Commissioner Aczon, do
4 you have any other questions?

5 VICE CHAIR ACZON: I was just going to say
6 that I agree with Commissioner Giovanni. If this is
7 kind of a very dangerous precedent that, you know, we
8 going to consider a lay testimony without, you know,
9 fully getting evidence and delay the other
10 proceeding. That's all. Thank you.

11 COMMISSIONER CHANG: I think, Commissioner
12 Aczon, I appreciate your practicality in looking at
13 this.

14 Let me ask you, Ms. Kato, I'd like to
15 followup on Commissioner Aczon's point because I
16 think it is a really important one.

17 Independent of the Land Use Commission, if
18 evidence comes forward, let's say Sierra Club does
19 documentation that there is an endangered species on
20 the property, independent of the Land Use Commission,
21 isn't the recourse to send that information to the
22 Department of Land and Natural Resources, DOFAW or to
23 U.S. Fish and Wildlife for an investigation and a
24 possible enforcement action, because aren't they
25 putting at risk the endangered species?

1 So that wouldn't come back to LUC as appeal
2 of this extension, that would be a regulatory issue
3 to both DLNR or Fish and Wildlife, would you agree?

4 MS. KATO: I'm not sure I can answer that.
5 I would have to look.

6 COMMISSIONER CHANG: Great point,
7 Commissioner Aczon, because I think you're right,
8 that even if we didn't know about it now, but it
9 comes up in the future, I think there are regulatory
10 resources to address that.

11 Thank you very much, Commissioner Aczon.

12 CHAIRPERSON SCHEUER: Commissioner
13 Giovanni.

14 COMMISSIONER GIOVANNI: I think
15 Commissioner Chang is spot on. Based on my
16 experience, when there is a take of an endangered
17 species, there is a course of action that can be
18 taken for enforcement, and it does not come back to a
19 permit or special permit-type of situation. It is an
20 enforcement action by Fish and Wildlife, Department
21 of Land and Natural Resources or the courts if it
22 comes to that. That's my experience.

23 MS. KATO: When I said appeal, I generally
24 meant appeal to circuit court. That's all. Sorry, I
25 don't have anything else to say.

1 CHAIRPERSON SCHEUER: Anything further,
2 Commissioners?

3 I would like to allow for any sort of final
4 statements by the parties before we go into
5 deliberation, give the opportunity to all three
6 parties.

7 Mr. Esmeralda, does the Applicant wish to
8 say anything further?

9 MR. ESMERALDA: Chair, we just like to,
10 again, thank you for your time and thoughtful
11 questions. It was a good discussion. I don't think
12 there's anything further from our side.

13 CHAIRPERSON SCHEUER: Mr. Hopper?

14 MR. HOPPER: Just that if the Commission is
15 inclined to consider the SHPD letter, there is -- I
16 think the rule, and I suggested, and maybe there is
17 another one, 15-15-63(k) which deals with official
18 notice. I don't think this would necessarily
19 establish a precedent where you would have to allow
20 everybody to submit new evidence in all these
21 proceedings.

22 But if there's a particular government
23 issued letter that wasn't discussed in the record, I
24 think if the issue was certainly discussed in the
25 record that may allow you to consider that.

1 So I think that was the only thing I would
2 want to add. I think I said that earlier, but want
3 to clarify that.

4 I don't think it's a precedent overturning
5 thing about not having evidence that the Planning
6 Commission didn't consider. It may be a case where
7 you can look at doing that. So just wanted to
8 suggest that.

9 CHAIRPERSON SCHEUER: Anything further, Ms.
10 Kato?

11 MS. KATO: The section he's referring to,
12 that's in reference to contested case evidentiary
13 requirements?

14 CHAIRPERSON SCHEUER: Mr. Hopper, do you
15 care to respond?

16 MR. HOPPER: Yes, it's evidence, it's which
17 is generally accepted. I think it's generally
18 applicable to your proceedings, if -- I mean, I think
19 that you don't have a better, clearer rule of
20 evidence that are specific necessarily to special
21 permits.

22 I think it's part of subchapter 7, agency
23 hearing, includes hearing procedures. It's under
24 evidence is what it's listed.

25 If the Commission believes that it can't

1 consider it, this is ultimately up to the Commission.
2 Just making a suggestion that we may make it easier.
3 If the Commission believes that it can't do that,
4 that's up to the Commission ultimately.

5 I was just suggesting this as official
6 notice, which I think is similar to judicial notice
7 that certain things -- maybe you can do that with a
8 government record, but from State, given the
9 Commission disagrees with that, that's fine, but I
10 just wanted to raise that as a potential avenue for
11 consideration, and I think it's the closest thing you
12 have to rules of evidence, which of course, Hawaii
13 Rules of Evidence don't apply, so you got a bit of
14 ability to have some leeway, but I just wanted to
15 base that.

16 MS. KATO: Okay, I understand. I have no
17 further comments. Thank you.

18 CHAIRPERSON SCHEUER: Okay, Commissioners,
19 we can move into deliberations.

20 You know, before we go into full
21 deliberation, I would like to ask our Executive
22 Officer, Mr. Orodener, who, thanks to the change of
23 AGs on the Office of Planning side as well as our
24 AGs, might have a better recollection of -- we
25 actually did face an almost identical issue with a

1 quarry in Hilo except for the late testimony
2 allegations was that there was a historic trail that
3 was going to be affected.

4 Can you kind of walk us through what we did
5 previously, Mr. Orodener?

6 EXECUTIVE OFFICER: Thank you, Chair.

7 I'm trying to recollect the circumstances
8 of that, because I actually -- my recollection is
9 that that trail was actually in the record. So
10 uncertainty as to whether or not it actually passed
11 through the property, which is why we ultimately
12 remanded for further clarification.

13 So there was the issue that had been
14 raised, the existence of the roadway had been raised
15 at the County level, but it wasn't clear as to
16 whether or not what (indecipherable).

17
18 This case is a little bit it different in
19 that we have new information that may or may not be
20 credible. And under those circumstances, either the
21 Commission can determine that information lacks
22 weight, and therefore, can move forward; or it can
23 provide some weight to the information. However,
24 perhaps the condition that would require further
25 investigation, or remand back to the County by the

1 Commission.

2 CHAIRPERSON SCHEUER: Thank you.

3 The case was SP14-404 James Glover, Ltd.

4 Okay, Commissioners. So I'm just going to
5 read for the benefit of the Commission from our own
6 website for that case.

7 The LUC received a special permit
8 application along with all necessary filed documents
9 from the County of Hawaii Windward Planning
10 Commission on August 1st, 2014.

