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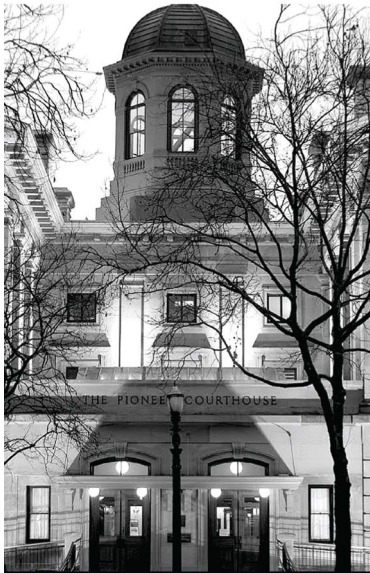
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**STATE OF HAWAII
LAND USE COMMISSION**

Meeting held on July 26, 2022

Commencing at 9:15 a.m.

Held at

Homer A. Maxey Center Conference Room

(Foreign-Trade Zone No. 9)

521 Ala Moana Boulevard

Honolulu, HI 96813

FINAL

I. CALL TO ORDER

II. ADOPTION OF MINUTES

June 23, 2022

III. TENTATIVE MEETING SCHEDULE

IV. MINUTES/TRANSCRIPTS

To Consider using the Transcripts in Lieu of the Minutes (HRS Section 92-9)

V. COMMISSIONER TRAINING

Training session to allow Commission to consult with its attorney and LUC staff regarding the Commission's powers, duties, privileges, immunities, and liabilities, with respect to:

(1) Conducting meetings and contested case hearings,

(2) Applicability of HRS Chapter 92, the state sunshine law,

(3) Applicability of HRS Chapter 91, Hawaii Administrative Procedures Act,

(4) Applicability of HRS Chapter 92F, the uniform information act,

(5) Section 15-15-62 Ex parte communications,

(6) Supreme Court decisions affecting LUC, and

(7) HRS Section 92-5(a)(2), Personnel matters where consideration of matters affecting privacy will be involved.

VI. RECESS

BEFORE :

1 **APPEARANCES :**

2

3 **COMMISSIONERS PRESENT :**

4 Dan Giovanni, Chair (Via Zoom)

5 Dawn Chang

6 Gary Okuda

7 George Atta

8 Kuikeokalani Kamakea-Ohelo

9 Lee Ohigashi (2nd Vice-Chair)

10 Melvin Kahele

11 Michael Yamane

12 Nancy Cabral (1st Vice-Chair)

13

14

15 **STAFF PRESENT :**

16 Daniel Orodener, Executive Officer

17 Scott Derrickson, Chief Planner

18 Riley Hakoda, Planner

19 Martina Segura, Planner

20 Ariana Kwan, Secretary

21 Julie China, Esq. Deputy Attorney General (Via Zoom)

22

23

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1 **APPEARANCES (CONTINUED)**

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3 **PRESENTERS FROM LUC STAFF:**

4 Daniel Orondenker

5 Scott Derrickson

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8 **PUBLIC TESTIMONY**

9 Ken Church

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1 **CHAIR GIOVANNI:** So in the absence of a
2 gavel, I will clap my hand and call this meeting to
3 order.

4 Aloha mai kakou. Good morning, everyone.
5 This is the July 26, 2022 Land Use Commission
6 meeting.

7 This is a hybrid meeting which is being
8 held at the Homer A. Maxey International Trade
9 Resource Center, Conference Room 401, which is open
10 to the public. It's also by interactive conference
11 technology, which links videoconference participants
12 and other interested individuals of the public via
13 Zoom.

14 To comply with state law, members of the
15 public are able to attend in person or by viewing
16 the meeting via Zoom webinar platform.

17 For all meeting participants, I would like
18 to stress to everyone the importance of speaking
19 slowly, clearly, and directly into the microphone
20 before you. Before speaking, please state your name
21 and identify yourself for the record.

22 Also, please be aware that all meeting
23 participants are being recorded on the digital
24 record of this Zoom meeting. Your continued
25 participation is your implied consent to be part of

1 the public record of this event. If you do not wish
2 to be part of the public record, you should exit the
3 meeting now.

4 This Zoom conferencing technology allows
5 the parties and each participating commissioner
6 individual remote access to the meeting proceedings
7 via their personal digital devices. Also please
8 note that due to matters entirely outside of our
9 control, occasional disruptions regarding the
10 connectivity may occur for one or more members of
11 the meeting at any given time.

12 If such disruptions occur, please let us
13 know and be patient as we try to restore the
14 audiovisual signals to effectively conduct business.

15 For members of the public wishing to
16 testify during the public witness portion of the
17 meeting and who are accessing this meeting by
18 telephone rather than by smart phone or desk-top
19 software, again, if you're using a smart phone, use
20 star 9 to virtually raise your hand and then star 9
21 to virtually lower your hand. You also should use
22 the star 6 function to mute and then star 6 to
23 unmute.

24 Mr. Derrickson, let me say that you are
25 cohost on this Zoom meeting today. And due to my

1 limited visibility of the audience and the panel, I
2 will call on you to assist me in recognizing members
3 of the audience and members of the commission that
4 wish to speak, and I will call upon them
5 accordingly.

6 I will also share with the participants
7 that we tend to take breaks from time to time.
8 Typically, on about every hour we'll take a five- or
9 ten-minute break. We will also take a break for
10 lunch.

11 My name is Dan Giovanni, and I have the
12 pleasure to serve as the LUC Chair. We currently
13 have nine seated commissioners. In addition to
14 myself, we have Commissioner Dawn Chang,
15 Commissioner Nancy Cabral, who's the First Vice-
16 Chair, Commissioner Kamakea-Ohelo, Commissioner Gary
17 Okuda, Commissioner Lee Ohigashi, who's the Second
18 Vice-Chair, Commissioner Atta, Commissioner Michael
19 Yamane, Commissioner Kahele.

20 Also with us is the LUC Executive
21 Director, Daniel Orodener; LUC Chief Planner, Scott
22 Derrickson; LUC Staff Planner, Riley Hakoda; LUC
23 Staff Planner, Martina Segura; and I see that LUC
24 Attorney General, Julie China, is also joining us
25 today by Zoom. Court reporting transcriptions are

1 being done from the Zoom recording.

2 The Hawaii State Legislature recently
3 passed the following bills and resolution concerning
4 the Uniform Information Practices Act, known as
5 UIPA, Chapter 92F HRS and Sunshine Law Part 1 of
6 Chapter 2 -- Chapter 92 HRS.

7 As of July 8th, 2022, H.B. 2026, H.D. 2,
8 S.D. 1 was signed into law. This directly relates
9 to HRS Chapter 92. HRS significantly, boards can no
10 longer take oral testimony only at the beginning of
11 a board's agenda or meeting. In response to this
12 new requirement, the LUC will be allowing for public
13 testimony before and after major agenda items.

14 Our first order of business is the
15 adoption of the minutes of our meeting of June 23rd,
16 2022. Ms. Segura, has there been any written
17 testimony submitted on this matter?

18 **MS. SEGURA:** Thank you, Chair. No public
19 testimony has been received on this matter.

20 **CHAIR GIOVANNI:** Are there any members of
21 the public who wish to testify on the adoption of
22 the minutes from June 23rd, 2022? If so, use the
23 raise hand function of your Zoom software or star 9
24 if accessing the meeting by phone or raise your hand
25 if you are in attendance, and you will be promoted

1 to the meeting and given two minutes to testify.

2 Mr. Derrickson, can you assist me to
3 recognize any members of the public who may wish to
4 testify at this time?

5 **MR. DERRICKSON:** Will do, Chair.

6 Currently, we see no members of the public who are
7 in attendance raising their hand to testify on the -
8 - that agenda item.

9 **CHAIR GIOVANNI:** Just the minutes,
10 correct? Yeah.

11 So to my fellow commissioners, are there
12 any suggested corrections or comments that you would
13 like to make regarding the minutes from the June
14 23rd, 2022 meeting?

15 Is that Nancy? Nancy, are you raising
16 your hand?

17 **COMMISSIONER CABRAL:** Correct. This is
18 Commissioner Cabral, and I'd like to go ahead and
19 make a motion to adopt the minutes from our June
20 23rd, 2022 meeting.

21 **COMMISSIONER OHIGASHI:** Second.

22 **CHAIR GIOVANNI:** Who seconded the motion?
23 I couldn't tell.

24 **COMMISSIONER OHIGASHI:** Lee.

25 **CHAIR GIOVANNI:** Thank you, Lee --

1 Commissioner Ohigashi.

2 Mr. Orodenger, please poll the
3 commissioners on the motion.

4 **MR. ORODENKER:** Thank you, Mr. Chair.
5 Commissioner Cabral?

6 **COMMISSIONER CABRAL:** Yes.

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

8 **COMMISSIONER OHIGASHI:** Aye.

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

10 **COMMISSIONER CHANG:** Aye.

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

12 **COMMISSIONER OKUDA:** Yes.

13 **MR. ORODENKER:** Commissioner Kamakea-
14 Ohelo?

15 **COMMISSIONER KAMAKEA-OHELO:** Aye.

16 **MR. ORODENKER:** Commissioner Yamane?

17 **COMMISSIONER YAMANE:** Aye.

18 **MR. ORODENKER:** Commissioner Atta?

19 **COMMISSIONER ATTA:** Aye.

20 **MR. ORODENKER:** Commissioner Kahele?

21 **COMMISSIONER KAHELE:** Aye.

22 **MR. ORODENKER:** Chair?

23 **CHAIR GIOVANNI:** Aye.

24 **MR. ORODENKER:** Thank you, Mr. Chair. The
25 motion passes unanimously.

1 **CHAIR GIOVANNI:** Thank you. The next
2 agenda item is the tentative meeting schedule. Mr.
3 Orodenker, will you share with us the tentative
4 schedule?

5 **MR. ORODENKER:** Thank you, Mr. Chair.
6 Tomorrow we will also be located here for additional
7 work on the training session. On August 10th, we
8 will be on the Big Island at -- in Hilo, for a
9 status report with regard to U. of N. Bancorp -- oh,
10 did you cancel? Okay. Nobody told me anything.
11 Okay. Okay. Never mind.

12 August 24th, we'll be at the Airport
13 Conference Room for status report on Hawaiian
14 Memorial Life. August 25th is currently open. In
15 September between September 14th and 16th, we will
16 be participating in HCPO on Kauai. On October 5th,
17 we will take up the Puunene Quarry matter, special
18 permit. On October 6th, we will take up Waikapu
19 Properties. On October 19th, we will be on Maui for
20 Pulama Lana'i. October 20th is currently open, and
21 that takes us through the fall.

22 **COMMISSIONER CABRAL:** Chair, Commissioner
23 Cabral here. I have a question of our Executive
24 Director.

25 **CHAIR GIOVANNI:** Yes, Commissioner Cabral.

1 **COMMISSIONER CABRAL:** For myself and even
2 our new commissioners, what is the probable
3 timeline? Because I'm going to be traveling a few
4 times here, so if I get to that month end and we're
5 less than 30 days out, are we not going to have a
6 hearing or how -- what is usually what happens in
7 terms of your timeline for scheduling, so we can
8 make airplane plans, et cetera?

9 **MR. ORODENKER:** Well, unfortunately, a lot
10 of this is out of our control. If we -- if it's a
11 motion relating to a district boundary amendment or
12 it's a district boundary amendment proceedings, or
13 even a declaratory ruling, for that matter, we have
14 some flexibility with when we schedule things, and
15 we can give the commission significantly longer
16 answers with regard to whether or not there will be
17 a hearing on that particular day.

18 A difficulty that we face is we have a
19 number of special permits and a 201-H project that
20 are coming before us. And with those, once the
21 county sends us the record, we have to complete the
22 docket within 45 days. Very often it's unclear as
23 to exactly when the county's going to send us the
24 record, so we don't know until -- we have to leave
25 it on the calendar until we know that the county's

1 not going to send us the record. So unfortunately,
2 the best we can do is 45 days out.

3 **COMMISSIONER CABRAL:** Thank you.

4 **CHAIR GIOVANNI:** Let me add my own comment
5 to that of Commissioner Cabral and encourage all my
6 fellow commissioners and the LUC staff to
7 communicate regularly to inform the LUC staff of any
8 possible days and times that they -- you as a
9 commissioner would be unavailable or have limited
10 availability.

11 That helps us to put together the schedule
12 and to revise it if and when we need to revise it.
13 So again, good communication between meetings with
14 letting the staff know when you have constraints, so
15 -- and for the staff to continue to give us as much
16 notice as possible for potential meeting dates and
17 locations, so that we can let you know when we might
18 have a problem. Just a general request.

19 Anything further, commissioners, on the
20 tentative meeting schedule? Okay. Thank you, Dan.

21 Our fourth order of business is to
22 consider using transcripts in lieu of minutes at
23 future meetings.

24 Ms. Segura, has there been any written
25 testimony submitted on this matter?

1 **MS. SEGURA:** Thank you, Chair. Once
2 again, no public testimony has been received.

3 **CHAIR GIOVANNI:** That's written testimony,
4 correct?

5 **MS. SEGURA:** Yes.

6 **CHAIR GIOVANNI:** Are there any members of
7 the public who wish to testify on the consideration
8 of using transcripts in lieu of minutes?

9 Mr. Derrickson, I need your assistance to
10 recognize if there's anyone in the audience or
11 virtually attending the meeting that might want to
12 testify on this matter.

13 If so, please use your raise hand function
14 of the Zoom software or star 9 if accessing this
15 meeting by phone, and you will be promoted in the
16 meeting and given two minutes to testify.

17 Mr. Derrickson, are there any comments in
18 consideration of the transcripts in lieu of minutes?

19 **MR. DERRICKSON:** Yes. We have one member
20 of the audience, Mr. Ken Church, raising his hand.
21 I can let him in.

22 **CHAIR GIOVANNI:** Yes. Please let him in.
23 Is he attending by Zoom or in person?

24 **MR. DERRICKSON:** He's attending by Zoom.

25 **CHAIR GIOVANNI:** Okay. So please let him

1 into the Zoom panel, and I will swear him in and
2 give him two minutes to testify.

3 **MR. DERRICKSON:** Okay. I just promoted
4 him to panelist, and we should be getting --

5 **CHAIR GIOVANNI:** Mr. Church, can you turn
6 on your audio and visual?

7 Mr. Derrickson, I see only his name. I do
8 not hear him and I do not see him.

9 **MR. DERRICKSON:** Yeah, I asked him to
10 unmute and turn his video on.

11 **CHAIR GIOVANNI:** Are you in communication
12 with him in any way?

13 **MR. DERRICKSON:** No. Just via the Zoom
14 connection. He's showing as a panelist right now,
15 but his audio and his video are still barred out.
16 And that's on his end.

17 **CHAIR GIOVANNI:** Correct. I'm seeing the
18 same thing on my end. I see that he is a -- he has
19 a holding place on the panel, but I do not see him
20 visually, and I do not hear him.

21 **MR. DERRICKSON:** I -- I don't know --

22 **KENNETH CHURCH:** Can you hear me now?

23 **CHAIR GIOVANNI:** Yes, Mr. Church, I do
24 hear you now.

25 **KENNETH CHURCH:** I did have it unmuted,

1 but for some reason it wasn't showing. I would like
2 to turn off the video so that it doesn't interfere
3 with my -- what I'm going to say. Just give me a
4 second to turn off the camera, and hopefully that
5 won't turn off the audio. Can you still hear me?

6 **CHAIR GIOVANNI:** I can hear you. We have
7 never seen your video.

8 **KENNETH CHURCH:** Okay. So my question is
9 --

10 **CHAIR GIOVANNI:** Mr. Church, before you
11 proceed, please state your name and address for the
12 record. And then you'll --

13 **KENNETH CHURCH:** My name is -- my name is
14 Kenneth S. Church. I live on the Big Island in the
15 area of Hakalau.

16 **CHAIR GIOVANNI:** Thank you. You've got
17 two minutes to testify on the matter of using
18 transcripts in lieu of meeting minutes.

19 **KENNETH CHURCH:** So my question basically
20 is minutes are usually posted on your website.
21 Transcripts usually don't exist unless a petitioner
22 pays for them. So how will the minutes or the
23 transcripts going forward be posted on your website
24 if the petitioner does not pay for the transcript?

25 **CHAIR GIOVANNI:** Thank you for your

1 question.

2 Mr. Orodenger, do you have a clarification
3 on this specific question?

4 **MR. ORODENKER:** Yes. The transcripts will
5 be posted on the website regardless of -- at some
6 point, regardless of whether or not a petitioner
7 pays for them, because it's a requirement by law.

8 The issue of paying for the production of
9 the transcripts is a separate matter from our
10 requirements to post them.

11 **CHAIR GIOVANNI:** So --

12 **MR. ORODENKER:** So they will be posted
13 regardless of whether or not -- pursuant to law,
14 regardless of whether or not they get paid for, and
15 if they were not paid for, then we would institute
16 collection proceedings against the petitioner who
17 refuse to pay for minutes -- or for the transcript.

18 **KENNETH CHURCH:** So in all cases, a
19 transcript will be produced in writing and posted,
20 and all petitioners will be required to pay that?

21 **MR. ORODENKER:** According to our rules,
22 yes.

23 **KENNETH CHURCH:** Thank you.

24 **CHAIR GIOVANNI:** Thank you, Mr. Church.

25 Mr. Derrickson, are there any other

1 members of the audience -- of the public that wish
2 to testify on this matter or have a question?

3 **MR. DERRICKSON:** No. I don't see anyone
4 else raising their hands to testify.

5 **CHAIR GIOVANNI:** Thank you.

6 Commissioners, are there any comments on the
7 consideration of using transcripts in lieu of
8 minutes on a going-forward basis?

9 **COMMISSIONER CABRAL:** Hello. Commissioner
10 Cabral again. I did -- I was aware this topic was
11 going to be discussed, and I deal with minutes in my
12 world a lot, and I have on previous occasions
13 commented on what an excellent job the LUC staff
14 does on these minutes.

15 My recommendation would be to do a very
16 concise set of minutes that are not nearly as
17 detailed. You would do the first part to note who's
18 present, and then to -- and if a petitioner or
19 whoever is present at the table, you know, not -- we
20 never kept track of who's in the audience, and then
21 just any motions -- any action is taken, so you move
22 and a second and adopt the minutes.

23 And if there's any other motion that was
24 made, that would be the only thing that would be
25 recorded in the minutes. So your minutes would

1 record where it was, who was present, what day,
2 when, where, how, and who was present, and any
3 motion made and either passed or voted down or, you
4 know, what-have-you.

5 So that would be my recommendation, just
6 make it a very concise set so we at least know, what
7 -- you know, who the petitioners were, what the
8 topic was, and that's it. Thank you.

9 **CHAIR GIOVANNI:** Thank you, Commissioner
10 Cabral.

11 Any other comments on this matter?

12 **COMMISSIONER CHANG:** Mr. Chair, this is
13 Dawn Chang, Commissioner Chang. Good morning.

14 **CHAIR GIOVANNI:** Good morning,
15 Commissioner Chang.

16 **COMMISSIONER CHANG:** I -- I support
17 Commissioner Cabral's recommendation. I think -- I
18 think Mr. Church raises a good issue regarding the
19 transcripts, and that I find them to be very
20 lengthy, and rather than replacing the minutes with
21 the transcripts, I would recommend that we support
22 Commissioner Cabral's recommendation to have a more
23 concise set of minutes that just show the action,
24 who made the motion, and then the ultimate outcome.

25 And once the transcripts are posted on the

1 website, if they're paid for, then anyone can go and
2 review them in more detail. But I think that that
3 would be sufficient and in compliance with the law.

4 Thank you.

5 **CHAIR GIOVANNI:** Thank you, Commissioner.
6 Commissioners, any other comments before I
7 call for a motion on this?

8 **COMMISSIONER OHIGASHI:** I'm going to make
9 a comment. This is Lee Ohigashi.

10 **CHAIR GIOVANNI:** Mr. Ohigashi, yes.

11 **COMMISSIONER OHIGASHI:** Yeah. I'm -- I'm
12 -- I'm leaning towards trying to get rid of the
13 minutes because I find them to be not necessarily
14 helpful in keeping a record of what goes on. And I
15 think that it would reduce staff responsibility and
16 staff work, and it would save us time and effort in
17 this matter.

18 And I don't see anything wrong if we use
19 the transcripts for the purposes of even the
20 minutes. My problem is -- is that the minutes --
21 they seem to take an exorbitant amount of time to
22 prepare, and I'm not sure if they're necessary at
23 this point in time. That's my point.

24 **CHAIR GIOVANNI:** Thank you, Commissioner.

25 Is that Commissioner Okuda?

1 **COMMISSIONER OKUDA:** Yes, Chair. I'll
2 talk loud because I think the -- the thing won't go
3 on. Anyway, Chair, I think minutes are good for
4 purposes of informing the public. In other words,
5 it's an easy way for the public, at a glance, to see
6 what's going on. But I believe there really is a
7 danger to having any minutes, and this is why I
8 believe there's a danger.

9 Since we are a quasi-judicial body, it's
10 the record that becomes important, and so later on,
11 the question always -- well, I shouldn't say later
12 on. Sometimes, the question becomes what is the
13 record. And we as human beings, we might make
14 mistakes. That's just human beings.

15 And so one of the problems that can arise
16 is where there might be some type of conflict or
17 people argue there's a conflict between the
18 transcript, which reflects what we considered and the
19 decision we made, and what the minutes would say.
20 Because I think us lawyers can always make an
21 argument, yeah, the Land Use Commission did make
22 that ruling, but you know what, 60 days or 30 days
23 later, they adopted the transcript -- or adopted the
24 minutes which said something slightly different.

25 Frankly, that's the argument that's been

1 raised to me in front of me in court where something
2 happens in a court hearing and later on the court
3 clerk writes things in what they call court minutes,
4 which technically does not have force of law, but
5 when it's down in writing, people start latching
6 onto that.

7 So this might be partly a question for our
8 Deputy Attorney General. I mean, what is the record
9 that solidifies or evidences our decision? If the
10 record really is the transcript of the proceedings
11 and not the minutes, we should be very careful what
12 we put in minutes. I think if we put it in there,
13 it should be with the goal of, you know, public
14 information, but the less we put in the minutes, so
15 much the better.

16 And frankly, if we can still have the
17 public feel that they -- we're not trying to hide
18 anything or we're not trying to bury things by
19 giving them the haystack of pages and pages of
20 transcripts, you know, as long as the public feels
21 they still have transparency here, the more we can
22 get rid of the minutes. I think it makes our record
23 a lot clearer and more accurate. So that's my
24 comment, Mr. Chair.

25 **CHAIR GIOVANNI:** So in your comments,

1 Commissioner Okuda, there was a question that you
2 wanted to direct to Attorney General China, I
3 believe, on what constitutes the actual record. Is
4 that correct? Could you restate your question?

5 **COMMISSIONER OKUDA:** Yeah. My --

6 **MS. CHINA:** I think I got the question. I
7 think -- sorry, Commissioner Okuda. I think there's
8 two different things you were talking about. Item
9 one is what are the minutes of a sunshine meeting,
10 and then item two is, excuse me, what is necessary
11 when, for example, the commission's decision is
12 appealed.

13 So when the commission's decision is
14 appealed, we're going to need a transcript. When
15 the commission, as a sunshine entity, does its
16 business, all that's required is something that
17 reflects a -- you know, that accurately reflects
18 what went on, okay?

19 So you could potentially have two
20 different documents or, to simplify things and make
21 things easier for commission staff, you can just
22 have the transcript because that takes care of
23 basically meeting both requirements.

24 **CHAIR GIOVANNI:** So Ms. China, you're
25 saying the transcripts take care of both

1 requirements; the minutes do not?

2 **MS. CHINA:** Correct.

3 **CHAIR GIOVANNI:** Does that answer your
4 question, Mr. Okuda -- Commissioner Okuda?

5 **COMMISSIONER OKUDA:** Chair, it does, it
6 does. Thank you very much, Ms. China. Appreciate
7 your input.

8 **CHAIR GIOVANNI:** Commissioners, any
9 further comments on this matter before we call for a
10 motion?

11 **COMMISSIONER OHIGASHI:** I have a question.
12 Lee Ohigashi again.

13 **CHAIR GIOVANNI:** Mr. Ohigashi, you are
14 recognized.

15 **COMMISSIONER OHIGASHI:** I just wanted to
16 clarify something. So if we pass this and say the
17 transcripts will be used in lieu of minutes,
18 obviously, we would take a look at it and we would
19 have to read these transcripts prior to every
20 meeting to adopt them. Is that right, Mr.
21 Orodenker?

22 **MR. ORODENKER:** Technically, yes.

