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**STATE OF HAWAII
LAND USE COMMISSION**

Meeting held on November 16, 2023
Commencing at 10:00 a.m.

Held at
West Hawaii Civic Center
Community Meeting Room Hale, Building G
74-5044 Ane Keohokalole Highway
Kailua-Kona, Hawaii 96740

I. CALL TO ORDER

II. A81-525 Y-O LIMITED PARTNERSHIP (Hawaii)

To Consider Petitioner's Motion for Reconsideration of Decision and Order Denying Motion for Extension of Time to Apply for Redistricting of Phase II. Approximately 408.719 Acres of Land at Kaloko and Kohanaiki, North Kona, Hawaii, TMK Nos.: (3)7-3-09:19, 20 and 57 to 62.

III. ADJOURNMENT

BEFORE :

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PARTICIPANTS

LUC COMMISSIONERS:

- Dan Giovanni, Chairman
- Lee Ohigashi
- Brian Lee
- Gary Okuda
- George Atta
- Mel Kahele
- Michael Yamane
- Kuike Kamakea-Ohelo
- Nancy Carr Smith

LUC STAFF:

- Daniel Orodener, Executive Officer
- Scott Derrickson, Chief Planner
- Martina Segura, Planner
- Ariana Kwan, Chief Clerk
- Daniel Morris, Esquire, Deputy Attorney General (By

OPSD:

- Alison Kato, Esquire, Deputy Attorney General
- Katia Blassiano, Planning Program Administrator

PARTICIPANTS (CONTINUED)

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COUNTY OF HAWAII:

Michelle Ahn, Esquire, Deputy Corporation Counsel
Zendo Kern, Director, Hawaii Planning Department
Jeff Darrow, Deputy Director, Hawaii Planning

PETITIONERS:

William Yuen, Esquire

PETITIONERS WITNESS:

Mark Mayer

PUBLIC TESTIMONY (ROUND 1):

Clare Loprinzi
Kimberly Crawford
Lily Salinas
Loke Aloua
Chuck Flaherty
Kilihea Inaba
Keliyah Kimitete-Pias
Janice Palma Glennie
Maki Morinoue
Ashley Obrey
Cindy Freitas

PARTICIPANTS (CONTINUED)

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PUBLIC TESTIMONY (ROUND 2) :

Janice Palma Glennie

Chuck Flaherty

Kimberly Crawford

Loke Aloua

1 **CHAIRMAN GIOVANNI:** Aloha mai kakou and
2 good morning, everyone. Thank you for coming. This
3 is the November 16th, 2023 Land Use Commission
4 meeting. This is an in-person meeting, which is
5 being held at the West Hawaii Civic Center 74-5044
6 Ane Keohokalole -- help me, please. I'm so
7 apologetic -- Keohokalole Highway, Kailua- Kona,
8 open to the public. My apologies for mispronouncing
9 that word.

10 Court reporting transcripts are being done
11 from the Zoom recording. For all meeting
12 participants, I would like to stress the importance
13 of speaking slowly, clearly, and directly into your
14 microphone. Before speaking, please state your name
15 and identify yourself for the record.

16 Even though this is an in-person meeting,
17 please be aware that all meeting participants are
18 being recorded on the digital record of this Zoom
19 meeting, and this is for court reporting purposes.
20 Your continued participation is your implied consent
21 to be part of the public record of this event. If
22 you do not wish to be part of the public record, you
23 should exit the meeting now.

24 I will also share with participants that
25 we'll be taking breaks from time to time, typically

1 five to ten minutes every hour.

2 My name is Dan Giovanni, and I have -- I
3 currently serve as the LUC Chair, and we currently
4 have nine seated commissioners, including myself.
5 Commissioner Lee Ohigashi from Maui; Commissioner
6 Gary Okuda, Commissioner Kamakea-Ohelo; Commissioner
7 Mel Kahele; Commissioner George Atta; and
8 Commissioner Brian Lee are from Oahu. Commissioner
9 Michael Yamane is from Kauai, and Commissioner Nancy
10 Carr Smith is from the Big Island of Hawaii.

11 Also in attendance are LUC Chief Planner,
12 Scott Derrickson; LUC Staff Planner, Martina Segura;
13 LUC Chief Clerk, Ariana Kwan; and the LUC Executive
14 Officer, Daniel Orodener. Joining us by Zoom is
15 Dan Morris, the LUC Attorney General.

16 Our only order of business today is A81-
17 525 Y-0 Limited Hawaii motion for reconsideration.
18 This agenda item is to consider the petitioner's
19 motion for extension of time to apply for
20 redistricting of phase 2 of this project.

21 At this time, I'd like all the parties to
22 identify themselves for the record, starting with
23 the petitioner.

24 **(Inaudible.)**

25 **CHAIRMAN GIOVANNI:** Is it turned on?

1 There you go.

2 **MR. YUEN:** Sorry.

3 **CHAIRMAN GIOVANNI:** Thank you.

4 **MR. YUEN:** Good morning, Mr. Chair and
5 Commissioners. My name is William Yuen, appearing
6 on behalf of the petitioners. With me is Mark
7 Mayer.

8 **CHAIRMAN GIOVANNI:** Thank you.

9 From the Office of Planning, please?

10 **MS. KATO:** Good morning. Alison Kato,
11 Deputy Attorney General for the Office of Planning
12 and Sustainable Development. Also here with me is
13 Katia Balassiano from OPSD. Thank you.

14 **CHAIRMAN GIOVANNI:** Welcome.

15 And from County of Hawaii?

16 **MS. AHN:** Good morning, Chair Giovanni and
17 Commissioners. Michelle Ahn --

18 **CHAIRMAN GIOVANNI:** Can you bend that down
19 a little bit? I'm sorry. Thank you.

20 **MS. AHN:** Okay. Good morning. Can you
21 hear me?

22 **CHAIRMAN GIOVANNI:** Yes.

23 **MS. AHN:** All right. My name is Michelle
24 Ahn, Deputy Corporation Counsel, County of Hawaii,
25 representing the Planning Department. And with me

1 is Zendo Kern, Director of the Planning Department.

2 **CHAIRMAN GIOVANNI:** Excellent. Thank you.

3 So at this time, I'd like to briefly
4 explain the procedures for today's hearing. First,
5 I will ask if there are any disclosures from the
6 Commissioners, and then I will update the record
7 accordingly. Next, I will give the opportunity for
8 the petitioner to comment on the commission's policy
9 governing reimbursement of hearing expenses.

10 Third, I will then recognize written
11 public testimony that has been submitted in this
12 matter, identifying the person or organizations who
13 have submitted that testimony. Then I will call
14 upon those individuals in the audience desiring to
15 provide public testimony for this docket.

16 After completion of the public testimony,
17 the Commission will then consider exhibits and that
18 the parties wish to offer into evidence, starting
19 with the petitioner, followed by the County Planning
20 Department, and then the State Office of Planning
21 and Sustainable Development. Then the petitioner
22 will make its presentation and receive any questions
23 or comments directly from the Commissioners.

24 Next, the County's Planning Department
25 will make its presentation and accept questions and

1 comments from the commissioners. And thirdly, the
2 OPSP will then follow with its presentation and will
3 receive questions and comments from the
4 Commissioners.

5 Following those three presentations in
6 question, the petitioner will be given an
7 opportunity to provide any additional or rebuttal
8 testimony. Then, the public will be granted a
9 second opportunity to provide public testimony in
10 the same manner set forth previously. Finally,
11 after all parties have presented their arguments and
12 their presentations, the Commission will conduct
13 formal deliberations and issue a decision on the
14 motion.

15 Again, I will be taking short breaks from
16 time to time, five to ten minutes every hour, and,
17 as necessary, we will take a longer break for lunch
18 if we get that far.

19 Are there any questions on the procedures
20 for today as I summarized, starting with the
21 petitioner?

22 **MR. YUEN:** No questions.

23 **CHAIRMAN GIOVANNI:** Thank you.

24 County?

25 **MS. AHN:** No, thank you.

1 **CHAIRMAN GIOVANNI:** And State?

2 **MS. KATO:** No, thank you.

3 **CHAIRMAN GIOVANNI:** Thank you.

4 Disclosures. Do any of the Commissioners
5 have any disclosures to make relative to this
6 matter? Commissioner Carr Smith?

7 **COMMISSIONER CARR SMITH:** Good morning.

8 I'll just note that I worked with the Planning
9 Department for ten years, five years on the Board of
10 Appeals, and five years on the Work Planning
11 Commission. It no way affects my decision-making
12 process.

13 **CHAIRMAN GIOVANNI:** Thank you.

14 Any objections to Commissioner Carr Smith
15 to continue --

16 **MR. YUEN:** No objection.

17 **CHAIRMAN GIOVANNI:** Could you repeat that,
18 please?

19 **MR. YUEN:** No objection.

20 **CHAIRMAN GIOVANNI:** So by the petitioner.
21 Was that Bill Yuen?

22 **MR. YUEN:** Yes.

23 **CHAIRMAN GIOVANNI:** Thank you.

24 County?

25 **MS. AHN:** We have no objection.

1 **CHAIRMAN GIOVANNI:** State?

2 **MS. KATO:** No objection.

3 **CHAIRMAN GIOVANNI:** Thank you.