11 The Commission heard the subject
12 application at its hearing on November 20th, 2014 in
13 Kahului, Maui.

14 At the time new information had come to the
15 Commission from the State Department of Defense
16 regarding a potential property boundary dispute and
17 archeological sites.

18 Since this information was not already part
19 of the official record forwarded from the Planning
20 Commission, the LUC remanded the application back to
21 the County by order on January 23rd, 2015. Noted
22 that the new information could be reviewed, and any
23 changes to the recommendation -- recommended
24 condition could be made.

25 It was right when I started the Commission,

1 so that's why I had to sort of put it out as to my
2 recollection.

3 We are in deliberations.

4 Commissioner Ohigashi.

5 COMMISSIONER OHIGASHI: Move to remand, and
6 if I get a second, I'll explain my reason.

7 CHAIRPERSON SCHEUER: There is a Motion to
8 Remand for further proceedings.

9 Commissioner Wong.

10 COMMISSIONER WONG: I'll second to hear his
11 reasons.

12 CHAIRPERSON SCHEUER: Okay, Commissioner
13 Ohigashi.

14 COMMISSIONER OHIGASHI: First of all, I
15 think that lawyers tend to argue things from both
16 sides of their mouth, whichever seems to support
17 them. I know I have in the past.

18 I think that you cannot move forward on
19 Conditions 10 and 16, because it is not technically
20 part of the record. To make it part of the record
21 would require us to take notice, which would then
22 open it up to questions as to whether or not we
23 can -- whether or not the Sierra Club would have
24 standing to file status, or some kind of intervenor
25 status into this matter.

1 I would prefer that if we are to take that
2 up, that evidence be properly introduced.

3 The second reason why I think that we
4 should remand is that I think that special use
5 permits, and the use of special use permits in the
6 past sort of tamp down the temporary nature and the
7 temporary use, and that's why I think that the record
8 shouldn't contain a discussion or even an analysis of
9 the community plan designation as it exists now and
10 what affect would this particular use be, or the
11 impact of this particular use in the future.

12 It should outline an idea, in my mind, of
13 when are we going to stop, and are we going to look
14 for additional resources to meet the necessary needs,
15 provided material, construction material.

16 And to the extent for just extension sake,
17 I don't think supports the intent of a special use
18 permit, being temporary in nature and for -- because
19 this resource won't go away. This resource will be
20 used up. And then we're going to give another SUP
21 for 15 years to another place.

22 Perhaps what we should be looking at is
23 some sort of impact analysis as to what will happen
24 after the use, and a record to show, yes, that we
25 need this time to secure additional resources in

1 areas where we going to take a look.

2 That was similarly done to, I think, the
3 landfill operation I believe in Waimanalo.

4 The third thing I wanted to say is that I
5 guess there is a mechanism to report this species.
6 However, the guidelines that are required, the
7 guidelines that are placed upon us is that we should
8 consider this matter.

9 So I think that we should remand for the
10 purposes of having the Planning Commission
11 establishing or investigate whether this is credible,
12 and determine whether or not this should be addressed
13 at this point in time. And that's the mechanism that
14 we set up is that the Planning Commission holds the
15 necessary hearings in order for this case.

16 We are not denying a project because of
17 this endangered species. What we are doing is to
18 say, okay, make the claim. Have to do it in front of
19 the Planning Commission, and you have to provide your
20 proof, and they're going to make a recommendation to
21 say whether or not if there is a need for a study for
22 environmental -- for this new allegation, or that
23 their is allegation is bogus because it's too far
24 north, not affecting the project site.

25 For those reasons I'm kind of -- and for

1 those, I realize the resource that details, and I
2 realize the importance it is for our construction
3 industry. I don't think they're stopping at this
4 point.

5 At this point in time I think it should be
6 remanded so we get a clearer record, we have some of
7 these issues ferreted out, decide.

8 That we can go forward, I mean, besides the
9 fact that I personally hate the SUP procedure,
10 because of historical thing, but I think that it's
11 more important that a lot more planning, even though
12 it is (indecipherable) -- and it means that, yeah, we
13 are going to live with this for 15 more years, we got
14 to figure out what's going to happen during 15 years.
15 Things change.

16 So we should have the best planning or the
17 best record possible to show, yes, because no impact
18 on this for the next 15 years. That's my reasoning.

19 CHAIRPERSON SCHEUER: Thank you,
20 Commissioner Ohigashi.

21 Commissioner Okuda.

22 COMMISSIONER OKUDA: Thank you, Chair.

23 With the Chair's indulgence, and
24 Commissioner Ohigashi's indulgence, I really haven't
25 made up my mind, so I just have some questions to

1 Commissioner Ohigashi, maybe he can address or
2 comment on some of my concerns.

3 One concern I do share is the concern
4 raised by Commissioners Aczon and Giovanni. It's the
5 fact that -- and let me preference my concern by
6 saying this.

7 I know we all value public participation.
8 I think if there's any bias in this Commission, it's
9 like you better have consultation with the public
10 and, you know, we want to see active input from the
11 public.

12 But one of my concerns is a concern that
13 if, you know, in these special permits, there is an
14 existing process, and I know it's a burden for
15 volunteer organizations like Sierra Club and others
16 without a staff to have to pay attention to notices
17 which they may or may not see, or notices which are
18 easy to see or not see about County proceedings.

19 But if there's really no input, or
20 participation at the County level, does that really
21 indicate that we should really just not defer to the
22 County, but have less willingness to upset the
23 process? I mean, that's kind of like the concern I'm
24 dealing with. I don't know if, Commissioner
25 Ohigashi, you can allay my concern or whatever.

1 COMMISSIONER OHIGASHI: There's two reasons
2 why I put it last.

3 The first reason is that I feel that there
4 was sufficient basis to remand anyway. And the
5 last -- and since if it's going to be remanded, I
6 believe that it would be in the best interest that we
7 address that given our statutory duty to address it.

8 Second thing is that the statutory duty I
9 always thought, and that if you're reporting
10 something, somebody should investigate it. And if
11 it's reported to us, it would appear to me that it
12 would be the best -- it would be wrong for us not to
13 say, yeah, if we are going to have it opened up or
14 remanded, we should investigate this claim. And if
15 it's found, of course, and it's found with the
16 resource of the County that it's not a valid claim,
17 then they can say it's not a valid claim.

18 However, those are the two reasons. And I
19 cannot think of anything else to tell you, Mr. Okuda.

20 COMMISSIONER OKUDA: If I can just make a
21 comment on this since deliberation.

22 Would it be different, for example,
23 where -- and this is no criticism aimed at the Sierra
24 Club now. I'm just talking general policy here.