23 **COMMISSIONER OHIGASHI:** And then the other
24 thing that we would have to do is, like Mr. Church
25 indicated and you indicated, before we produce these

1 transcripts, we would have to bill the petitioners
2 in that case, is that right?

3 **MR. ORODENKER:** Well, as I said, that
4 becomes more of a -- that's not an easy answer.
5 What happens is that --

6 **COMMISSIONER OHIGASHI:** Because they're
7 supposed to have several different cases that we
8 hear on a day.

9 **MR. ORODENKER:** Right. So it would --

10 **COMMISSIONER OHIGASHI:** We would have to
11 break out the transcript cost on that.

12 **MR. ORODENKER:** But we -- we actually have
13 never really had a problem with petitioners paying
14 for transcripts. I mean, that has not been an issue
15 for us.

16 **COMMISSIONER OHIGASHI:** I understand. I
17 just wanted to understand it. So the last part of
18 the question I have is -- or last part -- last
19 question I have is -- is if we have meetings like
20 this where there is no petitioner, the transcript
21 would automatically be allowed -- would be - -
22 wouldn't be paid for by anyone except us, is that
23 right?

24 **MR. ORODENKER:** That's correct.

25 **COMMISSIONER OHIGASHI:** Okay. I guess

1 finally is that is it possible, then, that we would
2 require -- is it possible that we would require
3 written minutes in these types of cases that we have
4 before us, but dispense and utilize transcripts if
5 we have a contested case?

6 In other words, when we have a contested
7 case hearing or -- or -- is it possible to use
8 transcripts only in that type where there's a
9 voluminous record occurring? I -- I'm just asking
10 that question. You know, I -- I'm just trying to
11 figure out if --

12 **MR. ORODENKER:** Yeah. Anything is
13 possible.

14 **COMMISSIONER OHIGASHI:** I'm just curious
15 of that because that -- the problem I am -- the
16 other -- other side is that, yeah, it saves work for
17 the staff, but it creates work for the
18 commissioners, which we have to review sometimes 300
19 pages of transcripts to adopt the minutes. So I --
20 I'm just -- that's entered my mind.

21 **CHAIR GIOVANNI:** All fair comments and
22 questions.

23 **COMMISSIONER YAMANE:** Chair, Commissioner
24 Yamane. I have a few comments. I guess personally,
25 for me, it is - - can you hear me?

1 Personally, for me, I prefer to review
2 minutes for being more concise. But, you know,
3 after this thing to Commissioner Okuda, that about
4 what's on the record, that kind of sheds some light,
5 but I'm hoping that the staff could do the minutes
6 to avoid any types of issues that Commissioner Okuda
7 was trying to allude to. But that's my position.
8 Thank you.

9 **CHAIR GIOVANNI:** Thank you, Commissioner.

10 So it sounds like we've got a number of
11 options that have been raised by the commissioners,
12 including a simplified set of minutes, doing away
13 with the minutes all together, doing minutes only
14 for non-contested case hearings and things of that
15 sort. So it --

16 Ms. China, let me recognize you.

17 **MS. CHINA:** Thank you, Chair. You can't
18 do away with minutes in their entirety. You have to
19 -- in order to comply with the sunshine law, you're
20 going to have -- I mean, okay.

21 If you have transcripts, you can do -- you
22 can do away with the minutes in their entirety
23 because they take the place of the minutes.
24 However, if you -- you can't just do away with the
25 minutes and then -- in their entirety if you don't

1 replace them with -- with transcripts.

2 Also, you can't just do a totally
3 simplified minutes in that it's got to accurately
4 reflect what went on at the meeting, so at a
5 minimum, it's got to have some detail, not
6 everything, but it's got to be something more than
7 nothing and less than the full transcript. You
8 know, it's -- basically, it's, you know, if -- if
9 somebody can tell what happened at the meeting,
10 that's sufficient, and so I know that that's not
11 really a clear explanation, but that's as good as,
12 you know -- how the minutes go.

13 So you can either do -- so I guess your
14 options are shorter form minutes which accurately
15 reflect what went on in the meeting or transcripts
16 or combination of both.

17 **MR. ORODENKER:** Mr. Chair, if I may?

18 **CHAIR GIOVANNI:** Mr. Orodenker, please.

19 **MR. ORODENKER:** Thank you. Kind of
20 reading the room, what I would suggest at this stage
21 is that staff work -- be allowed to work with the
22 Attorney General to see how we can better streamline
23 the minutes so that we can make sure that they
24 comply with Chapter 92 and still reduce the amount
25 of work that the staff currently has to undertake to

1 do very, very detailed minutes.

2 And that is -- that is a part of the
3 problem. Our minutes right now are very detailed.
4 So we would like to take the opportunity to work
5 with the Attorney General to see what we can and
6 cannot do, and then maybe come back and give you an
7 example of what those minutes would look like, so
8 that the commission would be able to have a better
9 idea of what we're talking about.

10 **CHAIR GIOVANNI:** So the Chair, for one,
11 thinks that's an excellent suggestion. Fellow
12 commissioners, do you have any comments on Mr.
13 Orodenker's suggestion that we table this, as far as
14 decision-making, and give the staff an opportunity
15 to work with Ms. China to come up with an example or
16 some recommendations for streamlined minutes that
17 still comply with the law requirements.

18 In all cases, we would not do away with
19 the transcripts. They would still continue to
20 exist, so any further comments on the suggestion by
21 Mr. Orodenker?

22 **COMMISSIONER OKUDA:** Yeah, Chair. Gary
23 Okuda. I -- after listening to Mr. Ohigashi, I
24 change my mind about getting rid of minutes totally.
25 No, no. He raises a really good point that I didn't

1 think about, which is, yeah, if we don't have
2 minutes, we've got to read all the pages.

3 And you know, having done so in some of
4 these cases, going back to review to help draft the
5 order, that's not an -- it's not an efficient way of
6 handling it. And I'm personally okay with giving
7 staff discretion, even without getting approval of
8 the exact format, because it might change depending
9 on the type of hearing we have -- to give staff the
10 discretion, you know, in consultation with the
11 Attorney General, to prepare the appropriate form of
12 minutes depending on what we're having.

13 Because in the end, we make the decision
14 whether we're going to approve those minutes or not.
15 But I take back any suggestion that we get rid of
16 the minutes because Commissioner Ohigashi is right,
17 we would have to read every single page, and that
18 is, you know -- that's not a good idea, so I change
19 my mind. Yeah, okay. Thank you.

20 **CHAIR GIOVANNI:** Yeah. And I think
21 Commissioner Yamane was also saying the same thing,
22 and I tend to feel the same way. I would personally
23 feel satisfied with a streamlined version of our
24 minutes that does comply with the requirements of
25 the law for minutes for our meeting, recognizing

1 that in all cases, we're still going to have
2 transcripts at some point in time.

3 So Mr. Orodenger, do I need a motion and a
4 vote on this, or can I accept your recommendation as
5 Chair and move forward?

6 **MR. ORODENKER:** I don't believe we need a
7 motion on this, Mr. Chair.

8 **CHAIR GIOVANNI:** Okay. So the Chair
9 decides to give -- to table this question until the
10 staff -- executive staff can work with Ms. China to
11 further clarify the requirements for some form of
12 streamlined or amended minutes that still comply.
13 And you'll come back to us as an agenda item in a
14 further meeting.

15 **MR. ORODENKER:** Yes, Mr. Chair. Thank
16 you.

17 **CHAIR GIOVANNI:** Thank you all.

18 So with that, our next order of business
19 is commissioner training. So Mr. Orodenger, would
20 you like to take a short break before we reconvene
21 and I hand the meeting over to you, or do you want
22 to plunge right into it now?

23 **MR. ORODENKER:** I think a short break
24 would be good. We've been going for almost an hour,
25 so that will -- that will give everybody an

1 opportunity to get ready.

2 **CHAIR GIOVANNI:** Okay. It's 9:53. We'll
3 take a short break and reconvene at 10 o'clock.

4 Thank you all.

5 **(Recess taken from 9:53 - 10:03 a.m.)**

6 **CHAIR GIOVANNI:** Okay. It's 10:03, and
7 we're back on the record.

8 So the next order of business is
9 commissioner training, a training session to allow
10 commission to consult with its attorney and LUC
11 staff regarding commission's powers, duties,
12 privileges and immunities and liabilities with
13 respect to conducting meetings, applicability of HRS
14 92, applicability of HRS 91, Hawaii Administrative
15 Procedure, Act 4, applicability of HRS Chapter 92f,
16 and Uniform Information Act, also regarding ex parte
17 communications, Supreme Court decisions affecting
18 the LUC, and HRS Section 92-5(a) and (2), and
19 personnel matters where consideration of matters
20 affecting privacy will be involved.

21 All of these topics will be subject to
22 training. Ms. Segura, has there been any written
23 testimony submitted on the matter of commissioner
24 training?

25 **MS. SEGURA:** Thank you, Chair. No written

1 testimony has been received on commissioner
2 training.

3 **CHAIR GIOVANNI:** Thank you.

4 Mr. Derrickson, are there any members of
5 the public who wish to testify on the commissioner
6 orientation and training? If so, please identify
7 them for the Chair.

8 **MR. DERRICKSON:** Yes, Chair. Mr. Ken
9 Church has raised his hand in the audience.

10 **CHAIR GIOVANNI:** Thank you. Would you
11 please elevate Mr. Church to a panelist so that we
12 can recognize him and see him and hear him?

13 **MR. DERRICKSON:** I enabled him to come
14 into the panel. That's in process right now.

15 **CHAIR GIOVANNI:** Thank you.

16 Mr. Church, I see you on the panel. Can
17 you identify yourself by voice or -- and/or video.

18 **KENNETH CHURCH:** Did you hear me?

19 **CHAIR GIOVANNI:** I hear you now. Are you
20 going to go without video again, Mr. Church?

21 **KENNEETH CHURCH:** Yes.

22 **CHAIR GIOVANNI:** Okay. Please state your
23 name again. Since this is a new matter, please
24 state your name again and your address and proceed.
25 You have two minutes.

1 **KENNETH CHURCH:** Yes. I live on the Big
2 Island. My name is Kenneth Church. I have one page
3 here. I hope I can get through it in one minute --
4 or two minutes.

5 It is time, in my opinion, and now with
6 this new commission, it's time that the Governor
7 asked the Auditor General to review the Land Use
8 Commission's administration of the state's land use
9 law.

10 The commissioners and the LUC's
11 administrator staff are supposed to be neutral.
12 When discretion is applied by the commissioners,
13 it's to be applied against the weight of evidence
14 and the laws with total neutrality void of personal
15 opinions. That has not been the practice of the
16 past commission.

17 First, not all petitioners are wealthy.
18 Fees and processes should be more ordinary citizen
19 friendly. The last four years are an example of the
20 tail wagging the dog where the administrative office
21 essentially tells the commissioners what to do in
22 their staff memorandum, which isn't a public
23 document and isn't available to the petitioner in
24 order that they may rebut it. So that's a problem,
25 and it should be corrected.

1 The commission also does not meet its own
2 mandated deadlines, and there's no penalty in many
3 cases. That's a problem.

4 During our hearing, Commissioner Okuda
5 reminded the commissioners that the courts would
6 likely not overturn their decisions as the courts
7 give deference to the commission's decisions.
8 That's problematic, too.

9 Challenging in court and usually all of
10 the way through the three courts that the commission
11 keeps appealing to -- to the Supreme Court exhausts
12 petitioners and particularly small landowners. That
13 should be corrected.

14 We currently have declaratory orders for
15 three recent petitions (audio disruption) Rosehill,
16 Church and Hildal bill. This is because the
17 commission has ignored their own laws and the
18 evidence and even transcripts of their own hearings,
19 and, in effect, the commissioners have become the
20 lawmakers instead of the body that is supposed to
21 apply the laws.

22 Declaratory orders do not reflect and
23 evenly apply the evidence and the law's
24 considerations during hearings in the final written
25 DOs. Sometimes, even these DOs even reference

1 evidence that was not before the commission when it
2 voted to deny.

3 During our petition, Commissioner Okuda
4 speculated what's really going on here as if he was
5 aware of something that was not in the evidence or
6 the testimony. He also stated his belief that the
7 courts would give deference to the commission's
8 decisions.

9 **CHAIR GIOVANNI:** Mr. Church, is that the
10 end of your comment, or do I need to ask you to
11 summarize?

12 **KENNETH CHURCH:** That's it.

13 **CHAIR GIOVANNI:** Thank you so much for
14 your testimony.

15 Commissioners, do you have any questions
16 for Mr. Church? I can't see. Mr. Derrickson, are
17 any of the commissioners raising their hands?

18 **MR. ORODENKER:** No, Mr. Chair.

19 **CHAIR GIOVANNI:** Okay. Thank you. Are
20 there any other members of the audience or the
21 public that would like to be recognized, Mr.
22 Derrickson?

23 **MR. DERRICKSON:** I don't see anyone else
24 in the audience who is raising their hand to
25 testify.

1 **CHAIR GIOVANNI:** Thank you. Then we will
2 proceed to the commissioner training.

3 So I'd like to recognize Dan Orodenker,
4 the Executive Director of the LUC, to lead a
5 discussion and to seek input from LUC staff and
6 commissioners on the topic of commissioner training.

7 Mr. Orodenker, I'm going to turn the
8 meeting over to you; however, I'd like to encourage
9 you to be cognizant of the clock for both a break at
10 approximately 11 o'clock and, of course, in the
11 absence Commissioner Wong, we need your help now to
12 identify when it's time to eat, for a lunch break.

13 So with that, I'll turn it over to you, Mr.
14 Orodenker.

15 **COMMISSIONER CHANG:** Mr. Chair, this is
16 Commissioner Chang. I would just like to raise a
17 question with our Deputy Attorney General. It is
18 whether the training is an open session or is this
19 more appropriate in executive session, as there have
20 been instances in previous years when we've done
21 training or we've had -- we've had discussions on
22 the board's powers, duties, and immunities and
23 liabilities, so I was assuming that this training
24 was going to be in executive session. So if I could
25 just get a clarification from Ms. China?

1 **CHAIR GIOVANNI:** Yeah, I think that's a
2 good point.

3 Ms. China, you have a comment?

4 **MS. CHINA:** Yeah -- no, it's -- this is my
5 first training with the LUC, so I don't really know
6 what -- what's going to be covered. But in general,
7 you know, when we're just going over, you know, the
8 statutes and, you know, Chapter 91, Chapter 92, and
9 the LUC statutes, I think that can be done in a
10 sunshine meeting.

11 To the extent that the commission has
12 specific questions as to their powers, duties,
13 responsibilities, et cetera, we can go into
14 executive session, and you can ask me those types of
15 questions.

16 I think, though, that this training
17 session was, in general, created to be more -- you
18 know, kind of broad in scope coverage, so -- but if
19 you do have specific questions, yeah, feel free. We
20 can go into executive session to discuss those
21 matters.

22 **CHAIR GIOVANNI:** I think that's a very
23 interesting point, Commissioner Chang. Why don't we
24 try to proceed with -- as open sunshine session, but
25 at any time, if any of the commissioners feel that

1 it would be appropriate, that we go into executive
2 session for -- to consult with our attorney, we've
3 got that option. So is that satisfactory,
4 Commissioner Chang?

5 **COMMISSIONER CHANG:** Yes, Mr. Chair.

6 And thank you, Ms. China. I appreciate
7 the clarification.

8 **CHAIR GIOVANNI:** So let me turn it over to
9 you, Mr. Orodenger. Are you going to share your
10 screen for the commissioner -- there we go. Thank
11 you.

12 **MR. ORODENKER:** Yes, Mr. Chair. Is the
13 microphone working? Hello? Okay.

14 **CHAIR GIOVANNI:** Yes, it works well.

15 **MR. ORODENKER:** Thank you. Maybe
16 everybody will be able to hear me for once. I need
17 to bring this to all the meetings, right?

18 Okay. Thank you, everybody. We do --
19 this is the third time that -- third or fourth time
20 that we've done this. Every once in a while, when
21 we get an influx of new commissioners, it's
22 important that we have a training session to talk
23 about the details of what we do and the issues that
24 arise.

25 We really appreciate the commissioners who

1 have already been here for a while and been through
2 this already being here, because one of the things
3 that we want to do today is -- and tomorrow is to
4 have a discussion about some of these commissioners'
5 view on things and the way things actually work.
6 And even for the commissioners who have been here
7 for a while, there may be nagging questions about
8 why we do it this way and what happens.

9 So if you can go to the next slide. These
10 are kind of the topics we'll be talking about in the
11 next day or so. So if you're thinking about some of
12 these things that have been nagging at you and
13 something you want to talk about, we appreciate
14 questions, and this is meant to be more of a flow.

15 I mean, I'll be going through a lot of
16 topics and discussing a lot of things, but at any
17 time, please ask questions or bring up a point that
18 you think that I may have missed or anything that
19 may be on your mind.

20 So with that, we'll start out with a brief
21 history. Chapter 205, the State land use law is
22 unique in the history of Hawaii and, actually,
23 anywhere in the country with regard to land use
24 planning. It was originally adopted by the State
25 Legislature in 1961.

1 Oops. Okay. It established a framework
2 of land use management and regulation and, as we
3 know, all lands in Hawaii are classified into the
4 four districts. Go ahead.

5 The purpose of the law, technically, and
6 if you read a lot of the scholarly works, was to --
7 the legislature identified in 1961 that there was a
8 lack of adequate controls which had caused the
9 development of Hawaii's limited and valuable land
10 for short-term gain for a few while resulting in
11 long-term loss to the income and growth potential of
12 our State's economy.

13 Basically, what was happening was that
14 development was occurring in a haphazard manner.
15 The big landowners were developing property that
16 they had that had less of a value economically for,
17 at that time, agricultural production, and things
18 were going up in a haphazard manner. Infrastructure
19 wasn't there and then the cost to bring that
20 infrastructure came -- fell back on the state or the
21 counties' roads, sewers, water, the whole thing.

22 They established the Land Use Commission
23 to regulate that. And one of the things that if you
24 look at what was going on back then, is at that
25 point in time, one of the things that the

1 legislature was trying to do was to preserve the
2 plantation economy.

3 After 60, 70 years, that may not be the
4 case anymore, but the land use law has morphed into
5 something that has become valuable and still remains
6 unique, especially in a state with a limited land
7 mass. I mean, we're not Texas, you know. We have
8 to recognize that.

9 We all know what the composition of the
10 Land Use Commission is. Nine members appointed by
11 the Governor and confirmed by the Senate.
12 Sometimes, reluctant appointments, but we're all
13 here. One member is from each county. Five members
14 are appointed at large. And I don't know about you,
15 but I've never seen a paycheck go to the
16 commissioners yet, so you know, it's --

17 The role of the commission. Its primary
18 role is to ensure that areas of state concern are
19 addressed and considered in the land use decision-
20 making policies. The commission is responsible for
21 preserving and protecting Hawaii's lands and
22 encouraging those uses to which the lands are best
23 suited.

24 We establish the district boundaries for
25 the state. But we have to rely on other

1 organizations to tell us what those best uses are
2 very often, and that's one of the reasons for our
3 contested case hearings, and that's one of the
4 reasons that OPSD is part of all of our proceeding,
5 because, as individuals, we don't all know what the
6 best use of the land is, so we've got to have
7 evidence presented to us and testimony with regard
8 to what's happening on that piece of land.

9 As you may know, when we have a brand-new
10 docket, and we have had many in the past few years,
11 a district boundary amendment, we'll do a field trip
12 to view the land, but that doesn't give us an idea
13 of what's happening with regards to infrastructure,
14 the impacts on the environment, and all the rest.
15 We also act on special use permits and the like.

16 It was originally contemplated that the
17 counties would develop the capacity to play a larger
18 role, and they have. I mean, some 15 acres, the
19 counties are in complete control. They have
20 participants in all of our meetings. A lot of our
21 rules require us to adhere to the general plans and
22 things like that the counties put forward.

23 But you know, I would maintain that we've
24 almost come full circle, that the issues facing land
25 use in Hawaii have not sort of made it such that the

1 counties, which look at only their individual means,
2 need to be watched over in the sense that issues of
3 sustainability, climate change, and especially now
4 with the Hawaiian Renaissance and what's happened
5 with Mauna Kea and some of the other cases, give - -
6 express the need for a statewide perspective on some
7 of these things, the impacts on the entire Hawaiian
8 community, the impacts -- or the mitigation on the
9 impacts of resources, so that the entire Hawaiian
10 community can still benefit from things, the impacts
11 on climate change from approvals for special permits
12 for solar on the impacts of climate change on
13 development itself, runoff, things like that.

14 A good example of that was our recent case
15 with regard to Hawaii Memorial Park were the
16 counties were only going to require their current
17 drainage laws -- or drainage standards which were
18 based on a hundred-year storm, which is now no
19 longer relevant because we're seeing storms that
20 come much more frequently. So we had the ability to
21 place a condition on the project that reflected the
22 changes as a result of climate change, whereas the
23 counties were not going to do that.

24 Originally, the boundary -- the land use
25 boundary development was for three districts,

1 conservation, agricultural, and urban. The original
2 designation was completed in 1964. The rural
3 district was added later. The counties still don't
4 take advantage of the rural district as much as they
5 should.

6 What we see is a lot of agricultural
7 subdivisions, even to this day. And as a result --
8 I mean, the problem with agricultural subdivisions
9 is that because they're ag, the agricultural rules
10 still apply, which gives the county an out. They
11 don't have to build the roads. They don't have to
12 build the sewer. They don't have to bring the water
13 in, and all sorts of other strange things happen.

14 I always tell the story of one time we
15 were at a meeting on the Big Island, and one of the
16 then councilmembers came up to me and said, "I need
17 to talk to you. We have a problem. We've got an
18 agricultural subdivision that was done for housing,
19 for affordable housing that we never got put into
20 the rural district. "And one of the guys in that
21 subdivision is raising chickens. And the police
22 can't do anything about it because it's technically
23 agriculture, and we can't prohibit him from raising
24 chickens. But all the neighbors are complaining
25 because they can't sleep."

1 **COMMISSIONER CABRAL:** And hogs.

2 **MR. ORODENKER:** And hogs, so -- you know,
3 the rural district really needs to be utilized more
4 by the counties. I'm going to talk about that more.

5 Originally, there was a five-year boundary
6 review requirement, but LUC was originally tasked
7 with doing that every five years. It was done in
8 '64, '69, and '74. In 1988, the responsibility was
9 transferred to the Office of Planning and
10 Sustainable Development. They last completed their
11 review in 1990. If anybody has any questions about
12 that, Scott was actively involved in that review
13 when he was at the Office of Planning.

14 Okay. Now we're going to jump into types
15 of petitions. And I'm going to turn it over to
16 Scott to do that.

17 **MR. DERRICKSON:** Aloha kakou. I'm going
18 to be the copilot -- Dan's copilot. We're going to
19 kind of bounce back and forth on portions of this
20 presentation.

21 So okay. District boundary amendments.
22 They're kind of the bread and butter of the Land Use
23 Commission. We've done over 800, starting back in
24 the sixties when the commission was first started.

25 It's a significant process usually

1 initiated by a developer or a landowner. That
2 landowner/developer could be a private entity. It
3 could be a public agency, state, or county,
4 sometimes federal. Once we get a petition in and we
5 accept it as a complete application, we have 365
6 days in which to do all of our hearings and render a
7 decision.

8 Petitions for district boundary
9 amendments, we have about a 60-day period between
10 application complete until we have to hold our first
11 hearing, and we have to hold it no sooner than 60
12 days and no more than 180 days after that
13 application's deemed complete.

14 Most of the district boundary amendments
15 that we've handled in the past are requests to
16 remove lands from the conservation or agricultural
17 district into the urban district, primarily.

18 Redesignations or classifications back
19 into the conservation district are fairly rare.
20 They have only usually happened by a state agency,
21 usually through a boundary review, district boundary
22 review process.

23 When we redesignate property into the
24 urban district, that's -- that opens up the county's
25 rezoning and allows them to rezone urban designated

1 lands into all different types of uses from housing
2 to commercial, industrial.

3 Most of the time, but not all of the time,
4 but most of the time, our district boundary
5 amendment petitions trigger Chapter 343 HRS, which
6 is the environmental review process. So an EA,
7 environmental assessment, or an environmental impact
8 statement is often required.

9 It's not that the district boundary
10 amendment itself triggers the review, that
11 environmental review. It's often the type of project
12 or sometimes where it's occurring that triggers the
13 review, because sometimes state land is implicated,
14 like connections to a state highway. Sometimes
15 county land or money is involved. Sometimes it's a
16 waste treatment plant. There's a number of
17 different triggers, and we'll talk a little bit
18 about that when we get to the EA and EIS section.

19 The district boundary amendments are
20 quasi-judicial proceedings. They are contested
21 case hearings. And they require at least six
22 affirmative votes from your nine-member commission,
23 so six of nine, two-thirds.