4 Anybody else need to make a disclosure?

5 Thank you.

6 Please be informed that the relevant
7 records and documents pertaining to this matter can
8 be accessed for review on the LUC website,
9 specifically under "pending dockets" tab.
10 Interested parties are welcome to review the
11 documents at their convenience. And this includes
12 the written testimony that has been received on this
13 matter.

14 I'd like now to address the reimbursement
15 policy with the petitioner.

16 Good morning, Mr. Yuen. Have you reviewed
17 HAR 15-15-45.1 regarding the reimbursement of
18 hearing expenses?

19 **MR. YUEN:** Yes, I have, Mr. Chairman.

20 **CHAIRMAN GIOVANNI:** Could you state your
21 position with respect to this policy?

22 **MR. YUEN:** We agree.

23 **CHAIRMAN GIOVANNI:** Thank you very much.

24 I will now recognize the written public
25 testimony submitted in this matter and also

1 identifying the person or organizations that have
2 submitted such testimony.

3 Ms. Kwan, has there been any written
4 testimony submitted in this matter?

5 **MS. SEGURA:** Segura filling in for Kwan.
6 We received six pieces of public testimony, one on
7 the 13th of November, from Councilmember Holeka
8 Inaba, and five on the 15th of November, one from
9 Antu Harvey, online form and via email. Also,
10 online and via email from Maki Morinoue; one from
11 Richard Bodien, Tanya Souza, and DLNR's Aha Moku.
12 And those have been posted to the website for public
13 review.

14 We also have one piece of public testimony
15 sitting in our email that was sent in last night at
16 7:03 that needs to be took, and we'll do that after
17 the hearing.

18 **CHAIRMAN GIOVANNI:** Do we know who that is
19 from?

20 **MS. SEGURA:** Loke Aloua.

21 **CHAIRMAN GIOVANNI:** Thank you very much.

22 So again, all of that testimony, if it has
23 been received, will be posted and you can access it
24 publicly.

25 Let's continue with the public testimony.

1 Have any members of the public signed up today to
2 testify on this agenda item?

3 **MS. SEGURA:** Yes. We have nine members of
4 the public in person who wish to provide in-person
5 testimony.

6 **CHAIRMAN GIOVANNI:** Okay. So let's -- we
7 will proceed in the order that they have been signed
8 up, and I'll ask that their names be called one at a
9 time. And when they do, I will swear you in and you
10 can proceed with your testimony. We'll be giving
11 two minutes for your testimony. So who is the first
12 person?

13 **MS. SEGURA:** First up I have Clare
14 Loprinzi.

15 **CHAIRMAN GIOVANNI:** Could I ask you to
16 state your name and address for the record, please?

17 **CLARE LOPRINZI:** The address too?

18 **CHAIRMAN GIOVANNI:** Pardon me?

19 **CLARE LOPRINZI:** The address you said?

20 **CHAIRMAN GIOVANNI:** Yes.

21 **CLARE LOPRINZI:** Are you going to ask me
22 out on a date?

23 **CHAIRMAN GIOVANNI:** No, I'm not going to
24 ask you on a date. I just want it for the record.

25 **CLARE LOPRINZI:** Okay. I'm just checking.

1 Okay. I'm just checking. Okay.

2 My name is Clare Loprinzi, P.O. Box 400,
3 Holualoa 96725.

4 **CHAIRMAN GIOVANNI:** Thank you. Will your
5 testimony today be the truth?

6 **CLARE LOPRINZI:** Always.

7 **CHAIRMAN GIOVANNI:** Very good. Please
8 proceed. You have two minutes.

9 **CLARE LOPRINZI:** Two?

10 **CHAIRMAN GIOVANNI:** Yeah.

11 **CLARE LOPRINZI:** Three? We always have
12 three.

13 **CHAIRMAN GIOVANNI:** No, we've been -- two
14 is what we have.

15 **CLARE LOPRINZI:** Three?

16 **CHAIRMAN GIOVANNI:** Okay. I'll give you
17 three minutes.

18 **CLARE LOPRINZI:** Thank you. That doesn't
19 go with the date. Okay.

20 **CHAIRMAN GIOVANNI:** Yeah. And we just
21 uses 10, 15 seconds. I will not count that against
22 you.

23 **CLARE LOPRINZI:** Okay. All right. I'm
24 Clare Loprinzi. I am an indigenous cultural
25 practitioner of over 50 years --

1 **CHAIRMAN GIOVANNI:** Please speak directly
2 into the microphone.

3 **CLARE LOPRINZI:** Oh, I'm sorry.

4 **CHAIRMAN GIOVANNI:** Yeah.

5 **CHAIRMAN GIOVANNI:** I'm Clare Loprinzi.
6 I'm an indigenous cultural practitioner of over 50
7 years, and this is my talk. First, the ka pa'akai
8 that was done on September 11th, 2000, the Hawaiian
9 Supreme Court landmark decision, Ka Pa'akai O
10 Ka'Aina versus Land Use Commission addresses the
11 preservation and practice and protection of
12 customary and traditional native practices,
13 specifically to Hawaiian communities.

14 You have the kuleana to protect cultural,
15 historical, and natural resources and customary
16 Native Hawaiian rights that will be impacted by this
17 project. I work with these ceremonies.

18 Sites surrounding and adjacent to this
19 area contain trails, burials, caves adjacent to
20 these properties -- proposed properties, lava tubes
21 specifically going mauka to makai, and we know
22 Kaloko Historical Park where restoration has been
23 established.

24 We also, as indigenous -- as indigenous,
25 know the importance of mauka to makai to the

1 relationship of the ahupua'a that's right next to
2 it. So it's a similar thing. It's going mauka to
3 makai from the caves and the burials, and I'm sure
4 you've all looked in -- I hope you have all looked
5 at the health effects of the desecrations of land
6 and native peoples.

7 The first law was -- came from the Moors,
8 which is my bloodline. It's the relationship
9 between the eo kanaka and aina. And so when you
10 desecrate land, you desecrate -- or sell land and
11 all of these things, we're -- we really should be
12 stewards of this land and hopefully gain places for
13 the people.

14 I also want to make sure that if you're a
15 realtor or if you're a broker and you're in this
16 committee here, if -- that's a conflict of interest.
17 I testify a lot in front of a lot of commissions,
18 and we've found where there is a conflict due to
19 your job, to which you do to how you act and what
20 your -- your -- what your kuleana is to do and to
21 recuse yourself. If you are -- I believe if you are
22 both a realtor and a broker, that that should be --
23 and you're on a Land Use Commission, I question that
24 myself. But -- not that I'm questioning anybody's
25 integrity or who they are.

1 I also look at this phase 1 and phase 2,
2 and I look at this thousand-dollar houses that are
3 going to come -- I mean, thousand houses that are
4 going to come up or would come up and look at what
5 do we really need to do for the native people here?
6 We need homes, you know? We -- we can't -- that --
7 if anything is developed, the homes should first go
8 to our native people. So that's all I have.

9 **CHAIRMAN GIOVANNI:** Thank you very much.
10 Please stay in case the parties have any questions
11 for you.

12 **CLARE LOPRINZI:** Okay.

13 **CHAIRMAN GIOVANNI:** So --

14 **MR. YUEN:** No questions.

15 **CHAIRMAN GIOVANNI:** State?

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

17 **CHAIRMAN GIOVANNI:** County?

18 **MS. AHN:** No questions.

19 **CHAIRMAN GIOVANNI:** Commissioners?

20 Commissioner Okuda?

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

23 Real quick question. If -- has anyone
24 approached you or anyone that you know in the
25 community about any cultural impact analysis or

1 study -- and you may or may not be a lawyer, but --
2 which would comply with the Ka pa'akai versus Land
3 Use Commission case? Anyone approach you?

4 **CLARE LOPRINZI:** Not approach. I studied
5 it. I'm very well aware of --

6 **COMMISSIONER OKUDA:** No. My question is
7 just limited. Did anyone ask for your input on any
8 type of study like that?

9 Or let me put it more in plain English.
10 Did anyone ever come up to you and ask you what are
11 the potential cultural resources on the subject
12 property or near the subject property?

13 **CLARE LOPRINZI:** Well, I've been in groups
14 of people where we've studied it.

15 **COMMISSIONER OKUDA:** Okay. Well, maybe
16 more specifically, anyone related to the petitioner
17 or working for the petitioner in this case ever
18 contact you about what type of cultural resources
19 are near or on the property?

20 **CLARE LOPRINZI:** The petitioner is not --

21 **COMMISSIONER OKUDA:** The petitioner is the
22 applicant, Mr. Yuen or his client.

23 **CLARE LOPRINZI:** Oh, no. No, they
24 haven't, but if they want to, they can.

25 **COMMISSIONER OKUDA:** Okay. And it's not

1 like you're a hard person to find if they really
2 wanted to ask you questions.

3 **CLARE LOPRINZI:** Oh, no.

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

6 **CHAIRMAN GIOVANNI:** Thank you.

7 Anything further? Thank you very much.
8 You're excused now. Thank you.

9 **CLARE LOPRINZI:** Thank you.

10 **CHAIRMAN GIOVANNI:** Who's the next?

11 **MS. SEGURA:** Up next we have Kimberly
12 Crawford.