25 It's one thing for a witness to say, okay,

1 there may be a historic site on the property which
2 requires investigation, compared with another witness
3 who comes before the Commission, even if we consider
4 it, gee, this is a pretty late stage, and say, okay,
5 I have a volunteer surveyor who went out there. The
6 survey shows these historic sites within the petition
7 area. Here are additional supplementary reports to
8 indicate that these historic sites are of value.
9 This should be considered.

10 In other words, the level of proof that a
11 witness should be required to present, if you're
12 coming in at the later part of the proceeding where
13 there is a lot of reliance on the prior actions that
14 have taken place, you got to come in with a higher
15 level of proof, compared with maybe early on in the
16 proceeding the level of proof is not going to be
17 required to be that high, because there isn't all
18 this reliance that has been going on up until now.
19 And when I say "reliance", you know, the
20 presentations of all the parties, whether it's the
21 Petitioner or Applicant, whether it's the Office of
22 Planning, whether it's the Maui County Planning
23 Office, it's relying on what was presented before.

24 And as one of the Commissioners pointed
25 out, if something -- or the Chair pointed out --

1 usually if something is brought up, except for very
2 few people in this town or in this State, usually
3 it's addressed.

4 So, I mean, is that something we should
5 look at that if you come in at a late stage, you
6 better come in with not only guns all loaded, but
7 maybe with a bazooka and a tank, versus where early
8 on maybe a knife would be sufficient.

9 COMMISSIONER OHIGASHI: I guess we can make
10 artificial burdens of proof or allegations to be made
11 at the particular -- at any particular stage.

12 But the way I look at it is this. Is that
13 like a judge asking the jury to disregard certain
14 statements? The jury doesn't disregard that
15 statement. They take it into account and take a look
16 at it.

17 I don't think that we can disregard
18 statements from the public in regard to whether or
19 not there should be some investigation. Whether --
20 investigative stage, it will be on the burden of
21 Sierra Club or whoever they want to put up or
22 whatever witnesses they want to bring to establish
23 that there is an issue here.

24 I'm just saying that it should have an
25 opportunity to remand.

1 COMMISSIONER OKUDA: I understand. Thank
2 you very much, Commissioner Ohigashi.

3 Thank you very much, Mr. Chair. No further
4 questions.

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

7 Commissioner Aczon followed by Chang.

8 VICE CHAIR ACZON: Thank you, Mr. Chair.

9 I love Mr. Ohigashi dearly, but this, I
10 cannot support the motion.

11 If you follow this process, this procedure,
12 are we willing to stick to this process moving
13 forward? Actually, no. You know, the Petitioner
14 followed all the process, all the requirements
15 required of them.

16 A, they filed their request on time. Went
17 through Planning Commission. The Planning Commission
18 did their work. And then made the recommendation to
19 us. OP did the same thing. We are talking about
20 years now, you know, by the time they put the request
21 of time extension, several years, went through this.
22 OP made recommendations. The County made a
23 recommendation. And then all of a sudden at this
24 point somebody came forward and says something.

25 I don't think it's fair to everybody with

1 all the work that is done. And my question now is,
2 say we remand to the County, they did the work again.
3 I don't know, it might take months or years before
4 the thing come back to LUC. Then came back to LUC
5 and it's the same thing, somebody came forward and
6 says, guess what?

7 So do we follow the same procedures?

8 That's kind of basically what my concern.

9 Thank you, Mr. Chair.

10 CHAIRPERSON SCHEUER: Thank you,
11 Commissioner Aczon.

12 Commissioner Chang.

13 COMMISSIONER CHANG: I greatly appreciate
14 my fellow Commissioners. I generally like to defer
15 to the island Commissioner. Commissioner Ohigashi
16 has much more understanding of Maui.

17 But I, like Commissioner Aczon, I guess for
18 me my balance is we have got an expired SUP. I have
19 no idea what that means. What are the legal
20 ramifications of an expired SUP? If we remand it
21 back, how long will that take?

22 In my mind there are clear processes to
23 address. At least two of Commissioner Ohigashi and
24 the other Commissioners' concern.

25 With respect to Condition 10 and 16, in my

1 view, we don't delete it. That stays as is, because
2 the record does not include documentation to support
3 the withdrawal, the deletion of that condition.

4 If they want to come in subsequently and
5 give us that SHPD letter withdrawing the
6 archaeological monitoring, that's fine. But as it is
7 right now, I cannot in good conscious delete that
8 condition, because those conditions -- and clearly,
9 their own witness has said they're not doing
10 archaeological monitoring. So they are not in
11 compliance. So I would not withdraw that.

12 The other issues regarding the alleged
13 endangered species, you know, I have great aloha and
14 respect for Ms. De Naie and the work that she does.

15 However, I believe there is an appropriate
16 vehicle to address that. I don't believe that is the
17 kuleana of the Land Use Commission. I think that
18 should be reported, and we should direct Ms. De Naie
19 to report that to DLNR and U.S. Fish and Wildlife for
20 independent investigation.

21 And if they find that the Petitioner is in
22 violation, then that's an enforcement action, that is
23 not a condition of the LUC. We may end up making it
24 a condition should there be endangered species
25 confirmed, but to me at this point in time it's an

1 enforcement action.

2 I don't know what to do with Commissioner
3 Ohigashi's, his other point about the Community Plan
4 not needing to be consistent with this extension.

5 But at this point in time, I think I am
6 more concerned about an expired SUP that may continue
7 to be expired for an additional period of time when
8 there are clear paths for us without setting
9 precedent to address those pressing issues related to
10 Condition 10 and 16, and the endangered species.

11 So I, like Commissioner Aczon, am not
12 inclined to support a motion for remand, but I am
13 more inclined to grant the Petition for an extension,
14 but no -- not to withdraw, not to delete any other
15 conditions.

16 Thank you. That's my comments at this
17 time.

18 CHAIRPERSON SCHEUER: Commissioner
19 Giovanni, followed by Commissioner Cabral.

20 COMMISSIONER GIOVANNI: Thank you, Chair.

21 I have nothing but respect, and scratching
22 my head when I listen to my fellow Commissioners and
23 how wise they are on what they have to say.

24 On this matter I am in particular alignment
25 with Commissioner Aczon and Commissioner Chang, and

1 will not support the Motion for Remand.

2 I think it's a very dangerous precedent to
3 establish, and I think the example that Commissioner
4 Aczon expressed at the end of his remarks, let's
5 remand it, let's go through the whole process. Let's
6 bring it back to the Commission. And then public
7 testimony will have a precedent where any community
8 testifier can say I've heard about another endangered
9 species that might be on that land. What are we
10 supposed to do? Follow the precedent? Remand it
11 again? Start it all over?