24 So we talked about -- I already talked
25 about this a little bit. The petitions are -- come

1 from landowners or developers who have authority to
2 act on behalf of a landowner, and those could be
3 private, and they can be public. We do get
4 petitions from public agencies like the Department
5 of Education, Department of Transportation.

6 Three parties are always automatically
7 there at the table for district boundary amendments.
8 You have the petitioner themselves who are asking
9 for the change. You also have the state represented
10 by the Office of Planning and Sustainable
11 Development, and you also have the counties who are
12 most often represented by the County Planning
13 Department.

14 So a DBA process begins with an initial
15 filing by a petitioner. And those are reviewed by
16 the staff for completeness, and many times they're
17 deemed incomplete most often because they have to go
18 through an environmental review process first.

19 Once we do review it and we deem it
20 complete, we hold a prehearing conference. That's
21 just at the staff level with the petitioner, the
22 county, and the state. And that's really to kind of
23 identify how long they believe the proceedings might
24 take. We ask the petitioner how many expert
25 witnesses do you have, how many days do you think

1 you need to put on your side of the hearing.

2 Same thing with the Office of Planning.

3 We're asking them, how many people do you think
4 you're going to call as witnesses, how much time do
5 you need. Same for the county. And we get a
6 feeling for how many days we're going to need to
7 allocate onto our schedule into the future, because
8 we're always mindful. We've got a 365-day clock
9 that we have to get all of that stuff done, hold our
10 hearings, then make our decision -- issue a decision
11 and order.

12 This is our complicated chart here. You
13 guys should take a look at it. I think all of you
14 have a copy of this packet. It lays it all out.
15 There's a lot of steps in the process.

16 The commission -- there are some things
17 that initial phase of the commission itself isn't
18 normally involved in. It's just at the staff level
19 until after we deemed it complete and we actually
20 start moving forward with some type of hearing.

21 So that initial filing that comes in, the
22 staff has 30 days to take a look at it and review it
23 to see if it's complete, if they've got all the
24 elements that are required under the statute and our
25 rules to be included in a petition.

1 Like I said, most of the time, those
2 initial petitions are really placeholders. They put
3 them forward, but they still know they've got to do
4 an environmental review process, and that's really
5 going to generate the majority of the information
6 that's required for a petition. You know, what kind
7 of impacts are going to occur? What kind of
8 mitigation measures might be required?

9 So we get that 30-day staff review. We
10 either issue -- yeah, we either issue a deemed
11 incomplete letter, where we identify what still
12 needs to be included in petition in order for it to
13 be deemed complete, or after review, we see it's
14 complete, and we issue a deemed complete letter.
15 That starts our time clock. That starts the 365-day
16 time clock. It also starts a few other things.

17 One, that the applicant's got to give
18 public notice, hey, we filed a petition with the
19 commission. Once they do that, they file that
20 notice in public, in a newspaper, there's a 30-day
21 period for other parties that are out there that
22 might want to become intervenors, that aren't
23 automatic. They're not the State Office of
24 Planning. They're not the county.

25 There's all kinds of people that have an

1 interest or think they have an interest. They've
2 got to notify the commission and the petitioner
3 that, hey, we want to intervene. We think we have
4 some interests that should be protected.

5 Go ahead to the next one. So that
6 prehearing that I talked about, it's the staff.
7 It's Executive Officer and the staff with the
8 petitioner, with the Office of Planning, with the
9 county, and again, what I talked about, we talk
10 about what the exhibit and witness lists should be -
11 - should look like, how many expert witnesses there
12 might be.

13 And we tell them, okay, you need to file
14 these things by these dates that are prior to our
15 first hearing that we're going to schedule. We also
16 may be talking to an intervenor who's identified
17 themselves and said, you know, we think we want to
18 intervene, and we have to, as staff, talk to them
19 and say, look, if you're going to intervene, this is
20 what you have to expect, and this is what you've got
21 to do. There are responsibilities. It's not just a
22 free-for-all anybody who wants any time.

23 I think --

24 **CHAIR GIOVANNI:** Scott, can I ask a
25 question?

1 **MR. DERRICKSON:** Yeah. I'm sorry, let me
2 just clarify. If you guys have questions, please
3 stop me. Go ahead and ask at any time.

4 Go ahead, Chair.

5 **CHAIR GIOVANNI:** So my question is about
6 the 343 compliance and the adequacy of an
7 environmental impact statement. So are you going to
8 -- can you comment now or is it later in your
9 presentation about the sufficiency or adequacy of an
10 environmental impact statement, what the process is
11 by which we accept it or deny it and send it back,
12 and whether or not that is sufficient to identify
13 and address all mitigations, or is that something
14 that there is more consideration of when the actual
15 hearing occurs?

16 **MR. DERRICKSON:** Right. Yeah, we do have
17 a section on the EA and EIS process that we'll
18 cover.

19 **CHAIR GIOVANNI:** Okay. Why don't we hold
20 my question until then.

21 **MR. DERRICKSON:** Okay. Any other
22 questions on the portions that I just --

23 **COMMISSIONER KAHELE:** I've got a question.
24 I don't think my mic is on. So if there's no
25 decision within the 365 days, it automatically gets

1 approved -- oh, I mean, what do you mean by generic
2 conditions?

3 **MR. DERRICKSON:** A little bit later on, I
4 am going to talk about that -- the conditions. But
5 your question about the 365 days, yes. By statute,
6 we have 365 days to hear and render a decision on
7 district boundary amendment. If we do not do that
8 within the 365 days, it is automatically approved.
9 And I'll talk about it a little bit later that if it
10 gets automatically approved, we do have rules that
11 automatically attach some generic conditions to that
12 automatic approval.

13 **COMMISSIONER KAHELE:** Thank you.

14 **MR. ORODENKER:** If I can comment on that a
15 little bit. When we go through that -- when Scott
16 goes through that, developers really don't want
17 those generic conditions. The generic conditions
18 are laid out in our rules and they're pretty
19 oppressive, so they don't really want us to go the
20 365 days and have it automatically approved. They'd
21 rather have us render a decision.

22 **MR. DERRICKSON:** Okay. So I'll lateral it
23 over to Dan now. He's on next.

24 **MR. ORODENKER:** Okay. At this stage, one
25 of the things I want to point out is that, you know,

1 there used to be a time -- and we'll have a little
2 bit of discussion on this right now -- when the LUC
3 was viewed as a pass-through, that we rubber-
4 stamped everything. Whatever the developers wanted
5 we gave them. And there's still -- some people
6 still throw up the statistics that, you know, oh,
7 well, you approve 90 percent of what comes in front
8 of you, this commission, or maybe 80 percent, but in
9 the past it was 90 percent.

10 And one of the reasons for that is, as you
11 can see, there's a lot of work that's done by staff
12 before the matter even gets to you. And to be
13 honest with you, we're very upfront with a
14 petitioner. If they've got a project that has a lot
15 of problems, even non-technical problems like, hey,
16 look, you know, you're really rolling over the
17 cultural community on this, or you're really rolling
18 over the environment on this, and I think the
19 commissioners are going to have a problem.

20 We tell them. We tell them right up
21 front, you know, if they're going to have a problem.
22 And a lot of times, they'll pull back. Really bad
23 projects don't come in front of you folks as a
24 result because we try to push back on them.

25 Sometimes they insist on coming in front

1 of you even though we've told them that they're not
2 going to get a good reception, but it's only the
3 ones that -- usually, it's the ones that we think
4 are going to fly or have met their obligations or
5 that, from a policy standpoint, have a chance of you
6 folks approving that we let come forward or that
7 come forward, you know.

8 The petitioner -- the attorneys for the
9 petitioners are in town -- in town are smart enough
10 to know that if staff is throwing up all sorts of
11 red flags, then they've got to go back and redo
12 their work. So that's one of the reasons that we
13 have a very high approval rate is because staff does
14 a lot of work in the background to make sure that
15 the petitioners have got decent projects.

16 **COMMISSIONER CHANG:** If I could just
17 comment. Ultimately, it is the applicant's decision.
18 Staff makes a strong recommendation based upon the
19 application of the rules and the facts, but the
20 petitioner can decide to go before the board even
21 though --

22 **MR. ORODENKER:** That's correct. And we
23 don't say, you don't bring this in front of the
24 board. We just throwing up, well, you're going to -
25 - you know, this is going to be a concern. That's

1 going to be a concern. And if it's only one red
2 flag, you know, a petitioner will probably, you
3 know, continue to move forward, and we'll probably
4 let them -- or not let them, but we'll encourage
5 them to move forward to resolve the issue with the
6 commissioners.

7 But if we start pointing out 10 or 15
8 things that are wrong with the petition,
9 petitioners' attorneys will usually go back to their
10 clients and say, look, we've got to resolve these
11 issues before we go in front of the commission,
12 because once they come in front of the commission,
13 if they get denied, they can't come back for a year.
14 And that can really mess up financing and all the
15 rest.

16 So they work with us to make sure that,
17 you know, that there aren't too many red flags. And
18 once again, we don't tell them, you can't come in
19 front of the commission or don't come in front of
20 the commission. What we tell them is, these are the
21 areas that you need to address if you're going to
22 come in front of the commission.

23 **CHAIR GIOVANNI:** So Dan, this is Chair
24 Giovanni. What is your feeling about the advice and
25 counsel that the land use attorneys provide in terms

1 of red flags to their clients? Or do they just wait
2 for the commission staff to identify them?

3 **MR. ORODENKER:** Excuse me? I'm not sure
4 I understood the question.

5 **CHAIR GIOVANNI:** The question is, what is
6 the staff's view of the competency of land use
7 attorneys that are hired by petitioners to identify
8 red flags?

9 **MR. ORODENKER:** Most of the attorneys who
10 practice in front of the Land Use Commission, and
11 there's about 10 or so in Hawaii that do, are very
12 good at that. And a lot of times -- sometimes what
13 occurs is that a petitioner will have an attorney or
14 will not have -- will just be trying to get through
15 the Land Use Commission with a planning firm and
16 then realize that they're -- they don't really have
17 a grasp of what's happening, and they'll hire one of
18 the better attorneys in town.

19 And those attorneys will take a look at a
20 project and then call me up and say, look, don't put
21 us on the agenda yet. I've got to straighten these
22 things out before we come in front of you.

23 And sometimes, I'll get a call from an
24 attorney and say, look, you know, this is what we're
25 -- this is what we're going to present. What do you

1 think? And I'll say, well, you know, the commission
2 has concerns about these types of issues, so you
3 better make sure you've got everything covered. And
4 they'll realize that they have -- their studies
5 haven't been adequate or whatever.

6 So it's kind of a both ways thing. Some
7 attorneys will know right off the bat when they get
8 a case what they've got to cover, and they'll push
9 back on their clients to straighten it out. And
10 other times they'll come to me and say, look, you
11 know, we've been mulling this over. What do you
12 think? You know, what -- is this going to be a
13 problem with the commission?

14 And I won't give them a yes or no. I
15 mean, the commission -- I won't say to them, the
16 commission's never going to pass this. I'll just
17 say, if you're going to bring this in front of the
18 commission, then you need to address these issues.

19 **CHAIR GIOVANNI:** And then one related
20 question, Dan. Could you speak to the guidance or
21 appropriateness of these petitioners reaching out
22 directly to commissioners on these issue?

23 **MR. ORODENKER:** Yeah. We actually have a
24 section with regard to commissioners' ethics, quote,
25 unquote, "ethics." The commissioner -- that's an ex

1 parte communication. Petitioners or attorneys or
2 anyone associated with a project, even a consultant,
3 should not be talking to the commissioners.

4 And if someone does call a commissioner
5 and asks to talk to one of you about a project, you
6 immediately have to tell them, "I cannot talk to
7 this -- talk about this with you. You need to call
8 staff." That should be your response, and there's a
9 number of reasons for that.

10 It's not only because it's an ex parte
11 communication in the rules, but also, you don't want
12 to -- and we're going to talk about this in the next
13 section -- obtain evidence that's not in the record,
14 because then you can't -- we can't decide on it
15 anyway.

16 You don't want to give the impression that
17 you're favoring a particular petitioner because
18 they've called you directly, and you also don't want
19 to give the impression that you've got a
20 preconceived idea on what the outcome is.

21 Commissioner Okuda is very, very good at
22 always stating, "I haven't made up my mind yet."
23 And that's the way you should view everything. I
24 haven't made up my mind yet. But you shouldn't --
25 if somebody calls you, it's totally inappropriate.

1 And we've had to reprimand various attorneys and
2 petitioners and their consultants with regard to
3 trying to contact commissioners directly. If
4 anybody calls you, refer them to us.

5 **COMMISSIONER CHANG:** Dan, just one final
6 point. You've referenced attorneys, but you don't
7 have to be an attorney to come before Land Use?

8 **MR. ORODENKER:** No, you do not.

9 **COMMISSIONER CHANG:** And because we've
10 definitely had some pretty good pro se people come
11 before --

12 **MR. ORODENKER:** That's correct.

13 **COMMISSIONER CHANG:** -- so it's not a
14 requirement to get --

15 **MR. ORODENKER:** No.

16 **COMMISSIONER CHANG:** -- some petitioners
17 make a decision to hire an attorney, but that's not
18 required.

19 **MR. ORODENKER:** No. It's --

20 **COMMISSIONER CHANG:** Nor does the
21 commission hold that against anyone, although they
22 are held to the same standard as knowing the rules
23 and the statutes --

24 **MR. ORODENKER:** That is correct. We've
25 had a number of petitions come in front of us from

1 individuals who are not represented by attorneys.

2 The -- the projects -- and usually, if
3 it's a very simple matter, that's fine. The danger
4 for a petitioner in a complex project of not having
5 an attorney is that they're going to miss something.
6 So the more complex the project is, the more likely
7 there will be an attorney involved.

8 Some of the projects are in between. You
9 know, they're not quite that complex, and they're
10 not simple, and we've had situations where a
11 planning firm has represented a petitioner in front
12 of the commission. So there's a broad spectrum of
13 the types of projects that we've seen in front of
14 us.

15 **COMMISSIONER OKUDA:** Dan. Dan, Gary Okuda
16 -- Chair -- so just to kind of follow up with what
17 Commissioner Chang said, people, whether represented
18 by an attorney or not, whether they have money or
19 not, whether they have influence or they don't think
20 they have influence, they have an absolute right to
21 bring whatever issues they have in front of us, and
22 we will hear them, as the whole saying says, without
23 fear or favoritism. That's your view, right?

24 **MR. ORODENKER:** That's correct.

25 **COMMISSIONER OKUDA:** And you as the staff,

1 you're not acting as a gatekeeper even to dissuade
2 people. You might give them suggestions, but in the
3 end, anybody in this community has a right to
4 present what their view is, and we're going to
5 listen to them and hear them. We might not agree or
6 we might agree, but there's no gatekeeper here.

7 **MR. ORODENKER:** No, there isn't. And what
8 I was referring to when I started out with this is
9 not so much that we're telling people, you're a
10 lousy project, don't come in front of the
11 commission.

12 What we do is we tell them, these are
13 issues that you need to resolve for our petition to
14 be complete, and these are issues that you're
15 required to resolve by law, by rule, by statute.
16 And these are concerns that the commissioners have
17 from a policy standpoint. We'll raise all of those
18 issues.

19 Then it's up to the petitioner to decide
20 how they're going to move forward --

21 **COMMISSIONER OKUDA:** And final follow-up
22 about your point about ex parte or contact with
23 people on the commission outside of a formal
24 hearing. In some ways, you can look at us like a
25 jury, right? We're like nine jurors. So like in a

1 criminal trial, the prosecutor shouldn't be calling
 2 up the juror at home and neither should the
 3 defendant or the defendant's lawyer, right? I mean,
 4 it's kind of like the same thing.

5 **MR. ORODENKER:** Exactly.

6 **COMMISSIONER OKUDA:** Yeah, okay. Thank
 7 you.

8 Thank you, Mr. Chair.

9 **MR. ORODENKER:** Okay. Since we're talking
 10 about -- talking about this a little bit and how
 11 things move forward, there is a discussion that we
 12 can have a little bit about how the landscape has
 13 changed for the commission before we go any further.
 14 Or we can wait for that. Maybe we should wait for
 15 that for later, so we don't lose perspective on
 16 district boundary amendments. So I'll pick that up
 17 at a later date or a later time.

18 But let's move forward with what happens
 19 once we scheduled a hearing and the hearing comes in
 20 front of us. All of our proceedings are contested --
 21 or all of our district boundary amendment
 22 proceedings are contested case hearings.

23 What does that mean? It's a quasi-
 24 judicial hearing, which means that the case --
 25 there's a case presentation and order. First, we

1 have public testimony. Now, we -- it says new, but
2 it's supposed to -- yeah, new. Now we have to have
3 it before and at some other point in the hearing.
4 It's our belief that the best way to handle the
5 additional time for public testimony is after the
6 evidence has been presented. And that way, the
7 public will have a full spectrum of whatever the
8 issues are in front of us that they can come and
9 talk.

10 **COMMISSIONER CABRAL:** Yeah. That was just
11 came up this morning, right?

12 **MR. ORODENKER:** Yeah.

13 **COMMISSIONER CABRAL:** So we have to open
14 it up for public testimony at the beginning as well
15 as at the end, or just at the end after everything -
16 - after all the evidence is in?

17 **MR. ORODENKER:** Well, okay. Maybe Julie
18 can comment on that. I -- this is a newly passed
19 rule, and I think the way it's stated is that we
20 have to take public testimony, but it can't be
21 limited to just at the beginning of the hearing. Is
22 that correct, Julie?

23 **MS. CHINA:** Yes, that is correct. So if
24 you just move it to after the evidence is presented,
25 you're hearing it once, although you can still --

1 you could do it twice. But yeah, it just can't be at
2 the beginning. That's all -- the new statute just
3 says you can't do it all at the beginning and not
4 give them an opportunity if there's, you know, other
5 evidence.

6 So I would say, you know, if you just want
7 to move it to after the evidence, then that's a good
8 time to have it done.

9 **COMMISSIONER CABRAL:** Thank you.

10 **MR. ORODENKER:** A little bit of a point on
11 that that will fold into a later discussion. One of
12 the things that we've done over the past 10 or 11
13 years -- I mean, let's be honest about it. The
14 commission didn't have a very good reputation 10 or
15 11 years ago. I mean, one of our commissioners
16 thought we were all crooks, you know, before he came
17 on the commission.

18 I didn't say which commissioner it was.
19 No, I was exaggerating a little bit there. But we
20 did have a reputation -- the commission had a
21 reputation for not being responsive to the public.
22 And we worked very hard since then to be responsive
23 to the public and to make sure that the public felt
24 that it was being listened to.

25 I mean, we may render a decision that the

1 public doesn't always agree with us on, but it's
2 very important, I believe, and what's -- the only
3 real change that staff has made with regard to how
4 the commission operates is that we push the
5 commission to listen to everybody.

6 Sometimes that means even though the rules
7 say we only have to go to this point, sometimes we
8 go further just to make sure that everybody gets
9 their chance to say everything and so that they'll
10 listen to us, so that the commission can hear
11 everything.

12 So we will probably continue to have
13 public testimony in the beginning, and one of the
14 reasons for that is that a lot of people can't hang
15 around to see what time it's going to be that
16 they're going to have a chance to testify. They're
17 wanting to say what they're going to say at the
18 beginning so that they can go off and take their
19 kids to school or pick them up or do whatever or go
20 back to work.

21 And so in an effort to make sure that the
22 public is as involved as it possibly can be in our
23 process, we'll probably continue to have public
24 testimony at the beginning of an agenda.

25 **COMMISSIONER CABRAL:** I want to say that I

1 think we've done an amazing job because we've always
2 had it at the beginning, but when people have wanted
3 to, we've always been willing to hear it. Sometimes
4 the same people speak at the end just prior to a
5 decision being rendered.

6 **MR. ORODENKER:** Yeah, yeah.

7 **COMMISSIONER CABRAL:** So I think we've
8 done an amazing job. I'm glad to hear it. Even
9 until 10 o'clock at night with no --

10 **CHAIR GIOVANNI:** This is the Chair. I
11 also like hearing from the public at the beginning.
12 Oftentimes, they raise really important issues that
13 enable us to focus our deliberations and
14 considerations and questioning of the petitioners
15 and other witnesses. So I like having them at the
16 beginning as well, even if we open the door for them
17 to appear a second time later.

18 **MR. ORODENKER:** Yeah, and that's a good
19 point because, as we'll discuss, our decisions have
20 to be based on the record. I mean, even if you know
21 something but it doesn't come out in the record, you
22 can't base your decision on it.

23 So having the public testify at the
24 beginning allows us to sometimes pick up on some
25 issues that may have not been brought up in the

1 petitioners' exhibits, witnesses, and testimony.
2 And if a member of the public brings up an issue
3 that hasn't -- that isn't technically part of the
4 petitioners' presentation, this commission has the
5 ability to flex a bit more, to ask the petitioner to
6 address that question, so that's one of the reasons
7 that public testimony at the front is good.

8 **COMMISSIONER OHIGASHI:** So I just want to
9 know the mechanics. How does it work? For example,
10 before we go into deliberation, is that when it
11 comes into effect?

12 **MR. ORODENKER:** Yes, yes. It will have to
13 be before --

14 **COMMISSIONER OHIGASHI:** Is the -- is the
15 law that clear? Do we have to offer it after
16 deliberation, after we made a decision? Just tell
17 me what -- what you --

18 **MR. ORODENKER:** Is the law clear? I don't
19 think I've seen much in the past several years
20 passed by the legislature that's particularly clear,
21 but it can be reasonably interpreted to mean that it
22 has to be before deliberations.

23 **COMMISSIONER CHANG:** So -- I mean -- so I
24 anticipate that this could just lengthen our
25 hearings considerably in the sense that we'll take -

1 - because I, like the previous commissioners, I do
2 appreciate having the public provide testimony at
3 the beginning, as it helps me identify what the
4 issues are, especially in the community.

5 However, we have generally closed public
6 testimony, and we're not -- we don't take it once we
7 go into the contested case with the parties. But in
8 the event that we're going to take public comments
9 at the end, then we give everybody, all the parties
10 an opportunity to also question the same person and
11 then it goes around, and then we can ask the
12 questions again?

13 **MR. ORODENKER:** Yeah. I mean, right now,
14 that's how we're anticipating it occurring. It
15 could become unwieldy, and I don't think that there
16 is any legal requirement, Julie, for us to allow
17 petitioners to requestion or to question public
18 testifiers at the end of a hearing as well as the
19 beginning.

20 I don't know if that's technically -- I
21 mean, I -- we would -- one of the reasons that we
22 would probably do that is to prevent a lack of due
23 process claim. I think you might get caught up in
24 due process if we didn't allow petitioners to
25 question --

1 **COMMISSIONER CHANG:** I -- I think from a
2 commissioner standpoint, I would want to hear a
3 response, but then it does -- it just seems like it
4 -- it just -- I think we just need to manage
5 expectations because that has not been our practice,
6 and we're all kind of struggling through what
7 exactly -- how do we implement this.

8 I think we need to make it very clear to
9 the public that they will have -- they will have or
10 they may -- they will have an opportunity to provide
11 additional comments, or they can provide the same
12 comments?

13 **CHAIR GIOVANNI:** So I, for one -- this is
14 the Chair -- would like to be able to invite further
15 comments at the end of the presentation of evidence;
16 however, I don't want the same public testifier to
17 just be redundant and reiterate what they have put
18 on the record, so are we able to give them that kind
19 of guidance to -- if they do come forward for a
20 second time, that they be limited to new
21 perspectives and information to put on the record?

22 **MS. CHINA:** This is Julie. I -- yes. I
23 think -- I think since, you know -- at least these
24 kind of weird in that -- not you guys are weird, but
25 the way that it's set up as both a sunshine and a

1 contested case hearing together, and so you've got
2 to comply with both laws.

3 But in a contested case hearing, you know,
4 you don't need to, you know, consider, you know,
5 duplicative kind of, you know, evidence, and so
6 maybe if they've had an opportunity to testify at
7 the beginning, you can say, you know, if you've got
8 something new to add, you know, after hearing all of
9 this evidence, you know, this is your opportunity,
10 but you know, we -- you know, but we've heard what
11 you have to say kind of thing.

12 And I think that's sufficient to comply
13 with both sunshine as well as contested case hearing
14 rules.

15 **CHAIR GIOVANNI:** Yeah, I appreciate that.
16 And if they do start to offer redundant commentary,
17 I presume that the Chair can cut them off? You
18 raised your thumb. What does that mean?

19 **MS. CHINA:** Correct.

20 **CHAIR GIOVANNI:** Thank you.

21 **MS. CHINA:** It just takes me a long time
22 to hit on the unmute button.

