

LAND USE COMMISSION
STATE OF HAWAI'I

Hearing held on August 12, 2020
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. Adoption of Order

SP97-390 COUNTY OF MAUI (Central Maui Landfill)

Adopt Form of the Order for Amendment to State
Special Permit (SP97-390) for the Proposed
Central Maui Landfill Facilities project at TMK
(2)3-8-003:19 (por) and 020, Pu'unene, Maui,
Hawaii.

V. Continued Hearing and Action

A17-804 Hawaiian Memorial Life Plan, Ltd.

(O'ahu) Petition for District Boundary
Amendment to Consider Petition to Amend the
Conservation Land Use District Boundary
into the Urban Land Use District for
Approximately 53.449 acres of land at Kane'ohe,
Island of O'ahu, State of Hawai'i TMK
(1)4-5-033:por.001

VI. RECESS

BEFORE: Jean Marie McManus, CSR #156

1 APPEARANCES:

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

6
7 STAFF:

8 CINDY YOUNG, ESQ.
Deputy Attorney General

9 DAN ORODENKER, Executive Officer
RILEY K. HAKODA, Chief Clerk
10 SCOTT DERRICKSON, Chief Planner

11 DAWN T. APUNA, ESQ.
RODNEY FUNAKOSHI, Planning Program Administrator
12 LORENE MAKI, Planner
State of Hawaii, Office of Planning

13 JENNIFER OANA, ESQ.
14 Deputy Corporation Counsel
ERIC NAKAGAWA, Director of Environmental Management
15 ELAINE BAKER, Dept. of Environmental Management
Solid Waste Division Project Manager
16 For SP97-390 County of Maui

17 DUANE PANG, ESQ.
Deputy Corporation Counsel
18 Department of Planning and Permitting
City and County of Honolulu

19 BENJAMIN MATSUBARA, ESQ.
20 CURTIS TABATA, ESQ.
Attorneys for Hawaiian Memorial Park

21 GRANT YOSHIMORI, Pro Se
22 RICH McCREEDY, Pro Se
For Intervenor Hui O Pikoiloa

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1 CHAIRPERSON SCHEUER: Aloha mai kakou.
2 This is the August 12, 2020 Land Use Commission
3 meeting, and it is being held using interactive
4 conference technology linking videoconference
5 participants and other interested individuals of the
6 public via the ZOOM internet conferencing program to
7 comply with State and County official operational
8 directives during the pandemic.

9 Members of the public are viewing the
10 meeting via the ZOOM webinar platform. For all
11 meeting participants, I would like to stress to
12 everyone the importance of speaking slowly, clearly,
13 and directly into your microphone. Before speaking,
14 please state your name and identify yourself for the
15 record.

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

22 This ZOOM conferencing technology allows
23 the parties and each participating Commissioner
24 individual remote access to the meeting proceedings
25 via their personal digital devices.

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

8 My name is Jonathan Likeke Scheuer and I
9 currently serve as the LUC Chair. Commissioners
10 Aczon, Chang, Okuda and Wong, the LUC Executive
11 Officer Daniel Orodener, the LUC Chief Planner Scott
12 Derrickson, Chief Clerk Riley Hakoda, the LUC's
13 Deputy Attorney General Cindy Young, and the Court
14 Reporter Jean McManus are on Oahu.

15 Commissioner Cabral is on the Big Island,
16 and Commissioner Ohigashi is on Maui, and
17 Commissioner Giovanni is on Kauai. There are
18 currently eight seated Commissioners.

19 First order of business is the adoption of
20 the July 22-23, 2020 minutes.

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

23 CHIEF CLERK: No. This is Riley Hakoda.
24 No comments.

25 CHAIRPERSON SCHEUER: If there are any

1 members of the public who wish to testify solely on
2 the adoption of the minutes from July 22nd and 23rd
3 meeting, you should use the raise-hand function in
4 the attendee software and indicate that you wish to
5 testify on this matter.

6 Seeing none.

7 Are there any comments or corrections on
8 the minutes? If not, is there a Motion to Approve?

9 VICE CHAIR CABRAL: I'll make a Motion to
10 Approve those minutes as presented.

11 CHAIRPERSON SCHEUER: Commissioner -- is
12 there a second?

13 VICE CHAIR ACZON: I'll second.

14 CHAIRPERSON SCHEUER: I see your hand now,
15 Commissioner Wong.

16 Seconded by Commissioner Aczon, moved by
17 Commissioner Cabral. Is there any discussion? If
18 not, Mr. Orodenker, please do a roll call vote.

19 EXECUTIVE OFFICER: Commissioner Giovanni?

20 COMMISSIONER GIOVANNI: Aye.

21 EXECUTIVE OFFICER: Commissioner Wong?

22 COMMISSIONER WONG: Aye.

23 EXECUTIVE OFFICER: Commissioner Chang?

24 COMMISSIONER CHANG: Yes.

25 EXECUTIVE OFFICER: Commissioner Okuda?

1 COMMISSIONER OKUDA: Yes.

2 EXECUTIVE OFFICER: Commissioner Cabral?

3 VICE CHAIR CABRAL: Yes.

4 EXECUTIVE OFFICER: Commissioner Ohigashi?

5 COMMISSIONER OHIGASHI: Yes.

6 EXECUTIVE OFFICER: Commissioner Aczon?

7 VICE CHAIR ACZON: Aye.

8 EXECUTIVE OFFICER: Chair Scheuer?

9 CHAIRPERSON SCHEUER: Aye.

10 EXECUTIVE OFFICER: Thank you, Mr. Chair.

11 The motion passes unanimously.

12 CHAIRPERSON SCHEUER: Thank you very much,
13 Mr. Orodener.

14 Would you continue with our next agenda
15 item meeting schedule?

16 EXECUTIVE OFFICER: Thank you, Chair.

17 Tomorrow we will again be meeting via ZOOM
18 to take up the DR and the other matter.

19 Then on September 2nd we will be,
20 hopefully, still be on ZOOM. If not, we will be on
21 Maui for the C. Brewer bifurcation matter.

22 September 10th, continuation of the C.
23 Brewer bifurcation matter and the Hanohano Motion to
24 Amend.

25 September 23rd we will be again on Oahu for

1 the Hawaiian Memorial Park closing. And on
2 September 24th, we will also be on Oahu for the
3 Halekua Development Motion.

4 October 7, we will be continuing the
5 Halekua Development Motion to Amend on Oahu and
6 Hanohano Motion to Release.

7 On October 8th this we will again be on
8 Oahu for Hawaiian Memorial Park matter. October 21st
9 is currently vacant.

10 October 22, that will be in Hilo, the
11 Newton Family Trust, and the Hawaiian Islands' matter
12 Motion to Amend.

13 November 4th, once again, take up the
14 Halekua Development matter.

15 The rest of the schedule for the year is
16 still tentative that we do not have anything really
17 set. We have tentative meetings on Wednesday,
18 December 2nd for the Pulama Lanai matter and Windward
19 Hotel matter on Maui.

20 December 3rd for Barry Trust matter.

21 December 16th for the Church matter on
22 Hilo.

23 And December 17th is the Barry Trust matter
24 Adoption of Order. That takes us to the end of the
25 year.

1 CHAIRPERSON SCHEUER: Thank you very much.
2 Dan.

3 Any questions for Mr. Orodener,
4 Commissioners? No. Seeing none, thank you very
5 much.

6 SP97-390 Maui Landfill

7 Our next order of business is Adoption of
8 the Form of the Order for the fourth Amendment to the
9 State Special Permit (SP97-390) for the Proposed
10 Central Maui Landfill Facilities project at TMK
11 (2)3-8-003.019(por.) and 020, Pu'unene, Maui, Hawaii.

12 Mr. Hakoda or Mr. Derrickson, has any last
13 written testimony been submitted on this matter.

14 CHIEF CLERK: This is Riley. No testimony
15 received on this matter.

16 CHAIRPERSON SCHEUER: Thank you very much.

17 Are there any members of the public who
18 wish to testify in this matter who are attending the
19 ZOOM meeting? If so, you can use your raise-hand
20 function and indicate that you wish to testify. If
21 you do, I will admit you into the meeting as a full
22 participant, swear you in, and provide you two
23 minutes to speak.

24 I am seeing none. So there is no public
25 testimony on this matter.

1 Before we take up the motion, I would like
2 to confirm with all of the Commissioners as well as
3 myself are present and prepared to participate in
4 this proceeding.

5 Commissioner Chang, are you prepared to
6 participate?

7 COMMISSIONER CHANG: Yes, Chair.

8 CHAIRPERSON SCHEUER: Thank you.

9 Commissioner Aczon?

10 VICE CHAIR ACZON: Yes.

11 CHAIRPERSON SCHEUER: Commissioner Cabral?

12 VICE CHAIR CABRAL: Yes, I am prepared.

13 CHAIRPERSON SCHEUER: Thank you.

14 Okuda?

15 COMMISSIONER OKUDA: Yes.

16 CHAIRPERSON SCHEUER: Wong?

17 COMMISSIONER WONG: Yes.

18 CHAIRPERSON SCHEUER: Ohigashi?

19 COMMISSIONER OHIGASHI: Yes.

20 CHAIRPERSON SCHEUER: Giovanni?

21 COMMISSIONER GIOVANNI: Yes.

22 CHAIRPERSON SCHEUER: The Chair is also
23 prepared to participate.

24 We will now consider Adoption of the Order.

25 Commissioners, before you for your

1 consideration, deliberation and adoption are the
2 proposed Findings of Fact, Conclusions of Law,
3 Decision and Order prepared by the staff as
4 instructed at the last meeting on this docket.

5 Is there any discussion?

6 If there is none, I will now entertain a
7 Motion to Approve the Form of the Order for Docket
8 No. SP97-390's Findings of Fact, Conclusions of Law,
9 and Decision and Order approving with modifications
10 the recommendations of the County of Maui's Planning
11 Commission to Approve a Fourth Amendment to the Land
12 Use Commission Special Permit.

13 Commissioners, what is your pleasure?

14 COMMISSIONER WONG: Chair, I would move for
15 the Adoption of the Order, and all the other things
16 you just said.

17 CHAIRPERSON SCHEUER: Thank you,
18 Commissioner Wong. Is there a second?

19 VICE CHAIR ACZON: I will second it.

20 CHAIRPERSON SCHEUER: The motion has been
21 made by Commissioner Wong and seconded by
22 commissioner Aczon.

23 Is there any discussion on the motion?

24 Commissioner Ohigashi.

25 COMMISSIONER OHIGASHI: I will be voting in

1 favor of the Form of the Order. However, I'd like to
2 note that I voted against this matter.

3 CHAIRPERSON SCHEUER: Thank you,
4 Commissioner Ohigashi.

5 The Chair feels the same way. My
6 obligation is to say that the order correctly
7 reflects the action of the Commission, but I voted
8 against the issuance of the permit.

9 Any other discussion? Commissioner Okuda.

10 COMMISSIONER OKUDA: Chair, I agree that
11 the Form of the Order accurately reflects the
12 discussion and decision of the Commission, but to be
13 consistent with my vote, I'm voting no, but it's not
14 a comment on the Form of the Order. Thank you.

15 CHAIRPERSON SCHEUER: Thank you,
16 Commissioner Okuda. Anything further, Commissioners?
17 If not, Mr. Orodener, please poll the Commission.

18 EXECUTIVE OFFICER: Thank you, Mr. Chair.
19 The Motion is to Adopt the Order, Maui Landfill
20 matter, SP97-390.

21 Commissioner Wong?

22 COMMISSIONER WONG: Aye.

23 EXECUTIVE OFFICER: Commissioner Aczon?

24 VICE CHAIR ACZON: Yes.

25 EXECUTIVE OFFICER: Commissioner Ohigashi?

1 COMMISSIONER OHIGASHI: Aye, for the
2 limited purpose of the Form of the Order.

3 EXECUTIVE OFFICER: Commissioner Cabral?

4 VICE CHAIR CABRAL: Yes.

5 EXECUTIVE OFFICER: Commissioner Okuda?

6 COMMISSIONER OKUDA: No.

7 EXECUTIVE OFFICER: Commissioner Chang?

8 COMMISSIONER CHANG: Yes.

9 EXECUTIVE OFFICER: Commissioner Giovanni?

10 COMMISSIONER GIOVANNI: Aye.

11 EXECUTIVE OFFICER: Chair Scheuer?

12 CHAIRPERSON SCHEUER: Aye.

13 EXECUTIVE OFFICER: Thank you, Mr. Chair,
14 the motion passes with 7 affirmative votes and 1 no.

15 CHAIRPERSON SCHEUER: Thank you very much.

16 Thank you, Maui County, for being available
17 on that matter.

18 A17-804 Hawaii Memorial Life Plan, Ltd.

19 Our next agenda item -- moving right
20 along -- is the Continued Hearing and Action Meeting
21 on A17-804 Hawaiian Memorial Life Plan, Ltd., to
22 Consider Petition to Amend the Conservation Land Use
23 District Boundary into Urban Land Use District for
24 approximately 53.449 acres of Land at Kane'ohe,
25 Island of O'ahu, State of Hawaii TMK (1)4-5-033:

1 Portion of Lot 1.

2 Will the parties for Docket A17-804 please
3 identify yourself for the record? I remind you, you
4 may need to unmute yourself.

5 MR. TABATA: Good morning. Curtis Tabata
6 and Ben Matsubara for Hawaiian Memorial.

7 CHAIRPERSON SCHEUER: Good morning.

8 MR. PANG: Good morning. Duane Pang,
9 Deputy Corporation Counsel on behalf of the City and
10 County of Honolulu.

11 CHAIRPERSON SCHEUER: Good morning, Mr.
12 Pang. It's nice to see you fully rather than a small
13 dot on my screen.

14 MS. APUNA: Good morning, Chair, members of
15 the Commission, Dawn Apuna, Deputy Attorney General,
16 on behalf of the State Office of Planning.

17 CHAIRPERSON SCHEUER: And with you?

18 MS. APUNA: Visually with me is Rodney
19 Funakoshi and Lorene Maki.

20 CHAIRPERSON SCHEUER: Thank you.

21 MR. YOSHIMORI: Good morning. Grant
22 Yoshimori, and with me is Rich McCreedy representing
23 Intervenors Pro Se.

24 CHAIRPERSON SCHEUER: Thank you very much.
25 Let me update the record.

1 On July 23, 2020, the Commission met using
2 interactive conferencing technology for an Action
3 Meeting on Docket No. A17-804 Hawaiian Memorial Life
4 Plan, Ltd (O'ahu) to Consider the Petition to Amend
5 the Conservation Land Use District Boundary into the
6 Urban Land Use District.

7 The State Office of Planning concluded its
8 presentation on this docket at that meeting and the
9 Commission had heard from three witnesses from
10 Intervenor's presentation before concluding
11 proceedings for that day.

12 From July 23rd, 2020, until recently, any
13 public comments via email and written correspondence
14 received by the Commission have been made part of the
15 record, and I will actually read to you all -- when I
16 pull it up -- the people who have submitted testimony
17 on this matter.

18 Between June 22nd and 23rd we received
19 testimony from Pane Meatoga III from Hawaii Operating
20 Engineers, Kera Wong-Miyasato and Alec Wong-Miyasato,
21 Kalma Wong, Teresa Chao, Kathleen O'Malley, Paulette
22 Tam.

23 On June 19th we received the results of a
24 survey conducted by Senator Jarrett Keohokalole.

25 On June 23rd we received testimony from

1 Robert O'Connor.

2 June 24th we received testimony from Ryan
3 Kobayashi Hawaii Labor Union, as well as Erin
4 Yamashita.

5 On July 6th we received testimony from Nick
6 Drance.

7 On July 20th, from Gary Gray.

8 On July 23rd from Glenn Miyasato; and
9 July 24th from Lorraine Minatoishi.

10 On August 4th the Commission mailed our
11 August 12th and 13th, 2020 Notice of Agenda to our
12 Parties, to the Statewide, O'ahu and Hawai'i regular
13 and email mailing lists.

14 I will now run over our procedures briefly
15 for today. I have already recognized the written
16 public testimony that has been received by the
17 Commission on this docket and posted to our website.

18 I remind all parties that may be attending
19 that oral testimony on this is closed as we are in
20 the evidentiary portion of our proceedings.

21 The Commission will continue to accept
22 written testimony up until a final decision is
23 reached. In addition, we will accept oral testimony
24 at the hearing where we will consider Adoption of the
25 Order.

1 The Petitioner, City and County of
2 Honolulu, and the State Office of Planning have
3 completed their presentation. Intervenors will
4 continue their presentation by the request of the
5 Commission prior to close of the evidentiary
6 proceedings, Petitioners will recall -- the
7 Petitioner will recall Mr. Morford.

8 Once that is completed, the Commission will
9 close the evidentiary portion of the proceedings and
10 move on to deliberations.

11 For the parties as well as the public, I
12 will note that from time to time, approximately once
13 an hour, I will call for a short ten-minute break as
14 well as a lunch break.

15 Any questions from the parties for our
16 procedures for today?

17 MR. TABATA: No questions.

18 MR. PANG: No questions.

19 MS. APUNA: No questions.

20 MR. YOSHIMORI: Intervenor has no
21 questions.

22 CHAIRPERSON SCHEUER: Commissioners?

23 Thank you. Mr. Yoshimori, ready to resume?

24 MR. YOSHIMORI: Yes, I am.

25 CHAIRPERSON SCHEUER: Who is your next

1 witness?

2 MR. YOSHIMORI: Our next witness is Nate
3 Yuen.

4 Before we go there, Dr. Lee Goff is not
5 available today, so he will not be testifying today.
6 So our first witness is Nate Yuen.