12 I think it's very dangerous, not only for
13 this immediate Petition, but for all future petitions
14 that come before this body.

15 As Commissioner Chang has very well said,
16 there are mechanisms in place that deal with
17 endangered species that become threatened at any
18 point in time, and there are enforcement actions,
19 reporting actions. There are mechanisms that can
20 take place. And I don't think any of those actions
21 challenge this Commission's duties in terms of the
22 statutes that we have to live up to.

23 We're doing our job, and it's not in
24 conflict with what's going on in terms of enforcement
25 of Endangered Species Act.

1 So I think the primary concern I have is
2 the very dangerous precedence of establishing
3 unverified claims to come before this body at the
4 last minute and automatic response being we will
5 remand it back to the County to manage for us.

6 For that reason I will not be supporting
7 this motion. Thank you.

8 CHAIRPERSON SCHEUER: Thank you,
9 Commissioner Giovanni.

10 Commissioner Cabral.

11 VICE CHAIR CABRAL: Thank you, Chair and
12 fellow Commissioners.

13 I'm glad to hear that my fellow
14 Commissioners -- because I have to agree with Aczon
15 and Chang and Giovanni that I'm concerned that -- and
16 I thought maybe I was the only one, but I'm not alone
17 here.

18 That every department and every agency, the
19 County is in support of it. Everyone says that it's
20 major, it's marked, it's done what it's supposed to
21 do, and an agreement to allow this to move forward
22 and to no longer be expired in a sense special use
23 permit.

24 So I too am not going to support the motion
25 as it reads, because I think that we need to rely on

1 the process and other agencies and on the opinion of
2 these different levels of government, which in
3 various ways do allow for public input along the way.

4 And so I think that there is so many other
5 agencies, that if there is a problem or concern with
6 endangered species, or misuse or something, that
7 there's so many agencies around that can help solve
8 that problem or address it if it comes to it, if it
9 might come back to us then.

10 So I'm not going to, as the current motion
11 reads, be able to support it, although I usually do
12 want to support the Commissioner from that island.
13 Us neighbor island guys got to support each other.

14 Thank you, though.

15 CHAIRPERSON SCHEUER: Commissioner
16 Ohigashi.

17 COMMISSIONER OHIGASHI: I counted four, so
18 I guess I will pull my motion from this.

19 However, I leave that up to the
20 Commissioners to decide what motion.

21 CHAIRPERSON SCHEUER: Commissioner
22 Ohigashi, you've withdrawn your motion.

23 Does the seconder also withdraw, I assume?

24 COMMISSIONER WONG: I agree.

25 CHAIRPERSON SCHEUER: We are in

1 deliberation.

2 COMMISSIONER WONG: Chair.

3 CHAIRPERSON SCHEUER: Commissioner Wong.

4 COMMISSIONER WONG: You know, the
5 deliberation of that past motion, there is still some
6 issues that was outstanding. And I agree with
7 Commissioner Aczon, I agree with Commissioner Okuda,
8 so I wanted to make a motion that hopefully
9 compromise with everyone.

10 And still protect -- some protection if
11 possible, so if you don't you mind, Mr. Chair, I
12 would like to make a motion.

13 CHAIRPERSON SCHEUER: Please proceed.

14 COMMISSIONER WONG: Wanted to move to grant
15 a motion for order granting time extension to amend
16 the condition of time to 12/15/35 and deny request to
17 delete Conditions 10 and 16.

18 We add a condition that says that a study
19 to be done and measures taken to protect any
20 endangered species on the property and consult with
21 DOFAW and Fish and Wildlife Service.

22 And add another condition that we added
23 requiring return the property to some sort of viable
24 agricultural usage.

25 Also authorize the LUC staff to make

1 non-substantive changes to the conditions, as
2 appropriate, regarding formatting, style and other
3 modifications to ensure consistency, and authorize
4 the Chair to sign the order in this matter on behalf
5 of the Commission.

6 CHAIRPERSON SCHEUER: There is a motion
7 before us. Is there a second? Commissioner Cabral
8 or Aczon. Commissioner Cabral has seconded the
9 motion.

10 VICE CHAIR CABRAL: I second that motion
11 from my fellow Commissioner Wong.

12 CHAIRPERSON SCHEUER: Does the movant wish
13 to speak to the motion?

14 COMMISSIONER WONG: I agree with
15 Commissioner Chang about this issue about the time
16 constraints, and what's going to happen with the
17 permit, you know, the legalities. So I would like to
18 give them that extension of time.

19 There was some issues that arose regarding,
20 you know, yellow bees and whatever came up from the
21 public witness. I know we should listen to the
22 public also, I mean, but a study at least to meet
23 with the specific agencies about this will help
24 alleviate everyone's issues.

25 Also there was a problem in this hearing

1 about what we going to do with this hole or quarry
2 after it's done, so bring it back to some sort of
3 viable agricultural usage. And if they want to
4 change it again for something else, then they come
5 back to us.

6 So that is why I'm pushing for this motion.

7 CHAIRPERSON SCHEUER: Thank you,
8 Commissioner Wong.

9 Commissioner Okuda.

10 COMMISSIONER OKUDA: Thank you, Mr. Chair.
11 I have a question to the movant and the seconder.

12 Whether they would consider instead of
13 having the property be restored for the agricultural
14 ability as described in the motion, that the
15 Applicant be required to perform all duties and
16 obligations that are required by the restoration plan
17 as approved by the County of Maui.

18 And that's my only question, Mr. Chair.
19 Thank you.

20 CHAIRPERSON SCHEUER: Commissioner Wong.

21 COMMISSIONER WONG: I have no problem with
22 that, but I also would like to say that any other
23 federal, state or city laws that have to be followed,
24 in line with that.

25 CHAIRPERSON SCHEUER: Commissioner Okuda.

1 COMMISSIONER OKUDA: Yes, that makes plenty
2 sense. Thank you.

3 CHAIRPERSON SCHEUER: Commissioner Cabral.

4 VICE CHAIR CABRAL: Yes, I would agree with
5 that including the amendment to the amendment that it
6 would be the County of Hawaii or other appropriate
7 government agencies.

8 CHAIRPERSON SCHEUER: County of Maui?

9 VICE CHAIR CABRAL: Maui, that's right.
10 Thank you.

11 CHAIRPERSON SCHEUER: So we have an amended
12 motion, which I'm trusting our Executive Officer will
13 read to us prior to taking a vote if a vote occurs.