23 **COMMISSIONER OKUDA:** Chair, this is Gary
24 Okuda. If I can say something?

25 **CHAIR GIOVANNI:** Please, Gary.

1 **COMMISSIONER OKUDA:** Yeah. I believe that
2 the Chair has the discretion to manage the hearing,
3 and since it's going to be your burden, Chair
4 Giovanni, I'm all in favor of that. I don't think
5 we really can predict how things are really going to
6 turn out and set firm rules. We have to rely on
7 discretion and good judgment.

8 But let me say this. I hear what the
9 concerns are about, you know, time is going to be
10 just burned up, wasted, or what-have-you, but the
11 reason why I'm really not that worried about it is
12 because of, very briefly, the experience of the
13 Mauna Kea hearing.

14 If there was ever a hearing which I
15 thought was going to be a disaster -- and I think I
16 told it to the Executive Director and even Mr.
17 Derrickson, "This is a no- win situation." You
18 know, it's just going to be a question of how much -
19 - how much bad stuff is going to come out of it.

20 If there was ever a hearing that was going
21 to be contentious, bad feelings would come out of
22 it, it would have been that hearing. But what
23 happened in that hearing is that even though, as we
24 all recall, even though in the end the Land Use
25 Commission voted to deny the Kanahaes' petition on

1 a technical grounds, lack of subject matter
2 jurisdiction, I think we can all recall that who
3 came up and shook our hands and thanked us for
4 coming out to Hilo? It was the petitioners, the
5 Kanaheles and the people who were against the TMT.

6 So I think -- I think, generally, using
7 common sense, good will, the Chair at that point in
8 time, you know, Jonathan Scheuer, and seeing how
9 you, Chair, handle things when Commissioner Scheuer
10 wasn't around, I think, you know, if we continue
11 encouraging people to come have their say and we
12 honestly listen to them and consider what they have
13 to say, I don't really think it's going to get that
14 unwieldy in the end.

15 Last point, which is just a personal
16 point, like when I -- when the senate asked me the
17 last go-around, what's your duty as a commissioner,
18 I didn't say, enforce the land use laws. I said,
19 keep and restore faith of the citizens in their
20 government. And so I think that's what we've got to
21 do is people get sick and tired of government
22 because they think we're not listening.

23 So hey, if we've got to spend hours and
24 hours and hours, since I've got nothing else to do
25 in my life, I'll sit there and listen to it, but I

1 don't think that's going to happen, just because
2 more than not, I think, people in Hawaii recognize
3 good will and aloha. And people will reciprocate.

4 You know, people rightly get pissed off
5 when they feel us in government, it's like, you
6 know, you only have so much time, and we're going to
7 cut you off. I mean, yeah, the chairs have forced
8 time limits on witnesses, but it's not done in a
9 heavy-handed manner.

10 And not to talk stink about anybody, but
11 I've listened to the department -- the Board of
12 Education meetings. You hit two minutes, they
13 actually hang up on you. You know, it doesn't
14 matter what you're saying. It doesn't matter how
15 important what you're saying is. You're the HSTA
16 Union President, Corey Rosenlee, his two minutes are
17 up, suddenly it's like they hung up the phone on
18 him.

19 You know, and even I, just an observer,
20 felt offended by that kind of thing. I don't see us
21 do offensive conduct. And so I think if it's
22 continued to be handled the way it's handled before,
23 we're going to be okay, even with the change in the
24 law, so now I will keep quiet. Thank you, Mr.
25 Chair.

1 **COMMISSIONER OHIGASHI:** Can I just make
2 some practical questions? That was one of the
3 reasons why I think maybe we should have transcript,
4 what do you call it, minutes to review the
5 statements.

6 But besides that -- but besides that, I
7 just was curious. We still retain the power to
8 determine what the length of time for the purposes
9 of -- we could say two minutes at the beginning, one
10 minute at the end, so long as we announce it, right?

11 And in the -- the other question is
12 besides contested case hearings, are we required to
13 hold this type of procedure in all cases? Because
14 we have public testimonies in all cases, whether it
15 be IAL petition or whether it be -- what --
16 declaratory ruling petition, or even just like these
17 training meetings that we have.

18 **MR. ORODENKER:** Yes.

19 **COMMISSIONER OHIGASHI:** And so when -- and
20 so effective -- so when do we hold it for two-day
21 meetings like this? Would it be after the second
22 day where we can have -- we have to open it up, or
23 would it be after today? I'm just trying to get
24 practical.

25 **MR. ORODENKER:** Julie, maybe you can

1 comment on that, but the way I interpret it is that
2 it's -- if the agenda item runs over more than one
3 day, then as long as we do it on the -- fully close
4 the agenda item, we're okay.

5 **COMMISSIONER OHIGASHI:** I think that was
6 for you, Ms. --

7 **MR. ORODENKER:** She's nodding her head.

8 **COMMISSIONER OHIGASHI:** Yeah.

9 **MS. CHINA:** Okay. Yes. I've unmuted
10 myself. And yes, that is correct. As long as you do
11 it before, you know, before you close the agenda
12 item. And I think we only have this one super long
13 agenda item that goes over two days for now, so
14 yeah.

15 And -- and Commissioner Ohigashi, I think,
16 was the one who asked the question. I can't really
17 see. But I think that this new rule -- this new
18 statute came into being as to Chapter 92, which is
19 the sunshine law, and so anything that the
20 commission hears as part of its sunshine meeting,
21 like today and tomorrow, will be subject to that
22 public testimony requirement.

23 **COMMISSIONER OHIGASHI:** The last thing is,
24 on a contested case procedure, would it be better to
25 have the final statements made by the public and

1 then take final oral argument? Can we do that?

2 **CHAIR GIOVANNI:** Yes, I believe you can.

3 **COMMISSIONER OHIGASHI:** Okay. So we can
4 schedule within -- so long as it's in the ending
5 part of the hearing, the second -- what is it,
6 public testimony, is that right?

7 **MR. ORODENKER:** Yeah. It's just as long
8 as it's not just at the beginning. We could break
9 in the middle and say, okay, now you get public
10 testimony, but from --

11 **COMMISSIONER OHIGASHI:** Okay.

12 **MR. ORODENKER:** -- a public participation
13 standpoint, regardless of what the statute says,
14 we're assuming that -- we're making the -- I've been
15 under the belief that the second time that we open
16 up to the public should be at the end, because then
17 they'll have seen everything. You know, they'll
18 have the ability to comment on it.

19 The last thing in the world we want is,
20 you know, the -- the allegation that we're land
21 mining a railroad and things, and I was going to
22 have this discussion later, but I -- I'd like to
23 make a couple point because Gary brought up some of
24 the things that I was going to talk about later and
25 some of them are very important.

1 You know, years ago, back in the eighties
2 and nineties, there -- I came before the Land Use
3 Commission here as an attorney or as a planner for
4 various things. And I can tell you -- and even when
5 I started, it was different. We had a different
6 Land Use Commission, and then there was the mass
7 exodus, and I can tell you that things have changed.
8 And I like to think that that's probably due to the
9 staff's influence with regard to getting the
10 commission (inaudible).

11 There has been a sentiment expressed
12 recently that -- by some people in and out of
13 government that, oh, that three commissioners are
14 gone, and some very potent ones, that the Land Use
15 Commission's going to go back the way it was in the
16 old days, you know, which is bias towards the -- the
17 public perception was bias towards the landowner and
18 less responsive to the public and less responsive to
19 issues.

20 I don't believe that even if -- as this
21 group slowly changes, and as things go forward, that
22 that's really where we're going to end up. I think
23 that the landscape has changed. I think that if we
24 want to remain - - and I've got to tell you, over
25 the past ten years, we have gained a reputation not

1 just with the public, as we saw in Mauna Kea, but
2 with the legislature as being very responsive to the
3 community, very open, rendering good decisions, and
4 making decisions that make sense in the long term.

5 And what's happened over the past 20 years
6 or last -- as I was talking about before, there's
7 been a cultural renaissance. You know, we've seen
8 the Hawaiian community and the host community wake
9 up with a new generation and say, you know, we're
10 not going to sit here and stay silent anymore.
11 We're going to make our needs known. We're going to
12 bring up the issues that are important to us, and
13 we're going to be a part of the process.

14 We've also seen the environmental
15 community start to stand up because of climate
16 change and sustainability issues and say, look, you
17 need to take this stuff into account. These are
18 important. There's not much land left. Every
19 decision that you make impacts everything from water
20 to the environment, and some of these things want to
21 get to the public trust doctrine. A lot of these
22 things are the public trust doctrine anyway.

23 But on top of that, you know, there's a --
24 what we've been trying to avoid -- what staff has
25 been trying to make the commissioners cognizant of

1 and make sure that this commission remains cognizant
2 of is the fact that we're public servants. You may
3 not make your living as public servants, but when
4 you're sitting in these chairs, you're public
5 servants.

6 And it's important that, you know, you
7 talk about this skepticism of government, you know,
8 that, oh, government, you know, they don't care.
9 They're just going to do things. You know, it's
10 just where the money's coming from and blah, blah,
11 blah.

12 This Land Use Commission is one of those
13 first pioneers of changing that. We're not going to
14 be that way. We're going to listen to the public.
15 We're going to take what the public says into
16 account. We're going to make decisions that are
17 based on our obligations under the law, but also
18 ethically that -- because we live in this community.

19 Let's face it, agricultural community -- I
20 mean, we've got a serious agricultural problem. We
21 need to help out agriculture. We need to do things
22 that will support agriculture. We need to make sure
23 that if we're going to allow development, it's not
24 dooming agriculture in the manner, you know -- I
25 mean, there's going to be some natural -- as

1 population grows, a natural whittling away at the
2 amount of agricultural land.

3 But going back to the original mandate of
4 the -- of the Land Use Commission, we don't want to
5 put a huge housing project in the middle of
6 agriculture, surrounded by agricultural. I mean,
7 that doesn't make any sense, right? There's got to
8 be some regimented planning that we're involved in
9 and the counties are doing that with their general
10 plans that allow for growth without destruction of
11 economic engines.

12 And that is in our statutes. We're
13 supposed to take the economy into account, and
14 agriculture is part of it.

15 **COMMISSIONER OKUDA:** Can I chime in? But
16 I think it's got to be clear that what we're doing
17 is not viewed as, oh, it's environmental activists'
18 interest or any type of ethnic community interest,
19 because our duties come out of that 1978 Hawaii
20 Constitution. And you know, even though it's many
21 years ago, I remember working at that convention --
22 constitutional convention before going off to law
23 school my first trip to the Mainland.

24 And you know, somebody told me there were
25 seven Native Hawaiian delegates at the convention.

1 I can only remember three or four. Frenchy DeSoto,
2 Yungjon Weihai (phonetic) -- I don't know who else -
3 - Laihua Fernandes Sallings (phonetic) from Kauai,
4 you know --

5 **COMMISSIONER OHIGASHI:** Yamane --

6 **COMMISSIONER OKUDA:** Okay, yeah, but it
7 wasn't -- it wasn't a convention controlled by any
8 ethnic group. There are many people from big
9 industry there, too. Look, the Chair was Bill Paty,
10 right? And so the statements in the constitution is
11 -- are not statements of any specific ethnic group.

12 The convention represented the broad
13 spectrum of the people in Hawaii who are basically
14 saying that these values, which includes the express
15 protection and a requirement to protect Native
16 Hawaiian practices and resources, that wasn't a
17 Hawaiian thing. It was a thing that all the ethnic
18 groups in Hawaii and all the different diverse
19 business interests and non-business interests said,
20 this is what makes Hawaii different.

21 So I think, you know -- I want to make
22 sure that we don't view this as, you know, where
23 we're carrying out our duties under the
24 constitution. Look, my law firm where we've been
25 all together, our firm, from 1986 -- we were

1 licensed in '81 -- we represent the banks, you know?
2 I mean, these are the last people who are going to
3 have any public trust doctrine, you know? We -- we
4 -- you know, and that's another story.

5 But the bottom line is the convention is
6 not ethnic-centric or politically centric. It's a
7 statement of the values that people across the state
8 in 1978, labor, nonlabor, business, nonbusiness,
9 profit, nonprofit, have said that this is what makes
10 Hawaii different is community and common goals and
11 objectives.

12 So I just want to throw that in, you know,
13 that what we're doing is not, you know, narrowly
14 focused where some people might think it is. And
15 you know, it's irrespective of any renaissance or
16 anything like that. It's a statement of community
17 goals broadly held. Yeah.

18 **MR. ORODENKER:** I would agree with that a
19 hundred percent. And the reason that I brought up
20 the renaissance and everything else is that it --
21 it's made things more evident. But this
22 commission's role has always been about balance.

23 And what has changed is this commission's
24 willingness to listen. There was a time when the
25 commission was reputed to not listen. And I think

1 that that's what has become more evident. And yeah,
2 I agree with you a hundred percent. I mean, I'm not
3 -- I don't have -- I'm not part Hawaiian, but these
4 things are very important to me as well.

5 I think that the constitutional convention
6 brought that out. Hey, look, we're a community.
7 This is about community and what this land -- this
8 commission should be doing is focusing on balance
9 and the community in general, and that's just my
10 opinion. You guys are the decision-makers. I'm
11 just expressing my opinion and what I've seen occur
12 over the past ten years as the commission has
13 morphed into something that is more open, shall we
14 say, to public involvement.

15 And Gary's example was a very good one,
16 which is, you know, we really felt we were going
17 into a really tough situation on that Mauna Kea
18 case. But the fact that this commission has always
19 been willing to listen or this group has been very
20 open to listening and to recognizing what the issues
21 are has made a big impact on everyone, including the
22 legislators.

23 **COMMISSIONER OHIGASHI:** In fact, it was
24 the university who won who wouldn't --

25 **MR. ORODENKER:** Yeah, yeah, yeah. They

1 ran out the door fast, yeah.

2 **COMMISSIONER CABRAL:** It's true that we
3 worked up on the Mauna Kea (indiscernible) and then
4 when -- he was asking a detailed question because my
5 stepson worked up there for years. And he finally
6 goes, oh, you're Jeff's mom. And I thought he was
7 going to run over and hug me.

8 **MR. ORODENKER:** No, but I mean, with all
9 that said, I mean, it's just something to
10 contemplate as we move forward as a group, and to
11 keep in mind that staff is always going to be
12 pushing you to listen. That's -- that's what we see
13 our role as when hearing these comments, to make
14 sure that, you know, what that -- we set up a
15 situation wherein you are able to listen to all
16 sides and take in all the evidence without feeling
17 threatened.

18 **COMMISSIONER CABRAL:** At the same time
19 that -- the Mauna Kea was really, really was
20 excellent. At the same time, we had the one in
21 (indiscernible). That -- we entered that at such a
22 different position. I was really new on the
23 commission then, too, so I was sort of shocked, too.

24 But -- but at the same time, the attitude
25 of the group was at a completely different place,

1 too. It was -- you know, there was so much
2 hostility. I mean, we show up and people are
3 already camped out on the lawns, and they're just
4 groups were there, and it was a horrible meeting
5 room. I mean, it just couldn't have been a worse
6 place to be.

7 You know, they moved it into the -- the
8 bleachers were -- there was aluminum bleachers
9 inside this room, and everybody -- crowds of people,
10 they're up there eating their lunches and having a
11 luau and not listening to us. If they listened to
12 us, they would have, you know -- we never were
13 agreeing with what the petitioner wanted, you know?
14 But they did -- so they were just there to object.

15 **MR. ORODENKER:** Yeah. Well, Olowalu -- if
16 I could pinpoint a watershed moment with this
17 commission, Olowalu was it. You know, I think that
18 the community, the 200-plus people who showed up
19 were actually quite surprised that we were going to
20 listen. You know, they weren't expecting us to.

21 And that was kind of the first hearing
22 where things started -- where it -- the community
23 began to realize that we were going to listen. And
24 it was a good moment. It was a scary moment.

25 Jonathan Scheuer, in particular, was, you

1 know, concerned that some of those big guys were
2 going to run him over and you were getting escorted
3 to the bathroom, but in the end --

4 **COMMISSIONER CABRAL:** Yeah. The delicate
5 young lady that I am.

6 **MR. ORODENKER:** Yeah. In the end, I think
7 that the commission -- this group of commissioners
8 did an excellent job in making clear that they were
9 listening. And that's what's important.

10 **COMMISSIONER CABRAL:** And just to prepare
11 you guys, we had a break for lunch, but we never
12 took a dinner break, and we stayed there until 10
13 o'clock at night and we told them all, we have to
14 leave at 10 because this room is closing down. It
15 was in the Maui Cultural Center.

16 Anyway, and so -- and so, you know, we
17 really went out of our way to listen to everybody,
18 and they did get a chance at the end to speak again.
19 Most of them got up and spent their two minutes or
20 whatever because we were almost out of time. Also
21 got out there and just (indiscernible) and they
22 didn't get their full three minutes (indiscernible).

23 **MR. ORODENKER:** Well, you know, what was
24 interesting about that hearing was that, if you
25 recall, it was the adoption of an environmental

1 impact statement, which we'll get into later. But
2 you know, the community itself even was confused
3 about why we rendered that decision.

4 The testimony that they gave was always in
5 opposition to the project, but the testimony that
6 the decision rotate -- various testimonies that the
7 decision rotated around were various people coming
8 forward and saying they never talked to me. You
9 know, if you remember, it was -- you know, there
10 were cultural practices here, and they never talked
11 to me. They did -- the consultant never came out
12 and talked to me.

13 And we saw that later on at the hearing on
14 Kauai where it was brought out that the community
15 really hadn't been talked to about the project, that
16 the cultural assessment had just sent out a bunch of
17 letters and then never followed up, you know.

18 So -- and it wasn't -- in the end, we
19 approved the project on Kauai, but you know --

20 **COMMISSIONER CABRAL:** (Indiscernible.)

21 **MR. ORODENKER:** Yeah. They scrambled and
22 they knew that we were listening, and that is
23 important.

24 With that, I'd like to take a break, I
25 think, Chair, for 10 minutes because we've been

1 going --

2 **(Simultaneous speaking.)**

3 **CHAIR GIOVANNI:** Yeah. Let's take a break
4 now. When you come back, can we assume you'll go to
5 12:30 and then take a lunch break?

6 **MR. ORODENKER:** Yes.

7 **CHAIR GIOVANNI:** Okay. We'll take a break
8 now until 11:30.

9 **(Recess taken from 11:19 - 11:30 a.m.)**

10 **MR. ORODENKER:** Where we were, we were
11 talking about contested case hearing procedure --

12 **CHAIR GIOVANNI:** One second. One second,
13 Dan. This is the Chair. I'd like to kind of set the
14 timing for this afternoon. First of all, we'll take
15 a lunch break about 12:30, and I think that's going
16 to be a one-hour break, is that correct, Dan?

17 **MR. ORODENKER:** Yes, sir.

18 **CHAIR GIOVANNI:** So if we resume at 1:30,
19 do any of the commissioners have a hard stop today?
20 I can't see or hear.

21 **MR. ORODENKER:** We're checking on the
22 flight times. Okay. Lee has a flight at 5:15, so -
23 - yeah, he's got to be -- 3:30, 3:45 would be the
24 hard stop.

25 **CHAIR GIOVANNI:** Okay. Let's target 3:30

1 for our hard stop today. So Dan, why don't you
2 resume.

3 **MR. ORODENKER:** Okay. That discussion
4 that we just had was probably the longest discussion
5 out of all of them that we were planning on. It
6 wasn't supposed to happen now. It's supposed to
7 happen later, but we had it.

8 Okay. So let's move back to the nuts and
9 bolts of contested case hearing procedure. As we --
10 we're talking about public testimony before and
11 after, and then the evidence will be submitted.

12 And what will usually happen is that
13 you'll see that by the time you get to the hearing,
14 the parties will have submitted a bunch of exhibits.
15 Sometimes they'll have submitted expert witness
16 testimony and anything else they want to bring
17 before the commission, maps or whatever.

18 When the hearing is opened after public
19 testimony, the Chair will ask what the parties want
20 to have admitted to the record. And it's usually
21 everything that they've filed, so you should have it
22 available on the website. You'll be able to look at
23 it. But that's the first thing that will happen.

24 And then the parties will begin to make
25 their presentations. First, it will be the

1 petitioner. Then it will be the county. Then
2 Office of Planning and Sustainable Development, and
3 then any intervenors is usually the way it goes.

4 Each witness -- the parties will have to
5 put on their witnesses, and the witnesses will be --
6 first give direct testimony, which means they'll be
7 questioned by the party that's bringing the witness
8 on, and let's call it the petitioner for now. And
9 then once the petitioners are through with direct
10 questions, then the county and the Office of
11 Planning and Sustainable Development and then the
12 intervenor will then be allowed to cross-examine
13 that witness.

14 Once that has been completed, then the
15 commissioners will be allowed to ask questions of
16 the witness. Then the next witness comes on until
17 each party is done with presenting their case.

18 The Rules of Evidence are generally
19 applied to the proceedings, and what I mean by
20 generally is that there's a lot of flexibility on
21 the part of the Chair as to what will be allowed and
22 what won't be allowed. You won't see a lot of what
23 you see on Perry Mason where there's objections to
24 testimony and claims of hearsay and things like
25 that. That usually doesn't happen because it's not

1 really a formal evidentiary proceeding.

2 Robert's Rules of Order are also in
3 effect. We can take and go into executive session
4 at any point in time if the commissioners have a
5 question that they need to address to counsel. When
6 we go into executive session, it's to answer that
7 legal question. It's not to debate things. If you
8 have factual questions, you should bring them up in
9 the hearing at -- so it's on the record.

10 It's okay. There's nothing wrong with
11 saying, "I don't understand what you're saying,
12 petitioner. Do you mean to say that the line of
13 demarcation is here, or is it over there? Do you
14 mean to say that you're going to put in, you know, X
15 number of homes that are going to be affordable or Y
16 number?"

17 It's okay to ask. Even if the
18 petitioner's witness is not currently on the stand,
19 if all of a sudden, something comes up, you can say,
20 "Look, I don't understand what's happening here.
21 What -- there's different testimony. Let's get to
22 the answer." And maybe a witness needs to be
23 recalled. The commission has the ability to recall
24 a witness if it needs further clarification.

25 Then there'll be final oral arguments by

1 the parties, and at the close of that, the
2 evidentiary hearing, there will be directions to the
3 parties to submit proposed decisions and orders.
4 Those are usually only submitted by the petitioner
5 and the -- and in recent years, the county and the
6 Office of Planning and Sustainable Development have
7 not submitted proposed decisions and orders.
8 They've just commented on the proposed decisions and
9 orders.

10 At a later hearing, the staff will prepare
11 -- well, actually, there's a decision to approve or
12 approve with conditions or deny the district
13 boundary amendment. And we haven't done a pure
14 district boundary amendment in a long time. Most of
15 them have been motions. That's when the vote will
16 be taken, and that's when any conditions will be
17 placed.

18 **COMMISSIONER CHANG:** Can I -- this is
19 Dawn. I do want to make a point because it was very
20 important to me when I joined the commission. The
21 Land Use Commission, unlike many other boards and
22 commissions, our decisions have to be made -- our
23 deliberative process is in public. So in executive
24 session, we cannot say, "Oh, this is how we're going
25 to vote" or we cannot meet outside more than, you

1 know -- and discuss it, so we can only deliberate
2 the matter in public.

3 And that was really important because that
4 is unlike most boards and commissions; that they are
5 permitted to have closed session. So I think that's
6 really important so that when we do deliberation,
7 it's very hard questions, but it's only amongst the
8 commission, although we may have the public out in
9 the audience. But it's only the commissions who
10 deliberate about the proposed decision.

11 And people are very candid. They express
12 their weaknesses, the strengths, but it has to be in
13 public. So -- and I thought that was a really
14 important point for me, sitting on the commission.

15 **MR. ORODENKER:** Yeah. We'll go over
16 executive session in a little bit more later on.
17 But generally, you can't deliberate in executive
18 session. It has to be to discuss the issue that was
19 --

20 **COMMISSIONER CABRAL:** More difficult for
21 me because I'm not a lawyer so I'm not trained on
22 that level. Especially, when we ended up staying
23 overnight at the motels and stuff, so (inaudible).

24 **(Simultaneous speaking.)**

25 **COMMISSIONER CABRAL:** -- I could talk to

1 any one of you, well, come over here, you know. Two
 2 of us talk, but we can't --

3 **(Simultaneous speaking.)**

4 **MR. ORODENKER:** Exactly.

5 **(Simultaneous speaking.)**

6 **COMMISSIONER CABRAL:** -- I'm not -- I'm
 7 too casual (inaudible) trained lawyers are.
 8 (Indiscernible) kind of discuss this and see how we
 9 really think, and that's -- I've been (inaudible),
 10 so --

11 **MR. ORODENKER:** Nancy's got a number of
 12 red cards.