7 CHAIRPERSON SCHEUER: Sorry, if we conclude
8 proceedings today, this means that you'll be unable
9 to call Mr. Goff.

10 MR. YOSHIMORI: I understand, thank you.

11 CHAIRPERSON SCHEUER: Mr. Yuen. I am going
12 to find Mr. Yuen and promote him to be a panelist.
13 If you would enable your video and audio, Nate. Are
14 you able to enable your video and audio?

15 THE WITNESS: There we go.

16 CHAIRPERSON SCHEUER: I'll swear you in and
17 then proceed with questioning.

18 Do you swear or affirm the testimony you're
19 about to give is the truth?

20 THE WITNESS: Sir, there's a cat here.

21 CHAIRPERSON SCHEUER: Do you affirm the
22 testimony you're about to give is the truth?

23 THE WITNESS: Yes.

24 CHAIRPERSON SCHEUER: Mr. Yoshimori, please
25 proceed.

1 NATHAN YUEN

2 Was called as a witness by and on behalf of the
3 Intervenors, was sworn to tell the truth, was
4 examined and testified as follows:

5 DIRECT EXAMINATION

6 MR. YOSHIMORI: For the record, Mr. Yuen's
7 resume is Intervenors' Exhibit No. 5; and his written
8 testimony is Intervenors' testimony No. 1.

9 Thanks, Nate, for appearing today.

10 BY MR. YOSHIMORI:

11 Q Can you please state your name and your
12 address?

13 A My name is Nathan Yuen. I go by Nate. And
14 I my address is 91-233 Hanapouli Circle, Ewa Beach
15 96706.

16 Q Thank you.

17 Can you please list some of the experience
18 you've had related to Hawaii conservation?

19 A Well, I guess I started out -- I've been
20 hiking the Hawaiian islands like 30-some-odd years.
21 And I first started through the Hawaiian Trail and
22 Mountain Club. And I was -- (indecipherable).

23 CHAIRPERSON SCHEUER: For the court
24 reporter, I might ask you to speak slightly slower.

25 THE WITNESS: I started with Hawaiian Trail

1 and Mountain Club with Mabel Kekina, and -- I'm sorry
2 there is a cat here. I'm actually in Puna today at a
3 friend's house, and his cat seems to take a liking to
4 me.

5 Anyway, so I was in Mabel Kekina's group
6 and she was a grandmother, who organized everybody
7 on -- organized the crew in maintaining the trails in
8 the Hawaiian islands.

9 So we would go out into the forest and cut
10 the vegetation that has overgrown the trails. And
11 also the landslide -- this cat --

12 CHAIRPERSON SCHEUER: We can proceed even
13 with the cat meowing.

14 THE WITNESS: She's messing with the mic --
15 anyway, she did search and rescue as well.

16 I was with her for about ten years before
17 she passed away.

18 I also became involved in the Sierra Club,
19 because the Sierra Club is developed more politically
20 in making sure that the land is protected and
21 conservation is properly performed in Hawaii so that
22 native plants and animals can live into the future.

23 So I'm also photographer. I'm not a
24 professional photographer in that I have a regular
25 job as an accountant that I work through during the

1 week, but on weekends I become an amateur hiker,
2 photographer, naturalist. So I look in Hawaii's
3 forest for rare native plants and animals, and right
4 now trees are a big focus of my work.

5 And so I've also -- the Kohala Watershed
6 Partnership asked me to be a photographer in
7 residence in their program back in 2015. So I go
8 periodically through Kohala into their ohia forest to
9 take photos to document what is happening up in
10 Kohala.

11 I'm also involved in tree planting and tree
12 malama. For the past ten years I've been planting
13 trees on Mauna Kea and Pu'u Wa'awa'a the cinder cone
14 on the Kona side. On O'ahu at the Ala Mahamoe Water
15 Project in Moanalua. The Hamakua Marsh in Kailua,
16 and on Mount Ka'ala.

17 Most of these are rare and endangered
18 plants. The purpose is not so much for removal of
19 carbon from the atmosphere but more to preserve rare
20 and endangered species.

21 I became a Certified Urban Forester back in
22 2017. And so this is the group that does Urban
23 forestry in Honolulu and throughout -- actually the
24 County of Honolulu and interisland. And the group
25 measures trees to help planners in assessing the

1 effect of trees for climate change. And we know that
2 trees provide shade, reduce the temperature, reduce
3 evaporation and some of the beneficial things.
4 Especially the city, the trees also absorb sun
5 (indecipherable).

6 So the group that I'm involved in is the
7 downtown Honolulu group that measures trees in the
8 afternoons. And so they are plotted by GIS, the
9 location of the trees, the girth of the trees, the
10 height, the crown size, everything for planners to be
11 able to plot in their systems to be able to model the
12 effects of the trees on the Urban landscape.

13 So I've just been an all-around naturalist
14 photographer. I have a website, hawaiianforest.com
15 that I have blogged about for many years, although
16 recently I have not been blogging, but rather posting
17 on Facebook. Several times a week I will post native
18 trees and native creatures in an attempt to raise
19 awareness of them, and to give people a reason to
20 save them.

21 So that's kind of like my involvement in
22 conservation in Hawaii.

23 Q Thank you.

24 Can you describe your involvement with the
25 discovery of the Blackline damselfly, please?

1 A I had provided written documentation before
2 you, it was on the Sierra Club letterhead.

3 CHAIRPERSON SCHEUER: One moment, Nate.
4 Ms. McManus, you have your hand raised.

5 COURT REPORTER: I'm sorry, I meant to take
6 that off.

7 CHAIRPERSON SCHEUER: Okay. Sorry,
8 continue.

9 THE WITNESS: So I had provided written
10 testimony through the Oahu Sierra Club, and
11 essentially I'm authorized by the Oahu Sierra Club to
12 testify on behalf of the damselfly to see that this
13 population of damselflies survives into the future.

14 I got involved in this project -- well, if
15 you look at that document, you can see the pictures
16 of it. Actually my account of the discovery of it is
17 in there. And one of the neighborhood people --
18 well, I have a friend who is running for political
19 office at that time Patrick Shea. And he was
20 canvassing through the neighborhood of Ohaha, and
21 came across Liam Gray, a resident that lives on
22 Ohaha.

23 CHAIRPERSON SCHEUER: If I may, Mr.
24 Yoshimori, can you direct the witness a little more
25 tightly on what you wish him to testify about.

1 Q (By Mr. Yoshimori): Mr. Yuen, were you --
2 did you meet with Dan Polhemus of Fish and Wildlife,
3 and identify the damselfly as well as photograph
4 them?

5 And would you mind keeping your answers
6 more succinct, please?

7 A After I confirmed that it was the damselfly
8 to my satisfaction, I know Dan Polhemus and called
9 him. He's the expert on these damselflies,
10 researcher and scientist who did the documentation
11 for the listing of these features, the rainbow eye
12 damselfly, pinapinao anuenue, Megalagrion
13 nigrohamatum nigrolineatum, that he's the expert that
14 had this creature placed as endangered species on the
15 federal list of endangered species.

16 So I called him and he confirmed that that
17 indeed was the damselfly.

18 Q Did you also take photographs at that time
19 of the damselfly to help with confirmation?

20 A Yes.

21 Q Thank you.

22 A One of the my specialties in photography is
23 night insect photography. So it's dark in there but
24 I do have the lighting, and I do have the equipment
25 necessary to photograph them properly.

1 Q I would like to submit Mr. Yuen as
2 representative of Sierra Club, as well as expert on
3 locating and photographing nature insects and natural
4 beauty.

5 CHAIRPERSON SCHEUER: So just to be clear,
6 you want -- you don't have to submit him as a member
7 of the club, one would just assume that he is as he
8 claims to be.

9 Do you want him submitted as an expert in
10 nature photography, because your testimony that he
11 will provide has to do with nature photography?

12 MR. YOSHIMORI: It's for the locating and
13 photographing damselflies, as well as providing
14 expertise on the damselfly's habitat requirements.

15 THE WITNESS: If I can interject. I think
16 that my background with tree planting and tree malama
17 and general science and understanding the
18 relationship between the watershed and the clouds and
19 trees that I do have that general science background.

20 So I can speak to removal of trees,
21 deforestation of forest, and basically general
22 science.

23 MR. YOSHIMORI: I think our main goal is
24 to, one, confirm that the Sierra Club's position on
25 the damselfly as well as to get Mr. Yuen feedback on

1 his take on the remediation being planned by the
2 Petitioner for the Hawaiian damselfly's habitat.
3 Those are our two objectives.

4 CHAIRPERSON SCHEUER: I guess this is my
5 take. I want to give great deference to you as Pro
6 Se Intervenor. It seems to me that from your
7 description and Mr. Yuen's self description of his
8 expertise, if you wanted to submit him as a
9 naturalist, not representative necessarily as an
10 entomologist expert, but as a qualified naturalist on
11 Oahu, that might fit the bill of what you're trying
12 to do.

13 MR. YOSHIMORI: Thank you. Thank you for
14 those recommendations. We will submit him as a
15 naturalist.

16 CHAIRPERSON SCHEUER: I'm now going to
17 check with comments or objections from the parties,
18 starting with Petitioner.

19 MR. TABATA: Petitioner does not object.
20 The witness' expertise, as defined by the witness
21 himself, he describes his expertise as science, and
22 based on his personal experience, so to that extent
23 we would not have an objection.

24 CHAIRPERSON SCHEUER: City and County, Mr.
25 Pang?

1 MR. PANG: The City would make the same
2 comments. But want to clarify one thing. Mr. Yuen
3 is testifying on behalf of the Sierra Club?

4 THE WITNESS: Yes, I am.

5 MR. PANG: Then, yes, those comments, we
6 have no objections.

7 CHAIRPERSON SCHEUER: State?

8 MS. APUNA: State has no objection.

9 CHAIRPERSON SCHEUER: Commissioners?
10 Commissioner Giovanni.

11 COMMISSIONER GIOVANNI: I would like to
12 thank you, Chair, and I would like to clarify that I
13 did not hear, and I'm unclear whether the Intervenor
14 is offering Mr. Yuen as an expert on climate change,
15 and in particular whether trees or a replacement of
16 trees in that clearing are -- is the offer expertise
17 in that field or not?

18 CHAIRPERSON SCHEUER: Mr. Yoshimori?

19 MR. YOSHIMORI: I was not planning on
20 asking questions with regard to climate change and
21 forestation.

22 COMMISSIONER GIOVANNI: Then I think that
23 the expertise offered by the witness is acceptable
24 with the exclusion of any -- of that expertise,
25 because I don't hear that he has it. Thank you.

1 CHAIRPERSON SCHEUER: Commissioners,
2 further -- seeing none.

3 Mr. Yoshimori, Mr. Yuen is admitted based
4 as an expert to the matters that he spoke to in his
5 testimony as a naturalist. Please proceed.

6 MR. YOSHIMORI: I just have two quick
7 questions.

8 Q Can you describe what the Sierra Club's
9 position is on the proposed development and potential
10 impact to the Blackline damselfly?

11 A Well, the Sierra Club is concerned that the
12 proposed expansion will adversely effect the ability
13 of that population of damselflies to survive into the
14 future.

15 Q Thank you.

16 The Petitioner has said that they would do
17 the following mitigations: Create an underground
18 drainage system; put a water recorder in the well.
19 And the third one was, install a waterline to
20 supplement the water if needed, and another one was
21 to inspect for invasive fish.

22 Do you think that will support the
23 Blackline damselfly habitat?

24 A Those are baseline things that need to be
25 done. I do agree with the list of items, yes. But

1 there should be more.

2 Q Can you elaborate just a little on what
3 those additional things you believe should be done
4 are?

5 A Well, entire -- well, those measures that
6 where just listed will increase the water supply to
7 the seep, and that is a very positive outcome. The
8 damselflies do require wet, muddy little miniature
9 wetland in order to survive.

10 Actually the Hawaiian islands have been
11 shown to be undergoing a drying trend over the past
12 50 to 100 years, so by providing additional water to
13 that seep will actually increase the security to the
14 damselfly population. From that aspect, those
15 measures are good.

16 Q Thank you so much, Mr. Yuen, for
17 volunteering your time and testifying today.

18 Mr. Yuen is available for questions.

19 A Actually I have more. When I had said that
20 there is more things that can be done, I can
21 elaborate on that if that's what you want to ask.

22 Q If you can bulletize just a few items of
23 what you're thinking, would be helpful.

24 A The project entails the grading of that
25 entire slope, and there are ridges on that slope. So

1 the high points are being cut off, and the low points
2 are being filled in, so that entire slope is going to
3 be denuded of vegetation.

4 We had heard from Dr. Steven Montgomery
5 that the damselflies are shade-loving creatures, that
6 they are shade specialists.

7 Unless they have a way to mitigate against
8 that, I think that will cause what Dr. Cynthia King
9 said was that sometimes these populations of rare
10 insects, they fade away over time, peter out over
11 time.

12 If the conditions are not optimal by
13 creating more sunlight in the habitat, I think that
14 will be detrimental to their survival.

15 Q Thank you again for your testimony.

16 MR. YOSHIMORI: Mr. Yuen is available for
17 questions.

18 CHAIRPERSON SCHEUER: Thank you very much,
19 Mr. Yoshimori.

20 Let's start with Mr. Tabata.

21 MR. TABATA: Thank you, Chair. Thank you,
22 Mr. Yuen, for your testimony.

23 CROSS-EXAMINATION

24 BY MR. TABATA:

25 Q I was going over your written testimony and

1 you mentioned that damselfly's chances for survival
2 will be greatly improved if the landowner install a
3 long hose to supply the habitat and clean water.

4 Is that correct, Mr. Yuen?

5 A That's correct. I just reaffirmed that in
6 my previous testimony.

7 Q Yes, thank you.

8 Could you just explain for us why that
9 water source is important?

10 A That seep there -- well, I guess -- these
11 damselflies once lived all over Oahu, all elevations,
12 all over.

13 By the way, this is in the Fish and
14 Wildlife report written by Dan Polhemus, the
15 damselfly expert who wrote the placement of the
16 damselfly on the federal list of endangered species.

17 The damselflies were once everywhere, but
18 in about the '50s, '60s, '70s their population
19 crashed, and the report said that due to habitat loss
20 and also to invasive species, primarily invasive
21 fish, that the fish would eat the larvae, so that
22 caused the population to crash.

23 So we have a unique set of circumstances at
24 that location right above Ohaha Place where there is
25 a little seep. The water comes up from the ground,

1 and it's not a whole lot of water.

2 I kind of recall, I could be wrong, but I
3 kind of recall that the last report said 30 gallons
4 an hour, not that much water. So it basically makes
5 that part wet and muddy. Very little standing water,
6 so no fish. So actually that's a plus to the
7 damselfly, because the fish are the ones that eat the
8 larvae. So that improves chances of success.

9 Also because it's so dark. There's a lot
10 of trees in there, mainly invasive species,
11 schefflera, strawberry guava, albezia. So these
12 trees are not really desirable, but nonetheless they
13 provide the shade that allowed, number one, the seep
14 not to dry out, because it's quite dark, it's quite
15 humid. Without the trees it would be much different,
16 and the seep could potentially dry out.

17 You know, given intense sunlight on that
18 muddy little patch that could definitely have a
19 long-term impact on the long-term survival of the
20 damselfly.

21 So what we are concerned about is -- so it
22 was the contrast of the three factors, very little
23 water, but enough water for them to breed, and it was
24 dark, and that's what allowed that population to
25 continue into now, to survive into the future.

1 So these damselflies are pushed all the way
2 into the northern Koolaus, that's the critical
3 habitat for the damselfly. I believe there are 18
4 populations that have been identified. And then
5 there is no damselflies anywhere else in the island
6 except in Kaneohe at that one spot.

7 So it was a fortuitous confluence of
8 factors that enabled this population of damselflies
9 to exist.

10 Q Actually, Mr. Yuen, you mentioned it's
11 possible that the seep could dry up. What would
12 happen to the damselflies if the seep were to dry up?
13 What is your understanding?

14 A They'll eventually die. Dr. Steve
15 Montgomery said that he believes the larvae could
16 survive in the mud for a few months. Theoretically,
17 if it dried out, and the last larvae are in the mud,
18 you have two months until they will die.

19 Q You mentioned your blog. And I was reading
20 your blog. It's very interesting. And this one
21 entry I was reading mentioned that back in June 2016
22 Liam Gray took you and Mr. Yoshimori, Mr. McCreedy,
23 Julie McCreedy to go see the damselflies on the
24 Hawaiian Memorial property. Do you remember that?

25 A Yes, I wrote that blog entry to document

1 what happened.

2 Q Right, right.

3 Does this -- is this the time where the
4 damselfly was discovered?

5 A Yes. Yes.

6 Q Thank you.

7 A Actually to be more correct, Liam Gray
8 discovered the damselfly. So it probably was a few
9 weeks before that. So that's the actual discovery
10 date, I don't know exactly when it is, but that's
11 when I became aware of it. That's how Dan Polhemus
12 became aware of it, and that's how this became known.

13 Q Was anyone from Hawaiian Memorial present
14 at that --

15 A No.

16 Q -- visit?

17 A No.

18 Q Thank you.

19 That blog entry goes on to talk about,
20 says:

21 Hawaiian Memorial Park became aware of the
22 damselfly population at the Kaneohe Neighborhood
23 Board meeting on July 20, 2017.

24 Is that correct, Mr. Yuen?

25 A Probably a few days before that, but

1 that's -- I was at that meeting, and that's when, at
2 least I'm aware, that Hawaiian Memorial Park became
3 aware of it. Prior too that they were not aware of
4 the existence of the damselfly.