14 Commissioner Chang followed by Commissioner
15 Aczon.

16 COMMISSIONER CHANG: Thank you, Mr. Chair.

17 I am not inclined to support the motion
18 with all of those provisions. I think the matter --
19 I think the Applicant is on notice that there is --
20 there may be an endangered species, and it is
21 incumbent upon them to take all appropriate actions.

22 I am concerned about making it a condition
23 to do a study. I'm just uncomfortable with doing
24 that.

25 With respect to the restoration, I think it

1 might be easier to amend the condition that says:
2 "Shall prepare". It should also say "shall prepare
3 and implement a restoration plan, or whatever that
4 final condition. Because I, like previously, I think
5 Deputy Attorney General Bryan Yee, you know, try not
6 to create more conditions but use the ones that we
7 have got.

8 So my inclination, I'm uncomfortable adding
9 these other conditions with respect to the endangered
10 species, but rather putting -- the Applicant is on
11 notice, and they should respond accordingly.

12 Thank you.

13 CHAIRPERSON SCHEUER: Commissioner Aczon
14 followed by Commissioner Giovanni.

15 VICE CHAIR ACZON: Commissioner kind of
16 threw a curve ball on me. Actually I agree with her.
17 I'm only -- the original motion was acceptable to me,
18 because it kind of addressed Commissioner Chang's
19 concern. And also addressed the Sierra Club's
20 concern. As you know, Sierra Club is not trying to
21 object to the extension.

22 At least moving forward with the extension,
23 and their concerns are being addressed, is for me is
24 a good compromise.

25 So now I have to think how I'm going to

1 vote.

2 CHAIRPERSON SCHEUER: Commissioner
3 Giovanni, followed by Commissioner Ohigashi.

4 COMMISSIONER GIOVANNI: Thank you, Chair.
5 I'm kind of in the same boat as
6 Commissioner Aczon again.

7 I generally support what Commissioner Wong
8 is attempting to do. I'm a little hesitant about
9 making it overly complicated, and adding conditions
10 that are unnecessary, because I do think that adding
11 a study of endangered species is unnecessary, because
12 there are mechanisms, regulatory mechanisms, and
13 enforcement mechanisms already existing to deal with
14 that.

15 And if the Sierra Club wanted to take that
16 issue seriously, they could certainly utilize those
17 mechanisms, and not rely on a condition that LUC
18 might put in place.

19 I also have a -- and maybe it's my own
20 misunderstanding -- but I'm sensitive and support the
21 friendly amendment that's being offered by
22 Commissioner Okuda that they have got to fix the hole
23 that they leave behind, and repair it so it would be
24 very much -- it would be to plan and implement a
25 remediation of property at the end of the lease.

1 My concern or confusion is, where is the
2 dam landowner in this process? And can we address
3 that? Are we really going to rely on a lessee at the
4 end of a lease to do that when it's really the
5 landowner's responsibility to take care of his own
6 land in accordance with the designation of that land?

7 So earlier in this hearing, Commissioner
8 Okuda used the phrase "successors or assigns". Is
9 that appropriate to put in this case so that we can
10 tie together, and the hole doesn't exist once the
11 lease ends, and the owner says, well, that's the
12 lessee's responsibility, but they're long gone now.

13 How can we close that little gap there?
14 That's where I'm at.

15 CHAIRPERSON SCHEUER: Commissioner
16 Ohigashi.

17 COMMISSIONER OHIGASHI: I started to
18 support the motion, and support the friendly
19 amendment, including Commissioner Giovanni's request.

20 I think it's most important that the
21 landowner be held responsible as such. However, I
22 am -- the overall problem that I have, that needs to
23 be addressed, and perhaps not here but for future
24 SUP, for future designations of areas, is the
25 question of how and why; how do we close this?

1 How do these SUPs end? And what do we do
2 to plan for the future for their end?

3 I was hoping that we would get some kind of
4 direction or some kind of insight from the County of
5 Maui to have that type of planning, and have that
6 kind of discussion within an extension, because an
7 extension affects so many other things in the future.

8 So I'm going to support this, but the days
9 of giving out a SUP without knowing the end game
10 should end. We're just extending and extending
11 things that we decide to be convenient and good for
12 people, but it's not necessarily good planning or
13 good use of the property or helpful for our future.

14 And that's the only reason why I said to
15 remand, that's the major reason.

16 The second was the issues that I've raised,
17 issues raised about the endangered species, those are
18 secondary.

19 Main thing is that, hey, got to start
20 realizing what an a SUP is. Because what we have
21 created is forever thing, rather than a temporary.
22 And if that requires legislation or that requires
23 future thinking, so be it, but I was hoping that we
24 could get that discussion.

25 CHAIRPERSON SCHEUER: Thank you,

1 Commissioner Ohigashi.

2 We have been going an hour and 15 minutes.
3 I generally tend not to try and take a break during
4 deliberations, but we have three hands up, four hands
5 up, including Commissioner Cabral. Chair hasn't
6 spoken. Actually previous motion was removed before
7 I could even speak to it. So I know we have some
8 more deliberation to go.

9 Commissioner Giovanni, you have a hard stop
10 at 3:00; is that correct?

11 I'm going to suggest that the way our day
12 might go forward is that we take a ten-minute break,
13 reconvene at 12:25, try to wrap up deliberation by
14 3:00 o'clock. Adjourn for the day.

15 Take up AES Solar tomorrow morning at 9:00,
16 followed by the anticipated conclusion based on the
17 motions before us of HoKua.

18 With that I'm going to ask -- it's 2:15.
19 Recess until 2:25.

20 Thanks for everyone's patience.

21 (Recess taken.)

22 CHAIRPERSON SCHEUER: We're back on the
23 record.

24 Commissioners Okuda followed by Chang
25 followed, I believe, by Giovanni -- not by Giovanni.

1 COMMISSIONER OKUDA: Thank you, Mr. Chair.

2 Number one, I agree with Commissioner
3 Chang's insertion of the word on the condition. I
4 was not articulating it as clearly, and I agree that
5 we should not mess around with conditions as much as
6 possible. So I would agree with Commissioner Chang's
7 recitation of the restoration condition.

8 Number two, I do agree with Commissioner
9 Aczon and Giovanni that we should not add any more
10 conditions on matters which can be taken care of by
11 other agencies at this point in time.

12 And number three, I do agree with
13 Commissioner Ohigashi about the problems, and the
14 detriment to the communities across the State of the
15 unrestricted use of the special permit.