13 **(Simultaneous speaking.)**

14 **MR. ORODENKER:** But a couple of other
 15 things about executive sessions, since we're talking
 16 about it, is that we try and avoid having executive
 17 -- not try to avoid. It's not a good idea to hold
 18 your executive session question until we're in
 19 deliberations.

20 You should ask the question when you get
 21 it because if it's a question -- and we just don't
 22 want to give the impression -- we don't want to make
 23 it seem like we're making a decision in executive
 24 session. I mean, staff will make sure you don't do
 25 that, but we don't want to get the public angry or -

1 - sometimes, it's unavoidable.

2 I mean, sometimes something comes up in
3 deliberations and we have to go into executive
4 session, but when you have the question, that's when
5 you want to ask it. Not wait until the end. It's
6 better to just ask it at that point in time.

7 When we do go into executive session, our
8 Deputy AGs and staff will be all over you if you try
9 and deliberate. I mean, Nancy's been red-carded a
10 number of times, so just remember --

11 **COMMISSIONER OHIGASHI:** What it -- what do
12 you require to do a motion to get into executive
13 session and how many votes do you need and what is
14 the basis --

15 **MR. ORODENKER:** Well, to go into executive
16 session, you need a simple majority. There is a
17 section of our rules that sets forth what lays out
18 the language that you would need to quote to go into
19 executive session, and we can help you with that.
20 And I would -- I would advise the commissioners that
21 if you're thinking about doing something and you're
22 unsure how to do it, you can ask the Chair for a
23 break and talk to the Chair or counsel or myself one
24 on one, and we can help you through whatever it is
25 you're trying to do.

1 But one of the things that is important is
2 you can't just say, "I want to go into executive
3 session and talk about rights, duties, and
4 obligations." You need to say, "With regard to
5 whatever it is," so that the public knows why we're
6 going into executive session and not some amorphous,
7 "I just want to talk to my attorneys."

8 So if it's with regard to, you know, the
9 Rules of Procedure with -- or with this, whether
10 it's regard to whether or not some testimony is
11 allowable, whether it's -- it's -- you just go to
12 say it, you know? So that at least -- you don't
13 have to go in detail, but just with regard to
14 something so that the public knows.

15 And then when we come out of executive
16 session, the chair will let the public know that
17 that's -- we'll remind them that's what we wanted to
18 discuss.

19 Okay. The decision making, let's talk
20 about that a little bit. At the close of the
21 evidentiary hearing, the commissioners will be asked
22 if they have read the record and reviewed the
23 transcripts and are ready to deliberate.

24 If you've missed it -- let's say we have a
25 multiple-day hearing on which we haven't had many

1 of, but there were times back in the day when we had
2 Hoopili and Koa Ridge where it went on for months,
3 you know. In between -- you know, hearing after
4 hearing date after hearing date.

5 If you miss a date, which sometimes
6 happens, you can't vote unless you've reviewed the
7 transcript. So one of the things that you really
8 want to caution the commissioners about is leaving
9 in the middle of the meeting and coming back,
10 because if we then have to vote at the end of that
11 meeting, you can't because you missed part of it,
12 right?

13 So that's something you need to be
14 cognizant of and avoid. If you do miss an entire
15 meeting, the transcript will be available. You can
16 review it and then you'll be able to vote.

17 **CHAIR GIOVANNI:** So this is Chair. The
18 way it's written, it says we review the transcripts
19 in all cases, but don't you really mean we ask if
20 the commissioner has reviewed the transcripts or any
21 portion or any of the meetings they may have missed?

22 **MR. ORODENKER:** Yes, that's correct.

23 **CHAIR GIOVANNI:** If we -- in other words,
24 if we've attended and been, you know, a participant
25 in all of the hearings on a matter, we don't need to

1 confirm that we've read the transcripts, is that
2 correct?

3 **MR. ORODENKER:** That's correct. The
4 language that we have on this slide is not the same
5 as what are contained in your request of the other
6 commissioners. I mean, the Chair's request of the
7 other commissioners. We use slightly different
8 language for that.

9 Okay. Once again, a reminder that the
10 decisions and any conditions that a commissioner
11 wants from those have to be based on the record. It
12 can't be something that you don't know about.

13 And one of the best examples of that is a
14 case that went up to the Supreme Court where one of
15 our commissioners decided they were only giving
16 petitioner for a special permit two years instead of
17 the six that they were requesting. And there was
18 nothing on the record to indicate that two years
19 would be sufficient to respond to the commission, so
20 that was -- we were reversed on that one.

21 So the --

22 **CHAIR GIOVANNI:** The other one that was
23 particularly relevant was the -- was the Waimanalo
24 Gulch decision or it came before us, in which the
25 record was different than what was being attempted

1 to be put forth as an argument by some of the
2 participants, and we had to make a decision based on
3 what was in the record in terms of the remaining
4 useful life of the landfill.

5 **MR. ORODENKER:** Yeah. That's exactly
6 right. It -- there has to be evidence to support
7 the decision.

8 Now, I would caution that that doesn't
9 mean that it has to be evidence presented by the
10 petitioner or one of the parties. There is -- there
11 are some -- there is some legal precedent out there
12 that says that public testimony can be taken into
13 account and can be considered evidence to a certain
14 extent.

15 **COMMISSIONER OKUDA:** Dan, we -- you're
16 correct, we've got to do things based on the record
17 and the evidence. But part of the thing we do is we
18 judge credibility, right?

19 **MR. ORODENKER:** That's correct.

20 **COMMISSIONER OKUDA:** In other words, we
21 look at these witnesses in the eyeball or -- like,
22 my vision is not that good, so maybe I just see a
23 blur, but we observe the witnesses. We listen to
24 them, but we can make a judgment whether somebody is
25 telling the truth or not telling the truth. We can

1 make that judgment based on other evidence in the
2 record, whether they're telling the truth or not,
3 and so we judge credibility.

4 And if it turns out we believe a witness
5 is not credible, either because their memory is bad
6 or whether they might be intentionally trying to
7 mislead us, or outright lie, we can take that into
8 account in deciding how much credibility or weight,
9 if any -- how much weight, if any, we're going to
10 give to that witness's testimony or argument.

11 Correct?

12 **MR. ORODENKER:** That's correct.

13 **COMMISSIONER OKUDA:** Yeah, okay. Thanks.

14 **MR. ORODENKER:** That is correct.

15 Okay. After all of everything's done, the
16 Chair will call for the question, and then one of
17 the petitioners -- the commissioners will make a
18 motion. In that motion, the commissioner making the
19 motion should include either reference to conditions
20 such that the Office of State Planning or the county
21 or an intervenor have requested or restate them
22 and/or state any conditions that they think they
23 should be added to the granting of the petition, if
24 they're going to grant it.

25 I mean, a denial is a different story.

1 There's no conditions. If you're going to grant the
2 petition, you can say things like, "I'd like to move
3 that we grant the district boundary amendment and
4 that it be based on the conditions contained in
5 OPSD's testimony or the county's testimony or
6 intervenor's testimony or a mixture of all three,
7 and I'd like to add a condition saying such and
8 such."

9 As long it's based on the record, you can
10 add that condition. When you make those additional
11 conditions, please talk slowly because staff is
12 trying to get it down so we can make sure we get it
13 into the DBA. But that is possible.

14 Now, after the motion is made and
15 seconded, it is possible for a commissioner in
16 discussion to say, "You know, I'm not going to vote
17 for this unless we put in a condition for this," and
18 then, under Robert's Rules of Order, you can ask
19 the, quote -- the commissioner who made the motion
20 if they'll take a friendly amendment, and then
21 there's a discussion on that and so forth and so on.

22 So -- but once the motion is made, that's
23 the time to -- when this commission should really be
24 discussing what conditions they think are necessary,
25 why they think that the petition should be granted

1 or not granted, why they think certain conditions
2 apply. That discussion needs to be had in open
3 session.

4 And it's important that you have that
5 discussion so that not only the parties are clear as
6 to why you're making your decision, but so that
7 staff is clear as to why you're making decisions.
8 So when we go to write it up, we'll make sure we
9 connect the dots between the evidence and the
10 condition that you're requesting. So that's a very
11 important time to have that debate.

12 We have a set of standard conditions that
13 we usually put in, so the one that's most -- you're
14 probably most familiar with are the ones -- or the
15 ones who have been here -- is the one that says that
16 the project shall be developed in substantial
17 compliance with the representations made.

18 We have other standard conditions with
19 regard to submission of annual reports and things
20 like that. And then there's case-specific
21 conditions. The typical ones are ones with regard
22 to drainage, traffic impact analysis. You know,
23 sometimes they might get into roadway alignments and
24 things like that, but those are atypical. We have
25 atypical conditions that we put in that are project

1 specific.

2 An example of that would have been one of
3 the ones from the Hawaii Memorial Park with regard
4 to preservation of the waterflow for the damselfly.
5 But I will let Scott go into more detail on those
6 and I'm going to lateral to him.

7 **MR. DERRICKSON:** Okay. I'm going to talk
8 a little bit about conditions. And first I want to
9 say conditions are intended to address issues that
10 have come up within the district boundary amendment
11 petition, and they're generally tailored to mitigate
12 some type of issue.

13 As Dan said, we have a list of standard
14 conditions. I believe we have six standard
15 conditions that get attached pretty much any time we
16 do a district boundary amendment.

17 Then we have case-specific, as Dan was
18 talking about. And there's -- there are typical
19 ones and then there's atypical ones. The typical
20 ones are ones you would expect. They usually
21 revolve around transportation, and these are
22 conditions, usually, that we get for state roadways
23 or county roadways or even private drainage, how
24 they're going to mitigate and address drainage.

25 There's traffic impact analysis reports

1 that spell out what mitigation measures should
2 occur, affordable housing. You know, affordable
3 housing in many of the petitions is kind of the one
4 up at -- they're very near the top. It spells out
5 who's responsible for and what has to happen to
6 address affordable housing.

7 There's one that's -- and this is one of
8 those that's part of our standard ones. It's
9 compliance with representations, substantial
10 compliance with representations made to the
11 commission as reflected in the Findings of Fact and
12 Conclusions of Law and Decision and Order.

13 Representations. They're slightly
14 different than conditions. In an ideal situation,
15 any time a petitioner makes a representation that, I
16 will do this, I will mitigate this way, ideal world,
17 we have a condition and it memorializes that.

18 But that's not always the case. Sometimes
19 there are representations that are made that don't
20 find them away as conditions; however, we have kind
21 of a blanket condition that says, "Hey, if you make
22 a representation that you're going to do something,
23 you can be held liable to make sure that you do
24 that."

25 As Dan was saying, the atypical, meaning

1 that they're not the types of things that you see in
2 most lists of conditions on district boundary
3 amendments because they're really tailored finely to
4 the specifics of a given project.

5 In this case that we have up here that was
6 part of the Hawaiian Memorial Life Plans petition.
7 Damsel fly habitat was affected because they were
8 going to change the way water drained across the
9 property. And because of that, there needed to be a
10 condition that specifically addressed that, look,
11 drainage cannot be impacted to this habitat, so
12 they're going to have to do some very specific
13 things to ensure that there's at least a minimum
14 water flow to this area. So it's very interesting,
15 very unusual thing that transpired. We get those in
16 some instances.

17 Okay. Next. Okay. After a decision --
18 okay. This is --

19 **CHAIR GIOVANNI:** Scott, this the Chair.

20 **MR. DERRICKSON:** Oh, yeah. Go ahead,
21 Chair. Sorry.

22 **CHAIR GIOVANNI:** On the conditions, are
23 you going to -- can you speak now or will you be
24 covering it later a condition regarding commencement
25 of -- substantial commencement condition?

1 **MR. DERRICKSON:** I -- I'm going to ask Dan
2 how -- are -- how are we going to address that
3 regarding substantial commencement?

4 **MR. ORODENKER:** You've got a section.

5 **MR. DERRICKSON:** Okay. So I think we -- I
6 think we will -- yeah, I think when we talk about
7 the motion for order to show cause, we will talk
8 about that issue of substantial commencement. But
9 you are correct that we often have that language in
10 one of our conditions.

11 **CHAIR GIOVANNI:** Yeah, would it -- is it
12 generally appropriate for us to ask the petitioner
13 for what would constitute substantial commencement
14 of their own project and then potentially put that
15 back into a condition in their own words?

16 **MR. ORODENKER:** We're in uncharted
17 territory there. As I've mentioned before, and
18 Julie, you can chime in whenever you need to, that
19 Bridge Aina Le'a is sort of like the pornography
20 decision that was made by the U.S. Supreme Court
21 many years ago. It's like I know it when I see it.

22 Having the petitioner describe what they
23 consider substantial commencement to be and agree to
24 it as a condition would be helpful if we eventually
25 reverted the property and then it was -- it went up

1 on appeal. I think Gary would say that it was
2 probably an admission, but I don't know.

3 We don't know, and, in all honesty, my
4 personal opinion is we need more clarification from
5 the Supreme Court, so I'm hoping that some day we
6 get a case that's -- that has really good facts for
7 us that -- but we really don't know.

8 **MS. CHINA:** Yeah. The reason I think it
9 might be very important is that that's the one
10 condition that really would lead to our having the
11 authority to revert as opposed to if they've already
12 -- or if they're 50 percent through the project and
13 they -- and then they don't follow through on a
14 certain condition, our ability to enforce is really,
15 you know, zero, and it's in the hands of the
16 counties at that point.

17 **COMMISSIONER CHANG:** Dan?

18 **CHAIR GIOVANNI:** Yes, Commissioner Chang?

19 **COMMISSIONER CHANG:** If I can maybe ask
20 and maybe -- I don't know if Dan or Scott -- I think
21 it would be helpful to understand the limitations of
22 the Land Use Commission once -- once the decision is
23 made. As Chair said, you know, our authority may
24 only be with respect to reverting if there's not
25 been compliance.

1 But with respect to conditions, I think
2 what we've noticed -- at least, what I've noticed --
3 it is very helpful to have those conditions be a
4 little specific because we are not -- LUC doesn't
5 enforce those conditions. That's really up to the
6 counties.

7 So if we're going to require, like, a
8 traffic study or affordable housing, I think it is
9 really incumbent to provide more specific guidance
10 in those conditions, so that the county can --
11 there's not a question, but I think it would be
12 helpful if maybe there's some explanation or --
13 because I just wanted to add onto the Chair
14 Giovanni's comment about the limited role of the LUC
15 to enforce the DBA once it's been approved other
16 than the reversion.

17 **MR. ORODENKER:** I think we have another
18 area where we're going to discuss all of that. And
19 that is one of the emerging issues facing the Land
20 Use Commission.

21 Eight or nine years ago, we tried to amend
22 Chapter 205 to give us more flexibility to enforce
23 conditions because the counties weren't doing it.
24 We still see that problem. The counties don't
25 always enforce the conditions.

1 The current Hoopili matter is a good
2 example. We're not sure how the county's going to
3 respond. We -- we try and -- when we draft
4 conditions, we try and take into account and get as
5 specific as we can with it, with regard to as many
6 different representations that were made as we can.

7 But one of the reasons for the catchall,
8 you know, a condition of the project being
9 constructed and substantial compliance with the
10 representations made is that we don't always catch
11 everything. We can't always catch everything.

12 And that -- that's where most of the
13 problem lies with county enforcement is that when
14 it's that type of a condition, like it is currently
15 in Hoopili, they're uncertain as to what it means.
16 We don't think it's uncertain. I mean, we think
17 that if petitioners made a representation, they've
18 made that representation.

19 Once again, I go back to the current
20 situation with Hoopili and the requirement -- we
21 believe there was a requirement, based on a
22 representation that the transmission lines be put
23 underground. And that's sort of the community view.

24 We haven't been asked for a declaratory
25 ruling on that yet by the county. But then again,

1 the county hasn't decided what they're going to do
2 yet with regard to that. So it's a matter of
3 anticipating as much as we can and being as specific
4 as we can when we can. But we can't anticipate
5 everything. We just try to.

6 **COMMISSIONER OHIGASHI:** So -- so Chair,
7 this is Lee Ohigashi. I just wanted -- are we going
8 to discuss the interplay between the various court
9 cases that we're talking about now for the -- so we
10 can have a framework and -- because my understanding
11 is that Scott is going to do something procedural,
12 more procedurally, just talk -- name out the
13 process. (Inaudible) are we scheduled to discuss
14 what -- what court cases that relate and how they
15 interplay and whether it's -- (inaudible)?

16 **MR. ORODENKER:** Yes.

17 **COMMISSIONER OHIGASHI:** And so one comment
18 about that. I just was wondering whether or not we
19 would do it in -- that part in executive session,
20 because it does have an effect on discussing things
21 that may involve -- convincing cases in the past
22 that may involve approaches that were made for the
23 commission and have to discuss it with their
24 attorney concerning future matters, so that's the
25 gist of my question.

1 (Inaudible) share an opinion like Andrew
2 Jackson said (inaudible) made his signal that
3 enforce it, sort of like a (inaudible) make a
4 decision on. (Inaudible.)

5 **(Simultaneous speaking.)**

6 **COMMISSIONER OHIGASHI:** I was asking Julie
7 whether we should --

8 + **MS. CHINA:** Sorry. I -- I -- you were in
9 and out, and I really can't hear clearly. Can I get
10 -- sorry. It's -- it was -- you were kind of
11 bouncing in and out.

12 **MR. ORODENKER:** Julie, if I can, I think
13 what Lee -- Commissioner Ohigashi is asking is
14 whether or not we get -- we can go into executive
15 session when they get to the point where we're
16 discussing how there's an interplay of these cases
17 with regard to enforcement and what the Supreme
18 Court decisions mean and what kind of changes we can
19 put into our decisions and order to be more clear
20 with regard to enforcement.

21 **MS. CHINA:** Okay. That's a lot of
22 questions.

23 **MR. ORODENKER:** Well, basically, it's a
24 question about whether or not we can go into
25 executive session to discuss --

1 **MS. CHINA:** Yeah. I mean, you can -- you
2 can talk about the cases just in sunshine, and you
3 know -- I mean, because these are from court
4 decisions, and I guess - - I don't know what LUC
5 staff is going to be discussing over the next day
6 and a half, but you know, they can brief you on the
7 cases.

8 If you have specific questions as to how
9 that -- those cases affect, you know -- affect you,
10 and you want to, you know, discuss your duties,
11 responsibilities, privileges, whatever with me, we
12 can go into executive session to do that.

13 In general, also, I don't think that we
14 should be discussing specific cases because that's
15 not what was noticed, and that's not what parties --
16 you know, people don't know -- the public doesn't
17 know that that's what you guys are going to be
18 discussing, so that should maybe be held until
19 you're actually discussing a specific case.

20 But if you have a question as to how a
21 Supreme Court decision specifically would apply to
22 you, then yes, we can go into executive session to
23 discuss that.

24 **CHAIR GIOVANNI:** Okay. Are we good?

25 **MR. DERRICKSON:** So unless you've got any

1 more questions about conditions, I'm going to move
2 to what happens at the end, after the decision is
3 made.

4 After you make the decision and adopt the
5 decision and order, that ends that 365-day clock.
6 However, there is an opportunity if a party wants to
7 (inaudible) reconsider the decision. It's pretty
8 rare that this happens with a district boundary
9 amendment, but it has happened in the past.
10 Hoopili, in fact.

11 Motion to reconsider. The party, either
12 the petitioner, OPSD, the county or if there's an
13 intervenor, an intervenor can request -- you know,
14 file a motion to reconsider and within ten days of
15 the decision.

16 And they're basically asking the
17 commission by stating specifically where the
18 decision was unreasonable, where there were errors
19 of law made. And because it's a tight timeframe, we
20 end up having to have a -- hold a hearing really
21 quick on that motion and render a decision. This is
22 with respect to a district boundary amendment.

23 There's also an opportunity -- because we
24 have this 365-day clock, we generally finish up
25 district boundary amendments in about anywhere from

1 three to six months after it's been deemed complete.
2 So we actually do it well within that 365-day
3 timeframe; however, there are allowances. If we're
4 getting close to that 365-day timeframe and we still
5 have hearings, we're still discussing the matter,
6 there can be a one-time request for up to a 90-day
7 extension of that timing.

8 And in fact, Hoopili, again, was one of
9 those instances where the petitioner requested --
10 because they knew that all the stuff had not been
11 discussed and the commission was not ready to vote,
12 and they did not want it to be automatically
13 approved. They wanted to be able to finish and make
14 their case. They requested an extension, and we did
15 do an extension. Even though it was a 90-day
16 extension, we were able to finish things up, I
17 think, within about a month and a half, so we didn't
18 even approach that end time.

19 I think a little bit later I'm going to
20 talk about other motions that happen after a
21 decision. Okay. So I guess now is when I'm going to
22 talk about those things -- those other types of
23 motions.

24 Okay. So after the original decision has
25 been made, there's often, you know -- a project now

1 should be going off and doing the other permitting
2 that's necessary for them to move forward.
3 Generally, that all then moves to a county level to
4 get -- seek permits, everything from community plan
5 developments, zoning, building permits, S and A
6 permits.

7 It depends on the project, but that's
8 usually the direction. What happens over a course
9 of time, these projects often are long-term
10 projects. Conditions change. Ownership changes.
11 Even the developers who initially spearheaded the
12 project, they change.

13 So some of the types of motions that we
14 see -- and this is really where -- I don't want to
15 say it's a growth industry, but it's -- we're seeing
16 fewer pure district boundary amendment petitions and
17 we're seeing more of these motions to amend, motions
18 to delete conditions, motions to extend time.

19 And so the parties -- usually, it's the
20 petitioner, but sometimes it's the Office of
21 Planning. Sometimes it's the county. And in other
22 rare cases, it may be an intervenor who was involved
23 in the original decision coming in and asking for --
24 for changes.

25 Those motions are submitted to the

1 parties, and generally, it's the Office of Planning
2 and Sustainable Development and the county, and if
3 there were any other intervening parties, to them as
4 well; submit it to them for their review and
5 comments to the commission.

6 These motions allow an opportunity for
7 intervention by new parties because, you know, maybe
8 the project's 20 years old and now they're coming in
9 and they want to amend conditions. They want to
10 change what was required of them to build out or
11 complete their project. And now you may have new
12 parties out there, new community groups, new people.
13 Maybe it's a new owner of an adjacent property and
14 they've got, you know, concerns, so they want to be
15 part of that.

16 These are contested cases just like our
17 original district boundary amendments, and they kind
18 of follow the same process of petitioner who -- or
19 the movant, in this case, making their case, Office
20 of Planning or the county following with their side.
21 Office of Planning and then any other parties that
22 might be involved.

23 Next. Anybody have any questions about
24 the motions? Because that's something that we've
25 been seeing a lot of. We've been seeing a lot of

1 motions to amend. Nothing? Okay. I'm going to move
2 on.

3 Another type of thing that we see a lot of
4 is special permits. And special permits are for
5 unusual but reasonable activities that can take
6 place in, usually, the agriculture district. It
7 also covers rural districts, but I think I can only
8 remember one such special permit in, like, the last
9 15 years.

10 So generally, special permits are going to
11 be about uses on agricultural lands that are not
12 permissible uses, so they have to be asked for a
13 special -- special permits are similar to variances
14 at a county level. We never get special permits for
15 activities proposed on conservation lands. They're
16 all pretty much 99 percent agricultural district,
17 its use.

18 The difference between a special permit
19 and a district boundary amendment is these special
20 permits go to the counties first, and they're
21 initiated at the county level. Here's where --
22 another place where the 15 acres or less comes into
23 play. If the property where the special permit is
24 to take place, if the activity is going to take 15
25 acres or less, it only goes through the county.

1 And if the county hears it and the county
2 denies it, there's no opportunity for the petitioner
3 to try to appeal it to the Land Use Commission.
4 It's dead at that point. The only opportunity,
5 then, for a petitioner denied at the county level
6 would be to go to District Court.

7 For those activities in the agricultural
8 district that are taking place on more than 15 acres
9 of land, a special permit application is filed at
10 the county level, and it's heard at the county level
11 before their planning commission and decided upon
12 there. That's where the record -- that's where the
13 evidence is; that's where the record is developed,
14 at the county level.

15 When they make their decision, they
16 usually put conditions on it, and then they send it
17 up to us with a recommendation for approval with
18 conditions. Okay.

19 We hold the hearing, and we're either
20 confirming the decision that the county's made or
21 we're denying it. And it's based on the county's
22 record. It's not on the record -- it's not -- we
23 don't develop any record. We don't take any new
24 evidence on a special permit at our level.

25 **COMMISSIONER OHIGASHI:** Scott, you can

1 remand, too.

2 **MR. DERRICKSON:** Huh?

3 **COMMISSIONER OHIGASHI:** You can remand,
4 too.