5 Q Thank you.

6 And that's about one year after the
7 Intervenors found the damselfly, correct?

8 A Yes.

9 Q And do you remember -- were you present at
10 that neighborhood board meeting?

11 A I was.

12 Q Do you recall what was being discussed at
13 the neighborhood board meeting? Was the Hawaiian
14 Memorial expansion project being discussed?

15 A Yes, it was. Hawaiian Memorial Park had
16 many of their friends and supporters in green
17 T-shirts and they supported the -- I guess
18 proposed -- I guess they were looking for support
19 from the neighborhood board to proceed with the
20 expansion.

21 Q How did the subject of the damselfly come
22 about?

23 A Probably the best person to ask is Grant
24 Yoshimori himself, he's the guy that did that. And
25 my memory is kind of like fuzzy about that. He's the

1 guy who did it.

2 Q So Mr. Yoshimori is the one who raised the
3 issue of the damselfly?

4 A That's my recollection.

5 Q And do you recall what the message was
6 regarding the damselfly by Mr. Yoshimori?

7 A I don't really recall. I know it's in
8 opposition to the project because there were these
9 damselflies. But I don't recall the exact angle.

10 Q Okay, thank you. Just asking for what you
11 remember.

12 Thank you, Mr. Yuen. Appreciate your
13 testimony.

14 I have no more questions.

15 CHAIRPERSON SCHEUER: Thank you, Mr.

16 Tabata.

17 Mr. Pang.

18 MR. PANG: City has no questions for this
19 witness. Thank you.

20 CHAIRPERSON SCHEUER: Thank you.

21 Ms. Apuna.

22 MS. APUNA: No questions.

23 CHAIRPERSON SCHEUER: Commissioners,
24 questions for the witness?

25 Commissioner Okuda follow by Commissioner

1 Wong.

2 COMMISSIONER OKUDA: Thank you, Mr. Chair.
3 And thank you, Mr. Yuen, for your testimony.

4 You testified that you are a naturalist.
5 Just so that I get an idea of your scope or
6 geographic scope of knowledge, can I ask you the
7 local question. Which high school did you graduate
8 from?

9 THE WITNESS: I went to McKinley High
10 School.

11 COMMISSIONER OKUDA: During the time that
12 you were growing up in Hawaii, how much time did you
13 spend on the Windward side, the Kaneohe side?

14 THE WITNESS: Not much. We lived in
15 Kalihi. We would go fishing in Kahana Valley couple
16 times a month, maybe, for a few years, not often, but
17 -- but I've always loved the Windward side, but I
18 wouldn't say I had a lot of contact with Windward,
19 O'ahu until later in life.

20 COMMISSIONER OKUDA: Even though I grew up
21 in Kailua before Kailua became a tourist trap, my
22 mother's family is from Kalihi, but you would not
23 want to visit the neighborhood where the family house
24 is.

25 Let me ask you this. About -- and you'veve

1 given testimony also I believe as representative of
2 the Sierra Club. There's been evidence placed in the
3 record that there is a Memorandum of Understanding
4 between the Koolaupoko Hawaiian Civic Club and
5 Hawaiian Memorial Park, a preliminary memorandum, and
6 there's been testimony about how that if this project
7 goes forward, Hawaiian Memorial Park is willing to
8 enter into an arrangement, still to be determined,
9 with the Koolaupoko Hawaiian Civic Club with respect
10 to a cultural preserve.

11 Who is in a better position to give advice
12 or control over the area with respect to the cultural
13 preserve, Sierra Club or Koolaupoko Hawaiian Civic
14 Club?

15 THE WITNESS: Koolaupoko Hawaiian Civic
16 Club.

17 COMMISSIONER OKUDA: Are you aware -- or
18 there's been representations made that the Koolaupoko
19 Hawaiian Civic Club is in favor of this expansion.
20 Are you aware of those representations?

21 THE WITNESS: Yes, I am.

22 COMMISSIONER OKUDA: Do you dispute the
23 fact that the Koolaupoko Hawaiian Civic Club is in
24 favor of the expansion?

25 THE WITNESS: I hear that they are in favor

1 of the expansion, yes.

2 COMMISSIONER OKUDA: Wouldn't that be a
3 significant factor that the Koolaupoko Hawaiian Civic
4 Club believes when you look at all the factors here,
5 and I assume they have looked at all the factors,
6 that they are in favor of the expansion?

7 THE WITNESS: I didn't quite understand the
8 question. Can you repeat the question?

9 COMMISSIONER OKUDA: Do you find it
10 significant that the Koolaupoko Hawaiian Civic Club
11 is allegedly in favor of the expansion?

12 THE WITNESS: Regardless about the
13 damselflies, yeah, I guess it is significant because
14 they prioritize the heiau, Kawa'ewa'e Heiau, and the
15 preservation of that cultural treasure above the
16 damselflies, I think they prioritize it that way.

17 I understand why, but this is also a
18 natural treasure, and it's also a Hawaiian cultural
19 significance, the pinapinao anuenua, the rainbow eye
20 damselfly, it has a Hawaiian name. That's
21 significant of itself.

22 And these damselflies are in the Kumulipo,
23 and there are heiau named after pinao. It is a
24 culturally significant animal.

25 So in addition to protection of the heiau,

1 which I fully support, the damselflies need to be
2 protected too, and the Hawaiian Memorial Park has, in
3 my opinion, been supportive in the damselfly
4 population in that they have already moved back the
5 boundary lines where they had originally placed it
6 because the damselfly's population was discovered.

7 But now the danger that I see, is that by
8 removal of the trees, it's going to reduce the
9 sunlight. So I would like to ask Dr. Cynthia King,
10 the State entomologist --

11 COMMISSIONER OKUDA: Yeah, Mr. --

12 THE WITNESS: -- if the conditions are not
13 optimized for the damselflies, whether or not that is
14 going to be an issue for --

15 COMMISSIONER OKUDA: I'm sorry, Mr. Yuen, I
16 don't mean to cut you off, but my questions are a lot
17 more limited. If I ask --

18 THE WITNESS: I'm rambling.

19 COMMISSIONER OKUDA: I'm trying to keep my
20 questions limited here and in a limited scope. I'm
21 not sure about how much of this hearing, or all these
22 days of hearing you observed by ZOOM, but I ask a
23 number of questions of a number of witnesses about
24 the fact that there is no legal duty to affirmatively
25 or take positive steps to preserve, for example,

1 cultural sites or anything like that, the duty is
2 basically not to do anything affirmatively to harm
3 things.

4 So let me ask the question this way. You
5 know, one of the issues that I'm struggling with is
6 the fact that it seems to be a tradeoff that's being
7 proposed here, that if this development does not go
8 forward, then certain promises to take actions to
9 preserve things like the damselfly habitat, cultural
10 sites, there does not seem to be a vehicle under the
11 law to basically force the landowner to take these
12 steps.

13 Do you agree that that's a reasonable way
14 of looking at part of the decision we have to make
15 which is whether or not the tradeoff here, you know,
16 having the owner affirmatively agree to do something
17 which it is not otherwise required to do, whether
18 it's worth the tradeoff, that's what we're looking
19 at.

20 THE WITNESS: Yeah. That is the conundrum
21 that we are in. Because there are things about the
22 project that are good, and I guess certain assurances
23 are being made to mitigate against some of the things
24 that have detrimental impact. Like the removal of
25 invasive species from their retention ponds.

1 You know, the retention ponds, if you look
2 at where they are relative to the damselfly habitat,
3 it's right next to them. And if they don't remove
4 the invasive species from retention ponds, they can
5 end up in the damselfly habitat.

6 COMMISSIONER OKUDA: Yeah, yeah. Well, Mr.
7 Yuen --

8 THE WITNESS: There needs to be ways for
9 them to maintain the property, but there isn't any
10 mechanism in the law to force the land's owner to do
11 that. That's the conundrum that the Land Use
12 Commission finds itself.

13 COMMISSIONER OKUDA: We might be faced
14 with -- and I'm speaking, for example, just
15 specifically about the damselfly.

16 We really might be faced with a decision
17 here that if we wanted to have specific promises made
18 for specific actions to be taken to affirmatively
19 protect the damselfly habitat, the tradeoff might
20 have to be that we have to approve the development.
21 That's really the quid pro quo. We're talking about
22 a quid pro quo.

23 Do you agree that that's one reasonable way
24 of looking at the question that is being faced here?

25 THE WITNESS: Yes, provided that additional

1 safeguards are made to protect the light levels at
2 that habitat from being detrimentally affected by
3 additional sunlight.

4 COMMISSIONER OKUDA: Thank you very much.
5 Thank you, Chair. No further questions.

6 CHAIRPERSON SCHEUER: Thank you very much.
7 Commissioner Wong.

8 COMMISSIONER WONG: Thank you, Chair.

9 So the questions I have is following up
10 with Commissioner Okuda in terms of say Hawaiian
11 Memorial Park has said they're going to add water to
12 that pond. Wouldn't that help with the evaporation,
13 so you keep that water in?

14 THE WITNESS: Yes. The addition of water
15 to supplement what's in that spring will generally
16 add more security to the damselfly, providing however
17 not too much water, because then fish can get inside
18 there. So there needs to be a way of monitoring the
19 amount of water just right, not too much, not too
20 little, just right.

21 CHAIRPERSON SCHEUER: Reference to Auntie
22 Malia Lani.

23 COMMISSIONER WONG: The other question I
24 have is as Commissioner Okuda said, if they don't do
25 anything, let's say there's an earthquake and seepage

1 or water dries off, you know, don't have, so the
2 damselfly would die anyway, right?

3 THE WITNESS: That's right. If you disrupt
4 the water supply for whatever reason, yeah.

5 COMMISSIONER WONG: Hawaiian Memorial Park
6 has -- as Commissioner Okuda stated, they don't have
7 any legal obligations to do anything, correct? So if
8 I was, say a kid, and I said -- you know, cause
9 trouble and throw soap in there, you know, how kids
10 are, they're kind of -- some of them are bad like me.

11 So what I'm just saying is, you know, right
12 now I'm in a conundrum to give Hawaiian Memorial Park
13 the agreement, to me the damselfly will be more safe
14 because they'll be more protected. People will look
15 at it more, compared to if they don't do anything, if
16 Hawaiian Memorial Park don't touch it, so I'm in that
17 area right now.

18 THE WITNESS: The addition of water does
19 provide additional security to the damselfly in the
20 future, so the habitat will remain viable provided
21 that they provide a way -- like when they denude that
22 slope, the sunlight will be hitting directly on
23 that -- well, when the sun is at a certain angle,
24 it's going to hit directly on the damselfly habitat.
25 So during construction -- I've seen construction

1 site, they have kind of walls with the cloth in order
2 to stop the dust. This would also have to be up on
3 the angle to prevent the sun, when it's at an angle,
4 to affect it, but I haven't seen any plan from
5 Hawaiian Memorial Park in their construction, whether
6 they would do that.

7 And also they need to restore the
8 landscape, after they denude the slope, they have to,
9 at least close to the habitat, they need to put more
10 trees, so that when the sun is at a low angle, there
11 are trees there to block the sunlight.

12 So I have not seen that in their plans, and
13 I would recommend the Land Use Commission to include
14 that as part of the conditions.

15 COMMISSIONER WONG: So let's just say that
16 they do add these things. If they do add or don't
17 during the condition -- would the Sierra Club be okay
18 with this and support the project after that?

19 THE WITNESS: I wouldn't say that we would
20 support the project, we wouldn't object to the
21 project. If they provide enough safeguards to ensure
22 that the damselfly population will survive into the
23 future, we would no longer object.

24 COMMISSIONER WONG: Just one of those
25 things that, you know, we are looking at those items.

1 And also note that the Windward side is pretty dark
2 at times, because I used to live there with all the
3 rain. So I haven't been there for awhile, but, you
4 know, the clouds does come by the Koolaus and does
5 shade the area. You don't think that would help too?

6 THE WITNESS: Well, yes and no. Clearly,
7 clouds over the Windward side would block it, but the
8 clouds are there now. When the sun sets and the sun
9 is at an angle it could provide an opportunity for
10 the light to hit the damselfly habitat from
11 horizontal angle, and that's what I'm concerned
12 about. The lighting conditions would cause the
13 population to peter out slowly over time.

14 COMMISSIONER WONG: That's all. Thank you.
15 Thank you, Chair.

16 CHAIRPERSON SCHEUER: Thank you,
17 Commissioner Wong.

18 Commissioner Ohigashi.

19 COMMISSIONER OHIGASHI: I just have a few
20 questions.

21 I understand your position is that you need
22 to be shown some mitigation regarding during the
23 construction phase as to whether or not to prevent
24 shade from -- to keep the shade over there so that we
25 have as close a natural habitat as possible.

1 Is that something that can be handled by,
2 say, I guess what is called -- well, the State
3 expertise in determining what those mitigations
4 should be, what those mitigation measures should be?

5 THE WITNESS: I guess ultimately it's with
6 Dr. Cynthia King, State entomologist. I think they
7 ultimately decide, I think.

8 COMMISSIONER OHIGASHI: So a condition that
9 you would be satisfied, or Sierra Club would be
10 satisfied with would be that the habitat be protected
11 as much as possible in accordance with guidance from
12 the State, Dr. King?

13 THE WITNESS: Well, I actually heard Dr.
14 Cynthia King's testimony and she did not -- she
15 didn't object to the project, and the concern that I
16 have is I'm not sure if she is aware that the
17 damselflies are shade specialist, and that their
18 continued survival may require shade.

19 Dr. Steven Montgomery, who testified
20 earlier, said that they were shade-loving creatures.
21 So I think that question should be posed to her
22 whether or not shade is an important factor.
23 Ultimately, I would have to defer to her because she
24 is the one that makes --

25 COMMISSIONER OHIGASHI: That is correct.

1 So if we put in a condition that makes her
2 responsible to determine whether or not there is
3 sufficient shade in that area or sufficient
4 mitigation measures in that area, that would satisfy
5 the Sierra Club?

6 THE WITNESS: I wouldn't say we would be
7 satisfied, because if the outcome wasn't what we
8 thought was optimal for the damselflies, then we
9 would still object.

10 COMMISSIONER OHIGASHI: I don't understand
11 your testimony. First you tell me mitigation
12 measures should be increased and that the State
13 entomologist is the person to make that
14 determination. And when I offer a mitigation for
15 that, your statement is, well, that's not enough.

16 So I'm just trying to get, trying to figure
17 out -- let me finish -- how to address your concern,
18 Sierra Club's concern regarding damselfly, to make
19 sure that the State entomologist, if we pass this,
20 will have a condition saying that this is the
21 mitigation factor that you have to use, because
22 that's the nature of your testimony.

23 You can answer that, if you like.

24 THE WITNESS: Well, I guess I would answer
25 that by saying that we -- we want to provide the best

1 opportunity for the damselflies to survive into the
2 future, and we believe shade is a factor. And that
3 ultimately I believe the State entomologist would
4 make the decision about whether or not that was an
5 important factor.

6 COMMISSIONER OHIGASHI: Thank you. I don't
7 have any more questions.

8 CHAIRPERSON SCHEUER: Thank you,
9 Commissioner Ohigashi. Commissioners?

10 Commissioner Chang. I see your physical
11 and virtual hand.

12 COMMISSIONER CHANG: Thank you, Mr. Chair.
13 And thank you so much, Mr. Yuen. You look like
14 you're in a very beautiful place this morning.

15 THE WITNESS: Hilo is heaven on earth.

16 COMMISSIONER CHANG: Thank you for taking
17 the time to provide this testimony.

18 You have been offered as an expert as a
19 naturalist. But -- so would you agree that for
20 purposes of expert testimony, and with respect to the
21 damselfly, that your qualifications that Dr. King
22 with DLNR is probably more qualified than you are to
23 make determinations regarding the damselfly
24 mitigation?

25 THE WITNESS: Absolutely. I am a member of

1 the Hawaiian Entomological Society, and I'm very
2 active in hiking to remote places in the Hawaiian
3 islands, and taking photographs of native Hawaiian
4 plants and trees and insect. I often post them to
5 the news groups, and I'm a member of the entomology
6 community, but I'm not an expert. And I can
7 photograph them and I can show them what they look
8 like, but the experts are the researchers.

9 COMMISSIONER CHANG: And I appreciate that.
10 Thank you so much. I appreciate the good work you do
11 as well your testimony. Thank you. I have no
12 further questions.

13 CHAIRPERSON SCHEUER: Thank you,
14 Commissioner Chang.

15 Commissioners, further questions for the
16 witness? Commissioners, any questions for the
17 witness?

18 If not, if I may, Mr. Yuen, can I clarify?
19 Are you being paid in any manner for this
20 work on behalf of the Intervenor?

21 THE WITNESS: No, I'm not.

22 CHAIRPERSON SCHEUER: You're doing this
23 purely as a volunteer?

24 THE WITNESS: Yes. I have a personal
25 interest, because I was involved in the initial

1 discovery and confirmation of the damselfly
2 population, so I kind of have a personal interest.

3 CHAIRPERSON SCHEUER: I would like to ask
4 you quickly, because I think your expertise is
5 uniquely suited to it, a question that I asked Ms.
6 King, and I believe just for the record Ms. King has
7 a Master's degree but not a Doctor.

8 THE WITNESS: Sorry.

9 CHAIRPERSON SCHEUER: I asked her whether
10 she felt community engagement in addition to the
11 physical changes to physical infrastructure and
12 predator control was an integral part of conservation
13 for the protection of the species.

14 So it's just as important that the
15 community in the surrounding area know of and, at
16 least don't take harmful actions against this
17 creature, just as much as it is important to have
18 good drainage and the hose. Would you agree or
19 disagree with that statement?