16 I won't go into all of that, because I
17 believe during the hearing we had on the Waimanalo
18 Gulch Landfill on the Leeward Coast of Oahu I did
19 make a point that I believe the use of the special
20 permit process deprives local communities of input,
21 and frankly, sometimes is used to shove negative
22 public facilities down the throats of people who are
23 bearing an inordinate burden of these negative public
24 facilities, like a dump.

25 So I do share Commissioner Ohigashi's

1 concern about the special permit and about the fact
2 that there has to be a more robust discussion about
3 what happens when the permit ends.

4 Thank you, Mr. Chair.

5 CHAIRPERSON SCHEUER: Mr. Esmeralda, once
6 the Commission is in deliberation, we do not normally
7 entertain comments from the parties.

8 What is the nature of the statement that
9 you want to share before making your statement?

10 MR. ESMERALDA: Thank you, Chair. I just
11 wanted to offer that Mr. Dega is on, and might be
12 able to provide some additional clarification to his
13 earlier testimony, if he's able to. Thank you.

14 CHAIRPERSON SCHEUER: Commissioner Chang.

15 COMMISSIONER CHANG: Thank you, Mr. Chair.

16 I appreciate Commissioner Ohigashi, and
17 quite frankly, the Land Use Commission's concerns
18 about the use of special use permit.

19 However, in my view, that is a much larger
20 policy discussion because most landfills around the
21 State are on SUPs.

22 So I am reluctant to extend this particular
23 docket. In order to facilitate this discussion, I
24 would like to ask both the movant and the seconder if
25 you would consider the following in lieu of your

1 motion. And if you won't, then you can keep it, but
2 what I'm suggesting is that we would move to grant
3 the Petitioner's Motion for Order Granting Time
4 Extension to December 15, 2035, and amend Condition
5 12 to read:

6 That upon cessation of the Pohakea quarry
7 operations, the Applicant, including the owner of the
8 land, shall prepare -- and this would be inserted --
9 and implement -- that's to be inserted -- a closure
10 plan to vegetate the site or other measures to reduce
11 erosion -- and would I insert this -- prior to the
12 expiration of the SUP, so that we have assurances
13 that this is going to be done before the SUP expires,
14 and the condition already included the owner, so
15 we're not adding that, and they must have been part
16 of those discussions.

17 But it would just be to add, to timely
18 implement prior to expiration, and not have any other
19 changes to this motion.

20 Not add any other conditions, just to grant
21 the extension and to amend that condition.

22 So I would just pose that. If you are, if
23 the movant and the seconder are willing to withdraw
24 and then consider this motion.

25 If not, we will continue the deliberations.

1 CHAIRPERSON SCHEUER: I will give the
2 opportunity for the movant and the seconder to
3 respond.

4 Just so you all are clear with where I'm at
5 on things, since I haven't spoken yet, I'm inclined
6 to have some kind of condition related to potential
7 presence of an endangered species and likely to vote
8 against a motion that does not have such.

9 Commissioner Wong, a request has been made
10 in whether you're interested in having a different
11 motion.

12 COMMISSIONER WONG: Chair, I'm pretty much
13 in favor of Commissioner Chang's motion, however, the
14 only thing I would like to add, if you don't mind
15 listening to it, is to authorize LUC staff to fix up
16 the motion for non-substantial changes, all that kind
17 of thing, and have -- authorize the Chair to sign the
18 order on behalf of the Commission.

19 So the other question I have on this is, so
20 are we going to keep Conditions 10 and 16, or delete
21 it?

22 COMMISSIONER CHANG: Commissioner Wong --
23 excuse me, Mr. Chair -- my intention is to keep those
24 conditions.

25 COMMISSIONER WONG: Chair, because I

1 hear -- after the deliberation of my motion, and
2 hearing Commissioner Chang's motion or possible
3 motion, I'm going to retract my motion.

4 CHAIRPERSON SCHEUER: Does the seconder,
5 who I believe was Commissioner Cabral, agree?

6 VICE CHAIR CABRAL: Yes, okay. I'm willing
7 to accept the amendment from Commissioner Chang, but
8 now --

9 CHAIRPERSON SCHEUER: It's actually styled
10 as a request to withdraw the motion, and have a
11 different motion made, rather than amending your
12 motion.

13 VICE CHAIR CABRAL: I'm okay with that,
14 because I've gotten confused myself. So let's clean
15 it up, guys.

16 I think we are coming to an agreement of
17 language that we can pretty much all agree to,
18 including I do appreciate Commissioner Ohigashi's
19 need, but I think that's a much bigger question than
20 what we want to take up on this particular docket.

21 Thank you. I'm ready for the new motion or
22 someone else can be the second. Thank you.

23 CHAIRPERSON SCHEUER: For the second time,
24 a motion has been made and withdrawn, and we now
25 have, I believe by Commissioner Chang, a proposed new

1 motion.

2 Would you please restate the motion which
3 presumably would incorporate the request from
4 Commissioner Wong regarding the clarifications from
5 the LUC staff and signature by the Chair.

6 COMMISSIONER CHANG: Thank you, Mr. Chair.

7 The motion would be move to grant
8 Petitioner's Motion for Order Granting Time Extension
9 to December 15th, 2035, and amend Condition 12 to
10 read as follows:

11 That upon cessation of the quality of
12 quarry operations, the Applicant, including the owner
13 of the land, shall prepare and timely implement a
14 closure plan to revegetate the site or other measures
15 to reduce the erosion prior to the expiration of the
16 SUP.

17 The closure plan shall be reviewed and
18 approved by DP, and authorize LUC staff to make
19 non-substantive changes to the conditions as
20 appropriate regarding formatting, style and other
21 modifications to ensure consistency, and authorize
22 the Chair to sign the order in this matter on behalf
23 of the Commission. Thank you.

24 CHAIRPERSON SCHEUER: Commissioner Aczon,
25 is that a second?

1 VICE CHAIR ACZON: Yes, second. Thank you.

2 CHAIRPERSON SCHEUER: Commissioner Chang,
3 you've already sort of spoken to the motion, but do
4 you want to say anything more? Okay.

5 Commissioner Aczon?

6 VICE CHAIR ACZON: I'm good.

7 CHAIRPERSON SCHEUER: If you guys withdraw
8 it, then everybody will get a chance to make a motion
9 and second something.

10 COMMISSIONER WONG: Chair, you have -- the
11 AG wants to speak.

12 MR. MORRIS: I do have a concern about
13 ordering the landowner to do something, when the
14 landowner is not a party to this proceeding.