13 **CHAIRMAN GIOVANNI:** Ms. Crawford, will you
14 please come in. State your name and address, and
15 then I'll ask you to swear in.

16 **KIMBERLY CRAWFORD:** Good morning,
17 Commission and Chair. My name is Kimberly Crawford,
18 and my address is 73- 1167 Loloa Drive, Kailua Kona,
19 Hawaii.

20 **CHAIRMAN GIOVANNI:** And do you swear the
21 testimony you're about to give will be the truth?

22 **KIMBERLY CRAWFORD:** Yes.

23 **CHAIRMAN GIOVANNI:** Please proceed.

24 **KIMBERLY CRAWFORD:** So good morning, and
25 thank you for your last decision to deny the

1 extension for the redistricting of this project.

2 I am a kia'i loko at Kaloko Fishpond, and
3 I am a mom. I have three girls, and I just had a
4 boy four weeks ago, so --

5 **CHAIRMAN GIOVANNI:** Congratulations.

6 **KIMBERLY CRAWFORD:** -- we're excited on
7 that one.

8 But I wanted to testify today on behalf of
9 Kaloko and the ag lands that are above it. When we
10 look at these projects as TMKs and we segment them
11 by acreage, we aren't looking at the full effects
12 that we have on the whole entire ahupua'a system,
13 which Hawaii is designed around or was designed to
14 fit Hawaii to feed the people.

15 So when we are looking with a microscope
16 onto just these small TMKs and saying that these
17 caves, these shrines don't really have any
18 significance, we're taking away from the
19 practitioners who are mauka or makai, and I know in
20 Mr. Yuen's submittal they said that there is no
21 cultural practices that are happening, but I would
22 like to testify against that to say that we are
23 cultural practitioners at Kaloko Loko i'a, Kaloko
24 Fishpond, and the trails that run through these
25 areas, through this property are vital to our -- our

1 history, the story, and to our next generation.

2 Maybe there's gaps in the practitioner or
3 the cultural practice, but there's definitely a
4 revival happening, and I'm proud to say that
5 although I didn't get to love the loko i'a until I
6 was 22 years old, my kids have been raised from the
7 womb down there, and their cultural practice started
8 from within my body. And so when we take those
9 away, we're taking away the knowledge that they can
10 hold in the future and their power to make that
11 decision themselves, whether they want to include
12 themselves in the cultural practice.

13 If you can imagine how important those
14 watering caves are for the agricultural system that
15 was there, if you can imagine in the morning when
16 you make your coffee you turn on your faucet and
17 your water is there, but they actually had to go
18 into these caves. They had to make the calabashes
19 to collect the water, and that significance and that
20 love that they put into it is vital for the next
21 generation to know that they have that opportunity,
22 especially as water is becoming more scarce.

23 The Department of Water Supply continues
24 to issue extended drought notices for Kona and that
25 we have to be mindful of our water use. So when we

1 continue to demolish lands that are feeding the
2 aquifer, especially in the lower level basal lands
3 which makes it to the ocean a little bit quicker
4 than those high-level aquifers do and feeds our
5 ocean and feeds the rich fisheries that Kona is
6 known for, then we're jeopardizing the next
7 generation's opportunity to fish and to practice.

8 I also want to say that these ag lands
9 aren't -- sorry. They aren't marginal or
10 nonessential. They are essential, especially in the
11 northern part of the Kona field system, where we are
12 in the kekahas, the Kekaha, Waikoloa Kona area, the
13 waterless shores of Kekaha, they're super important
14 for recharging and replenishing all of this Kona
15 area, so I ask you to stick with your decision to
16 deny the extension for the rezoning of this lands
17 today.

18 **CHAIRMAN GIOVANNI:** Thank you very much.
19 Please remain for questions.

20 Petitioner, do you have any questions?

21 **MR. YUEN:** No questions.

22 **CHAIRMAN GIOVANNI:** County, do you have
23 any questions?

24 **MS. AHN:** No questions.

25 **CHAIRMAN GIOVANNI:** State, do you have any

1 questions?

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

3 **CHAIRMAN GIOVANNI:** Commissioners, any

4 questions?

5 Thank you very much for taking the time to
6 testify.

7 **KIMBERLY CRAWFORD:** Is it okay if I sit
8 here? My daughter's going to testify next.

9 **CHAIRMAN GIOVANNI:** Sure.

10 **KIMBERLY CRAWFORD:** She might need a
11 little bit of moral support.

12 **CHAIRMAN GIOVANNI:** Who's next? Martina,
13 who's next on the list?

14 **MS. SEGURA:** Lily Salinas.

15 **CHAIRMAN GIOVANNI:** Young lady, please
16 state your name and address where you live, and then
17 I'll swear you in.

18 **LILY SALINAS:** My name is Lily Salinas.
19 My address is 73-1167 Loloa Drive.

20 **CHAIRMAN GIOVANNI:** So do you swear that
21 the testimony you're going to give will be the
22 truth?

23 **LILY SALINAS:** Yes.

24 **CHAIRMAN GIOVANNI:** Okay. Please proceed.

25 **LILY SALINAS:** Aloha, Chair and

1 Commission. My name is Lily Salinas. I am ten
2 years old. I'm a kiai'i loko at Kaloko loko i'a,
3 and I ask you to stand by your decision to deny the
4 extension for redistricting to protect my cultural
5 practice, and I -- I appreciate your decision.
6 Mahalo.

7 **CHAIRMAN GIOVANNI:** Thank you so much.

8 **LILY SALINAS:** Mm-hmm.

9 **CHAIRMAN GIOVANNI:** Petitioner, any
10 questions for this witness?

11 **MR. YUEN:** No questions.

12 **CHAIRMAN GIOVANNI:** County?

13 **MS. AHN:** No, thank you.

14 **CHAIRMAN GIOVANNI:** State?

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

16 **CHAIRMAN GIOVANNI:** Commissioners?
17 Commissioner Ohelo?

18 **COMMISSIONER KAMAKEA-OHELO:** Mahalo,
19 Chair.

20 Hele o mahalo I'm a kia 'i loko at Ka Loko
21 loko i'a.

22 **LILY SALINAS:** Hmm?

23 **COMMISSIONER KAMAKEA-OHELO:** This is a
24 voice of mahalo, very grateful for you being here
25 today and giving testimony. Yeah. And in your

1 words, I just have one ninau, one question. Yeah.
2 In your mana'o, in your ike, yeah, how could or how
3 would this development impact, you know, your
4 cultural practice and what you do as a kia'i loko ma
5 ka loko?

6 **LILY SALINAS:** It would -- when you take
7 the water from -- like, when you take the water from
8 down, all the springs would not be able to flow down
9 to Kaloko.

10 **COMMISSIONER KAMAKEA-OHELO:** And in your
11 ike and in your mana'o, yeah, how would that impact
12 the restoration work or the work that you folks are
13 doing ma ka loko?

14 **LILY SALINAS:** It will hurt the fish. It
15 won't be able -- the fish won't be able to survive
16 without the fresh water.

17 **COMMISSIONER KAMAKEA-OHELO:** Mahalo. I
18 have one follow-up question. In your ten years, in
19 your lifelong, yeah, practice at Kaloko and the
20 restoration work that your makua and makua hanai
21 have been a part of, in your ike mana'o, in your
22 words, yeah, can you please explain to us how your
23 folks' work as cultural practitioners impacted the
24 geographical area that you guys are kia'i of,
25 meaning Kaloko and the surrounding areas?

1 **LILY SALINAS:** So --

2 **COMMISSIONER KAMAKEA-OHELO:** I can ask it
3 more plainly, yeah?

4 **LILY SALINAS:** We --

5 **COMMISSIONER KAMAKEA-OHELO:** Go ahead.

6 **LILY SALINAS:** We clean out the springs
7 and we help the water flow down, so then the fish
8 can survive in the impact of water. We take out,
9 like, the pickleweed and the mud from the springs.

10 **COMMISSIONER KAMAKEA-OHELO:** Mahalo. And
11 that kind of work, as one just -- one last question.
12 What kind of kilo observations have you made from
13 that kind of restoration work and the importance of
14 clearing the space of potential invasives so the
15 natural habitat can be restored, yeah, but more so
16 the importance of clearing the space for the flow of
17 Wai. What kind of observations have you made?

18 **LILY SALINAS:** The fish seem happier in
19 that area. The animals seem happier. The
20 environment seems better looking than it was before.

21 **COMMISSIONER KAMAKEA-OHELO:** Mahalo.
22 Mahalo again for your leo and for your testimony
23 this morning.

24 Chair, that is all the questions I have at
25 this time.

1 **CHAIRMAN GIOVANNI:** Thank you,
2 Commissioner Kamakea-Ohelo.

3 Other Commissioners, any questions?
4 Commissioner Okuda?

5 **COMMISSIONER OKUDA:** Just for completeness
6 of record because that was the line of questions I
7 was going to ask, but just so that we're clear who
8 you are, because I think your testimony is very
9 important and significant, can you spell out your
10 name, please, so there's no confusion who was
11 talking?

12 **LILY SALINAS:**
13 So how you spell my name is L-i-l- y. Last name S-
14 a-l-i-n-a-s.

15 **COMMISSIONER OKUDA:** Thank you very much
16 and thank you for taking time to testify today.