20 THE WITNESS: I would agree, yes.

21 CHAIRPERSON SCHEUER: So far in the
22 protective measures that have been offered there is
23 not a community engagement or education process.

24 Would you believe that such a process would
25 be of the benefit of protecting the species?

1 THE WITNESS: Yes. I think they could do
2 really easy things too. Like just visit the habitat
3 a few times a month to make sure there is water in
4 there. Look around to see if any invasive species.
5 So volunteers could have a big impact in trying to
6 ensure that these damselflies survive into the
7 future.

8 CHAIRPERSON SCHEUER: I don't have anything
9 further, Mr. Yuen.

10 Anything further from the Commissioners?
11 If not, Mr. Yoshimori, do you have any redirect?

12 MR. YOSHIMORI: I do not. Thank you, Mr.
13 Yuen.

14 CHAIRPERSON SCHEUER: I'm going to dismiss
15 Mr. Yuen as a witness. It's 10:16 a.m., I'm like to
16 take a ten-minute break to 10:26 a.m.

17 Mr. Yoshimori, who will you be admitting?

18 MR. YOSHIMORI: Dr. Steven Businger.

19 CHAIRPERSON SCHEUER: Followed by how many
20 more?

21 MR. YOSHIMORI: That will conclude our
22 presentation.

23 CHAIRPERSON SCHEUER: So we are going to go
24 into recess until 10:26 a.m. We will let in Mr.
25 Businger as your final witness.

1 (Recess taken.)

2 CHAIRPERSON SCHEUER: Let's go back on the
3 record.

4 Intervenors next and final witness
5 Dr. Steve Businger. I will swear you in, then, Mr.
6 Yoshimori, you can proceed with your direct
7 examination.

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: Mr. Yoshimori, you
12 may proceed with direct examination.

13 STEVE BUSINGER

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

17 DIRECT EXAMINATION

18 BY MR. YOSHIMORI:

19 Q Thank you, again, for testifying today.

20 For the record, Dr. Businger's resume is
21 Intervenors' Exhibit 6, and his testimony is
22 Intervenors' testimony No. 5.

23 Dr. Businger, can you please state your
24 name and address for the record, please?

25 A My name is Steve Businger. I live at 4837

1 Sierra Drive in Honolulu, Hawaii.

2 Q Can you give us a quick summary of your
3 educational background?

4 A Sure. I have a bachelor's degree in
5 atmospheric sciences from the University of
6 Washington. A master's in astro-geophysics from the
7 University of Colorado. And a Ph.D. from University
8 of Washington.

9 Q Can you please state some of the recent
10 positions you've held related to the field of
11 meteorology?

12 A Yes. I have been an assistant professor
13 originally in North Carolina, and that was starting
14 in 1986. In 1993 --

15 COURT REPORTER: Excuse me, Doctor. Can
16 you -- this is the Court Reporter, excuse me for
17 interrupting you.

18 Can you speak clearer or louder. Get
19 closer to your microphone.

20 THE WITNESS: Let me see if I'm connected
21 to the right microphone, sorry.

22 COURT REPORTER: You're sounding fine now,
23 but your voice lowers and I can't hear the words.

24 THE WITNESS: That was my fault. I have a
25 microphone as well as my laptop, and unfortunately it

1 was using my laptop rather than my microphone that I
2 have separate.

3 CHAIRPERSON SCHEUER: Thank you. Please
4 proceed.

5 THE WITNESS: So I was talking about my
6 history of employment, and I was an assistant
7 professor at the University of North Caroline, State
8 University, until 1993. I had just received tenure
9 at the time, and I moved to University of Hawaii at
10 that point, and was hired as an associate professor.
11 And then I promoted to full professor in 1999, and
12 have been in that same position until currently.

13 I've been Chair of the Atmospheric Science
14 Department for the last four years.

15 MR. YOSHIMORI: I would like to submit Dr.
16 Businger as expert on meteorology.

17 CHAIRPERSON SCHEUER: Any objections?
18 Petitioner.

19 MR. TABATA: No objection.

20 MR. PANG: No objections from the City.

21 MS. APUNA: No objections from the State.

22 CHAIRPERSON SCHEUER: Commissioners?
23 Seeing none, Dr. Businger is so admitted. Please
24 continue, Mr. Yoshimori.

25 MR. YOSHIMORI: Thank you.

1 Q Hawaiian Memorial is designing
2 retention/detention basins, capturing and treating
3 runoff generated from the cemetery would be
4 designated for 100-year frequency, one-hour duration
5 storm event, which is 4.5 inches per hour. That's
6 from the EIS page 3-95.

7 How often does a 100-year, one-hour
8 duration occur?

9 A Recurrence intervals are calculated using
10 past data. So the history of nearby rain gauges are
11 used, and then special mathematical distributions are
12 applied for extreme events, and it turns out that the
13 probability that a 100-year, one-hour event will
14 occur is about one percent for any given year.
15 That's not to say that two years in a row you
16 couldn't have a 100-year event.

17 Q Excuse me, just a minute here.

18 Is designing for the 100-year, one-hour
19 event reasonable?

20 A In this particular application, it is not
21 reasonable. And the reason I say that is because
22 when we have flood events, it usually occurs in
23 larger scale atmospheric disturbances or storm
24 systems like Kona lows, winter storm frontal
25 passages, tropical cyclones that pass, tropical

1 intensive events with rainfalls exceeding 4.5-inches
2 in one hour will increase?

3 A The scientific research on this topic is
4 quite clear, both in the United States and in the
5 world as a whole, there has been an increase in heavy
6 rainfall events. And, therefore, the recurrence
7 intervals have been growing less.

8 We have been seeing once in 10,000-year
9 flood events happening in places like Boulder,
10 Colorado. And we've seen unprecedented rainfall
11 events that happen in the Hawaiian islands, such as
12 the Kauai flood of 50 inches in 24 hours which broke
13 the U.S. rainfall record.

14 And the reason why we are seeing this
15 increase in extreme rainfall events is also very well
16 understood. It has to do with the fact that sea
17 surface temperatures are gradually becoming warmer,
18 and this is in response to the increase in carbon
19 dioxide in the atmosphere from also fuel burning.

20 This warmer water pushes more water vapor
21 into the atmosphere. The amount of water vapor in
22 the atmosphere is directly related to sea surface
23 temperature, because the sea surface temperature --
24 at the sea surface temperature you have an
25 equilibrium between the sea surface and that

1 temperature and the atmosphere. Warmer sea surface,
2 more moisture over that sea surface.

3 We are surrounded by the Pacific Ocean
4 here, and as the waters in the Pacific Ocean
5 gradually warm, we will see an enhancement of extreme
6 rainfall events.

7 Q I think you touched upon this, but is there
8 evidence of global warming?

9 A There is evidence of global warming. We
10 see it in many, many different data sets which are
11 independent in a sense. You see it in the fact that
12 the ice caps are reducing in extent, that alpine
13 glaciers are dwindling, permafrost is melting. The
14 atmospheric global temperature is rising, and the
15 precipital water, or the amount of water vapor in the
16 atmosphere is also rising.

17 So there are many, many independent data
18 sets that are being looked at and are giving us that
19 observation.

20 Q Thank you.

21 What can the State and the City do to help
22 alleviate climate change?

23 A Well, it's very important that we first
24 limit the amount of carbon dioxide we put in the air,
25 but also we need to limit deforestation and plant a

1 lot of trees because that helps to remove carbon
2 dioxide from the atmosphere.

3 Q Thank you for volunteering your time and
4 your testimony and for repeatedly coming to these
5 hearings. Thank you so much.

6 Dr. Businger is available for questions.

7 CHAIRPERSON SCHEUER: Thank you very much.
8 We will start with the Intervenor -- excuse me --
9 Petitioner.

10 CROSS-EXAMINATION

11 BY MR. TABATA:

12 Q Thank you.

13 Dr. Businger, you testified regarding our
14 retention basins or detention basins. Let me ask you
15 this specific question.

16 Are you saying that our retention/detention
17 basins are not in compliance with the City's drainage
18 rules? Is that what you're telling us?

19 A I am saying that the design does not take
20 into account the likelihood that a flood is going to
21 overwhelm that particular retention volume of 12,700
22 cubic feet.

23 Q I understand you're saying there is going
24 to be a lot more rain and a lot more runoff and
25 because of that, your opinion is that the basins are

1 insufficient.

2 I guess what I'm asking you is, can you
3 point to any specific rule in the City's drainage
4 rules that you think we're in violation of?

5 A No.

6 Q Thank you. I have no more questions.

7 MR. PANG: City has no questions for this
8 witness. Thank you.

9 CHAIRPERSON SCHEUER: Ms. Apuna?

10 MS. APUNA: OP has no questions.

11 CHAIRPERSON SCHEUER: Commissioners,
12 starting with Commissioner Wong followed by Okuda.

13 COMMISSIONER WONG: Doctor, I have a
14 question. In terms of if the landscape is kept as-is
15 and 100-year storm happens, wouldn't it be worse in
16 your estimation?

17 THE WITNESS: Would runoff be worse?

18 COMMISSIONER WONG: Yes.

19 THE WITNESS: When you have a slope covered
20 by forest, the ability for that landscape to retain
21 the water and not have it runoff is better.

22 COMMISSIONER WONG: So the question I have
23 is, you know, sometimes I've seen in the TV when you
24 have big rains you see these big mountains come down
25 because of, you know, all that rain.

1 Could that happen too with those big rains?

2 THE WITNESS: In this particular landscape
3 that is involved here, it seems to me that it's
4 pretty stable. The roots of the forest hold the soil
5 quite well.

6 COMMISSIONER WONG: So if they don't do
7 anything, they will be okay; but if they do
8 something, there may be runoff, is that what you're
9 saying?

10 THE WITNESS: What I'm saying is that the
11 environmental plan where they look at the one-hour
12 rainfall rate of 4.5 inches, and they build a
13 retention to match that is insufficient, that that's
14 basically, just based on my understanding of
15 recurrence intervals for storm rainfall, it is
16 insufficient.

17 COMMISSIONER WONG: That's all I need to
18 know. Thank you, Doctor. Thank you, Chair.

19 CHAIRPERSON SCHEUER: Commissioner Okuda.

20 COMMISSIONER OKUDA: Thank you, Doctor, for
21 your testimony, and I apologize if my next question
22 sounds more basic, but unfortunately I got my
23 bachelor's from University of Hawaii without taking
24 hard science, and I'm paying for it now.

25 Can you explain to me why you believe that

1 the Petitioner or the landowner is underestimating
2 the amount of rain that should be expected for the
3 site?

4 THE WITNESS: Well, they have put together
5 a retention volume which includes three ponds and a
6 volume of 12,700 cubic feet, and they say that the
7 amount of outflow from this, over a 24-hour period,
8 will allow for a 4.5-inch of rainfall which can occur
9 once in 100 years in a one-hour period.

10 I'm merely making the point that if you
11 have a thunder storm that produces 4.5 inches in an
12 hour, that that is not the standard to which you want
13 to design this, because storm systems tend to rain
14 for longer than an hour, and I think we all know this
15 living in Hawaii.

16 I've lived here for 30 years, and it seems
17 to me that when you get a storm system with heavy
18 rainfall, you really want to look at a 24-hour
19 period, and then you're looking at more like
20 15-inches, and that's what it should be designed for
21 in order for it to have a reasonable chance of
22 mitigating the hazard.

23 COMMISSIONER OKUDA: And even though this
24 might be a real basic question. If the storm or the
25 water drainage or retention system is not designed or

1 cannot sustain keeping the capacity of the rain that
2 occurs during that type of storm, what are some of
3 the foreseeable results? Would flooding of the
4 neighbors be a foreseeable result?

5 THE WITNESS: Yes.

6 COMMISSIONER OKUDA: Now, correct me if I
7 am wrong, but in your report, do you also include
8 some photos and discussion of the Kaloko Dam tragedy
9 on Kauai?

10 THE WITNESS: Yes.

11 COMMISSIONER OKUDA: I had the unfortunate
12 participation of representing a party in that case.

13 Isn't it true that it wasn't simply the
14 storm itself that caused the collapse of the Kaloko
15 Reservoir?

16 THE WITNESS: That is correct.

17 COMMISSIONER OKUDA: In fact, what some
18 would say was a major or substantial factor in
19 causing the dam to collapse was that the landowner at
20 that point in time -- when I say landowner, that's
21 the owner of the cinder cone which became the Kaloko
22 Reservoir, had filled in the concrete spillway of the
23 dam, so when it rained, the water overtopped the
24 other parts of the dam, causing the collapse. Is
25 that your understanding of what happened?

1 THE WITNESS: That is correct.

2 COMMISSIONER OKUDA: So in other words, it
3 wasn't simply rainfall that caused the collapse, it
4 was conduct -- and we don't have to get into whether
5 that's good conduct, bad conduct, or criminal
6 conduct -- but it was conduct of a human being that
7 was a substantial factor in contributing to the
8 collapse of the dam and the deaths of the individuals
9 downstream, correct?

10 THE WITNESS: That's correct. And if you
11 look at that particular month, that was the March of
12 2006, Oahu, in the region that we're talking about,
13 received between 20 and 40 inches of rainfall within
14 that month.

15 So whatever -- if this had been constructed
16 during -- prior to March of 2006, there's every
17 likelihood that these ponds would have failed
18 miserably.

19 COMMISSIONER OKUDA: I'm not saying that
20 necessarily that anyone would be killed or we would
21 have a disaster of the scope that resulted downstream
22 of the Kaloko Reservoir, but is it fair to say that
23 your opinion is it is foreseeable there would be some
24 amount of damage if that type of rainfall reoccurred
25 on Oahu?

1 THE WITNESS: That's a good summary, yes.

2 COMMISSIONER OKUDA: Do you have an opinion
3 of how likely or not likely such rainfall events will
4 happen in the future because we haven't seen a
5 Kaloko-type rain recently.

6 I mean, do you have an opinion -- I mean,
7 how likely or unlikely is it that we've given all the
8 factors you testified and other factors that you
9 might want to comment on, that that type of rainfall
10 is probable or not probable?

11 THE WITNESS: Well, if you -- oh, that was,
12 you know, 2006, not that terribly long ago, but in
13 June of 2019 we had over four inches on Oahu in an
14 hour. Same happened October 29th, 2018. April 13th
15 through 15, 2018 we had that, you know, up to six
16 inches over the Windward side of Oahu, and we had 50
17 inches of rainfall on Kauai. In March 9th of 2012
18 there was a super cell that developed over the
19 Koolaus and went right over Kaneohe, dropped
20 four-and-a-half inch hail, and also produced two
21 tornadoes in Kailua.

22 These extreme events are not that rare.
23 There was the Halloween flood of 2004 that had nine
24 inches of rain over six hours. There was a New
25 Year's flood of 1987 that had 25-inches of rainfall

1 in 24 hours, produced 50 million dollars worth of
2 damage in Hawaii Kai.

3 These events in Hawaii are not that rare,
4 and the problem is that they are becoming more
5 common. They will become more common.

6 COMMISSIONER OKUDA: And this is your
7 opinion based on --

8 THE WITNESS: That's science.

9 COMMISSIONER OKUDA: And the opinion that
10 you give based on the science is based on your
11 education and experience as documented in your
12 resume, is that correct?

13 THE WITNESS: That is correct, yes.

14 COMMISSIONER OKUDA: You know, last fast
15 question.

16 Not that people should be judged by
17 publications or anything like that, but how many
18 articles or books have you published in your field of
19 science?

20 THE WITNESS: I have close to 100
21 peer-reviewed publications. I've published several
22 textbooks.

23 COMMISSIONER OKUDA: Thank you very much,
24 Doctor.

25 I have no further questions, Mr. Chair.

1 CHAIRPERSON SCHEUER: Thank you,
2 Commissioner Okuda.

3 Commissioner Chang followed by Commissioner
4 Ohigashi.

5 COMMISSIONER CHANG: Thank you, Dr.
6 Businger. I appreciate hearing your testimony today
7 and you taking the time to provide that to the Land
8 Use Commission.

9 I would suspect that it's very frustrating
10 for those of you who have expertise and you see these
11 things coming and nothing is done.

12 The question I have is, do you know what
13 process the City and County of Honolulu goes through
14 to update their requirements? I know I think it
15 was -- we had testimony about there is methodologies,
16 Plate 6 or Rational Method.

17 Do you know what kinds of -- what is the
18 process to change those requirements so they more
19 accurately reflect conditions that you're talking
20 about?

21 THE WITNESS: That's a good question. I'm
22 afraid that that is above my pay grade. I haven't
23 delved into that side of things. I probably should.
24 I think that it behooves us to try to have input on
25 policy if we understand the science.

1 COMMISSIONER CHANG: And, you're right, I
2 think that is are part of my point, that this
3 expertise is extremely valuable to regulators who are
4 setting standards and regulations that people have to
5 comply with, because when Mr. Tabata asked you is
6 this -- are there any violations, given what their
7 plans are? And you said no.

8 But yet, your own expertise indicates this
9 is potentially a disaster to happen.

10 But for purposes of, I see, as the Land Use
11 Commission, it is looking at what are those
12 regulations? And what are the requirements? Because
13 I think it would be very helpful to have -- well,
14 one, as you say, understanding what the process is
15 for the City to update these standards so that it
16 more accurately reflects the current conditions.

17 So as I understand it, your testimony, your
18 response to Mr. Tabata was at this time the plans as
19 proposed by the Petitioner are consistent with the
20 County requirements, there is no violation.