15 The risk being that that condition may not
16 be enforced in its entirety.

17 COMMISSIONER CHANG: If I may, Mr. Chair.

18 CHAIRPERSON SCHEUER: Please proceed,
19 Commissioner Chang.

20 COMMISSIONER CHANG: Mr. Morris, that is
21 already part of the condition. I read an existing
22 condition that included the owner. That's not
23 something that I added. That was part of the
24 original condition that was approved in 2006.

25 MR. MORRIS: I guess my concern is if we

1 are ordering an implementation as well as a plan to
2 be submitted, that could be construed as ordering the
3 landowner to actually do something when they're not a
4 party to these proceedings. That's my concern.

5 COMMISSIONER CHANG: Notice is taken.

6 CHAIRPERSON SCHEUER: Commissioner Okuda.

7 COMMISSIONER OKUDA: Thank you, Mr. Chair.

8 And, Mr. Morris, your point, I think, is
9 well taken. Perhaps something can be added that the
10 Applicant will cause the landowner, prior to the
11 deadlines set forth by Commissioner Chang's motion,
12 the Applicant, the lessee will cause the landowner to
13 also consent and agree to what needs to be done as
14 described in Commissioner Chang's motion.

15 MR. MORRIS: You can't require someone to
16 get consent, but I guess you can see say, seek --

17 CHAIRPERSON SCHEUER: I'm just going to
18 interject here.

19 If our Attorney General is advising us
20 publicly as to the advisability of certain of our
21 actions, among other things, where I think possibly
22 waiving any attorney/client privilege surrounding
23 that. So I really appreciate that there will be a
24 communication with me that we suggest we go into
25 executive session for further advice. But noting

1 that, we will run out of time as well.

2 Mr. Morris, do you have further advice to
3 give this Commission?

4 MR. MORRIS: I've raised my concern about
5 ordering a non-party to do something. That's all I'm
6 going to say. If you would like to address it in
7 executive session, I'm prepared to do so.

8 CHAIRPERSON SCHEUER: Commissioner Okuda.

9 COMMISSIONER OKUDA: Chair, you're correct,
10 and I apologize too for asking the AG for advice out
11 in the open. I don't know what to say.

12 Maybe we need to go into executive session
13 if this is going to be an issue. And so also move
14 that we go into executive session, whether it's today
15 or tomorrow, at some time to discuss our privileges
16 and other matters with respect to scope of our
17 powers.

18 CHAIRPERSON SCHEUER: There is a motion to
19 go into executive session. Is there a second?

20 Commissioner Chang, you have your hand up,
21 but I believe it was from before.

22 COMMISSIONER CHANG: I'm not seconding the
23 motion to go into executive session.

24 COMMISSIONER OKUDA: Mr. Chair, then I
25 withdraw the motion, because it looks like it's going

1 to die for lack of a second. So I withdraw the
2 motion.

3 CHAIRPERSON SCHEUER: Thank you.

4 Commissioner Okuda, were you done with your
5 commenting on the motion before us?

6 COMMISSIONER OKUDA: Yes, Mr. Chair.

7 CHAIRPERSON SCHEUER: Thank you very much.

8 Commissioner Chang followed by Cabral
9 followed by Aczon.

10 COMMISSIONER CHANG: I'll try to make it
11 very short.

12 I believe the record, the testimony by both
13 the Petitioner, as well as the County, as well as OP
14 had indicated that the owners, the underlying lease
15 acknowledges that this needs to be done.

16 I appreciate our Deputy Attorney General's
17 caution. I think if the owner has an objection, they
18 can come forward. But I think at this point in time,
19 the fact that they had agreed to prepare a closure
20 plan, I think it's reasonable to conclude that they
21 would be willing.

22 Now, how the owner and the Applicant
23 structures who pays for it, that's up to them. I
24 appreciate the caution, but I'm comfortable with the
25 motion.

1 CHAIRPERSON SCHEUER: Commissioner Aczon
2 and Cabral. Not Commissioner Aczon.

3 Commissioner Cabral.

4 VICE CHAIR CABRAL: I was going to say that
5 I administer, that's what I do for a living. I have
6 around 250 commercial leases in place, and all of
7 those leases, the property owner ultimately becomes
8 very responsible for almost any damage that's done to
9 a property if the tenant doesn't do it.

10 So I'm okay, it may be not enforceable by
11 us in the future, but I think it's still something to
12 tie those two together as the original order is
13 appropriate to at least keep them tied together.

14 Thank you.

15 CHAIRPERSON SCHEUER: Commissioners, we are
16 in deliberations. There is a motion before us.

17 Commissioner Wong.

18 COMMISSIONER WONG: Just a clarification,
19 Chair, from Commissioner Chang.

20 Just wanted to make sure. So Conditions 10
21 and 16 would still be alive, correct?

22 COMMISSIONER CHANG: That is my intention,
23 because I believe the additional information by the
24 archeologist and the letter is not part of the
25 record. So I would keep those conditions in.

1 COMMISSIONER WONG: Thank you. Thank you,
2 Commissioner Chang; thank you, Chair.

3 CHAIRPERSON SCHEUER: Further discussion,
4 Commissioners?

5 Then I guess I'm going to weigh in. I was
6 originally going to support Commissioner Ohigashi's
7 motion for the good reasons he stated.

8 I am, generally speaking, inclined to
9 support this motion. However, I want to suggest to
10 make all Commissioners and draw distinction.

11 I hear clearly, and actually support the
12 concerns of Commissioners Aczon and Giovanni, as well
13 as Cabral, that we not set up a process by which
14 someone can simply run in, waiving their hands at the
15 last moment and raise anything and cause us to stop
16 action and remand proceedings.

17 The distinctions that I draw, however, are
18 twofold.

19 One is if this is not our precedent, we
20 actually did the exact same thing in Hilo for a
21 quarry, no less, and we remanded the proceedings.
22 The issues was resolved. It came forward to us,
23 nobody else came forward, and we moved on with a
24 clear record.

25 Secondly, you know, Ms. De Naie in her

1 written testimony and in her oral testimony also made
2 a number of allegations, or raised a number of
3 concerns about cultural sites.

4 The response from the Applicant and the
5 County and OP was like, there has been thorough site
6 review, and we do not believe that any of those
7 things have merit.

8 However, in response to could there be this
9 listed species here, the Applicant said we didn't
10 look for it, and OP said, we didn't have a chance to
11 consult.

12 I think it's a meaningful distinction. I
13 would prefer to see the motion go forward, and this
14 is with, at the least, a condition requiring
15 consultation of the Applicant with the Fish and
16 Wildlife Service, and the Division of Forestry and
17 Wildlife narrowed to if there is the presence of
18 yellow-faced bees on the property, taking appropriate
19 recommended action. That would be my preference, but
20 I don't know if the movant and seconder would be
21 willing to do it.