17 **LILY SALINAS:** You're welcome.

18 **CHAIRMAN GIOVANNI:** Ms. Salinas, thank you
19 very much for coming forward and taking time with us
20 today, and you are excused. Thank you.

21 **LILY SALINAS:** Thank you.

22 **CHAIRMAN GIOVANNI:** Who's next?

23 **MS. SEGURA:** Up next we have Loke Aloua.

24 **CHAIRMAN GIOVANNI:** Loke Aloua. Please
25 state your name and address and then I'll swear you

1 in.

2 **LOKE ALOUA:** Aloha. I'm Loke Aloua, and
3 my address is P.O. Box 584 Kailua Kona, Hawaii
4 96740.

5 **CHAIRMAN GIOVANNI:** Do you swear your
6 testimony today will be the truth?

7 **LOKE ALOUA:** Yes.

8 **CHAIRMAN GIOVANNI:** Please proceed.

9 **LOKE ALOUA:** Okay. Aloha, Commissioners.
10 Thanks for being here again. I oppose the request
11 from the petitioner and ask you to stand by your
12 decision which you made just a few months ago.

13 I'm a kia'i loko, as well. I'm a fishpond
14 guardian of Ka Loko Fishpond. My family has been in
15 Kona for more than ten generations. My family is
16 the Hoomanawanui and the h oapili. My grandfather,
17 my great, great, great grandfather before was a
18 judge, actually, of North Kona. One of my great
19 grandaunts was actually a kumu at one of the
20 earliest schools in Kona, so we have a long
21 genealogy to these lands.

22 We're actually descendants of our Mo'o,
23 which is our fishpond guardian, who is also taking
24 care of our loko i'a. We're directly downslope from
25 this development, and none of our members have been

1 talked to, and our community hasn't been spoken to,
2 to identify how this project could impact our
3 cultural practices of this place.

4 And just to touch on what other folks have
5 said, you know, we had school groups, have a lot of
6 school groups come down, and we talk about ahupua'a
7 and we tell them we have to think about what happens
8 in our mountains and how that impacts us downslope,
9 and this project hasn't done that. It hasn't
10 identified how it's going to impact us because we're
11 talking about the flow of water into the loko i'a
12 and how that's changing and how it's impacting our
13 i'a which our kinolau are a manifestation of kane.
14 These i'a are also a manifestation of our mo'o akua
15 to take care of this place. We haven't talked about
16 those things.

17 We haven't talked about the quality of the
18 water and the potential impacts to our fisheries
19 because our fisheries are connected. That impacts
20 us. The County of Hawaii just recently had a
21 lawsuit filed by our justice regarding the sewage
22 waste. This project and the MOA says that the
23 County will process up to ten million gallons of
24 sewage. What are the impacts to our fisheries and
25 our fish?

1 Our fish in Kona are becoming sick.
2 They're developing sores on top of them, which means
3 they become weak and they start to die. The people
4 will become sick if our oceans are sick. If our
5 waters are sick, the people will become sick.

6 And so I'm just really asking if you folks
7 can please stand by that decision so we can have the
8 full quality of information that we need because
9 Kona is irreplaceable. And once we start to take
10 away from this place and damage this place, we don't
11 get to have that back, and that's really 'eha.
12 That's big because Kona's changed plenty.

13 And the old folks long before I was even
14 born, they fought for this place and they said to
15 keep Kona Kona. And so that's partly why we're here
16 today is to keep Kona Kona and to just holomua, you
17 know, in their manao, in their ike what they told
18 us. So it's nothing new I'm telling you. I'm just
19 telling you again 60 years later what they had asked
20 for, so thank you folks for being here. Thank you
21 for letting me speak today. Thank you for making
22 time for us.

23 **CHAIRMAN GIOVANNI:** Thank you so much.

24 Please remain while we ask questions.

25 Petitioner, any questions for this

1 witness?

2 **MR. YUEN:** What is your cultural practice
3 that is affected?

4 **LOKE ALOUA:** The cultural practice is it's
5 kia'i loko, so fishpond guardian. We are directly
6 downslope from you folks, directly downslope. We
7 are not only in the same ahupua'a that you folks are
8 proposing to develop, we're in the neighboring
9 ahupua'a. That neighboring ahupua'a is also in the
10 Kekaha region, but the Kekaha region extends farther
11 north of us We are about at the southern boundary.

12 All of these traditional boundaries of
13 Kona, the Kona Kai'Opua, the Kekaha Waiole, the Kona
14 Kapali Lua, all of these regions are all revolving
15 around water, and they're tied to the fisheries. So
16 whether you look at Ka Loko Pond, whether you're
17 looking at Kanlaki, our neighbor, whether you're
18 looking at Honokohauleman, right next door, all
19 these places, none of these places been talked to.

20 The Aha Moku Council, who the state -- the
21 state elects those guys to help us, the Aha Moku
22 Council have submitted testimony in opposition to
23 the project because the ka pa'akai analysis had not
24 been completed. That's not me. That's the state.
25 That's Uncle Charles. That's Lemana.

1 **CHAIRMAN GIOVANNI:** Thank you.

2 Further --

3 **MR. YUEN:** No further questions.

4 **CHAIRMAN GIOVANNI:** Thank you.

5 County, any questions?

6 **MS. AHN:** No questions.

7 **CHAIRMAN GIOVANNI:** Thank you.

8 State, any questions?

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

10 **CHAIRMAN GIOVANNI:** Commissioners, any
11 questions?

12 Commissioner Kamakea-Ohelo?

13 **COMMISSIONER KAMAKEA-OHELO:** A ke aloha
14 nui Ka'aina 'ia 'oe.

15 **LOKE ALOUA:** Aloha.

16 **COMMISSIONER KAMAKEA-OHELO:** I have one --
17 well, my first question to follow up is -- has to do
18 with the petitioner's question, yeah, of what
19 specific cultural practice.

20 In your ike or mana'o and your olelo, can
21 you please explain to us the significance of a kia'i
22 loko, first, in traditional times, and then today,
23 in modern times?

24 **LOKE ALOUA:** I can tell you what I tell
25 the kids. If any of you have been out into the

1 oceans you put goggles on and you think about the
2 most beautiful, the most lush oceans, the rich
3 fisheries, yeah, and you think of that sea that you
4 went into and you multiply that ocean by 400. Now,
5 you multiply that ocean by 800. Now, you multiply
6 the ocean by 1,200, yeah? The mass and the quantity
7 of fish that once filled our seas that fed our
8 people that keep us healthy, a lot of that is due to
9 loko i'a because fishponds are nursery grounds.

10 They're spawning grounds which are crucial
11 for the next generation of fish. And key to this
12 habitat is the fresh water that's flowing down and
13 accumulating and creating the phytoplankton and the
14 piece of our food chain. Everything can collapse if
15 these systems not stay. These systems were taken
16 care of by kia'i loko, and those are fishpond
17 guardians.

18 A lot of people, when you think about
19 ponds, they think about what we can take, yeah.
20 What we can consume is only part of it. A big part
21 of my responsibility is to stock the seas. I am
22 responsible to the seas of Kona. My job is to make
23 sure that we have a healthy stock of fish, and those
24 fish, I've got to get them there, and they need that
25 fresh water. If they no more that water, they not

1 go make um.

2 They have to be able to come to the ponds
3 to mature so they run through the pelagics, and
4 they're going to restock the fisheries, yeah, and
5 this is all one dance in time because the way the
6 earth move and the nature cycles. Right now, our
7 fish are getting ready to spawn. They getting ready
8 for that.

9 So my kuleana, which is a kuleana from
10 before, is malama the awai, keep the channels open
11 because the fish got to run. They got to make it.
12 But not all fish leave. Sometimes the fish will
13 stay in the ponds and they will spawn in the ponds.
14 But I have to make sure they can make that run.
15 They have to make it out there. But I have to
16 malama the loko i'a, and I have to be there because
17 they're going to come back in spring.

18 And why do they come back in spring?
19 Because the water's going to start to pump from the
20 ukas, and that's going to be pushing out from our
21 loko i'a and the oceans, the loud ocean of the ikua
22 of ka Makahiki, yeah, the ocean -- the ocean goes to
23 recede. And what that going to do is now the fish
24 going to smell the sweet water, and we call that
25 water onaona. Onaona means alluring. That's kind

1 of alluring stuff that you no can resist, yeah? And
2 they going to come and they going to run, and
3 they're going to run in.

4 And they've been doing this for hundreds
5 to thousands of generations. That's how long
6 they've been doing it. The folks who came before,
7 that was their job, you know. Maybe they leased it
8 eventually for help make ends meet, you know, pay
9 the bills, keep the pond moving, but it has always
10 been a responsibility to the fisheries.

11 If the ponds are not there, we will start
12 to lose the fisheries of Kona. Yeah, so it's like -
13 - it's not only even about me, I no even have
14 pelagic fishing. I no more boat. I no more wa'a,
15 but I got to make sure those fish can eat, can get
16 there, and that's my kuleana. I do all I can, but
17 by the kai, we have plenty kids that come. They do
18 all they can.