21 THE WITNESS: I don't know the answer to
22 that question, to be honest, but I would say that as
23 Commissioners, it behooves you to look at the big
24 picture, and you can decide if something needs to
25 have a further look.

1 And also take into account things such as
2 changing climate, the value to the community of open
3 space, the importance of endangered species that
4 might be impacted.

5 I think that this is a complicated question
6 and I think that it would be not outside of your
7 purview to look at the big picture and try to make a
8 decision that takes everything into account.

9 COMMISSIONER CHANG: And I would echo that.
10 I think that is the role of the Commission to look at
11 all of those different issues, and there are certain
12 standards, but undoubtedly, you're right, that the
13 Commission's role is much broader.

14 We do have the authority to consider all of
15 these potential -- make full consideration of all the
16 impacts as well as the impacts to the public.

17 But thank you very much. I greatly
18 appreciate your testimony, and I wish that the City
19 would consider putting together a little task force
20 of people like you to provide them good guidance in
21 making -- adjusting our regulations so they more
22 reflect the conditions. Thank you very much.

23 THE WITNESS: Thank you, Dawn.

24 CHAIRPERSON SCHEUER: Go --

25 COMMISSIONER WONG: Chair, you're muted.

1 CHAIRPERSON SCHEUER: Sorry.

2 Commissioner Ohigashi followed by
3 Commissioner Cabral.

4 COMMISSIONER OHIGASHI: Doctor, I have just
5 a few questions.

6 Your analysis of the amount of rainfall or
7 the standard that we should be using, that would
8 apply to most every place in the State of Hawaii,
9 wouldn't it?

10 THE WITNESS: Yes, but keep in mind that
11 the rainfall amounts, the recurrence interval is very
12 specific to a location. And we provided -- I
13 provided a table to Grant which showed the recurrence
14 interval for the slope in Kaneohe of this particular
15 development request.

16 So, yes, it varies substantially from place
17 to place what these recurrence intervals and rainfall
18 are, because the rainfall itself varies significantly
19 across each island.

20 COMMISSIONER OHIGASHI: What I'm trying to
21 get at is not necessarily that. What I'm concerned
22 about is how are we to determine whether or not to
23 amend a boundary without specific standards that we
24 are to follow, like the City and County in terms of
25 their drainage policy and specific standards and

1 calculations that are used that are in law. And so
2 I'm having a hard time -- so what I'm -- I'm having a
3 hard time because what you're describing is that we
4 should get rid of these particular standards and we
5 should look at site specific standards to make that
6 determination. Is that what you're getting at or am
7 I --

8 THE WITNESS: Again, I'm not an expert in
9 the City's standards, and I would really ask you to
10 look at the big picture here, that you've got some
11 open space, you've got endangered species. You're
12 affecting forest, which is helping with regard to
13 carbon sequestration, and you have a situation in
14 which you have a decision to make that's going to
15 impact the natural environment in a very substantial
16 way.

17 The question is, do the benefits of having
18 a few more places for a cemetery, with all that that
19 implies in terms of what people want to do when they
20 leave this plane, do those benefits outweigh the
21 potential losses that are involved in doing this?

22 And I think that we have to look at that
23 very carefully in this case, and look at all the
24 different testimony and all the different aspects.
25 It's very easy to say, well, you know, let's just

1 change the boundary of the City a little bit here and
2 there, but it is a bit of a slippery slope. This is
3 a very finite island. So I think there is something
4 bigger here to think about.

5 COMMISSIONER OHIGASHI: Doctor, that's why
6 I think founders of the State in their wisdom
7 established the LUC.

8 Beyond that, what I'm concerned about is
9 this, and maybe I'm -- maybe the best analogy -- I'm
10 a lawyer and it's like the blind man and the
11 elephant. You're -- we can only determine what we
12 can feel or what our senses tell us.

13 And what we are giving over here is a
14 standard that is in the law, and that is applicable
15 to everybody on the island. And I'm just -- so what
16 I think that your testimony would do, would create a
17 situation where if we follow your testimony and we
18 follow your guidance and we follow you, that it may
19 place us in a position where we technically are
20 requiring more than the law provides; or maybe we're
21 going beyond our scope to require things that the law
22 provides.

23 So I'm having that difficulty, and I'm sure
24 that you won't solve it for me, but I just wanted to
25 express that difficulty that I'm having right now.

1 THE WITNESS: Can I answer that question as
2 a forensic meteorologist?

3 Let's talk about the legal aspect of this
4 just for a moment, because I do work in this area
5 quite frequently.

6 When there is a flood and there is damage
7 to property, including Kaloko Dam, for example -- I
8 was also retained in that case, and the question was,
9 was it foreseeable that what this guy did by filling
10 in the spillway was going to create a disaster, was
11 that foreseeable in any way?

12 And the answer was from the meteorologist
13 and the sciences, yes, that's foreseeable.

14 Here we're kind of facing a similar
15 situation. Sure you can go down the very narrow road
16 of the law, which I don't happen to know what it is
17 pertaining to building these retaining ponds, but
18 think about this.

19 An event is going to happen in five years,
20 I'm expecting within the construction if this goes
21 through, within five years you're going to see a
22 flood, and there's going to be damage downstream, and
23 then there'll be lawsuits, and the lawsuits could
24 very well come back to the City, the County, and say,
25 look, this was foreseeable, and there is a certain

1 amount of responsibility you're going to have to deal
2 with this in a financial way down the road.

3 So that's how I would sort of frame that
4 question.

5 COMMISSIONER OHIGASHI: There is this other
6 part about -- I won't bore you with it -- it's the
7 part whether there is a duty, whether there is an
8 actual action. But in this case, we're dealing with
9 somebody who meets the legal requirement, and that
10 is -- I'm trying to think -- and if we are to adopt
11 your -- I don't believe we can adopt your standards
12 and have it enforced by the City or anybody else
13 unless those standards are shown to be to the City
14 that those standards are inadequate to be met, and
15 that's another issue that I think that may not come
16 up in this situation.

17 So I'm just expressing to you my
18 frustration in trying to deal with that.

19 THE WITNESS: I understand. And I don't
20 envy you your position to, you know, deal with this,
21 and the consequences and all the rest.

22 I would just say, look at the big picture.
23 If you are absolutely constrained in making your
24 decision based on the very narrow reading of the law,
25 then so be it. That's beyond my ken.

1 CHAIRPERSON SCHEUER: Thank you, Doctor.
2 Commissioner Cabral, followed by
3 Commissioner Okuda.

4 VICE CHAIR CABRAL: Thank you. And I
5 appreciate the questions of my fellow Commissioners
6 and the information you've given, Mr. Businger.

7 So some of what my question has been
8 already touched on with some of your other answers.

9 In terms of the big picture, yeah, we
10 should all definitely get rid of our cars and any
11 more freeways, because we know people will die in a
12 freeway. And I have horses, one of them could kill
13 you too, trust me. So we will all be walking.

14 First off, I live in Hilo in Waiake'a Uka.
15 I have seen white water rapids running around my
16 house many times, and I've lived there over 30 years,
17 so I'm familiar with very heavy rain that is
18 unbelievable. Lots of rain in my world.

19 But what I'm concerned about, when I look
20 at the level of rainfall that I see personally at my
21 house, as well as the level of rainfall that you're
22 describing could occur in this location as it is
23 naturally sitting there right now.

24 Clearly at one time in the history of that
25 area there were no trees there, because at one point

1 it was all lava or rock formations. So at one point
2 there was no trees, and then the jungle has grown in.
3 Now the jungle covers that and other areas around my
4 house also. I live with jungle.

5 So the thing is what I'm concerned about is
6 the level of rainfall is such that when you talk
7 about the increase, if nothing is done, what is the
8 probability that some of all of that hillside will
9 still yet come down on those houses below? I mean,
10 is there a guarantee that if nothing is done, it
11 won't happen? Because -- versus if efforts are made
12 to control it, I don't know -- do you have any
13 comments on -- it just shifts the liabilities from us
14 to God, I guess.

15 What do you think about what is going to
16 happen if nothing is done?

17 THE WITNESS: I think that's a pretty good
18 summary, that it shifts the liability from us to God,
19 which in some sense is maybe not a bad way of looking
20 at this.

21 VICE CHAIR CABRAL: So you are not sure --
22 I mean, you don't -- I mean, of course, I'm assuming
23 you haven't been able to do one huge analysis, but
24 the Petitioner has had people, engineers analyze that
25 area clearly to try and come up with what their plan

1 is.

2 In terms of your knowledge of it, there's
3 no way you can predict if in fact the hillside would
4 come down on its own -- you know, the 50 inches of
5 rain in 24 hours.

6 THE WITNESS: That hillside has been there
7 in pretty much that configuration for centuries, for
8 sure, and so these rainfall events, these heavy
9 rainfall events have been hammering that area for
10 centuries and there's -- you know, you'd have to, of
11 course, get a soil engineer to verify this, but it
12 would be my testimony that that slope is not going to
13 go anywhere.

14 The slope currently at its steepest is
15 about 45 degrees. And for sloughing to occur, it
16 really needs to be a little steeper than that, you
17 know, ideally.

18 VICE CHAIR CABRAL: Isn't our concern that
19 what will happen to the houses below that touch up
20 quite high into that area -- if we went back
21 1000 years ago we won't worry because those houses
22 wouldn't be there, and any storm drains wouldn't be
23 there.

24 So the question, are those houses then
25 potentially -- because with trees that causes

1 different kinds of flooding. I mean, I manage
2 properties, it's usually the trees and the gunk that
3 gets in the floodways that cause me the problems.

4 But anyway, I guess there is no real answer
5 because it's -- who knows what the weather and
6 whatever the natural flow will be.

7 Okay, thank you very much.

8 CHAIRPERSON SCHEUER: Commissioner Okuda.

9 COMMISSIONER OKUDA: Thank you, Chair.

10 Doctor, I would like to follow up on a term
11 that you used if you could explain it a little bit
12 more.

13 You used the term "recurrence interval".
14 What do you mean by that?

15 THE WITNESS: If you take say 100 years
16 worth of rainfall data and you -- for every hour that
17 you have, you start with the heaviest rainfall in one
18 hour on one end, and you go down to no rainfall on
19 the other end, and you just stack it up in the
20 histogram, you get a certain shape, certain slope.

21 And from that -- from that function, if you
22 will, you can calculate this probability that a
23 rainfall event is going to happen. How often has it
24 happened in the past 100 years?

25 And from that you can calculate this

1 probability that in a given year you will get that
2 kind of a rainfall event. I don't know if that
3 helps.

4 COMMISSIONER OKUDA: It does.

5 And you testified that you gave the
6 Intervenor a chart which summarizes the information
7 regarding the recurrence interval with respect to
8 this site, is that correct?

9 THE WITNESS: That's correct. I could put
10 it up, if you want me to share my screen.

11 COMMISSIONER OKUDA: Maybe you can just
12 summarize.

13 What does that -- let me ask this other
14 question before I ask this.

15 Does that chart or that information reflect
16 your opinion about the recurrence interval for the
17 site and the effect of the recurrence interval with
18 respect to water or runoff regarding the site?

19 THE WITNESS: Yeah, the recurrence interval
20 chart was specifically calculated for the site, so it
21 is relevant to that cite.

22 COMMISSIONER OKUDA: And so for us lay
23 people, can you summarize what your opinion is as far
24 as what the significance or the relevance is of the
25 recurrence interval with respect to your opinion

1 regarding the site?

2 THE WITNESS: Yeah. Again, this recurrence
3 interval was utilized by the planners of this
4 development, and they cited that for 100-year,
5 one-hour rainfall event, they come up with something
6 like four-and-a-half-inches.

7 My chart actually shows 4.63 with an error
8 bar that goes from 3.8 to 5.4 inches. So there is a
9 little bit of wiggle room in there.

10 For a two-hour rainfall 100-year rainfall
11 event, it's 4.2. For a three hour, it's 7.5. For a
12 6-hour event, it's 9.7. So close to ten inches in
13 six hours. For a 12-hour event, it's 12 inches.

14 So you can see how it goes up as the
15 interval increases, your recurrence interval total
16 increases as well.

17 And it ramps up pretty fast. So you go
18 from 4.5 at one hour and you are 12 inches in 12
19 hours.

20 COMMISSIONER OKUDA: So if the Land Use
21 Commission, if the Land Use Commission were to take
22 into account and consider this opinion and this part
23 of the report that you have presented to us, why
24 should that be concerning to the Land Use Commission?

25 What does that really tell us in plain

1 English for some of us who never had hard science?

2 THE WITNESS: Yeah, well, you know, science
3 is just observing the natural environment around you.
4 And I believe that we are all scientists in that
5 regard.

6 And I think that living on Oahu as we do,
7 we have seen these heavy rainfall events. We have
8 seen the water cascading down the road. If you're
9 going to plan a retention for a certain amount of
10 rainfall, and have that be 100-year standard, then I
11 think that it behooves you to take something which is
12 likely to happen in the natural environment if you
13 want to avoid these legal ramifications.

14 So my opinion is that you want to probably
15 look at least 12 hour, but maybe a 24-hour rainfall
16 event in planning this.

17 COMMISSIONER OKUDA: So is it your opinion
18 that it's to minimize the foreseeable risk of harm to
19 people downslope we should consider something more
20 than what has been argued to us is the City standard?

21 THE WITNESS: Yes. My short answer would
22 be yes.

23 And my broader answer would be look at all
24 of the negatives and all of the positives and make
25 your decision based on your best conscious of what

1 you think is the right decision to make here.

2 COMMISSIONER OKUDA: Thank you very much,
3 Doctor.

4 CHAIRPERSON SCHEUER: Thank you.

5 Commissioners, are there further questions
6 for this witness? Looking for hands or other
7 gestures.

8 I have a couple questions.

9 Dr. Businger, I really appreciate your
10 testimony and your expertise, and particularly your
11 focus on the duration of rain events and frequency of
12 severe water events.

13 First thing I'm going to go down with you
14 though is part of your written testimony, where I
15 guess I'm not as -- I have more concerns with your
16 testimony, particularly in your written testimony.

17 You suggested the fact that trees are a
18 good and existing force and good at carbon
19 sequestration, and sequestering carbon is part of
20 addressing the impacts of climate change as one of
21 the reasons for us to deny this Petition.

22 Do I understand your written testimony
23 correct?

24 THE WITNESS: Yes, that's a fair statement.

25 CHAIRPERSON SCHEUER: So I guess the part

1 I'm struggling with, is it's not that I don't have
2 any problem on a broad and global sense that we need
3 to be reducing emissions and sequestering a heck of
4 lot more carbon to address this, but I have a little
5 bit with the problem, with the implication from your
6 testimony that somehow the removal of 50 acres of
7 forest on one island, and all those trees are going
8 to be replaced on a one-for-one basis is somehow
9 going to have any meaningful or measurable impact on
10 global climate change?

11 That's kind of what your testimony implies,
12 that we should take this action, because that is what
13 is needed to address global warming, or do I misread
14 what you're saying?

15 THE WITNESS: Let me answer that in a
16 little bit of a philosophical way.

17 When it comes to global warming, we all
18 have a responsibility to address this issue if we are
19 going to have any chance of dealing with it. And my
20 personal choice is to drive an electric car. I first
21 purchased an electric car back in 1995, and I've been
22 driving electric cars every since. The early ones
23 were not really that great.

24 And when I tool around during the pandemic,
25 I've been riding a bicycle. And admittedly it has an

1 electric assist on it, so I can go up the hill, I
2 live on Sierra Drive.

3 But we have to act following our conscious
4 and following the best science, and we have to act on
5 a personal way, you can say 50 acres is no big deal
6 on a global level. We're probably eliminating 40,000
7 acres an hour globally.

8 But I would argue that if we don't take
9 this opportunity to make decisions, which are right
10 in the broader understanding of science and history,
11 then I think we are abrogating our responsibility.

12 CHAIRPERSON SCHEUER: Thank you for that
13 response.

14 My doctorate is in environmental studies
15 and environmental policies, so I'm familiar with
16 these issues.

17 I just wanted to clarify from your written
18 testimony that the direct impact that we will have on
19 a reduction of carbon sequestration should we approve
20 this project is not immeasurable, but its impact is
21 probably immeasurable.

22 Going to the core of your testimony, I
23 understand what you're saying about the size of the
24 retention basins. But it is my understanding -- so
25 please clarify if I misunderstood -- the size of the

1 retention basins is only one of the strategies that
2 is necessary to adequately mitigate for high runoff
3 events; is that correct?

4 THE WITNESS: Yes, that's correct.

5 CHAIRPERSON SCHEUER: What are some of the
6 other things that have to be mitigated or changed?

7 THE WITNESS: Well, I think that slope is
8 going to be a factor. The retention of the soils.
9 There is a number of things.

10 Let me see if I can find -- I've written
11 some notes on this.

12 CHAIRPERSON SCHEUER: The outlet on the
13 lower end of the retention basin is certainly going
14 to be one of the concerns, right? If you have to
15 retain the water for two days versus an hour,
16 obviously you could have a smaller basin as long as
17 it's able to flow through into the City system; is
18 that correct?

19 THE WITNESS: I think essentially, yes.

20 CHAIRPERSON SCHEUER: So does any of your
21 testimony, or do you have any recommendations for us,
22 beyond the size of the retention basin, of things
23 that could be addressed to the concerns that you've
24 raised?

25 THE WITNESS: Well, one thing to consider

1 is the difference in the ability of the ground to
2 absorb the rainfall in the change that you're making,
3 and it does seem to me this forest is better equipped
4 to hold back water through the root system and so
5 forth, than a grass slope would be.