5 **MR. DERRICKSON:** Right. That's what I was
6 going to say. So another option is if we -- if we
7 find that the record from the county is lacking in
8 some way, that we know that they've missed something
9 important, the commission can remand back to the
10 county for further deliberation. And we have done
11 that. The Waimanalo Goat Ranch is an example where
12 we have remanded it back to the county for further
13 hearings to flesh out the record before it comes
14 back up to us.

15 **CHAIR GIOVANNI:** Scott, what was the --
16 what did we do in the Connections Charter School
17 case in Hilo?

18 **MR. DERRICKSON:** That was a denial. In
19 that case, we denied it. That would have been an
20 option. We could have remanded it back to the
21 county and asked them to hold more hearings on it
22 and develop the record further. But in denying it, I
23 believe we gave the petitioner the opportunity to go
24 back and revisit things.

25 **CHAIR GIOVANNI:** Yes, that's true. The

1 other comment I -- you made a comment about
2 conservation land, so they can get a conservation
3 district use permit, a CDUP, but they'd have to go
4 through DLNR or BLNR for that, not to the Land Use,
5 is that correct?

6 **MR. DERRICKSON:** Right, right. We don't -
7 - the commission, we do not govern or regulate uses
8 in the conservation district. That is the
9 jurisdiction of the State Land -- Department of Land
10 and Natural Resources.

11 **COMMISSIONER CHANG:** Mr. Chair -- oh, Dan.
12 Scott, I think it might be helpful -- I just lost my
13 train of thought.

14 For special use permits, the things that
15 really resonated with me, one, it's supposed to be a
16 temporary use, and I think that's really important.
17 And there are times where the use may be more
18 appropriate if it went through a DBA process versus
19 a special use permit. So I think that those are --
20 those are considerations, at least when I looked at
21 some of these special use permits, that
22 distinguished it from a DBA.

23 It's when it's a temporary -- supposedly,
24 temporary, but they could also go through a DBA
25 process to permanently change the temporary use to

1 more permanent if that was appropriate.

2 **MR. DERRICKSON:** That's -- that's correct.

3 **CHAIR GIOVANNI:** Commissioner Chang, you
 4 raise a very good point. And I remember a recent
 5 hearing in which we asked the petitioner why they
 6 chose to go to the special permit, and they said
 7 that they were advised by the county that it was a
 8 lot easier, quote, unquote, "easier process" to get
 9 a special use permit with a term as opposed to going
 10 through a DBA, so that's just something that's out
 11 there that -- that's a counsel that is maybe offered
 12 by some county representatives.

13 **MR. DERRICKSON:** Yes. We've heard that
 14 before, too, but I would say that there -- I think
 15 the county struggles with this sometimes. And you
 16 know, as I pointed out, the special permit
 17 application goes through the county. The Planning
 18 Commission are the ones that have to, you know,
 19 tackle it, and address it first.

20 Sometimes, I think that what they're
 21 looking at is, okay, this -- this special permit is
 22 out in the middle of and surrounded by thousands of
 23 acres of agricultural lands. It doesn't make sense
 24 for us to spot zone it to an urban district to allow
 25 for this temporary use, even though that temporary

1 use may be for 30 years. And I think that's part of
2 what they've got to struggle and balance.

3 Do they want to reclassify it through a
4 DBA process, or do they want to just grant it a
5 special permit and keep the integrity of the --
6 contiguity of that large agricultural district
7 intact? So you know, that's -- I think sometimes
8 that's what's occurring.

9 **COMMISSIONER CHANG:** And I think if I made
10 -- that's some of the challenges that we get from
11 the community's perspective where the counties -- I
12 think everybody struggles with that same kinds of
13 issues, but they do have an opportunity to come
14 before the -- the community does have an opportunity
15 to come before the Land Use Commission and raise
16 those kinds of concerns.

17 **MR. DERRICKSON:** Right.

18 So special permit, here are a couple
19 examples that this commission sitting her has seen.
20 We've seen rock quarries come in. We've seen solid
21 waste -- we've got it up there as dump, but solid
22 waste facilities, churches, and all different types
23 of processing facilities, some with a connection to
24 agriculture and some kind of dubious connection to
25 agriculture.

1 There have been recent changes to Chapter
2 205 that require a special permit for solar PD
3 projects when placed on class B or C lands. And
4 I'll talk about that in just a second, what that
5 class B or C lands relates to.

6 Go ahead. This is just a quick overview.
7 As I was saying, what happens is application goes
8 into the county. The County Planning Department
9 reviews it. County Planning Commission holds
10 hearings on the application and make a decision and
11 recommendation. Like I said before, if the
12 application involves 15 acres or less, the county's
13 decision is the final decision. If it's greater
14 than 15 acres, I think it's off the chart or at
15 least off mine. Okay.

16 It comes up to us. And when it comes up
17 to us, one of the things that has to happen is the
18 staff looks at it, and we have to decide whether the
19 application, that record is complete. And we work
20 pretty hard with the county planning folks to make
21 sure that when we get the application, it's
22 complete. And one of the reasons for that is
23 special permits are on a 45-day decision trigger. We
24 got to hold our hearings, make the decision in 45
25 days from the time we get the complete record from

1 the counties.

2 And as you guys know, and you folks are
3 going to learn, you know, if we're holding hearings,
4 in order for us to hold the hearings and make the
5 decision and issue the decision and order in 45
6 days, it's tight, and when the commission issues its
7 decision and order, as Commissioner Ohigashi pointed
8 out, we can sometimes decide to remand back to the
9 county because we don't think the record is fleshed
10 out enough to make the decision.

11 Sometimes, we are going to issue an
12 approval, usually with the conditions as the county
13 identified, but oftentimes, we have tailored the
14 conditions a bit, and sometimes we even add
15 conditions. And we can add conditions as long as
16 they are based on the record that we have before us.

17 We can't create conditions that not -- you
18 know, tied to evidence in the record that was
19 produced at the county level. We can also deny the
20 permit. And when we deny the permit, it can be then
21 appealed to court afterwards.

22 So the thing that triggers these special
23 permits is the fact that within the agriculture --
24 the state agricultural district, under Chapter 205,
25 we have a list of permissible uses.

1 Okay. So the permissible uses is this
2 laundry list of the types of agricultural or
3 agriculturally adjacent activities that are okay on
4 the best lands, the A and B lands, according to the
5 Land Study Bureau. And the Land Study Bureau was
6 this professional group contracted by the state,
7 pretty much the University of Hawaii's soils,
8 science, engineers, and ag specialists to look at
9 all the land in the state and categorize it.

10 And the result was this A through E, A, B,
11 C, D, E, highest to lower quality, and there's even
12 some that's unclassified, but generally, that A to E
13 is enshrined in Chapter 205. Permissible uses are
14 the ones that can occur on A and B lands. And by
15 extension, they can also happen on the poor lands as
16 well.

17 If it's not allowed as a permissible use,
18 it is prohibited. And when it's prohibited, the
19 only way that it can be allowed is through a special
20 permit. So the laundry list, I believe, is about 20
21 -- there's about 22, 23 different permissible uses.
22 That's Chapter 205-4.5(A), laundry list, multiple
23 pages, and subsection (B) is the one that says if
24 it's not permitted under 205-4.5(A), it's
25 prohibited. And the only way it can be allowed is

1 through the special permit process. So that's what
2 we're dealing with when we're looking at special
3 permits.

4 **CHAIR GIOVANNI:** So Scott?

5 **MR. DERRICKSON:** Yeah?

6 **CHAIR GIOVANNI:** In that example you're
7 giving us, for the lower quality lands, there are
8 permissible uses that -- in that listing that --
9 like solar farms, that are not allowable without a
10 special use permit on the A and B, is that correct?

11 **MR. DERRICKSON:** That's correct. Chapter
12 205- 4.5(A), the permissible uses, does identify
13 solar, PV, as well as many other renewable energy
14 types of projects, but it also caveats it and
15 identifies -- like with the PV, if it's -- it's
16 prohibited on A rated lands, and if it's on B or C
17 lands, it's permissible up to a certain acreage
18 after which a special permit is required. If you
19 have C, D, or E lands, it will not need a special
20 permit, and it will be allowed.

21 **CHAIR GIOVANNI:** Thanks -- thank you.

22 **MR. DERRICKSON:** This picture is an
23 example of one of those special permitted uses.
24 It's the Ocean Vodka Processing Facility using solar
25 PV.

1 Okay. So here's the subsection (B) that I
2 was talking about. Uses not expressly permitted in
3 subsection (A), which is the permissible uses, shall
4 be prohibited except the uses that are permitted as
5 provided under sections 205-6, which is the special
6 permit section of HRS.

7 So if the land is classified by the land
8 study bureau C, D, E, or U, then its limitations on
9 its use are governed by Chapter 205-5, which the
10 county has the leeway to further define. And that
11 205-5 is primarily related to agricultural tourism
12 uses that could be accessory to a bona fide farming
13 operation.

14 So 205-6 is the special permit provision.
15 It lays out where -- I mean, that jurisdiction that
16 I told you about before. 15 acres or less, it goes
17 to the county. 15 acres or more, the county first
18 and then the State Land Use Commission. It has to
19 be approved within 45 days or denied or remanded.

20 Okay. Special permit proceedings are not
21 contested case hearings. Why? Partly because the
22 record is not developed at the Land Use Commission.
23 It's developed at the county level. It's really
24 important. The commission can ask for further
25 clarification, and that's usually done by us

1 remanding back to the county. We can ask for
2 additional information from the parties, like I
3 said. Sometimes this can trigger that remand.

4 No new parties get admitted in front of
5 the Land Use Commission, only those parties that
6 took part at the county level are parties in front
7 of the Land Use Commission. That doesn't mean that
8 public and private individuals aren't allowed to
9 testify in front of us.

10 It's not a formal evidentiary proceeding
11 because all the evidence from the record should have
12 been developed at the county level already.
13 Oftentimes, the procedure that we allow to occur is
14 the petitioner gives its -- gives a presentation,
15 pretty much a summary, an overview of what went on
16 at the county level and what their project's about
17 and what conditions were attached to it.

18 Those decision and orders are prepared by
19 staff after the proceedings, and the second hearing
20 is held to adopt the order. And that's where I'm
21 talking about that 45-day thing. We got to hold the
22 hearings, and then we have to have another hearing
23 to adopt the actual order that comes out of it.

24 And if it's a very complicated special
25 permit, which some of them are, that might mean that

1 we've got multiple hearings and that we have to have
2 a short timeframe to draft a decision and order, and
3 then hold a hearing to adopt the order. So
4 sometimes our -- planning our meals, trying to make
5 sure that we get to that 45 days because special
6 permits also -- that 45 days, if it's not completed,
7 it gets automatically approved.

8 **CHAIR GIOVANNI:** So Scott, what role does
9 the Wizard of Oz play?

10 **MR. DERRICKSON:** That's a good question.
11 I'm not sure where that one came -- that image came
12 from or what the --

13 **MR. ORODENKER:** The staff are the wizards.

14 **COMMISSIONER CHANG:** Scott, can I ask a
15 question? In the special use permit process when it
16 comes before the land board, the LUC, we're confined
17 to the record, although we take public testimony.
18 So what is the -- what is -- how -- what's the role
19 or how do we consider the public testimony?

20 **MR. ORODENKER:** Well, that -- public
21 testimony can cause us some difficulty. And what I
22 mean by that is if the public comes in and testifies
23 to something that was not raised down below -- and a
24 good example of that, I think, is the issue that you
25 brought up that one time with a rock quarry on the

1 Big Island where, oh, somebody comes through and
2 says, "You know, there's a trail across here," and
3 that wasn't brought up down below, we have to
4 remand.

5 Most of the time, the public testimony
6 that we get is -- on special permits is with regard
7 to what's already been discussed. But if public
8 testimony does bring in something new and it appears
9 that it's credible, then we have no choice but to
10 remand it back for specifics.

11 **MR. ORODENKER:** The way the statute is
12 worded -- and special permits is one of the biggest
13 problems for staff, to be honest with you, because
14 we're asked to comment at the county when the county
15 is going through its proceedings. And we'll look at
16 what's been submitted to the county and then base
17 our comments on what we see as the evidence is
18 submitted to the county.

19 The way the statute is worded and the --
20 now, leeway that's given to the counties has
21 resulted in a lot of inconsistency and abuses. One
22 of the -- one of the things that's popped up most
23 frequently is, what does it mean when it says, "the
24 land area which is greater than 15 acres."

25 One of the things that we've had

1 discussions with the counties about, and
2 particularly on the Big Island, is we go get a
3 special permit request where the actual activity,
4 whether it be a recreational facility or a rock
5 quarry, is taking place with -- in 14.99 acres, but
6 then there's a parking lot or there's a roadway or
7 there's a storage area that takes it over 15 acres.

8 And so what we're telling -- what we've
9 been telling the county is that you've got to take
10 into account the entire area being used when you
11 calculate the acreage, not just what the petitioner
12 represents as the acreage they're going to use for
13 the facility or whatever. So -- you know, but --
14 okay. So -- but remember, if the county decides
15 that it's under 15 acres, we'll never see it.

16 So there's some frustration there because
17 the community will say to us, oh, this is bigger
18 than 15 acres and why don't you -- but we couldn't
19 even if we disagree with the county as their --
20 their assessment as to how big the operation is.

21 And I've got to remind you also that one
22 of the funky things is that if the county -- no
23 matter how big it is, if the county denies a special
24 permit, it will never get to us. So there's that.
25 There's no appeal from a county decision denying a

1 special permit to the Land Use Commission. It's
2 just done if the county denies the special permit.

3 One of the other areas of conflict, and
4 I'm going to wrap this up so that we can go to
5 lunch, is what is an unusual and reasonable use
6 within an agricultural district. Some counties --
7 and we've had communication with some planners at
8 the Department of Planning and Permitting at various
9 counties -- see this as, well, we can allow anything
10 that we want because special permits say unusual and
11 reasonable use of within an agricultural district.

12 And as a result, we have seen things that
13 should really be in the urban district, markets,
14 housing, you know, and you see some industrial use.
15 It really belongs in the urban district, but the
16 counties have taken the position that anything this
17 unusual and reasonable.

18 It's -- the way staff has interpreted
19 special use permits is that they're designed for
20 things that are not specifically allowed in the
21 agricultural district and not specifically
22 prohibited, because that's another argument that we
23 haven't -- that there's some things that are
24 specifically prohibited but aren't really
25 appropriate for the urban district, like a rock

1 quarry. I mean, that's clearly not an urban use,
2 but it's not an agricultural use.

3 One of the other areas that we get into
4 with the counties is what I just mentioned, things
5 that are specifically prohibited. We take the
6 position that if it's specifically prohibited, then
7 you can't get a special permit for it. And in the
8 past, there's been sometimes where the counties have
9 said, "Well, even though it's prohibited, we can
10 still give them a special permit," which doesn't
11 make any sense. If it's prohibited in the
12 agricultural district, it's prohibited, special
13 permit or not.

14 I mean, but then there's some -- like
15 these areas that are gray areas for just churches.
16 I mean, we get a lot of special permits -- we see a
17 lot of special permits at the county level for
18 churches. Is that an unusual and reasonable use
19 within an agricultural district? I mean, the
20 argument can be made that in an extreme urban -- a
21 rural area or agricultural district way out in, you
22 know, some far-reaching areas of the Big Island
23 that, yeah, church is necessary because they don't
24 want their parishioners to drive all the way -- make
25 a three-hour drive to town. You know, that's a gray

1 area.

2 Repair shops. You know, if you're -- if
3 you're way out in Hana, is a repair shop a
4 reasonable use from the agricultural district?
5 That's also difficult. Auto repair shops, B and Bs,
6 yoga studios, all those things that you see listed
7 up there are all things that the counties have dealt
8 with for special permits, some of which we've
9 objected to, some of which we haven't, but if
10 they're under 15 acres, we can't control it. It's
11 all by the counties. And then as this commission has
12 seen a couple of times, some of the uses are clearly
13 urban or industrial uses, and the SP is not the
14 right mechanism.

15 We also see some other issues with what we
16 call parceling, where a large tract of land, a
17 special permit will be taken out for a large -- on a
18 portion of a large tract of land for a 14.99-acre
19 rock quarry. And then that rock quarry bottoms out,
20 and then on the same piece of property right next
21 door or right adjacent on that same piece of --
22 right adjacent to that one rock quarry will be
23 another 14.99-acre rock quarry. And as one rock
24 quarry ends -- thank you.

25 We've actually had some success with that

1 commencing the planning departments that, look, at a
2 certain point you've got to say, okay, look, this is
3 -- this is over 15 acres because you're adding
4 everything together, even the ones that you're still
5 not working on, you've got a larger set of rock
6 quarries. You've got to go to the Land Use
7 Commission.

8 Agricultural subdivisions are a nightmare.
9 And I think we've already talked about that a little
10 bit. But those are the kind of issues that staff
11 has to deal with, with special permits. And you may
12 read about public complaining about these special
13 permits given, but it's not us. It's -- it's the
14 counties, just so you're aware.

15 And that is the end of special permits,
16 and we should probably take a lunch break and come
17 back for declaratory rulings, unless anybody's got
18 any questions.

19 **COMMISSIONER OHIGASHI:** No. I want to
20 eat.

21 **MR. ORODENKER:** I'm starving at this
22 point, so you know --

23 **(Simultaneous speaking.)**

24 **CHAIR GIOVANNI:** Let me just say that --
25 and we have failed Arnold's image in allowing this

1 to go all the way to 12:40, so we'll take a lunch
2 break now unless somebody has objection and return
3 at 1:45.

4 **(Recess taken from 12:41 - 1:45 p.m..)**

5 **CHAIR GIOVANNI:** Okay. We're back on the
6 record, and I'm going to turn it back over to Mr.
7 Orodenker.

8 Mr. Orodenker, let's plan to take a very
9 short break approximately 2:40, 2:45, and then we'll
10 reconvene and continue until 3:30. So I'm handing
11 the ball to you. Mr. Orodenker.

12 **MR. ORODENKER:** Now we're going to go into
13 something -- another one of the types of hearings
14 that we hold called declaratory rulings.
15 Declaratory rulings are a little bit interesting.
16 They're infrequent, and what happens is that a party
17 to a prior proceeding or the county or some entity
18 involved in a project will be uncertain as to how to
19 interpret either a statute, rule, or order or a
20 decision that the LUC has issued. And we then hold
21 a hearing to terminate a controversy.

22 Some examples of this are fairly recent
23 because we actually have had a lot of them recently
24 where there was a question as to whether or not
25 transient vacation rentals are allowed in, you know,

1 cultural districts. The question of -- that's one
2 example, and I completely forgot the other one. But
3 anyway, it's after lunch, so please be patient.

4 What happens by that is that we -- with
5 those is we get briefs by interested parties, and
6 then there's an oral argument. The LUC can affirm,
7 deny, or schedule the matter for further hearing,
8 based on the pleadings and the oral argument.

9 It's not usually an evidentiary hearing,
10 although we have had sometimes when people have
11 tried to bring in evidence to support or witnesses
12 to support their position. And it's usually limited
13 to a distinct set of factual circumstances, an
14 application of a rule or a decision and order to
15 something specific.

16 The other example that I was going to
17 point to was the Kihei High School matter where we
18 were asked to interpret one of our conditions in our
19 decision and order requiring an overpass or an
20 underpass. What's that?

21 **(Inaudible.)**

22 **MR. ORODENKER:** Yeah. Mauna Kea was a
23 declaratory ruling, as well, where we were asked to
24 make a determination as to whether or not the
25 activity on the top of the mauna was -- amounted to

1 an urban use such that the land had to be
2 reclassified rather than a permit being granted for
3 it.

4 The next slide shows sort of the way in
5 which declaratory rulings happen. There's a
6 petition, and then we -- within 90 days, we're
7 supposed to set it for hearing. We can deny, issue,
8 or refuse to issue a declaratory order.

9 It's very, very infrequent, but
10 technically, a party can request a hearing, and if
11 the commission decides that it needs to do further
12 fact-finding before it can render a decision, it can
13 hold a contested case hearing within a hundred --
14 and then pursuant to 15-15-103, and then within 120
15 days after that, issue findings and a decision.

16 I've never seen that happen. Usually, the
17 hearing that we originally schedule for the
18 declaratory ruling is sufficient for us to dispense
19 with the matter.

20 Subchapter 14 -- see, it says, "On
21 petition by any interested person," so it's pretty
22 wide open. Almost anybody can bring a request for a
23 declaratory order. And then the commission can also
24 issue on its -- an order on its own motion to remove
25 uncertainty if there's enough conflict. I've never

1 seen that happen either. It's usually based on a
2 petition of some kind.

3 Now, this is something that you need to
4 wrap your head around a little bit because it's a
5 little bit confusing. We can reject the petition,
6 issue a declaratory order on the matter, or set the
7 matter for hearing.

8 And on the next slide, you'll see that
9 grounds for rejection. If the question is
10 speculative, hypothetical, or not likely to occur,
11 meaning the facts are no good, the petitioner lacks
12 standing, which is legal criteria. I -- very rarely
13 have I seen that one happen.

14 The issuance of the order will adversely
15 affect the state or the commission in a pending or
16 likely litigation. Threat of suing if you don't
17 come out the way they want to is not likely
18 litigation. It's some -- it refers to something
19 outside of the proceeding at hand.

20 However, the matter is outside the
21 commission's jurisdiction or refers to a statute
22 outside of Chapter 205. And this is where you've got
23 to distinguish. For a long time, we were basing our
24 decisions on one of these four, but what we finally
25 began to realize, based on some cases that went up

1 on appeal, is that if you get past these four, then
2 you can get to the question, and then you can render
3 a decision without having to refer back to these
4 four issues if you're going to --

5 For instance, let's say you disagree with
6 the argument that the petitioner is making, you can
7 still find against the petitioner, based on the
8 commissions have now decided the issue. Sometimes
9 the confusion comes in on how the petitioner
10 presents their request.

11 They want you to either -- the petitioner
12 will file a request for a declaratory order, asking
13 you to grant their petition. And then the county or
14 OPSD or somebody else will come in and say, "We want
15 you to deny the petition," but it's not really
16 approval or denial because that means you're
17 adopting either the petitioner's or the opposing
18 party's argument in toto.

19 The commission gets to render a decision.
20 It doesn't have to adopt either one of those. They
21 can say, "No, you're both wrong. This is what the
22 actual answer is." This functions -- in this case,
23 the commission functions almost like a court of
24 appeals because you're listening to the argument,
25 and you're rendering a decision on the law, not so

1 much on the facts.

2 Go ahead. If we decide to schedule a
3 hearing, and once again, I've never seen this
4 because you have to distinguish between the hearing,
5 where we are initially -- that we initially hold to
6 make a determination and a decision that we haven't
7 heard enough at that hearing, so we want to schedule
8 a further hearing.

9 It has to be a showing that that hearing
10 is necessary or the commission has to find that
11 there is a reason to schedule the additional
12 hearing. It has to render a decision within 120
13 days of the hearing or within 45 days of the filing
14 of the final brief.

15 Once again, this is -- envisions a
16 situation where we hold an initial hearing, decide
17 we need to have further proceedings, hold those
18 further proceedings, and then give the parties the
19 opportunity to file final briefs. And then we have
20 to render a decision within 45 days.

21 Although, if the commission doesn't meet
22 those deadlines, the statute really -- and our rules
23 really don't say what happens. I mean, it's not
24 like it's automatically granted. It's not like a
25 DBA where if you don't meet the deadline, it

1 automatically gets approved. So there's some
 2 flexibility and we can set different timelines.

3 But once again, I've never seen this
 4 happen. Usually, we dispense with a declaratory
 5 ruling in one or two hearings and render a decision.

6 Now, a form of declaratory rulings is
 7 important agricultural land designations. Well, let
 8 me go through this because the commission should
 9 understand what -- what happens if we ever get one.

10 My personal belief, for reasons that I'll
 11 explain as we go through this, is that important
 12 agricultural land designations are dead. We will
 13 never see another one. But -- and I'll explain why
 14 as we get down in here a little bit.

15 Okay. It's the power of the LUC, which
 16 was designed originally intended -- the legislature
 17 passed this law in order to meet Article 12 -- what
 18 article of the constitution? I can't remember. The
 19 one that require -- huh?

20 **MR. DERRICKSON:** 11.

21 **MR. ORODENKER:** 11. 11 Section 3 that
 22 requires the state to preserve its -- the most
 23 important agricultural lands in the state.

24 So the legislature passed this law that is
 25 extremely convoluted, nobody really understands, and

1 is inherently inconsistent, which is typical. But I
2 mean, this is a real mess. This is much worse than
3 others.

4 As a matter of fact, when I went to -- it
5 was -- Ezra Kanohe was the one who was leading the
6 charge at the time, and he admitted on the floor
7 that the bill was flawed, but they would fix it next
8 year, which they never did, so we're stuck with it.