19 And when you're a part of a community, we
20 teach them it's not just about you. You have a
21 responsibility because you make up the character of
22 what Kona is. Yeah? And so when you come, you
23 listen to your community, you listen to your hui.
24 If they ask for kokua, eh kokua, you go kokua. You
25 go help. If they say, hey to e ninau, and you know

1 I get one question. Answer my question. You can
2 answer the question. You not say, hey, you know
3 what, I don't listen to you because you know I fine.
4 That's also a job as a kia'i loko is I got to listen
5 to my neighbors, listen to my community because what
6 I do going to impact them too.

7 **CHAIRMAN GIOVANNI:** Thank you.

8 **COMMISSIONER KAMAKEA-OHELO:** Mahalo. I
9 have a response in comment and then my last
10 question. So you mentioned the fish running, the
11 i'a holo ma Oahu anei on Oahu, you know, we have
12 history. We have records. A hundred years ago was
13 the last time the Anae holo or the mullet run
14 happened on Oahu, and a lot of the research that
15 I've been involved in, you know, over development
16 and the infill of these loko I'a, yeah, contributed
17 to the fall or the detriment of the Anae holo which
18 is totally nonexistent today.

19 We can see it in Florida, yeah. Millions
20 upon millions of Anae or mullet are running the
21 coastline that used to be very much prevalent on
22 every island. Every island has their own mo'olelo,
23 so my last question for you today, you know and
24 through testimony from other kia'i loko, you know,
25 loko i'a or fishponds, traditional Hawaiian

1 fishponds are often viewed as a looking glass or
2 report card for the health of the entire ahupua'a.

3 Let me ask you this two-part question.
4 What is that report card today? And then, given the
5 scope of the proposed project, in your words, in
6 your mana'o, in your belief, how will that impact,
7 whether positive or negative, yeah, the future
8 report cards?

9 **LOKE ALOUA:** Right now, we are at the
10 tipping point. We are at the tipping point, yeah,
11 because partly it's not just about pulling the
12 weeds, it's about monitoring the ecosystem. And we
13 monitor the ecosystem. We have to. We have to learn
14 these technologies to monitor it. And we are at the
15 cost of not having a Kaloko fishpond. Yeah.

16 Because partly, what this pond is for is
17 for those brackish water fish that rely on the fresh
18 water, and we need that water to stay -- and we not
19 only need it to stay, we need it to be clean water.
20 And even though we've done work that has helped this
21 place, the one thing we cannot do is influence
22 what's above directly except for through these
23 actions through coming here. But it's been - - it's
24 also been a hard year; I'm not going to lie. It's
25 changing things. Climate change is changing things

1 in Kona.

2 We've had more fish kill conditions this
3 year than the past ten years. The waters are so
4 hot, the fish are becoming sick. And partly it's
5 because we don't have enough fresh water. Summer
6 months are our hardest month at the pond because
7 freshwater floats on salt water. The fresh water is
8 becoming so thin on that top lens, our fish have to
9 go to that top layer to stay cool. And you know,
10 when they go to that top layer, they're getting
11 sunburned, becoming sick, and we cannot do nothing
12 for them but maybe try and make some shade (audio
13 disruption).

14 So the report card is we just kokua. We
15 at a point of saving it or not saving it. That's
16 really the power we have and just asking for your
17 help to save it. And the impact of this development
18 (audio disruption) in the same ahupua'a, in the same
19 traditional boundaries of the kaha lands. I mean,
20 that's a lot. That's 1,100 to 1,200 homes, up to
21 ten million gallons of sewage.

22 I don't see how that could -- the benefits
23 are going to outweigh what the possible consequences
24 will be if we don't even know that.

25 **CHAIRMAN GIOVANNI:** Thank you.

1 Any other questions?

2 **COMMISSIONER KAMAKEA-OHELO:** That is all,
3 Chair. Mahalo.

4 **CHAIRMAN GIOVANNI:** Mahalo. Thank you
5 very much.

6 I just want to clarify that today is not -
7 - this hearing is not whether or not the project
8 itself will go forward or not. It's about
9 reconsideration of a prior decision regarding a time
10 extension. So whether the project goes forward or
11 not is a bigger issue, and that will be addressed in
12 the future, not today. So just hopefully, everybody
13 understands that. But your comments and your
14 testimony coming from you and your mind and your
15 heart is very welcome in any respect.

16 Who's next?

17 **MS. SEGURA:** I'm going to switch the
18 battery for that. I'm going to try that.

19 **CHAIRMAN GIOVANNI:** Do you want to take a
20 two- minute break?

21 **MS. SEGURA:** Yeah.

22 **CHAIRMAN GIOVANNI:** Okay. We're going to
23 take -- it's 10:41, and we'll take a three- to five-
24 minute break so we can change some batteries.

25 **(Recess taken from 10:41 to 10:47 a.m.)**

1 **CHAIRMAN GIOVANNI:** Ariana, are we good?

2 **MS. KWAN:** I think so.

3 **CHAIRMAN GIOVANNI:** Are we recording?

4 **MS. KWAN:** Yes.

5 **CHAIRMAN GIOVANNI:** So we've had four of
6 the public witnesses. We're now calling number
7 five. Who is that?

8 **MS. KWAN:** Chuck Flaherty. I might have
9 said that wrong.

10 **CHAIRMAN GIOVANNI:** Mr. Flaherty, will you
11 please -- yeah.

12 All parties back, please. We'll commence.
13 So County is back. Everybody's in attendance. All
14 my Commissioners are here, so, sir, will you please
15 state your name and your address?

16 **CHUCK FLAHERTY:** My name is Chuck
17 Flaherty, 81- 950 Makahiki Lane, Captain Cook, 967 -
18 -

19 **CHAIRMAN GIOVANNI:** Do you swear --

20 **CHUCK FLAHERTY:** -- 04.

21 **CHAIRMAN GIOVANNI:** Very good.

22 **CHUCK FLAHERTY:** Sorry about that.

23 **CHAIRMAN GIOVANNI:** Will the testimony
24 you're about to give be the truth?

25 **CHUCK FLAHERTY:** To the best of my

1 knowledge.

2 **CHAIRMAN GIOVANNI:** Please proceed.

3 **CHUCK FLAHERTY:** Thank you, Mr. Chair and
4 Members of the Commission. I apologize, I just
5 found out about the hearing a couple of days ago,
6 but I did prepare some testimony.

7 The Kaloko Heights request for extension
8 should be denied as previously. Over time,
9 circumstances change, and the changes that have
10 occurred since 1983 have been significant in
11 relation to phase 2 of this proposed project.

12 First point I'd like to make is the Hawaii
13 Housing and Finance Development Corporation erred in
14 approving the finding of no significant impact on
15 January - - excuse me -- July 10th, 2019, for the
16 Kaloko Heights affordable housing project. The
17 final environmental assessment failed to consider
18 the impacts of additional flows to the Kealakehe
19 Wastewater Treatment Plant on coastal water quality.

20 As was mentioned by a previous testifier,
21 a federal lawsuit has been filed against the County
22 of Hawaii by a group of Native Hawaiian cultural
23 practitioners and ocean recreational users
24 represented by Earthjustice. The lawsuit alleges
25 that the Kealakehe Wastewater Treatment Plant is

1 violating the Clean Water Act by dumping wastewater
2 that flows into impaired navigable waters of the
3 United States.

4 Secondly, the Environmental Protection
5 Agency has been in contact with the County for a
6 number of years regarding the situation at Kealakehe
7 Wastewater Treatment Plant; therefore, the Kaloko
8 Heights community facilities on a district report by
9 the County Department of Environmental Management to
10 the County Council erred by ignoring the alleged
11 Clean Water Act violations at the Kealakehe
12 Wastewater Treatment Plant. The proposed project
13 does impact the SMA because its wastewater flows are
14 dumped into an open sump which then traverse the SMA
15 into near- shore environmental waters mauka the
16 project area.

17 In addition, the County may have violated
18 the affirmative duty to protect natural marine
19 waters as determined by the State Supreme Court in
20 Kelly versus 1250 Oceanside Partners.

21 Thirdly, I work closely with recognized
22 sculptural experts, the late kahuna Cynthia Nazara
23 and Ruby McDonald, as well as other kanaka maoli,
24 who's ohana from this land. Their opinion was that
25 the Kaloko Heights project failed to identify

1 numerous burial sites and other significant historic
2 and cultural sites, especially near the alignment of
3 the trail that traverses the property.

4 As such, I believe the Land Use
5 Commission's concerns about the adequacy of past
6 archeological mentoring surveys are valid. In
7 addition, a cultural impact assessment is warranted,
8 especially since the State constitution was ratified
9 in 1978 prior to the Land Use Commission's 1983
10 decision and order, and I believe the Land Use
11 Commission is correct. It would now apply the
12 subsequent State Supreme Court ruling in the Ka
13 pa'akai court case, which provided further guidance
14 for government agencies to properly adhere to the
15 constitution.

16 And I just also wanted to point out that
17 the Kona field system that -- in which this property
18 is located is eligible for the National Register of
19 Historic Places, and that if development in Kona
20 were to more thoroughly incorporate and restore that
21 ancient engineering edifice, a lot of the erosion
22 issues and control issues which they had previously
23 identified over hundreds of years would be
24 mitigated. Thank you very much.

25 **CHAIRMAN GIOVANNI:** Thank you very much.