6 But I know that there are other mitigating
7 aspects for this development.

8 CHAIRPERSON SCHEUER: And the other
9 Commissioners have mostly asked my questions. I will
10 end this. I appreciate your overall philosophical
11 perspective that we should look at the big picture.
12 And I can assure you personally that's what I try to
13 do on all these things, and part of the big picture,
14 which I think Commissioner Ohigashi's questions were
15 looking at, is do we treat Petitioners equitably? Do
16 we treat parties that come in front of us in a fair
17 manner and consistent? Or do we require of one
18 party, because they had a super good witness against
19 them, to do a whole bunch more than the party who
20 doesn't -- when the law says you're supposed to do
21 this thing, and that's part of the big picture issues
22 that we have to consider.

23 I would absolutely hope that the City and
24 County Office of Climate Change would work with your
25 expertise and others to suggest very real things

1 which would actually allow an equitable and
2 consistent application of these concerns across the
3 City and County.

4 So thank you very much. I don't have
5 anything further. Is there anything further from any
6 of the Commissioners?

7 THE WITNESS: I don't envy you your
8 decisions here. I wish you all well.

9 CHAIRPERSON SCHEUER: Thank you.

10 Do you have any redirect, Mr. Yoshimori?

11 MR. YOSHIMORI: I do not. Thank you,
12 again, Dr. Businger.

13 CHAIRPERSON SCHEUER: Thank you, I will put
14 the witness back into the role of attendee. And, Mr.
15 Yoshimori, just clarifying you have no further
16 witnesses at this time, correct?

17 MR. YOSHIMORI: That is correct. We have
18 no further witnesses.

19 CHAIRPERSON SCHEUER: I'm looking for a
20 little guidance from maybe Mr. Orodener given our
21 timing, it's 11:21. Where we are in the process,
22 we're due for a break. What do you think we should
23 do when we resume, Dan?

24 EXECUTIVE OFFICER: If the Intervenor has
25 completed their case, I believe that the Petitioner

1 has one more witness to recall.

2 CHAIRPERSON SCHEUER: Is Mr. Morford
3 available before lunch, Curtis?

4 MR. TABATA: He is available, but we do
5 have a procedural matter that we would like to raise.

6 Our understanding is that Dana Alden, Ph.D
7 and M. Lee Goff, Ph.D. are not testifying on behalf
8 of Intervenors, therefore, we would like to make a
9 Motion to Strike Dr. Goff's written testimony and
10 resume, and Dr. Alden's resume. So after lunch --

11 CHAIRPERSON SCHEUER: We will take up that
12 motion after the recall of Mr. Morford after our
13 break.

14 It is 11:23 -- Commissioner Giovanni.

15 COMMISSIONER GIOVANNI: Thank you, Chair.

16 I have a question for the Intervenors. I
17 know he has no more witnesses, but are we allowed to
18 ask a question to Mr. Yoshimori?

19 CHAIRPERSON SCHEUER: The parties will be
20 presenting closing witnesses -- not closing
21 witnesses, closing arguments, excuse me.

22 COMMISSIONER GIOVANNI: I can wait until
23 then. My question would be appropriate at that time.

24 CHAIRPERSON SCHEUER: Thank you.

25 Anything else from the Commissioners? If

1 not, it's 11:23. Let's take a ten-minute break to
2 11:33 and spend a half hour, 45 minutes with Mr.
3 Morford. Hopefully that takes care of it. Then we
4 will take up the procedural issue that Mr. Tabata
5 raised.

6 We are in recess until 11:43.

7 (Recess taken.)

8 CHAIRPERSON SCHEUER: Go ahead, Mr.
9 Giovanni.

10 COMMISSIONER GIOVANNI: Mr. Yoshimori, you
11 presented two witnesses that both testified to their
12 opinion of the inadequacy of the retention ponds, and
13 the criteria upon which they were being designed by
14 the Petitioner. And the consequential result may be
15 flooding of the downstream homes that are at the
16 outlet.

17 My question is that the two witnesses seem
18 to differ somewhat on the level of intensity or the
19 size of the retention ponds that would be
20 appropriate.

21 Do you intend to reconcile those
22 differences and present to us a recommendation on
23 what would be the appropriate size of the
24 retention -- an increased retention pond to deal with
25 these events?

1 MR. YOSHIMORI: Thank you for the question,
2 Commissioner.

3 I was not planning on reconciling their
4 testimony. I think the position that we're going in
5 with is that because of the potential for flooding to
6 residential homes, that under the guidance for the
7 reasons to keep the land as Conservation District,
8 that the land should be kept in Conservation
9 District, thus, we wouldn't need to have the
10 retention basins.

11 COMMISSIONER GIOVANNI: So each of your
12 witnesses basically put forth a remedy in the form of
13 a mitigation, which was a larger retention pond to
14 address a larger storm than was anticipated by the
15 Petitioner, or by the City and County. But yet
16 you're saying -- I'm asking for confirmation -- that
17 rather than following the recommendations of your
18 witnesses, your position is to not to follow -- not
19 to recommend mitigations that would deal with the
20 issue, but rather not approve the project?

21 MR. YOSHIMORI: I think their testimony
22 indicated that the current plan put before the
23 Commission is inadequate, and it puts the residents
24 at risk.

25 So given the current plan as it is, there

1 is risk to the residents. That because of the
2 guidance given for the Conservation District, that
3 this land qualifies to remain in the Conservation
4 District.

5 COMMISSIONER GIOVANNI: Thank you, Mr.
6 Yoshimori. I understand your position.

7 MR. YOSHIMORI: Thank you.

8 CHAIRPERSON SCHEUER: Thank you. That was
9 it, Dan?

10 COMMISSIONER GIOVANNI: Yes, that's it,
11 Chair.

12 CHAIRPERSON SCHEUER: Thank you. Thanks
13 with your patience with me as the Chair. We're now
14 ready to recall Mr. Morford.

15 MR. MATSUBARA: Mr. Morford is here and
16 available.

17 CHAIRPERSON SCHEUER: I'll swear him in.
18 Do you swear or affirm that the testimony
19 you're about to give is the truth?

20 THE WITNESS: I do.

21 CHAIRPERSON SCHEUER: Thank you. Thanks
22 for joining us again.

23 I'll just say introductory comments, I
24 believe that one of the main reasons we wanted you to
25 appear at the end was the ability to bind the

1 Petitioner to certain representations, but with that,
2 I will give an opportunity for the other parties to
3 first -- well, your attorney to question you and then
4 other parties to question you before the
5 Commissioners do.

6 Do you have anything on direct, Mr.
7 Matsubara?

8 MR. MATSUBARA: Yes.

9 JAY MORFORD

10 Was recalled as a witness by and on behalf of the
11 Petitioner, was sworn to tell the truth, was examined
12 and testified as follows:

13 REDIRECT EXAMINATION

14 BY MR. MATSUBARA:

15 Q In addition to -- in DPP's recommendation
16 to approve the Petition, they had three conditions as
17 part of their recommendation to approve. And you've
18 accepted those three recommendations, have you not?

19 A That's correct.

20 Q And the same relates to DPP -- OP's
21 recommendations for approval, you've accepted what is
22 now 12 recommendations and conditions, is that
23 correct?

24 A That is correct.

25 I do want to go back on DPP's position

1 though. I think on No. 3 on their position they had
2 traffic light on No.3, and I think there was a
3 traffic light letter that came out from the
4 Department of Transportation where we did not need to
5 supply support for that financially.

6 Is that correct? I think I have that
7 accurate.

8 Q A letter from DOT, and that's 13 initial
9 recommendations that OP had in support of the
10 Petition, it's now 12 because Department of
11 Transportation eliminated that.

12 A That is correct, thank you for clarifying
13 that.

14 Q And you've also committed to following all
15 the recommendations that your expert witnesses
16 provided as part of their testimony; is that correct?

17 A That is correct.

18 Q In addition, Mr. Beiler provided rebuttal
19 testimony based on concerns raised by Commissioner
20 Giovanni and Commissioner Aczon relating to sound
21 limits which were presented and included additional
22 recommendations in regard to sound mitigation,
23 community outreach, and a telephone line specifically
24 devoted to that which you've also agreed to
25 incorporate as part of the project.

1 A Yes, we agreed to those conditions.

2 Q Now, as we discussed earlier, the project
3 proceeds in stages. And you started initially with
4 concerns that were raised in the first Petition
5 regarding the inconsistency of the Petition at that
6 time with the sustainable community plan. So you
7 addressed that issue?

8 A That is correct.

9 Q As part of that process, did you engage in
10 extensive --

11 A I'm sorry, I froze up. I didn't hear your
12 question.

13 Q My wife tells me that too.

14 As part of resolution you're attempting to
15 make, you had many community outreach meetings, did
16 you not?

17 A That is correct.

18 Q Neighborhood board, various community
19 groups, civic clubs, would you briefly summarize the
20 outreach you engaged in which was different from the
21 first time you filed a Petition in response to Mr.
22 Aczon's question in regards to the difference between
23 the two Petitions?

24 A Happy to.

25 So on denial of the first Petition, one of

1 the major issues we needed to address was the
2 consistency with the sustainable plan.

3 So in that process, we took steps on
4 meeting with City Council, the commission that
5 oversaw that plan. And we started doing community
6 outreach in regards to canvassing the area adjacent
7 down to Hawaiian Memorial below the site projected,
8 current site projection.

9 And we also had meetings with Pohai Nani.
10 We had fliers of Hawaiian Memorial Park Cemetery that
11 were available when the community came in and parked.
12 It was a fact sheet that was available to the
13 community.

14 We did have numerous Kaneohe Neighborhood
15 Board meetings. Met with the civic club, and we also
16 met with the Intervenors themselves a couple times,
17 met with them and had discussions with them as well.

18 Q Thank you.

19 So now we are at the third stage before the
20 LUC to get approval on the Petition you filed. And
21 if that approval is granted, then you proceed to the
22 next step which includes more detailed plans,
23 drawings relating to grading, excavation, other
24 things, and specific sit-down discussions with the
25 civic club and whoever is willing to engage in

1 conversations relating to a land trust?

2 A That is correct. In the good grace that we
3 do get approval, we will move forward with our civil
4 engineer in creating a more detailed grading plan.
5 Also move forward and engage conversation with the
6 Koolaupoko Hawaiian Civic Club, and will identify a
7 land trust that can hold the conservation easement,
8 and start conversations with them as well.

9 Q Thank you.

10 As part of the hearing, subsequent to your
11 testimony, there were questions or concerns relating
12 to how to handle the excess fill that would come up
13 with the excavation that occurred on the property.
14 And the concern was whether or not, you know, PVT
15 would be used as a disposition site.

16 So the concern is -- based on concerns
17 raised -- is it your goal to not dump anything, if
18 possible, at PVT, but to use other means to dispose
19 of the soil, such as to other contractors who have
20 other projects, use it on-site or other things, and
21 that PVT would only be a last resort if there is no
22 other way for you to dispose of the soil?

23 A It's not a concern with PVT that came up,
24 that was the first I even was aware of PVT before
25 that came up during these hearings.

1 We are in agreement to take those measures
2 to make that a last resort before we use that site.

3 Q Thank you.

4 Now, there were questions also raised
5 regarding stewardship of the land in regard to that
6 property. Other than the maintenance you have on the
7 property currently permitted to have your operations
8 on, and the absence of use of harmful chemicals, are
9 there other measures relating to the current
10 operations you have regarding stewardship?

11 A In regards to our developed area, we have
12 ongoing maintenance and endowment care on our
13 property that is ongoing maintenance of the cemetery.
14 We don't use harmful chemicals on the property.

15 As far as fertilizers, we don't use
16 fertilizers. We very, very subtle use of
17 insecticides. Glyphosate is something that may be
18 spot treatment occasionally, but those aren't common
19 practices in our park.

20 Q If the Petition is approved and this
21 additional property is available from Hawaiian
22 Memorial Life Plan, what additional stewardship
23 measures do you propose to undertake?

24 A So in regards to the developed property, we
25 will plan on putting a plan together with the civic

1 club for ongoing stewardship and maintenance of the
2 cultural preserve area along with Kawa'ewa'e Heiau.
3 Our plan is to ensure the protection of the
4 endangered damselfly area with the mitigation
5 measures that have been submitted by Dr. Montgomery
6 and others on protecting that habitat. So that's our
7 plans moving forward.

8 Q In addition to what Dr. Montgomery has
9 proposed, an additional measure you've added was a
10 50-meter buffer area above the seep where there will
11 be no grading, no trimming away of trees, or anything
12 like that; is that correct?

13 A That's correct. Based on Mr. Montgomery's
14 recommendation, we moved the line of our original
15 plan and pushed the buffer away from the damselfly
16 with a 50-meter buffer.

17 Q Now, in regard to the cultural preserve,
18 you've also had numerous discussions with the
19 Koolaupoko Hawaiian Civic Club, have you not?

20 A That's correct.

21 Q And you've offered to continue maintaining
22 the heiau area and the cultural preserve area to
23 assist them in that regard, have you not?

24 A When we get into discussions, that's part
25 of my commitment to help them with that, yes.

1 Q Will but that occurs after you get past
2 this stage and the project is a go, then those more
3 definitive discussions, agreements and commitments
4 would be made?

5 A Everything is on hold at this point until
6 the Petition is approved.

7 Q What you're focusing right now is just
8 satisfying the existing statutory and regulatory
9 requirements that you are required to address for
10 purposes of approving and approval for this Petition,
11 is that correct?

12 A That's correct, sir.

13 MR. MATSUBARA: Thank you, Chair. I have
14 no further questions.

15 CHAIRPERSON SCHEUER: Thank you very much.
16 City and County?

17 MR. PANG: City has no further questions
18 for this witness. Thank you.

19 CHAIRPERSON SCHEUER: Ms. Maki, OP.

20 MS. MAKI: Good morning, Commissioners. OP
21 has no further questions.

22 CHAIRPERSON SCHEUER: Intervenor, Mr.
23 Yoshimori?

24 CROSS-EXAMINATION

25 BY MR. YOSHIMORI:

1 Q I think you mentioned regarding the
2 question about stewardship, light use of pesticide;
3 is that correct?

4 In regards to, or an answer to a question
5 regarding stewardship, you had mentioned light use of
6 pesticides; is that correct?

7 A I think I originally testified that too, we
8 have used it in the older section of the area, the
9 original section over on the far side.

10 Q I think that was --

11 Next question is: Monsignor Pollard, of
12 the Archdiocese of Chicago's Catholic Cemeteries
13 provided written testimony on June 6th in which he
14 stated, quote:

15 Cemeteries today need not be developed as
16 huge tracts of land for graves and roadways, unquote.

17 And that, quote: The use of graves for
18 multiple burials is usually only limited by the
19 cemetery's rules, unquote.

20 Hawaiian Memorial's current two urn per
21 plot limit is Hawaiian Memorial's limit; is that
22 right?

23 A Well, I think I testified based on cemetery
24 design how that is how cemeteries are developed, and
25 you develop urn sites that are much smaller for

1 inurnments. You design casket spaces for caskets.

2 So if the family wants to use a casket
3 space for inurnment, for a single interment space
4 casket, we will allow two inurnments, or two urns as
5 you would put it, into one casket space.

6 And that generally is due to requirements
7 when it comes to authorizations for interment spaces
8 and memorialization and installing markers, and
9 adding additional names to markers, it gets very
10 complicated and stressful on family.

11 So you design your cemetery appropriately
12 for the need, but you want to design inurnment spaces
13 for the sites for inurnment spaces, that way you're
14 utilizing the land properly.

15 Q That's a policy, not dictated by State
16 legal requirements?

17 A That is correct.

18 Q On June 10th one of the Commissioners asked
19 for clarification on the price of an interment plot,
20 and you stated it was 4,000 to 30,000.

21 Mr. and Mrs. Perkins filed written
22 testimony showing two quotes, one for 43,000 and one
23 for 60,000 for a single plot for two-inurnment rights
24 with financing. Is that the average quote for a
25 fully dressed plot?

1 A I wasn't involved in that transaction when
2 Mr. and Mrs. Perkins came into the cemetery and met
3 with the individual that helped them, but I do know
4 that the area that they were shown or taken to was
5 the most expensive area at the cemetery.

6 And we generally will take people to the
7 cemetery and show them the areas that are available,
8 so what they submitted was actually the most
9 expensive area in the entire cemetery they could have
10 went to provide testimony on.

11 Q I seem to recall that the Ocean View
12 Gardens was more expensive than the 60,000?

13 A That was the City Garden they were in.

14 Q Those are all the questions I have. Thank
15 you.

16 CHAIRPERSON SCHEUER: Commissioners? I'm
17 going to guess. Commissioner Okuda followed by Chang
18 followed by Giovanni.

19 Commissioner Okuda, do you want to go?

20 COMMISSIONER OKUDA: Chair, I wasn't going
21 to raise my hand, but since you're the Chair, I have
22 to follow the Chair's directions.

23 CHAIRPERSON SCHEUER: No, no, really you
24 don't.

25 COMMISSIONER OKUDA: I'll follow the

1 Chair's direction.

2 Mr. Morford, will Hawaiian Memorial Park
3 agree to be responsible for all damages caused by the
4 flow of water, including flooding of neighbors for
5 water coming from the cemetery property if this
6 Petition is approved?

7 THE WITNESS: I don't know you --

8 MR. MATSUBARA: I'd like to raise a concern
9 with that question. It's wide, open-ended in regard
10 to all liability. We will comply with all the
11 requirements under the law and the regulations, and
12 if for some reason those are not met, then I imagine
13 there would be exposure to some liability.