9 I have to admit that I was the one who
10 wrote the rules with regard to IAL, and when I wrote
11 them, I did the best I possibly could to make sense
12 out of them because my personal opinion is that
13 there are a couple of sections of it that are just
14 illegal, just don't work, and we'll go through that
15 in a minute. But what it was originally intended to
16 do was to identify the most important agricultural
17 lands in the state and protect them from future
18 generations.

19 There's two ways you can move when it's an
20 important agricultural land designation. One is a
21 private landowner can move the LUC to have their
22 lands designated IAL.

23 The counties were also tasked with
24 proposing a designation of all of the land within
25 their jurisdiction, public and private, appropriate

1 for IAL designation.

2 There's a -- there's a supposed incentive
3 in there that allows a private landowner to request
4 that a portion of the land that they're proposing
5 for IAL be designated rural or urban, or they can
6 take a tax credit for later urbanization of a
7 percentage of the land.

8 That clause is so -- that section is so
9 problematic that it's actually never been tested.
10 There's a lot of reasons for that.

11 There are tax implications. That is --
12 currently, that's really the only benefit to moving
13 a land into IAL is that you get some tax breaks.
14 But they're not big tax breaks. They're little tax
15 breaks. And it's not enough of an incentive to have
16 everybody jumping around and trying to get their
17 land into IAL.

18 It does not add any enhanced protections
19 with regard to uses unless a private landowner asks
20 for a portion to be redesignated urban.

21 Let's go on to the next slide. The
22 legislature intended IAL just to be -- almost as a
23 planning tool just to identify those -- those areas
24 of greatest value. So when the Land Use Commission,
25 for instance, or the county planning departments

1 were making a decision, they would know they would
2 have to balance the -- the importance of that land
3 against the other proposed use.

4 It's not a new district, and land remains
5 in the general agricultural district. The
6 legislature specifically provided they're not DBA
7 proceedings but declaratory rulings. So
8 technically, it's not an evidentiary hearing.

9 Except under certain circumstances,
10 designating - - and I have to say that this -- what
11 I'm about to say right now was one of the reasons
12 that IAL came apart. We originally viewed and the
13 counties originally viewed IAL as not really
14 changing what can and can't be done on the land.

15 Everything commonly allowed in the
16 agricultural district, either by statute or pursuant
17 to special permit, is allowed on land designated
18 IAL. There's no petition unless there was -- it was
19 in conjunction with the request to designate, on
20 later petitioning, the LUC to redistrict the land
21 from ag to any other designation, rural, urban, or
22 even conservation. There's no restriction on that.

23 Unfortunately, the way the statute was
24 drafted, I have to say this right now, is that
25 instead of just saying -- instead of leaving --

1 being silent on allowed uses in the agricultural
2 district, it rewrote some of the sections in the --
3 of allowed uses in the agricultural district that
4 have the same -- in my opinion, have the same
5 intent, but they don't say -- aren't worded exactly
6 the same. And that led to a lot of the confusion
7 that I'll get to in a few minutes.

8 Go ahead. How can land be designated IAL?
9 We already talked about that. The counties are
10 tasked with developing maps that identify all of the
11 lands within their jurisdiction, public and private
12 -- the LUC can adopt the map designations.

13 Private landowners can petition -- the
14 county is limited to -- if the county undertakes an
15 IAL designation, they're limited to designating no
16 more than 50 percent of a landowner's property IAL.
17 The 50 percent includes land the landowner may have
18 already voluntarily designated IAL.

19 So if you voluntarily designated 51
20 percent of your land and then the county goes to
21 designate, they can't include your land in that.
22 Even it's absolutely the best land in the area, they
23 can't. They're prohibited from it. Portions of TMKs
24 can be designated IAL because it's not a
25 redistricting.

1 There are eight criteria for IAL
2 designation. The commission has to evaluate the
3 petition in light of the criteria. If the petition
4 is solely for IAL designation, in other words,
5 there's not a reservation of a percentage for urban
6 or rural classification, the land need not meet all
7 eight of the criteria.

8 If the land meets any of the criteria, it
9 must be given consideration for designation. The
10 LUC is tasked with weighing the standards and
11 criteria to determine whether the land meets the
12 mandated purpose of the constitution and the
13 statute.

14 So you know, sometimes that analysis
15 amounts to something that says that, okay, so maybe
16 this land is not LSP rated A or B, but there's a lot
17 of activity going on on the land and -- agricultural
18 activity, it's contiguous with other agricultural
19 lands, and there's a lot of water going to it.

20 One of the things about the criteria is
21 that it's pretty clear that if there's no water
22 going to the land, it's not appropriate for IAL
23 designation. There's no way to farm there, although
24 Kuike might tell me different. As far as I know,
25 there's no way to farm land unless there's water

1 going to it.

2 Article 11, Section 3 of the constitution
3 is set out there. What this -- lands identified by
4 the state as important agricultural lands needed to
5 fulfill the purpose of the above shall not be
6 reclassified by the state or rezoned by its
7 political subdivisions without meeting the standards
8 and criteria established by the legislature and
9 approved by a two-thirds vote of the body
10 responsible for the reclassification or rezoning
11 action.

12 That's not -- that refers mainly to that
13 the two-thirds vote by the body responsible means
14 that it has to be a super majority of this entity.
15 The prohibition on rezoning and reclassification was
16 reinterpreted by the Supreme Court to mean -- and
17 this is based on dicta in both Hoopili and Koa Ridge
18 cases, that there's an elevated standard for
19 reclassifying IAL lands.

20 It's not clearly defined. It's just that
21 you've got to go deeper into the balancing act of
22 trying to figure out whether the land is really
23 needed for agriculture or not and the impact of
24 taking it out of agriculture if you're going to
25 reclassify IAL designated lands to urban or rural.

1 It's not impossible. It's not even a very high bar,
2 but it does require that if this commission decides
3 to redesignate IAL land, that it shows that it has
4 looked at it at a slightly higher level than it
5 normally would under a district boundary amendment
6 proceeding.

7 This is a -- you can look at this at your
8 leisure. It's 205-42, which sets out the
9 definitions and objectives. As you can see, it's to
10 promote agricultural development, ensure
11 agricultural viability, sustain growth of the
12 agricultural industry and a long-term agriculture
13 use and production of those productive agricultural
14 lands.

15 I can tell you that even the legislature
16 doesn't know how to accomplish those things. But
17 we're tasked with doing it.

18 **COMMISSIONER CHANG:** If I can comment.
19 What's the one with IAL -- one of the -- there was
20 originally an intention that this statute was
21 designed to preserve important agricultural lands,
22 to support the constitutional mandate, but at the --
23 and encourage farmers to keep their land in
24 agriculture. But it really was balanced against
25 also providing them incentives, having the

1 infrastructure, having tax incentives, having all of
2 those -- those incentives to create this environment
3 to support sustainable ag.

4 The challenges that we had is that we
5 don't have the state -- the counties have not really
6 adopted the incentives to create that kind of an
7 environment to support or to -- to support the
8 intention of IAL, so -- or boundary --

9 **MR. ORODENKER:** Yeah. And I was going to
10 -- I was going to get to that in a minute.

11 One of the things -- the difficulties
12 we're having with IAL and the reason that I think
13 it's dead is because there were -- there were two
14 incentives, two categories of incentives for a
15 private landowner to put their property into IAL.

16 One of them was a lot of the large
17 landowners, in particular, were very concerned that
18 the county was going to designate portions of the
19 land IAL that they wanted to preserve for maybe
20 future development. Okay. So initially, there was
21 a rush by some of the larger landowners to designate
22 land IAL.

23 The other incentive was what Dawn was just
24 talking about. It was intended that the state and
25 the counties put together packages of incentives,

1 tax breaks, infrastructure development, things like
2 that to incentivize landowners to put their land
3 into IAL.

4 And at the beginning there was actually a
5 loan program that would -- if your land was
6 designated IAL, you could have access to some
7 agricultural loans that were very low interest rates
8 and on a relatively long-term for infrastructure.
9 And that have gone for fences to water to whatever.
10 That expired. That no longer exists.

11 So the only real incentive that's left for
12 somebody to put their land into IAL in that category
13 is the tax breaks, which, as I mentioned before, are
14 not all that big -- the -- and because of the recent
15 debacle that was experienced with City and County of
16 Honolulu's IAL designation, and the screaming of
17 potential lawsuits all around the periphery on that.

18 I don't think that the county is --
19 counties are -- although, Maui says it's going to
20 proceed, I don't think Oahu, for instance, is going
21 to proceed with -- again, with trying to designate
22 IAL. And as a result, there's almost no reason for
23 a private landowner to come in and voluntarily
24 designate IAL.

25 So if the private landowners aren't going

1 to do and the counties are going to walk away from
2 it, who's going to do it? I mean, there's really no
3 reason. There's really no reason. So until and
4 when the law is fixed, in my opinion, I don't see a
5 lot of IAL coming before us. I don't see any IAL
6 coming before us.

7 This is part of what Dawn was just talking
8 about, tax policies, land use plans, ordinances to
9 promote the long-term viability of agricultural was
10 supposed to be a part of the program, but they
11 didn't really happen.

12 The eight standards and criteria are set
13 out here. Once again, I think the most important
14 one is number 5, land with sufficient quantities of
15 water to support viable agricultural production. I
16 think that all the other ones you can mix and match,
17 but that one has to be there.

18 Okay. Now, this is -- we start into the
19 issues here. This is with private designation.
20 Okay. So if you recall that I talked about that
21 percentage -- I think it's 15 percent that a private
22 landowner can reserve for urban, rural, or credits
23 at a later date.

24 In that section, there's no reference to
25 Chapter 343, in other words, the environmental

1 protection laws. So what happens if somebody's
2 going to say, okay, I got -- I'm going to designate
3 this area urban, and I'm going to build housing on
4 it, when does Chapter 343 come in?

5 Usually, Chapter 343 and our environmental
6 assessment comes in before we grant that permission.
7 But the way this is set up, it comes after, which
8 doesn't make a whole lot of sense because if the --
9 if you can't develop a good environmental mitigation
10 plan, how can you -- you've already got land
11 designated, right? So it's the 343 process becomes
12 perfunctory.

13 A lot of the Native Hawaiian Legal Corp
14 and CR Corp and those other organizations let it be
15 known early on that if anybody tried to exercise
16 that percentage holdback, they were going to take it
17 to the Supreme Court, which is why nobody ever has,
18 because everybody knows that they don't want the
19 expense of having to go the Supreme Court over 15
20 percent, a 15 percent designation, so nobody's ever
21 utilized it.

22 And our rules -- when I drafted our rules,
23 I actually threw in 343 compliance being a
24 requirement prior to this type of a petition because
25 I thought that was the only way I could make it

1 legal. It didn't make any sense otherwise.

2 Another problem is that while it
3 specifically sets forth that the process is a
4 declaratory ruling rather than a DBA, there's no
5 explanation of the procedure required to process a
6 petition. Remember, we talked about DRs, and it --
7 you know, DRs are intended to be, you know, oral
8 argument and then decision, or even a hearing later
9 on, but technically, they're still not contested
10 case hearings, although the IAL statute seems to
11 imply to have to hold a contested case hearing.

12 And every IAL private landowner
13 designation that we've done, we've acted as if it
14 was a contested case hearing out of an abundance of
15 caution, but the statute isn't clear on it.

16 We talked about the credit, the situation
17 already. And the end result is that we've got a set
18 of rules that are trying to interpret what the
19 legislature intended and reconciled the statute with
20 Supreme Court decisions was and statutes, and I
21 don't know if that's possible.

22 Okay. Now we're into the county
23 designation. And this is what -- this is the way
24 it's supposed to work. The county's supposed to
25 develop maps and consultation with landowners, DOA,

1 interest groups, including the Farm Bureau, USCOA,
2 the Office of Planning, and other groups, as
3 necessary. And then each county must, through its
4 planning department, develop an inclusive process
5 for public involvement.

6 That's very important because if you --
7 those are the commissioners who were onboard during
8 that time when Oahu sent its -- the City and County
9 of Honolulu sent its IAL maps to us. This became
10 the crux of the issue, whether -- whether it was in
11 fact inclusive. It may establish a citizen advisory
12 committee, although I don't know how you could do
13 this without.

14 It may use an existing process, the
15 general plan, et cetera, or use or employ existing
16 and adopted general plan, development plans, or
17 community plans, and take notice of those lands
18 already designated IAL by the commission.

19 The way this is set up and the way it
20 reads, it sounds like this is really just a planning
21 process. I mean, you've done your -- it's almost
22 like if you've done your general plan, if you've
23 designated what areas are going to be agriculture,
24 all you really need to do is overlay water and soil
25 maps on top of it, and existing use maps, and then

1 you can designate IAL or draw maps that designate
2 IAL.

3 As a practical matter, the county -- the
4 public goes, hey, what went haywire when the county
5 tried to do this. Anyway, next slide.

6 **COMMISSIONER CABRAL:** Once in a while, the
7 county messed it up so bad when --

8 **MR. ORODENKER:** Yeah. And I'll -- I've
9 got -- I'm going to go through that in a minute.

10 Simple IAL petition. We already talked
11 about this two-thirds vote. What we've been doing
12 in order to ensure that there's no later confusion
13 is that if somebody files a petition, a private
14 petition for IAL, is requesting a specific waiver of
15 the 15 percent credit for reclassification because
16 the statute, once again, is unclear.

17 If we don't ask for that 15 percent
18 waiver, theoretically, it could be argued a
19 petitioner could later come back to us and say,
20 well, you granted me an IAL petition for a hundred
21 acres. I want 15 percent of that set aside, even
22 though the decision was rendered years before. So
23 in order to make sure that we don't have any of that
24 happening, we always request a waiver of the 15
25 percent credit on the petition.

1 Go ahead. The planned uses of both the
2 agricultural lands and the lands sought to be
3 reclassified must be in the -- contained in the
4 petition. TMK numbers and verification of ownership
5 are required. You can't put somebody else's land
6 into IAL if you're a private landowner. The county
7 can do it, but a private landowner can't.

8 **(Simultaneous speaking.)**

9 **MR. ORODENKER:** And then the -- yeah.
10 Well, I mean, under the rules, the county -- next
11 slide.

12 And these are the -- the requirements for
13 the commission to find to grant the petition.
14 Suitable for reclassification, urban
15 reclassification is consistent with the county --
16 but this is if we're going to reclassify IAL lands
17 to something else. And once again, this is like a
18 standard DBA, just a slightly higher elevated and
19 level of analysis.

20 Should the commission find that the IAL
21 designation is inappropriate or the reclassification
22 of the remaining land is not appropriate, the
23 petition should be denied in its entirety. Yeah.
24 So if somebody comes in -- like I said, this has
25 never happened. If somebody came in with a 15

1 percent request and we found that 15 percent of land
2 that they were going to designate as urban or rural,
3 that that designation was inappropriate because it's
4 outside of the urban growth boundaries or whatever,
5 then we can't just designate -- deny that portion of
6 the petition. We have to deny the entire petition.

7 Okay. I'm really not -- we don't really
8 need to go through this reservation of credits
9 thing.

10 **(Inaudible.)**

11 **MR. ORODENKER:** Yeah. It hasn't happened
12 in 20 years or so. We can move on from this one,
13 too. We can move on from this one.

14 Okay. IAL raises a ton of issues,
15 especially if there's a redesignation included. And
16 I put this slide up there because it really topples
17 the cart over, you know. But there's no application
18 of the Public Trust Doctrine required, right?

19 There's no Chapter 343 requirements. There's no --
20 one of the things that this commission is tasked to
21 do when it reclassifies land from ag to urban or
22 rural is to make sure that the infrastructure costs
23 don't get placed on the state or the county for
24 these projects.

25 We don't get to put any conditions on it.

1 There's no analysis of the impacts on the
2 watersheds. It's -- the list just goes on and on.

3 It's almost -- Rule 15-15-124 is an
4 attempt to resolve some of these issues. It's
5 untested and extrapolated, but it's our best shot.
6 The AG and I -- Diane Ericksons struggled over this
7 for -- for days once, and we finally wrote
8 something. But once again, it never got tested, so
9 I think we wasted a lot of brain power.

10 We can move on from this. Okay. Once
11 again, we can still reclassify IAL land into urban,
12 rural, or conservation as long as the land was
13 designated IAL without that 15 percent reservation.
14 If the land was designated IAL -- and this is
15 another reason why nobody wants it -- in conjunction
16 with a 15 percent reservation request, the
17 legislature, by a two-third vote of both houses,
18 must authorize the redesignation.

19 Now, who in their right mind wants to do
20 that? I mean, you designate 15 percent of your land
21 for urban, the rest of it remains in ag as IAL, and
22 then the community grows up around it. Unless you
23 get two-thirds of the legislature and both houses to
24 agree, you can't redesignate that land urban. It's
25 -- it's -- it's not going to happen.

1 When I talked about the additional
2 criteria for redistricting of IAL lands, these are
3 some of the things that we think the commission
4 would have to take a look at if it was going to
5 redesignate land that had been designated -- or
6 reclassify lands that have been designated IAL.

7 The land is not critical for agriculture.
8 It will not harm the viability. It won't cause
9 fragmentation, there's a public need or benefit. It
10 won't adversely impact the ability of the state or
11 the county to support additional agriculture. The
12 public benefit to redistricting outweighs the public
13 benefit derived from the continued use for
14 agriculture.

15 Redistricting will not impact the
16 viability of agricultural operations on adjacent
17 lands. The criteria for granting a DBA have been
18 met. And must be by a two- thirds vote of the
19 commission. And a petition, like any other DBA,
20 cannot be heard again for a year if it's denied.

21 Okay. Absent a redistricting. If you
22 want to just return it to general ag, and you want
23 to take an IAL - - out of IAL, the only way you can
24 take land out of IAL -- because I mean, it's going
25 to remain in ag -- is if a landowner or farmer comes

1 in and says there's no longer enough water for
2 viable agriculture. And that's why I kept pointing
3 to that one criteria, the water criteria, as being
4 so important because if we granted an IAL
5 designation without making sure that there was
6 enough water for viable ag, the petitioner at any
7 point in time could just come back and say, take it
8 out because there's no water.

9 We already talked about the 15 percent
10 one. And County designations can be adjusted by
11 periodic review. Okay. So now we're into the
12 problem, and I've got to grab some notes here.

13 But you can see that the counties were
14 originally supposed to present their proposed
15 designation to the LUC within three years of
16 incentives, which was, as far as the Supreme Court
17 is concerned, happened in 2008. But it wasn't done
18 -- the counties viewed the mandate as unfunded and
19 have generally been slow to respond. 205-47 sets out
20 the specific requirements that the counties must
21 adhere to in developing its proposed designation.
22 This process is extremely complex, as the city and
23 county learned, much to its chagrin, and can be
24 expensive.

25 This is basically a rundown of what

1 they're supposed to do, but once the -- the way it
2 was supposed to work was the planning department was
3 supposed to look at its maps and say, these are the
4 areas that we think potentially could be designated
5 IAL.

6 Then it goes through that process that we
7 talked about where there's supposed to be all of
8 these different entities involved. There's nothing
9 in the statute that requires notice to the
10 landowners, okay? But as we'll talk about in a
11 minute, I don't see how they can get away without
12 notifying the landowners, especially since it's been
13 alleged that there's an issue with regard to due
14 process and rights of use on the land.

15 Okay. After it's submitted to the county,
16 the council, the County Council then must act, by
17 resolution, to adopt the maps with or without
18 changes. In other words, the County Council gets to
19 make changes. Once the council has done so, the maps
20 are transmitted to the LUC for action along with the
21 entire record of how they got there.

22 After it's submitted to the LUC, the LUC
23 can either remand the matter back if it feels
24 further clarification is required; adopt the
25 recommendation of the county; or amend or revise the

1 county recommendations to exclude or include certain
2 lands from designation.

3 In other words, the LUC can look at what
4 the county submitted and say, okay, based on your
5 own evidence, we don't think that this portion of
6 your maps or this land area should be designated IAL
7 but this area should, and it can adjust the maps,
8 basically.

9 They have to be officially transmitted,
10 the complete records of the proceedings have to be
11 submitted, and the county also has to serve a copy
12 on the State DOA and OPSD within 24 hours of filing.
13 And the DOA and OP have 45 days to provide comments
14 to the LUC.

15 Nest. Okay. Before we get into this,
16 let's talk a little bit about what happened with the
17 city and county's designation. Okay. The first --
18 one of the things you should know is that Kauai
19 County was actually the first county to make a run
20 at doing a county-wide designation. And they had
21 actually spent about 90 percent through their
22 process when they stopped.

23 And the reason that they stopped is that
24 Kauai County had set a bar for how much acreage they
25 wanted in IAL from the county. And what happened

1 was that before they finished their process, the
2 private landowners had all done their own
3 designations that hit that acreage bar, so they
4 said, okay, there's no reason for us to move
5 forward, which is unfortunate because I think
6 Kauai's process was a lot more rigorous than what
7 the city and county eventually did.

8 The city and county of Honolulu when they
9 -- their process got crossed up with implementation.
10 First of all, it took over seven years, which was a
11 little excessive. And during that period of time,
12 ownership of various pieces of property changed
13 hands. It had been purchased by Mainland owners.
14 It had been subdivided, and they never updated their
15 maps or their -- not their maps. They never updated
16 their ownership list and they never went back out to
17 reach out to landowners again.

18 It was extremely broad brush and swept up
19 a lot of small parcels that hadn't really been in ag
20 and were, for all intents and purposes, either rural
21 or even urban for generations. I mean, if you --
22 those of you who were on the commission at the time
23 recall, we had testimony from aunties and tutus and
24 schools and yeah, I mean, some of this land had not
25 been in ag for so long, and it was a very broad-

1 brush kind of development, map development by the
2 counties.

3 And part of it was the county's fault.
4 You know, there was a disconnect between the people
5 who were doing IAL in the part of the DPP that was
6 granting subdivision applications and permitting
7 because they didn't talk to each other. And George
8 knows how hard that is for the county, right,
9 getting those division at DPP to talk to each other.
10 And so there was no coherent development of maps and
11 the viability of certain land for agricultural
12 purposes and so forth and so on.

13 The community outreach effort was poor. I
14 mean, from a -- the county's standpoint, I can see
15 how they thought they'd done an adequate job because
16 they sent letters to all the property owners,
17 although it could be argued that they didn't send
18 them to the right people. They sent letters to all
19 the property owners telling them what they were
20 doing and inviting them to meetings.

21 There were two problems with that. Number
22 one is like most landowners just threw the letter
23 away. And some landowners said, well, this is not
24 my responsibility -- my community association's
25 responsibility, and they -- they figured the

1 community association was going to handle it. And
2 then other landowners never got them because they
3 sent them to prior owners or they sent them to what
4 owner on a list of many for that TMK when the actual
5 trust holder or corporate owner was on the mainland,
6 and they never got that -- they never got that
7 notice. So there was a lot of complaining being
8 done that we didn't know anything about.

9 None of that would have been a problem if
10 it wasn't that the -- there was an opinion rolling
11 around that said that changing -- or having land
12 designated IAL was going to change what you could do
13 and couldn't do on your property. And it was very -
14 - by the time it rolled around the communities, it
15 was very inflammatory. You know, people believed
16 that they weren't going to be able -- if they were
17 living on their agricultural land, they -- their
18 children weren't going to be allowed to live on the
19 land because they weren't working the farm. I mean,
20 it got all out of hand.

21 And whether they were right or wrong was
22 never tested. Where we eventually ended up was that
23 we decided that between the seven-year delay and the
24 inability of the county to provide adequate notice
25 to everybody -- and I have to tell you that when we

1 discovered the problem with notice, we spent a lot
2 of money and two months of staff time trying to fix
3 it. And even after we sent out the notice to all
4 the landowners, we were still getting complaints.

5 **COMMISSIONER CABRAL:** Which is the only
6 way a lot of them knew this was coming --

7 **MR. ORODENKER:** Exactly. Exactly,
8 exactly. That was the -- some of them said, this is
9 the first time we've heard about it. Riley had to
10 change his outgoing message on his phone because he
11 was getting so many people calling him and
12 complaining about the IAL thing that he had to
13 change it say, "If this is about IAL, this is what
14 you do." I mean, it was crazy. It was absolutely
15 crazy.

16 In the end, the commission concluded that
17 for very many reasons that it was inappropriate to
18 move forward with the designation on the other
19 county's request for designation. And that leads us
20 back to where I started about when I said that, you
21 know, I don't think we're going to see any more
22 because I don't believe that the counties will move
23 forward, but maybe Maui will. I don't know. But
24 the Big Island and City and County of Honolulu are
25 not going to move forward with IAL designations if

1 the law stays the way it currently is.