1 Petitioner, do you have questions for this
2 witness?

3 **MR. YUEN:** No questions.

4 **CHAIRMAN GIOVANNI:** County, do you have
5 questions for this witness?

6 **MS. AHN:** No questions.

7 **CHAIRMAN GIOVANNI:** State, do you have --

8 **MS. KATO:** No questions, thank you.

9 **CHAIRMAN GIOVANNI:** Thank you.
10 Commissioners? Commissioner Carr Smith?

11 **COMMISSIONER CARR SMITH:** Thank you for
12 your testimony. Could you speak more to the field
13 system that you speak of that this property is a
14 part of? What does that look like?

15 **CHUCK FLAHERTY:** Yes. Kona field system
16 was developed over several hundred years. It's
17 about 25 miles long, three miles mauka-makai, and
18 basically was -- you had forest in the mauka areas
19 which actually helped it generate rain. You had
20 flowing streams when there was too much rain. There
21 were channels and tiers that were able to mitigate
22 the excess water and direct it as appropriate.

23 In addition, the tiering helped to hold
24 the soil on the land. The West Hawaii Island is the
25 leeward and dry side, and so the soils here are a

1 very immature geological environment, and so the
2 soils here are very thin. And so they tend to run
3 off very easily if they're not withheld by
4 vegetation or some sort of engineering structure.

5 And so basically, over time, the native
6 people, the kanaka maoli constructed this onto a
7 system in capturing water, preserving the soil, and
8 the fertility, as well as cleaning the water and the
9 freshwater outflows that were going out into the
10 near-shore environment, which was pointed out
11 earlier, are essential to the health of the coral
12 reefs and the coral reefs themselves are very
13 important to the deep sea creatures who come up.

14 For instance, sea turtles, they come and
15 are cleaned in areas where coral reefs are not
16 healthy. You'll see the sea turtles covered with
17 barnacles and whatnot because they don't have the
18 sort of cleaning stations that a healthy coral reef
19 will provide.

20 So you have the forest of mauka helping to
21 generate water. You have the engineering system
22 that was created to help keep that water for
23 agriculture, as well as maintaining the fertility of
24 the soil and protecting the near-shore environment
25 from runoff soil while at the same time helping the

1 water to be clean.

2 **COMMISSIONER CARR SMITH:** And do you feel
3 that this petitioner or this land that we're
4 speaking of is different today because of climate
5 change or because of development?

6 **CHUCK FLAHERTY:** I think that this land
7 today in this particular property and in general,
8 what we're seeing is the fact that after first
9 contact, in order to generate revenue, the forests
10 were cut down and sold. And so areas which we now
11 see as being barren and covered with invasive
12 species of grass at one time or forests, and those
13 forests, again, help to generate rain to keep water,
14 assisted with keeping streams, I guess, as well, so
15 there's been a degradation of the environment
16 because of the values, the cultural values and
17 practices that kanaka maoli had learned as far as
18 trying to maintain the fertility of this area.

19 What you're seeing is a result of a lack
20 of having those in place. And I think a way for us
21 to move forward with development is to try to
22 somehow reincorporate that in future developments
23 regardless of whether they're market rate or
24 affordable housing or whatnot, and I think it's
25 essential given climate change.

1 **COMMISSIONER CARR SMITH:** Thank you.

2 **CHUCK FLAHERTY:** Mm-hmm.

3 **CHAIRMAN GIOVANNI:** Commissioners,

4 anything further?

5 Commissioner Okuda?

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

7 Mr. Flaherty, can you please briefly tell

8 us your education or experience which forms the

9 basis of your testimony that you just gave?

10 **CHUCK FLAHERTY:** Well, I was a CPA, but

11 that doesn't qualify me. I came here to study

12 Hawaiian culture practices, specifically healing

13 arts, lomi lomi, la'au lapa'au, the herbs,

14 ho'oponopono, which is a mental/spiritual cleansing.

15 I became -- as I learned more about

16 Hawaiian culture, I began to -- and I spoke with

17 kupuna and those who are knowledgeable, began to

18 understand the degree to which the culture and the

19 environment are not separable. You can't separate

20 the two. That one requires the other.

21 **COMMISSIONER OKUDA:** Yes. Let me just

22 summarize. So in other words, it's basically self-

23 study that forms the basis of your testimony, is

24 that correct?

25 **CHUCK FLAHERTY:** By being a haumana of

1 numerous kupuna.

2 **COMMISSIONER OKUDA:** Okay. Thank you very
3 much.

4 No further questions, Mr. Chair.

5 **CHAIRMAN GIOVANNI:** Thank you.

6 Nothing further. Thank you for your
7 testimony.

8 Ms. Kwan, who is next?

9 **MS. KWAN:** Next we have Kilihea Inaba.

10 **CHAIRMAN GIOVANNI:** Ms. Inaba, will you
11 come forward. State your name and address, and then
12 I'll swear you in.

13 **KILIHEA INABA:** Aloha, Chair. Aloha,
14 Commissioners. My name is Kilihea
15 Mekeonaonaokeahiahi Doreen Inaba. My address is 73-
16 4690 Kohanaiki Road, Kailua in Hawaii 96740.

17 **CHAIRMAN GIOVANNI:** Do you swear the
18 testimony you're about to give will be the truth?

19 **KILIHEA INABA:** Yes.

20 **CHAIRMAN GIOVANNI:** Okay. Please proceed.

21 **KILIHEA INABA:** Okay. Good morning,
22 everyone. As I stated my name, I'm a kanaka of the
23 mauka of Kona, specifically, the ahupua'a of Kaloko.
24 That's where I live, mauka of where this project
25 phase 1 is happening and phase 2 is what we're here

1 for today.

2 Today I'm asking you as Commissioners, to
3 stand by your previous decision, which was to deny
4 the extension of time that is being asked by these
5 petitioners to apply for the redistricting of phase
6 2 of this project. It's been over 40 years.

7 I mean, I've probably reiterated some of
8 the things that have already been talked about
9 today, but it's been over 40 years. A lot of this
10 has changed since then, namely the number of people
11 we have living here with the overwhelmed
12 infrastructure, as it is, the loss of lands to large
13 (audio disruption) that have been detrimentally
14 changed, irreversibly changed, as we have experts
15 who have spoken to today.

16 We shouldn't continue to approve
17 extensions for large developers such as the Stalwart
18 to this Delaware company, not even of Hawaii. I
19 find it unsettling that one of the reasons the
20 petitioner is seeking your reconsideration is that
21 their claim is that this is not an action;
22 therefore, the Commission, you guys, don't need to
23 complete a Ka pa'akai analysis. The Ka Pa'akai
24 analysis was huge, and that's recent. Although that
25 was recent after 1982 agreement for this project, we

1 know that if that was to be completed, if that was
2 completed, we'd definitely find cultural,
3 historical, and natural resources and related
4 traditional and customary practices affected
5 negatively by this project.

6 And so a few of the points that were made
7 today, I find it interesting that OPSD supports
8 RCFC's request and state that, quote, "the
9 archaeological and cultural impact concerns have
10 been adequately addressed for both affordable
11 housing and Koloko Heights phase 1 projects," end
12 quote. If the petitioner had the land and people's
13 best interest in mind, also knowing that an EA is
14 the righteous thing to do, being as you have
15 opposition as well, that they would do it.

16 Also, per Article 12, Section 7 of
17 Hawaii's Constitution, the State has a duty to
18 protect the traditional and customary rights and
19 practices of the native people. We also know that
20 these practices, these protected practices extend
21 beyond just ahupua'a itself.

22 Loke spoke to how most of this coastline
23 will be affected by this development, and so that
24 goes to show that this is -- yeah, this is protected
25 in our constitution, not just ahupua'a itself but

1 this entire coastline.

2 Another issue that we talked about was the
3 sewage waste that is created from this project. In
4 the last meeting, it was clearly explained that
5 lines from -- sewer lines are already being
6 constructed, and from phase 1 and phase 2 are going
7 to tie into those lines to be taken to the Kealakehe
8 Wastewater Treatment Plant, but Chuck was able to
9 explain that, you know, the County's already being
10 sued for this.

11 So it's something that is being violated,
12 the Clean Water Act. And knowing that already
13 almost two million gallons of sewage is being
14 discharged into our oceans, affecting us and
15 affecting our Keike here, yeah, and the Keike that
16 are yet to come.

17 **CHAIRMAN GIOVANNI:** I need you to
18 summarize.

19 **KILIHEA INABA:** So most of all, I'm
20 speaking on behalf of my kupuna who have passed and
21 keiki that are yet to come. Knowing that, we want
22 to leave this place as beautiful and as vibrant as
23 we were gifted to be able to take care of it and so
24 this project is in -- this project and bypassing
25 this would be in complete opposition of that

1 mission. Mahalo.

2 **CHAIRMAN GIOVANNI:** Mahalo.

3 Petitioner, any questions for this

4 witness?

5 **MR. YUEN:** No questions.

6 **CHAIRMAN GIOVANNI:** State?

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

8 **CHAIRMAN GIOVANNI:** County?

9 **MS. AHN:** No, thank you.

10 **CHAIRMAN GIOVANNI:** Commissioners?

11 Thank you very much for your testimony.

12 Ms. Kwan, who's next?

13 **MS. KWAN:** I have Keliyah Kimitete. I

14 apologize for mispronouncing anything.