14 But I'm concerned about that open-ended
15 question in regard to this being a question relating
16 to our going beyond I think what the law requires or
17 the regulations require or even the Commission has
18 the authority to do, and I don't want to get into the
19 situation where the question is asked by the body
20 authorized to make the decision on approval or
21 denial, and get some oral statement that could be
22 used as a representation to bind the Petitioner
23 inappropriately.

24 I said it before. We will follow all the
25 statutory requirements, all regulatory requirements.

1 And everything the Commission is authorized to
2 require, but we're not going to venture off into
3 areas at this point in time and allow questions
4 relating to areas beyond jurisdiction to be asked and
5 answered, and then determine to be a condition upon
6 us.

7 That's my only concern at this point in
8 regard to the line of questioning in that area.

9 COMMISSIONER OKUDA: And, Mr. Matsubara, I
10 do appreciate what your statement is, and I'm taking
11 that into account, but what I'm trying to do is also
12 evaluate the credibility of representations and
13 statements being made by all witnesses, all witnesses
14 that when statements are made I want to find out
15 whether or not there's boundaries on the
16 representations that are being made. And if the
17 answer is I don't know, then that's fine.

18 I'm just asking the questions. My
19 questions do not prejudice any view I have regarding
20 the outcome of this case, it's simply to get evidence
21 to help me and the others make an evaluation.

22 I do ask that question because
23 unfortunately, like I said, I had to defend the party
24 in the Kaloko Dam disaster, so whether it's right or
25 wrong, this kind of question sticks in my mind,

1 having dealt with that for several years.

2 MR. MATSUBARA: That occurrence where
3 injuries occurred and liability arose, I imagine in
4 that situation where even though the statutes are
5 required and the regulations are followed, and if
6 there is injury or damage, there is some exposure.

7 CHAIRPERSON SCHEUER: If I may,
8 Commissioner Okuda, you asked a question. Mr.
9 Morford gave an answer, you stated you were satisfied
10 with it. Are you asking Mr. Matsubara for the answer
11 to be stricken?

12 COMMISSIONER OKUDA: No, I'm just
13 responding to Mr. Matsubara.

14 Mr. Morford, will Hawaiian Memorial Park
15 offer to the Koolaupoko Hawaiian Civic Club an offer
16 to reimburse all its expenses incurred regarding the
17 management of the cultural preserve?

18 THE WITNESS: If the Petition is approved,
19 we will meet with the Koolaupoko Hawaiian Civic Club
20 and we will work out all those details with them.

21 We've had a relationship with the civic
22 club for ten years now. The civic club is very
23 comfortable with our relationship, and comfortable
24 moving forward together after this Petition is
25 approved.

1 COMMISSIONER OKUDA: My question is more
2 limited. The answer is either yes, no, or I don't
3 know, which is whether or not Hawaiian Memorial Park
4 will agree to offer to reimburse the Koolauoko
5 Hawaiian Civic Club for all its expenses incurred
6 regarding the management of the cultural preserve?

7 MR. MATSUBARA: It's been answered. Mr.
8 Morford answered originally those are details we work
9 out if the Petition is approved, and further
10 discussions occur with the civic club. At this point
11 in time I think it's been answered.

12 COMMISSIONER OKUDA: Is the answer I don't
13 know?

14 THE WITNESS: The answer is I will work
15 those details out with the civic club once the
16 Petition is approved.

17 COMMISSIONER OKUDA: And if the Petition is
18 approved, will Hawaiian Memorial Park offer to pay
19 for an attorney retained by the Koolauoko Hawaiian
20 Civic Club to represent the club in negotiating the
21 terms and conditions of its management of the
22 cultural preserve?

23 THE WITNESS: Again, I think those are
24 details that can be worked out with the civic club at
25 the time. Our relationship is not a contentious

1 relationship. It's a very good relationship. We
2 have a lot of trust with each other, and I feel we
3 can work out a management plan with our cultural
4 entities, and we are not going to need a lot of
5 attorneys involved in this other than drafting the
6 agreement on what we come up with.

7 COMMISSIONER OKUDA: I'll take your answer
8 for what it is.

9 There has been testimony about the
10 foreseeability or lack of foreseeability for injury
11 from rockfall in the expanded area and other areas.

12 If this Petition is approved, will Hawaiian
13 Memorial Park agree to offer to the Koolauloko
14 Hawaiian Civic Club an offer to indemnify, defend and
15 hold the civic club harmless from any and all claims
16 of injury or death resulting from the physical
17 conditions on the cultural preserve or above the
18 cultural preserve?

19 THE WITNESS: Currently today anyone that
20 goes on the property needs to sign a liability waiver
21 to go on. So we have mitigation measures to cover
22 liability, individuals that go on it, to answer your
23 question of the civic club, they're comfortable
24 working out those issues with us if the Petition is
25 approved.

1 COMMISSIONER OKUDA: My question is will
2 Hawaiian Memorial Park offer to the club to
3 indemnify, defend and hold the club harmless from
4 those types of claims?

5 CHAIRPERSON SCHEUER: We might have a
6 frozen witness.

7 THE WITNESS: Are we okay?

8 CHAIRPERSON SCHEUER: Now we are.

9 COMMISSIONER OKUDA: Let me repeat my
10 question in the event that my question was not heard
11 by you.

12 If this Petition is approved, will Hawaiian
13 Memorial Park agree to indemnify, defend and hold the
14 club harmless from the type of injury claims from
15 rockfall that I had described previously?

16 MR. MATSUBARA: My concern is it's been
17 asked and answered. Those details get worked out if
18 the Petition is granted, and the parties sit down and
19 work out the details of management, liability or
20 whatever else is of concern to the parties.

21 COMMISSIONER OKUDA: Mr. Morford, do you
22 have an answer?

23 THE WITNESS: At this point in time, I'm
24 not willing to commit to that. Those details will be
25 worked out with them at the time we work out the

1 management agreement.

2 COMMISSIONER OKUDA: If the Koolaupoko
3 Hawaiian Civic Club at some point in time becomes the
4 manager of the cultural preserve, and it in its sole
5 discretion determines that additional rockfall
6 mitigation measures are necessary to protect people
7 from bodily injury or even death, will Hawaiian
8 Memorial Park be willing to offer to be solely
9 responsible to pay for and complete those mitigation
10 efforts requested by the Koolaupoko Hawaiian Civic
11 Club?

12 THE WITNESS: Currently the conditions
13 already exist. We are not touching the area. So the
14 civic club is well aware of the conditions that are
15 currently there. They don't have any challenges with
16 the rockfall hazard that's up on the mauka side of
17 the cultural preserve, because no one goes up in that
18 area.

19 But in regards to any concerns that would
20 come up with the cultural preserve, we will make sure
21 they're covered in that regard.

22 At this point in time, those are details
23 that need to be worked out in the management plan.

24 COMMISSIONER OKUDA: When you say you will
25 make sure that the club will be covered, what do you

1 mean by the word "covered"?

2 How will the club be covered by Hawaiian
3 Memorial Park?

4 THE WITNESS: We are going to make sure
5 that there's measures in place that no one has any
6 chances of getting hurt on that property. So there
7 will be either signage put up, or there will be some
8 type of mitigation measures put up, but those are
9 issues that will be worked out in the civic club, and
10 again, they're comfortable working those issues out
11 with us.

12 COMMISSIONER OKUDA: Does Hawaiian Memorial
13 Park have any limitation on the measures it is
14 willing to do to mitigate any future need for
15 rockfall mitigation?

16 THE WITNESS: No.

17 MR. MATSUBARA: At this time, I imagine?

18 COMMISSIONER OKUDA: My question is what my
19 question is.

20 Now, Mr. Morford, you gave us testimony
21 regarding the PVT landfill as the last resort for
22 disposal of excavated material.

23 Will Hawaiian Memorial Park agree, as a
24 condition, that under no circumstance would materials
25 be dumped at or attempted to be disposed at PVT?

1 THE WITNESS: I think that we would like to
2 be able to have a last option as a condition.

3 COMMISSIONER OKUDA: Are you aware of
4 recently a bill that has passed which may limit the
5 potential expansion of the capacity of the PVT
6 landfill in Nanakuli?

7 THE WITNESS: No.

8 COMMISSIONER OKUDA: Will Hawaiian Memorial
9 Park be willing to be responsible for all damage,
10 including damage to Kaneohe Bay, caused by any runoff
11 from the cemetery property including soil runoff
12 which occurs during construction?

13 MR. MATSUBARA: I think, Mr. Morford -- I
14 would object at this point, Mr. Morford would have to
15 check with legal counsel on the breadth and scope of
16 the liability you're proposing that they accept.

17 At this point I would say he's not able to
18 answer that question.

19 COMMISSIONER OKUDA: Mr. Morford, are you
20 able to answer the question?

21 THE WITNESS: I don't know at this point.

22 COMMISSIONER OKUDA: Now, in the --

23 CHAIRPERSON SCHEUER: Commissioner Okuda,
24 can you give me a sense of how much you have?

25 COMMISSIONER OKUDA: One and a half

1 questions, Mr. Chair. In fact, this is the last
2 question.

3 THE WITNESS: Is this the half answer?

4 COMMISSIONER OKUDA: Well, no, actually --

5 CHAIRPERSON SCHEUER: A half-ass'd answer
6 is sufficient.

7 COMMISSIONER OKUDA: That was a note I had
8 made to myself.

9 The final question is basically this.

10 In the exhibit submitted by Petitioner was,
11 I believe, it might have been form 10Q of FCI
12 submitted to the Securities and Exchange Commission,
13 SCI being Hawaiian Memorial Park's parent
14 corporation.

15 Since SCI, the world's largest funeral,
16 mortuary, cemetery company is an entity which is
17 separate from Hawaiian Memorial Park, will SCI agree
18 to personally guarantee all the obligations of
19 Hawaiian Memorial Park that it makes regarding this
20 boundary amendment application, even if later on SCI
21 sells its interest in Hawaiian Memorial Park?

22 THE WITNESS: They are committed to this
23 project, so they are committed to following through
24 on all the commitments. Yes, they are.

25 COMMISSIONER OKUDA: So SCI will personally

1 guaranty the obligations of Hawaiian Memorial Park;
2 is that correct?

3 THE WITNESS: Yes, they have committed to
4 the funding of this project, yes.

5 COMMISSIONER OKUDA: That's also agreeing
6 to assume -- well, actually, that includes agreeing
7 to personally guarantee the performance of all the
8 obligations?

9 THE WITNESS: Yes.

10 COMMISSIONER OKUDA: Thank you, Chair. I
11 have no further questions.

12 CHAIRPERSON SCHEUER: Thank you.

13 Commissioner Chang, followed by
14 Commissioner Giovanni.

15 About how much do you have, do you think,
16 Commissioner Chang?

17 COMMISSIONER CHANG: I only have three
18 questions.

19 Thank you, Mr. Morford, I appreciate you
20 being back here again.

21 If you can only imagine, I'm going to ask
22 you questions that may be harder than Mr. Okuda.

23 THE WITNESS: That surprises me.

24 COMMISSIONER CHANG: My questions are
25 really going to go to what kind of a steward are you

1 to this land. I'm not in any way indicating how I'm
2 going to decide on your Petition.

3 The question I have is: One, if you don't
4 get the land use boundary amendment, first question,
5 will you continue to coordinate with the Koolaupoko
6 Hawaiian Civic Club on the Kawa'ewa'e Heiau?

7 THE WITNESS: We have always welcomed
8 anyone from the civic club that wanted to go on to
9 the property and work on the heiau. So that's never
10 been a problem for us.

11 The project itself, you know, as far as
12 cultural preserve, was developed over the last ten
13 years. The initial project only had a little buffer
14 zone around the cultural areas that were there. So
15 this has just kind of been a development that's just
16 moved on and on and on. So if the project is not
17 approved, we would never be adverse to allow the
18 civic club be at the Kawa'ewa'e Heiau, do whatever
19 they wanted to do there. We have always been willing
20 to do that.

21 COMMISSIONER CHANG: Thank you.

22 The second question is: If the boundary
23 amendment is not granted, will you take action to
24 ensure the protection of the damselfly? Because now
25 you know that there's -- now you know that there's a

1 habitat there. Will you, as the landowner and
2 steward of the property, take appropriate action to
3 ensure that the damselfly, the habitat is protected?

4 THE WITNESS: So the problem that we run
5 into is financial resources. So as we've learned
6 about the additional cultural aspects of the
7 property, then the damselfly habitat became an
8 awareness to us. We've incorporated those into the
9 plan.

10 How I've been able to provide the
11 protection measures for these was to incorporate them
12 in the full project that allows for the funding to be
13 able to provide the protection to these habitats. We
14 do not have the funding and the capability of doing
15 this without the project.

16 COMMISSIONER CHANG: My question goes to
17 other questions that have been raised by the
18 Commission that doing nothing, you know, and taking
19 no action, and you're not required to take any
20 action, but you are aware, so would you even be
21 willing to at least coordinate with the DLNR and U.S.
22 Fish and Wildlife what kind of appropriate measures
23 can you take that may be cost effective short of what
24 you're proposing as mitigation in the plan?

25 THE WITNESS: We're willing to consult with

1 them, yes.

2 COMMISSIONER CHANG: And number three, if
3 the boundary amendment is not granted, will you
4 continue to permit access through the cemetery to
5 community members who want to access the heiau?

6 THE WITNESS: Yes.

7 COMMISSIONER CHANG: Thank you very much.

8 CHAIRPERSON SCHEUER: I'm going to object,
9 Commissioner Chang, your questions weren't that
10 difficult. False advertising.

11 Commissioner Giovanni.

12 COMMISSIONER GIOVANNI: Thank you, Chair.

13 Thank you, Mr. Morford, for your rebuttal
14 testimony. I appreciate your coming back before the
15 Commission.

16 So Commissioner Okuda asked you a simple
17 straight forward yes or no question about landfilling
18 and PVT, and he did not get a straight forward
19 answer.

20 He asked you if, under no circumstances,
21 would you agree not to dispose of any material at
22 PVT. So I'm reasking that question and asking you to
23 please give us a simple, straight forward yes or no
24 response to that.

25 THE WITNESS: Yes.

1 COMMISSIONER GIOVANNI: Thank you very much
2 for that, I really appreciate it.

3 My other question is for Mr. Matsubara.

4 Mr. Matsubara, during the questioning by
5 Commissioner Okuda, he was asking you and the
6 Petitioner about the risk associated with water
7 runoff in heavy rain events. And I think your
8 response in general was that you will comply with the
9 requirements of the City and County of Honolulu, or
10 any conditions for which the Commission has the
11 authority to impose.

12 Could you clarify what you mean by
13 conditions that the Commission has the authority to
14 impose in the context of this very specific matter
15 involving the potential risk associated with runoff?

16 MR. MATSUBARA: I think in that particular
17 situation the conditions you would be able to impose,
18 beyond what the statute or the regulation currently
19 provide, or what the City and County might provide,
20 would be based on the representations made by the
21 Petitioner as part of the process in what he proposed
22 to do.

23 If that's done, then those proposed
24 benefits would be representations made by the
25 Petitioner, and would be, under the rules and

1 regulations, representations made that could be held
2 as conditions against the Petitioner.

3 COMMISSIONER GIOVANNI: If, for example,
4 the Commission concluded that the foreseeable risk
5 exceeded that anticipated by the criteria put forth
6 by the City and County standards, is it your position
7 that the Commission cannot impose more conservative
8 standards for the project, and that the only
9 alternative would be to perhaps deny the Petition?

10 MR. MATSUBARA: Well, that's talking about
11 a rock in a hard place.

12 Basically -- well, denial is one option you
13 always have, that's clear. The question is whether
14 or not a good faith response or representation can be
15 made based on the available science to comply with
16 that. And if that's available and we have provided
17 it, then, yes, we're bound by it, and you would be
18 authorized to make us do it.

19 COMMISSIONER GIOVANNI: That's not what I'm
20 asking. What I'm asking is if Commission concludes
21 that in its own mind that the City and County
22 standards are not adequate, and that is it your
23 position that we could not impose more conservative
24 criteria or standards, and our only alternative would
25 be to make a decision in the absence of that?

1 MR. MATSUBARA: Yes. I don't think you can
2 go beyond what the Petitioner has met in regard to
3 existing regulation and statutes.

4 COMMISSIONER GIOVANNI: So the only
5 alternative that I'm hearing from you in which a more
6 conservative standard would be met is if the
7 Petitioner voluntarily proposes that it would meet a
8 more conservative standard like Plate 6 standard that
9 was presented by one of the witnesses of the
10 Intervenor?

11 MR. MATSUBARA: That's my position.

12 COMMISSIONER GIOVANNI: Thank you very
13 much.

14 CHAIRPERSON SCHEUER: Commissioner
15 Ohigashi. You're muted.

16 COMMISSIONER OHIGASHI: If the City and
17 County requires you to do additional studies and
18 additional requirements regarding the engineering of
19 the basins as well as the drainage system, is it your
20 position that you would follow the recommendation of
21 the City and County?

22 THE WITNESS: Yes, we would.

23 COMMISSIONER OHIGASHI: So what I'm really
24 getting at is this: The Land Use Commission is not a
25 legislative body or necessarily rule-making body

1 concerning standards in engineering or anything else
2 like that. We rely upon City and County and
3 (indecipherable) to meet the standards.

4 So what my question is: Are you willing to
5 live with a standard that requires the City and
6 County to make that determination? In other words,
7 we have been presented with evidence saying that the
8 studies or the standards that you made are
9 inadequate, but would you be able to live with a
10 condition that says that, hey, if this is presented
11 to the City and County, and City and County decides
12 to upgrade their standards or necessary to provide
13 for whatever process they have to say that these
14 standards are necessary to be implemented, that you
15 will be following them?