2 It's just not worth it. There's threats
3 of lawsuit. The whole thing, it's just not worth
4 it. It's a negative -- from a political standpoint,
5 it's extremely negative, and, Kuike, your community
6 in Waimanalo was some of the most vocal because
7 there was a lot of people who were impacted by the
8 designation over there. And I have a lot of friends
9 who live over there. I was getting phone calls at
10 home from people who knew from my daughter or
11 whatever, saying, what are you doing, you know?

12 Yeah. Yeah. So I -- I -- my personal
13 opinion is that IAL as it currently exists is
14 probably dead. We will probably not see any more
15 either private or county designations. This statute
16 needs to be fixed. If the statute did what it was -
17 - I think, what was originally intended by the
18 legislature and simply set up a planning tool that
19 had no impact on -- that clearly had no impact on
20 the ability of people to utilize their land, I don't
21 think this would have been a problem. But the
22 statute is confusing, so that's kind of where we
23 left it.

24 Some other issues associated with IAL, we
25 recently had someone at Kekaha Agricultural

1 Association try and bring a petition. Turns out
2 they weren't farmers. They weren't landowners, and
3 it was state land, and it probably wasn't
4 appropriate for them to file, and they eventually
5 withdrew their petition.

6 We talked about the county IAL issues.
7 Now we're moving on to other proceedings. This --
8 is this where I hand it over to you, Scott? Okay.

9 **CHAIR GIOVANNI:** Dan, this is the Chair.
10 I've got a quick question back on the declaratory
11 rulings or a part of that. Is a declaratory ruling
12 petition the right vehicle for a landowner to get a
13 condition removed? I'm thinking of the case of Maui
14 High School.

15 **MR. ORODENKER:** No, absolutely not. To
16 remove a condition, you have to actually have to --
17 have to come in and petition the commission to have
18 a condition removed. It's a separate type of
19 proceeding. It -- it's not a declaratory ruling.

20 **CHAIR GIOVANNI:** So are you going to be
21 talking about that in any more detail later, or is
22 it just the petitioner comes and makes a motion and
23 we -- well, we've got 45 days that we have to deal
24 with it? How's it work?

25 **MR. ORODENKER:** Well, it -- it's -- it

1 falls under the general motions section, and it's --

2 **(Inaudible.)**

3 **MR. ORODENKER:** Yeah. It's -- it's
 4 similar to -- that's what I just was going to say.
 5 It's similar to a motion to amend a D and O. It --
 6 it -- it's actually -- we've been talking about
 7 perhaps getting it changed but through the
 8 legislature or at least amending our rules to deal
 9 with this. You know, it's actually quite a complex
 10 process for simply getting conditions removed, and,
 11 as a result, a lot of the landowners don't even
 12 bother. They just move on.

13 Even the simpler thing as removing the
 14 requirement for an annual report requires a motion
 15 under our rules right now. So -- and you know, I
 16 think there's a legitimate argument that for some
 17 non-construction-related or infrastructure-related
 18 requirements that we ought to be able to waive -- to
 19 delete those without having to go through hearing,
 20 but right now, everything has to go through hearing
 21 via a motion to amend.

22 **CHAIR GIOVANNI:** Okay. Thank you. Do you
 23 want to take a short break now, or do you want to go
 24 for another five minutes?

25 **MR. ORODENKER:** Might as well take a short

1 break now.

2 **CHAIR GIOVANNI:** Okay. Let's make it a
3 five- minute break, and we'll come back at -- or a
4 seven-minute break, and we'll come back at 2:45.

5 **(Recess taken from 2:37 - 2:45 p.m.)**

6 **MR. DERRICKSON:** Okay. We are back on the
7 record.

8 **COMMISSIONER CABRAL:** Oh, we're on the
9 record.

10 **MR. DERRICKSON:** Yes, we are.

11 **COMMISSIONER CABRAL:** Everyone knows my
12 itinerary. I had to check with Ariana. She knows
13 more about my travel plans than I do.

14 **CHAIR GIOVANNI:** We're back on the record,
15 Dan.

16 **MR. DERRICKSON:** I'm going to be
17 presenting now. This is Scott again. I'm going to
18 be talking about other types of proceedings that
19 we're involved in. There were some questions about
20 the EIS/EA approval process where the LUC is the
21 accepting authority.

22 Petitions to amend are modified district
23 boundary amendments, which is kind of a thing that
24 we're commonly seeing, much more common than a full
25 district boundary amendment.

1 Motions for order to show cause. And a
2 unicorn- type proceeding that we've all of a sudden
3 had about three of them recently. Declaratory
4 ruling for a boundary interpretation. So I'm going
5 to try to explain a little bit about what boundary
6 interpretations are and how they usually occur.

7 We'll start off with the EIS -- EA/EIS
8 approval process. For those -- especially for you
9 new commissioners, we throw a lot of acronyms
10 around, and I'm not sure if you guys know what we're
11 talking about at all times. So HRS, Hawaii Revised
12 Statutes, state laws, like Chapter 205 HRS. We have
13 talked about HARs, which is Hawaii Administrative
14 Rules. Our Land Use Commission's administrative
15 rules are Chapter 15-15. We often refer to those.

16 In this case, EA/EIS environmental
17 assessment, which is a -- kind of a mini or
18 environmental impact statement light, and then
19 there's the EIS, which is the environmental impact
20 statement. Those all derive from state statute
21 Chapter 343. So you'll often hear us refer to, oh,
22 did they -- are they compliant with Chapter 343.
23 That's what we're talking about. Did they -- have
24 they had to do an EIS or an EA?

25 So Chapter 343 lays out all the standards

1 of when you have to do an EA versus when you have to
2 do an EIS and who decides that. Hawaii
3 Administrative Rules, Chapter 11- 200.1, I believe,
4 is the rules that govern EAs and EISs. And in our
5 staff reports, we'll often be referring to sections
6 of the statute and the rules which -- which part of
7 -- you know, if the LUC is the accepting authority
8 for making a determination, you guys have to review,
9 and that's part of your decision-making process.

10 Although it's important to understand
11 about the EA/EIS approval process, especially with
12 the Land Use Commission, if the commission is the
13 accepting or approving authority, it's not the same
14 as approving the petition and the project itself.
15 What you're doing is you're saying, based on the
16 criteria in Chapter 343 and the administrative
17 rules, that the EA or EIS has followed and complied
18 with those. They've identified all the potential
19 impacts, the potential mitigation measures that
20 would need to be done, to address those impacts.

21 It's a -- not a compliance document.

22 What's the word I'm looking for?

23 **MR. ORODENKER:** Disclosure.

24 **MR. DERRICKSON:** Thank you. Disclosure.

25 It's not -- there's nothing in the EA or EIS that

1 binds the applicant or petitioner to carrying out
2 those mitigation measures. Those thing happen later
3 on during permitting, like the district boundary
4 amendment process or a special permit where you
5 attach conditions. Same goes at the county level
6 when they do permitting. You enshrine those things
7 that are identified in the EA or EIS and -- as
8 mitigation measures to be carried out pursuant to
9 those permits through conditions.

10 But again, it's worth repeating.
11 Approving an EA or an EIS is not project approval.
12 That still has to happen.

13 **MR. ORODENKER:** Yeah. To reiterate, and I
14 think that some of you have heard me say this, and
15 that's why this particular slide is up there. You
16 know, EIS is so separated from the project that, you
17 know, you could say that you're going to put in a
18 nuclear waste dump in urban Honolulu and as long as
19 you identified all the possible permutations of --
20 disclose all the -- the possible impacts of that
21 proposed project.

22 The EIS is technically valid. That
23 doesn't mean it -- you're in any way going to
24 approve the project, but the EIS is technically
25 valid. Very often, the community comes in and

1 objects to the EIS because they think they can get
2 the -- but their basis is really their objection to
3 the project. That puts us in a difficult position
4 sometimes because the community doesn't understand
5 that by approving an EIS, we're not approving the
6 project.

7 It's also Scott's point about where
8 conditions come from is also very worthy of note.
9 And when you review an EIS, you should look for
10 those proposed mitigation measures because it's
11 almost imperative that if those impacts are going to
12 occur as a result of the project, that we're going -
13 - that we need to have those mitigation measures put
14 in place. And they usually become conditions that
15 we place on the project, so those are two things
16 that I would add to Scott's statement or emphasize
17 about Scott's statement with regard to EISs.

18 **COMMISSIONER OKUDA:** (Inaudible) EIS or an
19 EA is supposed to be a tool for us to help us make
20 the decision, right? In other words, it's supposed
21 to have enough stuff in there so that we know the
22 pros and cons, and so we as the decision-making
23 agency can evaluate the pros and cons that come to
24 the decision.

25 **MR. ORODENKER:** Yeah. One -- one of the

1 things that we have to watch out for is a lot of
2 times, EISs or EAs will be submitted with a very
3 cursory review of what the project is going to look
4 like. And if it's too cursory, so that we really
5 don't know what the project is going to be, then we
6 can't really analyze whether or not the disclosures
7 on the impacts are valid.

8 So if a developer starts to argue that,
9 "oh, we don't have to go that deep. We haven't made
10 a decision on this or that or the other thing," it
11 immediately raises red flags because, okay, if you
12 haven't decided what you're going to build and you
13 don't know enough about what you're going to build,
14 then how can you identify the impacts, right?

15 You know, it's okay for a developer to not
16 -- or to not know exactly where his funding is going
17 to come from when they do the EIS, but it's not okay
18 for a developer not to know where they're going to
19 run a road.

20 **COMMISSIONER CHANG:** Oh, sorry. Chair,
21 did you want to say something?

22 **CHAIR GIOVANNI:** No. Proceed, Dawn.

23 **COMMISSIONER CHANG:** Okay. I'm sorry. I
24 just wanted to make a point, too, that the
25 environmental document is a -- is a -- it also helps

1 to determine whether the application is complete,
2 and that's a really important step that they go
3 through. And for me, as a commissioner, it is
4 extremely important document because it helps to
5 provide the factual basis upon which we can make
6 conditions.

7 So many times, I'm -- I have a real bias
8 or interest in cultural resources, and so when
9 community members come forward and they raise issues
10 related to cultural practices, cultural resources,
11 it is -- that's something that I think they ought to
12 do. I know in particular attention that the EIS or
13 the EA adequately addresses all of that. I it
14 doesn't, then I think that it puts us in a very
15 difficult position that we do review the actual
16 matter before us.

17 But I think this commission has taken very
18 seriously the adequacy of the environmental
19 document, and in fact, we have at times rejected,
20 not accepted the document. It is an extremely
21 helpful tool in ensuring that we have a factual
22 basis on which to render a decision.

23 **COMMISSIONER OKUDA:** Yeah, because the
24 EA/EIS, it's not only the substance of the document,
25 right? Isn't it also the process that was used to

1 get through the document, and so if the process
2 which, I think, contemplates communication with the
3 community, I mean, there's a formal process where
4 you guys send out notices, receive responses, and
5 address the responses.

6 If the process is not followed, then I
7 think the legal question or whether we can accept
8 it, you know, because the process was (inaudible).
9 It's the substance of the EA/EIS whether it really
10 addresses the things that are supposed to be
11 addressed. In other words, is it really the full
12 planning tool or resource that we should have to
13 make a decision.

14 But it's also -- they follow the process
15 to get us the document which will help educate us
16 about what's going on, so it's process and
17 substance. And if either one is defective, then I
18 think we have discretion to refuse to accept the
19 document, which is separate from whether it's a good
20 project or a bad project, yeah.

21 **COMMISSIONER CHANG:** No. Just to add, if
22 I might, to Gary's comments. It is also critical
23 that when looking at the environmental document, one
24 of the issues that has come up more frequently is
25 the issue of staleness, because many a times the

1 environmental document has been prepared sometimes
 2 10, 15, 20 years before the project is - - yeah,
 3 comes up to fruition, so I know that that has -- and
 4 laws have changed. Communities have changed.

5 There have been numerous changes that I
 6 think the commission has also raised issues related
 7 to this -- is the substance and the process of the
 8 document still valid. Is it -- can we still, in
 9 light of the proposal that's coming before us, so I
 10 think the environment document, both the process,
 11 the substance, and the timing upon which it was
 12 completed is critical to the commission's review.

13 **COMMISSIONER OKUDA:** And not (inaudible)
 14 but that's the (inaudible) --

15 **COMMISSIONER CHANG:** Right. Turtle Bay.

16 **COMMISSIONER OKUDA:** -- case where if the
 17 -- the EIs or EA stale, and it's -- it's not -- it's
 18 not reliable, I guess, for the deciding agency to
 19 rely on, so we got --

20 **COMMISSIONER CHANG:** Uh-huh.

21 **COMMISSIONER OHIGASHI:** So you'll see us
 22 next week.

23 **CHAIR GIOVANNI:** This is the Chair. I
 24 want to thank Commissioners Chang and Okuda. I was
 25 going to speak to many of those same points of which

1 I agree and also call into question the phraseology
2 by Dan -- by Dan Orodener and Mr. Derrickson when
3 it says, "all impacts."

4 Because of the staleness of some of these
5 EISs, they did not include all impacts like some of
6 the greenhouse gas and climate change effects that
7 needed to be addressed in an EIS that would be
8 initiated today.

9 I also find that we've got to be careful
10 of things like, for example, impacts of traffic.
11 You know, traffic patterns change pretty rapidly in
12 some of the island and some of the locations, and a
13 stale or old traffic study doesn't necessarily
14 address all the current impacts, so we do have --
15 and I hope you can clarify this.

16 We do -- we do -- we're the accepting
17 agency, and they bring forth EIS for us to accept it
18 as drafted. We can reject it for reasons including
19 that we want it to be updated or to address impacts
20 that were otherwise not included. Is that not
21 correct?

22 **MR. DERRICKSON:** Yeah, that's correct.

23 So that's a good segway unless
24 Commissioner Okuda wants to --

25 **COMMISSIONER OKUDA:** I don't know whether

1 anybody in the (inaudible) might be sick of hearing
2 us. But I don't believe the EIS process is met by
3 business, okay? I really don't. Because, you know,
4 I think you've seen the developers, petitioners,
5 even opponents who don't consult and talk with the
6 community, find that their projects are delayed or
7 torpedoed. I think the successful developers are
8 the ones who are brought out there and talked to the
9 community, engaged the community, so that process
10 goes into the environmental 343 procedures, so I --
11 I really think that this process shouldn't be --

12 **COMMISSIONER CHANG:** Uh-huh.

13 **COMMISSIONER OKUDA:** -- by business. In
14 fact, it can speed up a good project when you get
15 the community behind it. It think we saw that at
16 the Waikapu expansion, which, frankly, when I first
17 looked at that, I was going to vote against it
18 because I thought, what the hell, you know, you've
19 got to rezone and redesignate ag land, but the
20 developer had engaged with the community, and it was
21 the community that explained how this development
22 was in the interest of the people of Maui to change
23 my mind. I was like, yeah, yeah.

24 **(Simultaneous speaking.)**

25 **COMMISSIONER OKUDA:** All I want to say is

1 that --

2 **(Simultaneous speaking.)**

3 **CHAIR GIOVANNI:** One at a time. One at a
4 time, please. One at a time.

5 **COMMISSIONER OKUDA:** I think I had
6 concerns (inaudible), but all I want to, again, say
7 is that I don't think it's automatic because you
8 (inaudible) processes (inaudible). Thank you.

9 **CHAIR GIOVANNI:** Commissioner Ohigashi,
10 did you want to say anything?

11 **COMMISSIONER OHIGASHI:** No, nothing.

12 **CHAIR GIOVANNI:** This is the Chair. I
13 just want to acknowledge that I notice a person of
14 the -- a public person has raised their hand for
15 comment. We will be taking additional -- we will
16 make time for additional public comment in these
17 proceedings before they end, but we're not going to
18 do it right now in the middle of this presentation.
19 So we'll schedule that. It probably will occur at
20 some point when we resume tomorrow, so just want to
21 say we're not going to call on the -- for general
22 public testimony at this time.

23 So I'll return it to you, Mr. Derrickson.

24 **MR. DERRICKSON:** Thank you, Chair. A
25 couple more observations about the EA/EIS process.

1 One is that the LUC, we're not always the accepting
2 authority. We, at times, will get a petition for a
3 district boundary amendment where the EA or EIS has
4 been done prior, sometimes by a county. That's
5 normally what will happen if we get a 201(H) project
6 that's coming out of the county's housing agency or
7 even DHHFDC from the state housing, with a partner,
8 with a private partner.

9 But there are other cases like Department
10 of Education. If they're doing a school, they may
11 do their own EA/EIS and be the accepting authority,
12 or the Governor will be the accepting authority,
13 technically. We have a project that hasn't come to
14 us yet, but it's working its way up, and I believe
15 the Governor's office is the accepting authority,
16 but it's for a project out in Mililani Tech Park
17 area, so we're not always the accepting authority,
18 so sometimes we are dealing with whatever that
19 accepting authority has deemed sufficient.

20 The other thing is Chapter 343 is not
21 always triggered for a project. The district
22 boundary -- I said this in a meeting, a district
23 boundary amendment process isn't a trigger for the
24 Chapter 343 review. It's -- there are other
25 specific triggers that usually happen like if

1 there's state or county funding involved, there are
2 state or county lands involved.

3 And state and county lands can be in fault
4 if the project has to hook up to a state or county
5 roadway or sometimes the drainage infrastructure.
6 So -- or sewer or water, so there's a lot of
7 different things that might trigger Chapter 343, but
8 a DBA doesn't trigger it. Special permit doesn't
9 trigger it, so that's something to keep in mind.

10 And sometimes when we're dealing with
11 motions to amend conditions, you know, from an
12 existing old district boundary amendment, those
13 actions, those changes that they want to make can
14 trigger a Chapter 343, and sometimes we are an
15 accepting authority prior to that motion being able
16 to move through us.

17 Special permits also can trigger, and
18 those will be handled at the county level, and
19 that's an example of where the EA or EIS might be
20 accepted at the county level and will get that as
21 part of that record that comes up to us.

22 Okay. Motions to amend or modify the DBA.
23 Historically, I said we've done over 800 district
24 boundary amendments since the early days in the
25 sixties, so it's only natural that some of those

1 projects have changed circumstances. It could be
2 economic. It could be the ownership. It could be a
3 lot of different things. It could be requirements
4 from federal government, state with respect to
5 infrastructure, all kinds of different things, so
6 we're seeing these petitions to amend or modify
7 district boundary amendments. Pretty common now.

8 They kind of amount to a reapproval of the
9 project but with some changed circumstances. Most
10 of the time, these are modifications of conditions.
11 Sometimes it's to extend the time to perform because
12 a petitioner -- an initial district boundary
13 amendment said we'll do it, we'll do everything
14 within 10 years, and 10 years have come and gone,
15 and because of changes, they're not going to be able
16 to comply with that 10-year timeframe. They come in
17 and ask for a motion to extend the time.

18 There's also -- they come in to release
19 conditions because they're providing us with
20 evidence that, hey, we've met this condition. We've
21 done it already. We built the affordable housing.
22 We put in the road. We dedicated the school site.
23 So evidence-based, we can release conditions.

24 When they come in for a motion to amend,
25 it kind of opens up that project again, and the

1 commission can and has, aside from the things that
2 the petitioner might be asking us to change, the
3 commission itself has said, you know what? We think
4 in order for this to happen and for us to approve
5 you with these things, we need some new conditions
6 or we need changes to existing conditions that maybe
7 the petitioners not asking for.

8 What does it require when they bring in a
9 motion? They've got to show us good cause why. Why
10 should the commission overturn or change decisions
11 that have been made by a prior commission? So
12 they've got to show good cause.

13 Oftentimes, they're -- they're talking
14 about change the amount of conditions or new
15 ownership, a project that was conceived under the
16 old owner doesn't work out economically, or they
17 want to go in a different direction. So they're
18 coming in to ask for changes. A lot of times, it's
19 to change the time of performance.

20 Okay. I'm trying to -- I'm blanking.
21 Aside from good cause -- oh, the petitioner, when
22 they come in for a motion to change things, they've
23 got the preponderance of evidence. They've got to
24 prove to you guys that this is in the public's
25 benefit, not just in the private benefit for making

1 these changes. There's got to be some balance.

2 **MR. ORODENKER:** A couple things to add to
3 that is we've been treating motions to amend or
4 modify district boundary amendments as contested
5 case hearings, not -- I mean, technically, it's a
6 motion. But since basically what you're asked a lot
7 of times by the petitioner, unless it's just a
8 motion for extending -- an extension of time, if the
9 commission -- if the petitioner is making
10 substantive changes to the project proposal, you're
11 basically looking at almost a new DBA.

12 So they need to tell us exactly what
13 they're proposing to build and what they're going to
14 do, what the timeline is, what the impacts are, if
15 they haven't done a new EIS, why they haven't done a
16 new EIS and why they don't feel it's right. So
17 those -- those are pretty much treated as contested
18 case hearings.

19 Some motions to amend or petitions to
20 amend are simply to amend to extend time, and those
21 are usually just handled as a motion because they're
22 not asking us to change the project at that time.
23 They're just giving us -- I mean, up until recently,
24 a lot of the motions to amend to change the
25 timeframes were revolved around the recession, you

1 know. We couldn't get funding during that period,
2 and it slowed us down and blah, blah, blah.

3 You know, so we don't really go into
4 contested case hearing for those, but -- but motions
5 to amend can be just as lengthy as a district
6 boundary amendment process.

7 Are you done, Scott, with motions?

8 **MR. DERRICKSON:** I'm done with motions. I
9 was going to do order to show cause but --

10 **MR. ORODENKER:** I think this is a good
11 place to stop because I think we're going to have a
12 lot of discussion on orders to show cause, right? I
13 know we're about 15 minutes early. We can go until
14 3:30, but we can pick up motions for order to show
15 cause tomorrow. And I think that we'll have
16 sufficient time. I wouldn't want to shorten the
17 discussion on that because it gets complex.

18 Mr. Chair, if that's okay, we can --

19 **CHAIR GIOVANNI:** We can recess at this
20 point?

21 **MR. ORODENKER:** Yeah. Recess and pick up
22 the agenda tomorrow.

23 **CHAIR GIOVANNI:** And you'll have plenty of
24 time to conclude your presentations within the
25 allotted time tomorrow?

1 **MR. ORODENKER:** Well, as long as I don't
2 talk too much.

3 **COMMISSIONER CABRAL:** Was there anything
4 (inaudible) while we're here because I don't want to
5 -- I might have to miss some of it. (Inaudible.)
6 Administrative matters, those are really fast.
7 Those are really good. And I want to compliment
8 everybody that worked on this. This is really -- I
9 read it last night (inaudible) so anyway, but it's
10 really, really a good document.

11 **MR. ORODENKER:** I think we have plenty of
12 time to get through everything tomorrow. We'll get
13 there. Our goal is -- okay. Tomorrow we hope that
14 we will have completed the Land Use Commission
15 staff's presentation by 11 o'clock, and then we'll
16 hear from OPSD and then after lunch, we'll hear from
17 the sustainability coordinator.

18 **CHAIR GIOVANNI:** So in the event that we
19 have public -- wants to have public -- more public
20 testimony, would you recommend that we have that at
21 the conclusion of your presentation or after OP's
22 presentation?

23 **MR. ORODENKER:** I -- I believe that at the
24 end of our presentation would suffice.

25 **CHAIR GIOVANNI:** Okay. So let me advise

1 the general public that may want to provide this
2 commission further testimony, that at approximately
3 11 a.m. tomorrow, we'll open a window for that
4 purpose, and it will be subject to the presentations
5 that you've heard today on training that have been
6 made by staff to the commission.

7 With that, I want to thank all of you,
8 commissioners, LUC staff, and our Executive
9 Director, Mr. Orodener. This concludes day one of
10 the LUC commissioner training. The commission will
11 recess and resume tomorrow in the same meeting room.
12 So I have in my notes that you -- that's scheduled
13 at 9:15, not at 9 a.m. Is that correct?

14 **MR. ORODENER:** Yes, that is correct.

15 **CHAIR GIOVANNI:** Okay. So we will
16 reconvene, following the overnight recess, at 9:15
17 a.m. tomorrow morning. Thank you all. We are
18 adjourned for today.

19 **(Meeting recessed at 3:14 p.m.)**

1 CERTIFICATE

2
3 I, Jodi Dean, do hereby certify that the
4 proceeding named herein was professionally transcribed on
5 the date set forth in the certificate herein; that I
6 transcribed all testimony adduced and other oral
7 proceedings had in the foregoing matter; and that the
8 foregoing transcript pages constitute a full, true, and
9 correct record of such testimony adduced and oral
10 proceeding had and of the whole thereof.

11
12 IN WITNESS HEREOF, I have hereunto set my
13 hand this 11th day of August, 2022.

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19 Jodi Dean
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