15 **CHAIRMAN GIOVANNI:** Please state your name

16 and address?

17 **KELIYAH KIMITETE-PIAS:** Aloha. My name is

18 Keliyah Kimitete Pias. My address is 776587 Kuakini

19 Highway, Kailua Kona, Hawaii.

20 **CHAIRMAN GIOVANNI:** So your testimony

21 today will be the truth?

22 **KELIYAH KIMITETE-PIAS:** Yes.

23 **CHAIRMAN GIOVANNI:** Please proceed.

24 **KELIYAH KIMITETE-PIAS:** Aloha, everyone.

25 I am here on behalf of myself, my kupuna, my keiki,

1 my son, my first son -- I just had him. He's seven
2 months old -- and my community to just be here to
3 say that I'm concerned for our kai, our wai, and our
4 loko i'a for the future generations. And that's why
5 I'm here today.

6 I just also hope you stand by your
7 decision to deny the further development of the
8 area.

9 **CHAIRMAN GIOVANNI:** All right. The
10 decision in question was a time extension, not the
11 project itself, so --

12 **KELIYAH KIMITETE-PIAS:** Yeah.

13 **CHAIRMAN GIOVANNI:** -- is your -- could
14 you restate your position?

15 **KELIYAH KIMITETE-PIAS:** To stand by your
16 previous decision, your denial.

17 **CHAIRMAN GIOVANNI:** Okay. Thank you.

18 **KELIYAH KIMITETE-PIAS:** Yeah. That's all
19 I have. Mahalo.

20 **CHAIRMAN GIOVANNI:** Mahalo.

21 Petitioner, any questions for this
22 witness?

23 **MR. YUEN:** No questions.

24 **CHAIRMAN GIOVANNI:** Thank you.

25 State?

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

2 **CHAIRMAN GIOVANNI:** County?

3 **MS. AHN:** No, thank you.

4 **CHAIRMAN GIOVANNI:** Commissioners?

5 Thank you very much for coming forward.

6 **KELIYAH KIMITETE-PIAS:** Thank you.

7 **CHAIRMAN GIOVANNI:** Ms. Kwan, who's next?

8 **MS. KWAN:** Next I have Janice Palma

9 Glennie.

10 **CHAIRMAN GIOVANNI:** Is she in attendance?

11 **MS. KWAN:** And I think she signed up twice
12 by mistake. I have her name duplicated.

13 **CHAIRMAN GIOVANNI:** Okay. Here she comes.

14 Take your time. So please state your name
15 and address as a starting point.

16 **JANICE PALMA GLENNIE:** Ms. Janice Palma
17 Glennie. And my address is P.O. Box 4849, Kailua
18 Kona.

19 **CHAIRMAN GIOVANNI:** And will your
20 testimony today be the truth?

21 **JANICE PALMA GLENNIE:** Yes, I plan on it.

22 **CHAIRMAN GIOVANNI:** So you have three
23 minutes.

24 **JANICE PALMA GLENNIE:** Things always
25 change, though, don't they?

1 Good morning. Aloha, Commissioners.
2 Instead of another pat on the head for another
3 rename changed, untried and untrue speculator, this
4 body can provide a solid "no" to plans to bulldoze
5 the cultural and historical importance of 400 acres
6 of land into oblivion without regard to the needs or
7 goals of the greater community or the modern
8 parameters of smarter growth, which our residents
9 have longed and worked for.

10 You followed the four decades' long,
11 almost mythological Y-O Limited Partnership saga. I
12 lived in the neighborhood back when this all
13 started. Hinalani Road didn't exist. Now it's full
14 of traffic. Never imagined 30 or 40 years ago, nor
15 planned for. Have we come no closer to forward-
16 thinking land use planning and what our region
17 should and could look like rather than piecemeal
18 development and its ugly stepchild, sprawl.

19 Since the six earlier extension requests
20 and approvals, there was the K2K plan, an effort and
21 document that stakeholders put heart and soul and
22 dreams into. Today, likely heavily covered with dust
23 or mold. Now we have the Kona Community Development
24 Plan that beg to be written in stone that the K2K
25 Plan wasn't an ordinance promising something better

1 than the previous decades of developer-generated
2 growth.

3 Does this current extension for
4 reclassification fit any of the parameters that have
5 been longed for, legislated, and necessary to avoid
6 the rampant sprawl, traffic gridlock, and decimation
7 of resources that our leaders have seemed obliged to
8 consider de rigueur and unavoidable.

9 It's clear on intuitive, historical and
10 evidential levels that this past -- that this past
11 its expiration date request isn't pono. Forty years
12 of granting extensions is the definition of insane.
13 The arguments go around and around, but none of them
14 seem to reach a higher level of the responsibility
15 or understanding of what our region's residents need
16 and long for, for themselves, in the livable future
17 for our keiki.

18 There are a host of specific issues that
19 should give this Commission to deny this request,
20 but one in the crowd of behemoths in the room is the
21 ongoing lack of proper and law-abiding wastewater
22 treatment that plagues our region.

23 And, of course, whenever a speculative
24 plan that's presented to the state, that plan is
25 never ever what happens down the line or on the

1 ground. Residents are left holding a bag of bad
2 precedent, more unplanned growth, and infrastructure
3 woes, and a loss of options to protect the land's
4 environmental and cultural integrity, all dead ends
5 both literally and figuratively.

6 Now is the time to cut the cord. No other
7 decision from this body makes sense other than to
8 hold up your denial of this extension request once
9 and for all.

10 **CHAIRMAN GIOVANNI:** Thank you very much.

11 **JANICE PALMA GLENNIE:** Mahalo.

12 **CHAIRMAN GIOVANNI:** Please stand by for
13 questions.

14 Petitioner?

15 **MR. YUEN:** No questions.

16 **CHAIRMAN GIOVANNI:** County?

17 **MS. AHN:** No questions.

18 **CHAIRMAN GIOVANNI:** State?

19 **MS. KATO:** No questions, thank you.

20 **CHAIRMAN GIOVANNI:** Commissioners?

21 Thank you very much for your testimony.

22 **JANICE PALMA GLENNIE:** Thank you. I
23 wanted to just mahalo the practitioners that have
24 spoken today. It's been a fabulous education, and
25 especially I just admire you for getting up here and

1 even answering questions that you weren't expecting.

2 It's always fantastic and heartwarming to see that.

3 **CHAIRMAN GIOVANNI:** I share your view on
4 that. It is very heartwarming, and we appreciate the
5 community coming out and especially the young
6 people. Thank you.

7 Who's next?

8 **MS. KWAN:** Next we have Maki Morinoue.

9 **CHAIRMAN GIOVANNI:** Ms. Morinoue, please
10 state your name and address and then I'll ask you to
11 swear.

12 **MAKI MORINOUE:** Okay. My name is Maki
13 Ku'ulei Morinoue. I live 76-5920 Mamalahoa Highway
14 in Holualoa.

15 I walk through the lens. I did put in my
16 written testimony and --

17 **CHAIRMAN GIOVANNI:** One second. Do you
18 swear the --

19 **MAKI MORINOUE:** Oh.

20 **CHAIRMAN GIOVANNI:** -- testimony you're
21 about to give will be the truth?

22 **MAKI MORINOUE:** Yes, the truth.
23 Absolutely.

24 **CHAIRMAN GIOVANNI:** Great. Please
25 proceed.

1 **MAKI MORINOUE:** I have sent in my written
2 testimony, and I stand by every word. I think I --
3 well, not I think. I do support everybody that came
4 before me today in oral testimony. It was
5 articulate, poignant and absolutely correct. I
6 stand by their testimony.

7 As a fourth-generation Japanese American
8 walking through the lenses, I got to experience the
9 birth of OHA and the impact of Native Hawaiian
10 culture coming back. With that said, I was a keiki
11 'o ka'aina that got to reap the benefits and
12 knowledge of Native Hawaiian practices and the use
13 of lands well before immigrant history.

14 I also walked through the lens of
15 Executive Order 9066 and the impacts that it had
16 from federal, state, and county levels. Our own
17 home is historical and represents all our historic
18 past.

19 Today, everyone's testimony echos the land
20 use and may Maui's tragic history not be repeated on
21 other islands, because the Native Hawaiians have
22 warned and the multigeneration 'Ohana has warned
23 about proper land use, water use, and its impact on
24 our ocean. And I would like to remind everyone we
25 have about over 300,000 acres of struggling but

1 living coral reef system. It is quite impressive
2 and very scary that 85 percent of our coral
3 resources in the U.S. is from Hawaii, 85 percent.

4 We have Florida having major coral
5 collapse and other places, and these are scientific
6 evidence from our Dr. Asner and Dr. Martin, Robin
7 from the Arizona State University that lies right
8 here on our island, the Big Island. So there are
9 scientific backings for that. If you're curious,
10 I'm happy to direct you.

11 With that said, we also, by Dr. Asner's
12 team, marine biologist team, he has -- has brought
13 out scientific articles this year, very specifically
14 about land to sea relationships. So that is
15 something that's very vital for all of you to take a
16 look at, and I'm happy to connect and give you that
17 data that was very public, because this is going to
18 address every island, every ahupua'a, all across our
19 neighbor islands, vital importance.