16 THE WITNESS: I don't know if I'm going to
17 answer your question with this. When we submitted
18 our final grading plan, if the City and County at
19 that time said to us that this isn't adequate to meet
20 our standards at this time, you're going to have to
21 go back and relook at it, we would be willing to do
22 that. We wouldn't get a final grading permit unless
23 they were comfortable with what we put in front of
24 them.

25 So I guess my answer to your question is,

1 yes, we're going to comply with what the City and
2 County requires from us.

3 COMMISSIONER OHIGASHI: It's more -- my
4 question more dealt with a condition of the Land Use
5 Commission. Because I don't think we're
6 adequately -- and I'm speaking only for myself --
7 able to deal with the issues of whether or not the
8 standards that expert witnesses provided to us should
9 be adopted or not, because we're not necessarily a
10 legislative or rule-making body in that vein.

11 The people who apply those standards or
12 create those standards is the City and County of
13 Honolulu. What I'm saying is, would you live by a
14 condition -- would we be able to attach a condition
15 to -- or would you agree to a condition that the Land
16 Use Commission direct you to comply with the City and
17 County of Honolulu, and it would be up to the
18 Intervenors or their staff or anything like that to
19 present what they believe the standards should be to
20 the City and County of Honolulu in whatever process
21 is available to them?

22 THE WITNESS: Yeah, I think we can agree to
23 that, yes.

24 COMMISSIONER OHIGASHI: The other thing I
25 just wanted to clear up. You don't have an agreement

1 with the Hawaiian civic club; is that right?

2 THE WITNESS: We have a letter of intent
3 with the civic club.

4 COMMISSIONER OHIGASHI: From what I
5 understand is that the apportionment of liability and
6 responsibility is something that is negotiated
7 between those two parties; is that right?

8 THE WITNESS: That is correct.

9 COMMISSIONER OHIGASHI: And I don't --
10 neither -- I haven't heard from the civic club, but
11 I'm assuming that they haven't requested the LUC to
12 include any particular conditions in that proposed --
13 or that agreement; is that right?

14 THE WITNESS: Not to my knowledge, no.

15 COMMISSIONER OHIGASHI: So I can understand
16 your answer then saying that you -- you don't know,
17 because within those negotiations the liabilities and
18 responsibilities will be worked out. And I'm
19 assuming that the civic club is smart enough to say,
20 hey, we are taking on too much. Say we don't want
21 that provision in there, and they can walk away from
22 the deal if they want to.

23 But those are the kinds of situation that
24 you're planning to work with the civic club; is that
25 right?

1 THE WITNESS: That's correct.

2 COMMISSIONER OHIGASHI: Okay, just wanted
3 to understand.

4 CHAIRPERSON SCHEUER: That's it,
5 Commissioner Ohigashi?

6 COMMISSIONER OHIGASHI: That's it.

7 CHAIRPERSON SCHEUER: Commissioners, are
8 there further comments or questions for Mr. Morford?

9 I have three brief ones if there's nothing
10 further.

11 Thank you, Mr. Morford.

12 I want to follow up first on Commissioner
13 Giovanni's line of questioning, which was to you as
14 well as Mr. Matsubara.

15 If the Commission found itself -- if we
16 accepted the argument as true of Mr. Matsubara that
17 we could not impose a higher standard for the runoff
18 control unless you agreed to it, and if the only
19 options available to the Commissioners to get the
20 votes necessary was to have the Petitioner agree to
21 something higher than what the City and County
22 currently allows, is that something that the
23 Petitioner is willing to consider doing?

24 THE WITNESS: We're willing to consider it,
25 Chair. You know, the plan right now, the City only

1 requires a ten-year, one-hour storm event. We went
2 to 100-year, one-hour storm event to exceed the
3 City's minimum recommendations to mitigate against
4 any flooding.

5 We took what we felt were the appropriate
6 steps to mitigate flooding in the neighborhood. But
7 to answer your question, yes.

8 CHAIRPERSON SCHEUER: Thank you.

9 And to be clear, the concerns that I think
10 the witness raised, that I found credible from
11 Intervenor's witness, is that the City's level of
12 standards may not reflect the way climate has
13 changed. Not that you're not following what the City
14 has indeed directed you to do or even exceeding what
15 they directed you to do.

16 I've raised a point with a couple of
17 witnesses about the mitigations around the damselfly.
18 And it's my personal view -- I think the mitigation,
19 while excellent, were designed by engineers and
20 biologists, not actually people who deal with people.

21 I think there needs to be some kind of
22 community engagement around the protection of the
23 species. On one level there is the issue of you just
24 don't want the neighborhood kids going in and messing
25 with things; on another level, you're going to be

1 bringing in folks from the civic club and land trust,
2 and you want them to have some kind of education.

3 Those have not been mentioned so far as one
4 part of mitigation measures around the protection of
5 the damselfly.

6 Is the Petitioner willing to consider such
7 kinds of measures as a condition?

8 THE WITNESS: Yes, we are.

9 CHAIRPERSON SCHEUER: And then finally, let
10 me say I have declared multiple times throughout this
11 process my involvement with Hawaiian Islands Land
12 Trust. I found some of the discussion over what
13 conservation easements are, and how they're
14 negotiated to be challenging.

15 But one of the big differentiations you
16 have, you can have land trust, and then you have land
17 trusts that are accredited by the Land Trust Alliance
18 which adhere to certain standards which gives the
19 Commission a clearer idea of the permanent nature and
20 level of stewardship that might be required.

21 Are you willing to abide by a condition
22 that the conservation easement, if this project is
23 approved, be held by an accredited land trust?

24 THE WITNESS: Yes.

25 CHAIRPERSON SCHEUER: I have nothing

1 further. Thank you very much.

2 Anything further, Commissioners?

3 Commissioner Aczon.

4 VICE CHAIR ACZON: It wasn't a question.

5 Just one question, Mr. Morford. Are you
6 aware that there are several restrictions or
7 requirements imposed by -- regarding the runoff,
8 there's several requirements, rules imposed by the
9 City and County, the State government and also
10 Federal government, for example, EPA, that monitors
11 all those runoff. That, you know, regardless the
12 home -- the landowner or the contractor is liable.
13 Are you aware of that?

14 THE WITNESS: I wasn't aware of the
15 liability issue. I was aware of the entities that
16 you're speaking of, yes, but not the liability issue,
17 I was not.

18 VICE CHAIR ACZON: If there is a, for
19 example, a runoff, I know you're going to do whatever
20 is necessary to prevent all those runoff or
21 liabilities, but if something happens, there's a
22 runoff, it doesn't absolve you of any liability,
23 right?

24 THE WITNESS: That's correct.

25 COMMISSIONER ACZON: So you're aware that

1 there's some other agencies that they're going to
2 step in just in case something happens that will make
3 you accountable?

4 THE WITNESS: I understand, yes.

5 VICE CHAIR ACZON: Thank you, Mr. Chair.
6 That's all.

7 Thank you, Mr. Morford.

8 CHAIRPERSON SCHEUER: I want to do a time
9 check with the Commissioners. I think we're close to
10 be being done with Mr. Morford. If we can complete
11 and close the evidentiary proceedings for the day, we
12 are actually done for the day and we would recess
13 until tomorrow morning.

14 I realize I'm pushing through lunchtime,
15 and we have to bring the procedural question by Mr.
16 Tabata as well.

17 Are folks willing to gut it through for the
18 next little while, see if we can get through and move
19 onto closing the evidentiary procedures?

20 The alternative is taking a 45-minute break
21 and coming back --

22 COMMISSIONER CHANG: I'm willing to go,
23 Chair.

24 CHAIRPERSON SCHEUER: Anybody strenuously
25 objecting other than Arnold, saying he's hungry?

1 Anything further for Mr. Morford from the
2 Commissioners?

3 Do you have any redirect?

4 MR. MATSUBARA: No redirect, Chair.

5 CHAIRPERSON SCHEUER: Thank you very much,
6 Mr. Morford. I'm going to move you back to being an
7 attendee.

8 THE WITNESS: Thanks, everyone. Thanks.

9 CHAIRPERSON SCHEUER: You're welcome.

10 Ben, I don't know if you or Curtis are
11 going to deal with the request raised to strike
12 witnesses.

13 MR. MATSUBARA: I'll turn it over to Mr.
14 Tabata.

15 CHAIRPERSON SCHEUER: Okay.

16 Mr. Tabata, I wanted you to restate your
17 objection and request, and I would like you to keep
18 in mind, of course, that the written direct testimony
19 has been posted and part of the record. So I would
20 like you to clarify what you're asking for, and how
21 you wish for us to deal with it.

22 MR. TABATA: The Intervenors' witnesses
23 Dana Alden, Ph.D. and M. Lee Goff, Ph.D. were listed
24 as witnesses and they submitted written testimony and
25 resumes. They have not been made available for live

1 testimony, and they have not been made available for
2 cross-examination.

3 Our position is that this in violation of
4 the LUC's rules. HAR 15-15-59(e) which provides that
5 the witnesses shall be examined in the following
6 order, direct examination by the party calling the
7 witness, and then cross-examination by the other
8 parties.

9 The written testimony constitutes the
10 direct examination. Their failure to appear deprives
11 the Petitioner of the right to cross-examination
12 under this LUC rule.

13 On that basis we make a Motion to Strike
14 the written testimony of M. Lee Goff and the resume
15 of Dr. Goff and the resume of Dana Alden, Ph.D.

16 CHAIRPERSON SCHEUER: Mr. Yoshimori, do you
17 object to the motion?

18 MR. YOSHIMORI: We had previously removed
19 Dr. Alden from our subsequent witness list. So I
20 have no objections with striking Dr. Alden.

21 With regard to our other testifier,
22 Dr. Goff, he wanted to testify. It was due to
23 scheduling issues that he was not able to testify.

24 I would like to request rather than his
25 testimony be entirely stricken, that it be treated as

1 written testimony instead and be kept in the record.

2 CHAIRPERSON SCHEUER: Clarify. The written
3 testimony as if he had submitted written testimony
4 directly to the Commission included on the website
5 rather than Intervenors' witness?

6 MR. YOSHIMORI: Yes.

7 CHAIRPERSON SCHEUER: Curtis.

8 MR. TABATA: If that constitutes the
9 withdrawal of Dr. Goff's written testimony from the
10 evidentiary record, then we would agree to that.

11 CHAIRPERSON SCHEUER: I think it would
12 remain on the record just the same way people are
13 sending in written testimony right now, that
14 testimony is technically part of the record. But it
15 would not be included any more as an Intervenors'
16 witness, and the written testimony would not be
17 treated as such.

18 MR. TABATA: My understanding that the
19 evidentiary record is different from the entire
20 record, which includes written public testimony. I
21 believe there's a difference between public testimony
22 and testimony within the evidentiary record.

23 CHAIRPERSON SCHEUER: There is. It would
24 not be expert testimony.

25 MR. TABATA: On that basis, we would agree

1 to the withdrawal of Dr. Goff's expert testimony.

2 CHAIRPERSON SCHEUER: So I'm going to hear
3 from the other parties.

4 There is a Motion to Strike these two
5 witnesses' testimony. One has already been removed,
6 and the second witness is Mr. Goff's testimony, will
7 be stricken but included in the entire record as
8 non-expert witness testimony as if it was submitted
9 via the website or other means to the LUC.

10 City and county?

11 MR. PANG: Thank you, Mr. Chair. With
12 respect to the Intervenors' representation that the
13 testimony would be withdrawn as witness testimony,
14 and be resubmitted as public testimony, the City has
15 no objections.

16 CHAIRPERSON SCHEUER: Thank you.

17 Ms. Takeuchi Apuna.

18 MS. APUNA: Office of Planning does not
19 object either to Intervenors' suggestion that they
20 would withdraw the testimony.

21 I would just comment that I think even
22 public testimony is subject to cross-examination, but
23 we do not object.

24 CHAIRPERSON SCHEUER: Commissioners, any
25 comments? Just -- I'm checking with our Deputy AG,

1 technically it is a granting of the motion rather
2 than acknowledgment of the Intervenors' withdrawal,
3 which one is it? You're muted.

4 COMMISSIONER OHIGASHI: I thought it was a
5 stipulation between the two. They agreed that they
6 would treat it this way.

7 CHAIRPERSON SCHEUER: I think we have the
8 understanding, I'm just trying procedurally to be
9 clear.

10 You are still muted, Cindy.

11 MS. YOUNG: Sorry. Yes, it would be a
12 granting of the motion with the understanding that
13 the testimony would be recognized as written public
14 testimony.

15 CHAIRPERSON SCHEUER: And it does not
16 require -- Dan, it doesn't require a vote, it's just
17 by the Chair?

18 MS. YOUNG: It would be better if the
19 Commission voted on that, because it's a motion
20 brought by the Petitioner.

21 EXECUTIVE OFFICER: Under our rules, you
22 have the ability to rule on it.

23 CHAIRPERSON SCHEUER: That was my
24 understanding. Okay, I'm granting as has been stated
25 just now.

1 With that, let me go back to the things
2 that I have to read you.

3 Given the parties that have now completed
4 their presentations before the Land Use Commission,
5 I'm declaring the evidentiary portions of these
6 proceedings to have been completed, subject to the
7 receipt of any followup reports or answers that may
8 have been requested during the course of the hearing.

9 I direct the Parties to begin to draft
10 their individual proposed Findings of Fact,
11 Collusions of Law, and Decision and Order based upon
12 the record in this docket and serve the same upon
13 each other and on the Commission.

14 The proposed Findings of Fact must
15 reference the witnesses as well as the date, page and
16 line numbers of the transcripts to identify your
17 facts.

18 In addition to the transcript, the exhibits
19 and evidence should also be referenced. Please
20 contact Jean McManus, our Court Reporter, to arrange
21 for copies of today's transcript.

22 I'm going to note for the parties that the
23 Commission has standard conditions which we would
24 like the parties to include and prepare in their
25 proposed orders. A copy of standard conditions may

1 be obtained from Commission staff.

2 I recommend the Parties consult the
3 Commission staff early in the process to ensure that
4 technical and non-substantive formatting protocols
5 observed by the Commission are adhered to.

6 If any Party desires to stipulate to any or
7 all of the findings of fact, conclusions of law and
8 decision and order, they are encouraged to do so.

9 Regardless of whether the parties pursue a
10 partial or fully stipulated order, each party is
11 directed to file its proposed findings of fact,
12 conclusions of law and decision and order with the
13 Commission and serve copies on the other parties no
14 later than the close of business on August 26, 2020.

15 All comments, stipulations or objections to
16 the parties's respective proposals shall be filed
17 with the Commission and served upon the other parties
18 no later than the close of business on September 4,
19 2020. The deadline for any rebuttals is September 9,
20 2020.

21 Are there any questions with respect to our
22 post-hearing procedures, starting with Petitioner?

23 MR. TABATA: I apologize, I make a request
24 that the date, deadline for the proposed D&O be made
25 on September 2nd, if possible, just to give us

1 enough -- two weeks is a very tight schedule. I may
2 not even get the transcript within that time period
3 for today.

4 So I would request that the deadline for
5 the proposed D&Os be set on September 2, the
6 objections be due one week thereafter, and the
7 rebuttal one week thereafter.

8 I believe that would give us enough time
9 for the September 23rd action hearing.

10 CHAIRPERSON SCHEUER: Let me first check,
11 Mr. Tabata, with the LUC staff, because partially we
12 are dealing with the deadlines that we need to make a
13 decision by.

14 MR. TABATA: I believe the action was
15 described as September 23 during the beginning of
16 today's meeting.

17 CHAIRPERSON SCHEUER: Tentatively we have
18 closing arguments scheduled for September 23 and 24.

19 Mr. Orodener.

20 EXECUTIVE OFFICER: Mr. Chair, that would
21 make it extremely difficult on staff to prepare the
22 Commission for final adoption of the Decision and
23 Order and for the hearing on the 23rd-24th.

24 We understand Mr. Tabata's concerns, but
25 we're just -- we've got too -- we're short-staffed

1 and we have too much else going on to move the dates
2 for submission.

3 CHAIRPERSON SCHEUER: Mr. Tabata, I will
4 note all of the parties and the Commission have
5 really taken extensive time on this case, so that's
6 how we've gotten to this point.

7 MR. TABATA: Mr. Chair, I had to ask.
8 Thank you.

9 CHAIRPERSON SCHEUER: So you would prefer
10 not, but you will be able to live by it?

11 MR. TABATA: We will comply with the
12 Commission's ruling, yes, sir.

13 CHAIRPERSON SCHEUER: City and County.

14 MR. PANG: The City also has issues with
15 the date, but we will comply with date set by the
16 Commission. Thank you very much.

17 CHAIRPERSON SCHEUER: OP?

18 MS. APUNA: No questions.

19 CHAIRPERSON SCHEUER: Mr. Yoshimori?

20 MR. YOSHIMORI: Intervenors agree with the
21 schedule.

22 CHAIRPERSON SCHEUER: Thank you.

23 So I'm proposing to expedite the
24 proceedings, and then the closing arguments will be
25 heard September 23rd-24th to accommodate LUC staffing

1 commitment and other docket schedule and demands.

2 With that we have a schedule moving
3 forward. I would like to thank all the parties, and
4 particularly all the witnesses, the volunteers from
5 the public who have chosen to participate in this
6 matter, and especially my Commissioners for their
7 great diligence so far on this matter.

8 Any other issues to discuss today? If not,
9 we will recess until 9:00 a.m., let me say 9:00 a.m.
10 tomorrow morning for other matters.

11 Thank you very much. We're in recess.

12 (The proceedings recessed at 12:48 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 August 12, 2020, 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 12th day of August, 2020, in
16 Honolulu, Hawaii.

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