22 I'm willing to vote against the motion
23 without such a thing, but I prefer to vote for the
24 motion, because I do feel, in general, this is a very
25 worthwhile project, and the special permit should be

1 issued, though I deeply share the concerns of
2 Commissioner Ohigashi around the misuse of special
3 permits.

4 Commissioner Chang.

5 COMMISSIONER CHANG: Thank you, Mr. Chair.
6 And, you know, and you have been very thoughtful and
7 you have -- and I recognize how important this is,
8 and I'm trying to figure out what is the best way to
9 convey that so we are still staying within our
10 kuleana, but really directing it to the right agency.

11 So I think I'm comfortable with what you
12 are suggesting that the Applicant consult with DLNR
13 and U.S. Fish and Wildlife on the issue that's been
14 raised.

15 We're not saying do a study. All we are
16 saying is that the Applicant shall consult with the
17 right regulatory agencies, and then take appropriate
18 action.

19 So, Mr. Chair, I think I am comfortable
20 making an amendment to the motion to include, as an
21 additional condition, that the Applicant consult with
22 the Department of Land and Natural Resources and the
23 U.S. Fish and Wildlife on the issue that's been
24 raised regarding potential endangered species, in
25 particular, what is it, the bee?

1 CHAIRPERSON SCHEUER: Yellow-faced bee.

2 COMMISSIONER CHANG: It's just to consult.
3 And it places the onus on the Applicant to do that.
4 I'm comfortable with that. So I would make an
5 amendment.

6 CHAIRPERSON SCHEUER: The seconder, who I
7 believe was Commissioner Aczon.

8 VICE CHAIR ACZON: Mr. Chair, if it's just
9 to consult, I believe I'm okay with it.

10 CHAIRPERSON SCHEUER: We have a revised
11 motion in front of us.

12 Commissioners, is there further
13 deliberation?

14 Mr. Orodener, would you poll the
15 Commission before anybody can say anything else?

16 VICE CHAIR CABRAL: And have Dan vote early
17 so he can get out of here at 3:00.

18 EXECUTIVE OFFICER: The motion is to grant
19 the request for a time extension to 12/13/35, but
20 with retention of Conditions 10 and 16, and to amend
21 Condition 12 regarding closure or remediation as
22 stated by Commissioner Chang, and for the Applicant
23 to consult with DOFAW and U.S. Fish and Wildlife
24 Service with regard to protection of endangered
25 species, and that staff be authorized to make

1 non-substantive changes, and have the Chair sign the
2 order.

3 CHAIRPERSON SCHEUER: The movant was
4 Commissioner Chang and the seconder was Commissioner
5 Aczon.

6 Commissioner Giovanni, sorry.

7 COMMISSIONER GIOVANNI: My understanding of
8 your friendly amendment was to limit it to the yellow
9 bees, not to make it all endangered species.

10 CHAIRPERSON SCHEUER: That is correct.

11 COMMISSIONER CHANG: Yes. Yes.

12 COMMISSIONER GIOVANNI: So let's try to
13 confine it to that in what we're voting on.

14 CHAIRPERSON SCHEUER: If you would restate
15 that provision, Mr. Orodener.

16 EXECUTIVE OFFICER: Applicant is to consult
17 with the Department of DOFAW and U.S. Fish and
18 Wildlife regarding the protection of yellow-faced
19 bees.

20 Is that correct?

21 COMMISSIONER CHANG: Mr. Orodener, I would
22 draft it as, with respect to the issue that's been
23 raised regarding endangered species, the yellow bee.
24 It's just an issue that's been raised. We don't know
25 if they exist there. So just to consult on this

1 issue that's been raised.

2 EXECUTIVE OFFICER: Consult with DOFAW and
3 U.S. Fish and Wildlife with regard to the issue
4 raised with regard to yellow-faced bees.

5 COMMISSIONER CHANG: Yes.

6 CHAIRPERSON SCHEUER: Commissioner
7 Giovanni, does that capture the concern you have?

8 COMMISSIONER GIOVANNI: Yeah, I like not
9 including the words "endangered species", it's not
10 even verified that it's on the list for endangered
11 species before this Commission.

12 CHAIRPERSON SCHEUER: Okay.

13 We have a motion. Mr. Orodener, please
14 poll the Commission.

15 EXECUTIVE OFFICER: Commissioner Chang?

16 COMMISSIONER CHANG: Aye.

17 EXECUTIVE OFFICER: Commissioner Aczon?

18 VICE CHAIR ACZON: Aye.

19 EXECUTIVE OFFICER: Commissioner Cabral?

20 VICE CHAIR CABRAL: Yes.

21 EXECUTIVE OFFICER: Commissioner Giovanni?

22 COMMISSIONER GIOVANNI: Aye.

23 EXECUTIVE OFFICER: Commissioner Okuda?

24 COMMISSIONER OKUDA: Yes.

25 EXECUTIVE OFFICER: Commissioner Ohigashi?

1 COMMISSIONER OHIGASHI: Yes, with
2 reservations.

3 EXECUTIVE OFFICER: Commissioner Wong?

4 COMMISSIONER WONG: Yes.

5 EXECUTIVE OFFICER: Chair Scheuer?

6 CHAIRPERSON SCHEUER: Aye.

7 EXECUTIVE OFFICER: Thank you, Mr. Chair.

8 The motion passes unanimously.

9 CHAIRPERSON SCHEUER: Thank you to the
10 Applicant, the County of Maui, and the Office of
11 Planning and to the various consultants on this
12 project and testifiers, those in favor and those with
13 concern.

14 It is now -- I'm going to suggest that we
15 go into recess until 9:00 A.M. tomorrow morning where
16 we have two remaining items on the Agenda, first of
17 all continued action on Docket SP21-411 AES West Oahu
18 Solar, LLC; and then continued action on HG Kaua'i
19 Joint Venture, LLC, HoKua Place A11-791.

20 Any further business before we recess for
21 the afternoon until tomorrow?

22 VICE CHAIR CABRAL: I wanted to -- I read
23 the damselfly is making a comeback and found in
24 additional locations.

25 CHAIRPERSON SCHEUER: Orange back

1 damselfly, that is true.

2 That was not the business. That is
3 anticipating somebody might raise, but thank you for
4 that natural history moment, Commissioner Cabral.

5 Anything further? If not, we are in recess
6 until 9:00 A.M. morning tomorrow.

7 Thank you very much.

8 (The proceedings recessed at 2:50 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 June 9th, 2012 at 9:00 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 9th day of June, 2021, in Honolulu,
16 Hawaii.

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