20 And because we have an active litigation a
21 standpoint for Honokohau Harbor, this pleads a
22 reality of coral collapse. And I'd like to remind
23 the importance of our most little, you know, living
24 creatures in our ocean, which is the phytoplanktons
25 --

1 **CHAIRMAN GIOVANNI:** I have to ask you to
2 summarize, please.

3 **MAKI MORINOUE:** Yes. -- they provide 70
4 percent of our oxygen. So it is vital that we
5 protect forest lands to call in the water as well as
6 mitigate coral collapse. Thank you.

7 **CHAIRMAN GIOVANNI:** Thank you very much.
8 Please stand by for questions.

9 **MR. YUEN:** No questions.

10 **CHAIRMAN GIOVANNI:** No questions by
11 petitioner.

12 State?

13 **MS. KATO:** No questions.

14 **CHAIRMAN GIOVANNI:** County?

15 **MS. AHN:** No questions.

16 **CHAIRMAN GIOVANNI:** Commissioners?

17 Okay. Thank you very much.

18 **MAKI MORINOUE:** Thank you.

19 **CHAIRMAN GIOVANNI:** Ms. Kwan, anyone else?

20 **MS. KWAN:** The last person who signed up
21 is Ashley Obrey.

22 **CHAIRMAN GIOVANNI:** Ms. Obrey, please
23 state your name and address?

24 **ASHLEY OBREY:** Sure. My name is Ashley
25 Obrey. I live at 76-871 Horseshoe Turn Road in

1 Kailua Kona.

2 **CHAIRMAN GIOVANNI:** Great. So Ms. Obrey,
3 will you swear that your testimony today will be the
4 truth?

5 **ASHLEY OBREY:** Absolutely.

6 **CHAIRMAN GIOVANNI:** Okay. Please proceed.

7 **ASHLEY OBREY:** So again, aloha, everybody.
8 I'm Ashley Obrey. For the record, I am an attorney,
9 but I'm here in my personal capacity today as a
10 resident of this community and just thinking this
11 issue is really important.

12 I do oppose this motion for
13 reconsideration and ask that you uphold your August
14 5th decision to deny the extension. I wasn't
15 planning on testifying because this community has
16 such a strong voice and I think it's spot on and
17 substantively I can't really add anything to what's
18 already been expressed but did want to offer some
19 information for your consideration that might, you
20 know, be helpful.

21 So Ka Pa'akai, as you know, is not an
22 optional thing, and I'm not sure if this Commission
23 is aware, but earlier this year the Hawaii Supreme
24 Court recently held that the state is required to
25 engage in this analysis not only quasi-judicial

1 proceedings but also in rulemaking context, and so
2 there is this concept of this analysis applies in
3 all kinds of situations, and I just wanted to read
4 from the decision briefly because I think it's
5 important to hear.

6 Applying the Ka Pa'akai framework to
7 rulemaking is consistent with the intent of the
8 framers of Article 12, Section 7. That provision
9 grew out of a desire to preserve the small remaining
10 vestiges of a quickly disappearing culture by
11 providing a legal means by constitutional amendment
12 to recognize and reaffirm Native Hawaiian rights.
13 The framers recognize that sustenance, religious,
14 and cultural practices of Native Hawaiians are an
15 integral part of their culture, tradition, and
16 heritage with some practices forming the basis of
17 Hawaiian identity and value systems and, accordingly
18 -- yes -- and, accordingly, did not intend to have
19 this section narrowly construed.

20 Native Hawaiian traditional and customary
21 rights do not exist at the sufferance of the state
22 and its agencies. In sum, the Ka Pa'akai framework
23 applies to administrative rulemaking in addition to
24 contested case hearings requiring the state and its
25 agencies to consider Native Hawaiian traditional and

1 customary rights in these contexts effectuates the
2 state's obligation to protect Native Hawaiian
3 traditional and customary practices.

4 So you do have a kuleana under the
5 Constitution, as the Ka Pa'akai case first made
6 clear, which was, you know, involving this
7 Commission, and therefore, you have the right to
8 require this analysis whenever you act. And
9 although this is a motion to extend time, I agree
10 with that, this is not simply continuing the status
11 quo. There's more at stake.

12 There's been other case law that the
13 Supreme Court has made clear that continuing actions
14 under new legal authorizations constitute new
15 authorizations. The Umberger case, which I think
16 had to do with Kona, the court held that aquarium
17 collection activities that occurred for years
18 constituted a new project or program where that
19 activity came under a new permit.

20 Similarly, in the Carmichael case, the
21 court found that water diversions made under annual
22 revocable permits, you know, were new actions
23 because each disposition changed the status quo. So
24 ultimately, this may not be a decision about whether
25 the project goes forward, but the Commission is

1 considering a motion that gives this project
2 authority, the green light to go forward that it
3 would not have but for the decision you make today.

4 So --

5 **CHAIRMAN GIOVANNI:** Please summarize.

6 **ASHLEY OBREY:** Yeah. So that's all. A
7 lot has changed over these, you know, decades. This
8 project is as old as I am, and, you know, you have
9 this affirmative duty, and we just -- you know, you
10 were correct the first time and stand by that
11 decision.

12 **CHAIRMAN GIOVANNI:** Thank you.

13 **ASHLEY OBREY:** You're welcome.

14 **CHAIRMAN GIOVANNI:** Petitioner, any
15 questions?

16 **MR. YUEN:** No questions.

17 **CHAIRMAN GIOVANNI:** Thank you.

18 State, any questions?

19 **MS. KATO:** No questions, thank you.

20 **CHAIRMAN GIOVANNI:** County?

21 **MS. AHN:** No questions.

22 **CHAIRMAN GIOVANNI:** Commissioners?

23 Commissioner Okuda?

24 **COMMISSIONER OKUDA:** Ms. Obrey, just so
25 that I'm sure I don't have any conflict of interest

1 with you or whatever firm you practice with, are you
2 with a firm?

3 **ASHLEY OBREY:** I work for the Native
4 Hawaiian Legal Corporation. But again, I'm here in
5 my personal capacity.

6 **COMMISSIONER OKUDA:** Okay. I have no
7 current cases involving the Native Hawaiian Legal
8 Corporation. I do disclose that I think a few of
9 them are my friends, but -- many people -- many
10 people in Mr. Yuen's -- yeah --

11 **CHAIRMAN GIOVANNI:** Be careful there.

12 **COMMISSIONER OKUDA:** -- firm are friends.
13 But you mentioned something about Ka Pa'akai. But -
14 - so just so that we have clarity here, the case you
15 are citing from was the recent case of Flores, F-1-
16 o-r-e-s, case, Ohana versus University of Hawaii,
17 that's found at 153 Hawaii, starting at page 76,
18 correct?

19 **ASHLEY OBREY:** Correct, yes.

20 **COMMISSIONER OKUDA:** Yeah. And actually,
21 when you look at that case, the Hawaii Supreme Court
22 not only said the Ka Pa'akai applies not only in
23 quasi-judicial contested cases but rulemaking, but
24 the Supreme Court also said that before -- before
25 the agency can take action, the Ka Pa'akai analysis

1 or compliance has to be done. Is that a fair
2 statement?

3 **ASHLEY OBREY:** That's a fair statement.

4 **COMMISSIONER OKUDA:** And just to make
5 sure that I'm not saying anything unfair, in fact,
6 the Supreme Court, at page 84, or if you look at the
7 Pacific 3d at page 609 said this: At its core, Ka
8 Pa'akai concluded the state's constitutional duty
9 means that its agencies, quote, "may not act without
10 independently considering the effect of their
11 actions on Hawaiian traditions and practices,"
12 closed quote.

13 And then there's a citation to where in
14 the Ka Pa'akai case that comes from. But continuing
15 to quote from the Flores case, "The procedural
16 requirement and agency action must be preceded by
17 consideration of Native Hawaiian traditional and
18 customary rights shall apply equally when agencies
19 act in a quasi-judicial manner, paren, (contested
20 case hearing,) closed paren, and in a quasi-
21 legislative matter, paren, (administrative
22 rulemaking), close paren."

23 So in other words, that -- let me ask you
24 this. It looks like you're reading off of something,
25 so did I accurately state the statement of law as

1 made by the Supreme Court?

2 **ASHLEY OBREY:** Yes, you sure did.

3 **COMMISSIONER OKUDA:** So the Supreme Court
4 again is saying not only does the analysis have to
5 be done when the agency acts, but the analysis has
6 to be done before the agency acts. In other words,
7 you can't say, okay, we're going to take this action
8 and we'll do the analysis later and maybe we'll
9 change our minds. Is that a fair statement?

10 **ASHLEY OBREY:** That's correct.

11 **COMMISSIONER OKUDA:** And you've been
12 practicing law with Native Hawaiian Legal
13 Corporation for how long?

14 **ASHLEY OBREY:** Since 2010. I took a
15 little break, but close enough.

16 **COMMISSIONER OKUDA:** Okay. Great. Okay.
17 And the Native Hawaiian Legal Corporation is viewed
18 as specializing in these types of land use and
19 cultural protection practice areas, correct?

20 **ASHLEY OBREY:** Yes.

21 **COMMISSIONER OKUDA:** Okay. Thank you, Mr.
22 Chair. I have no further questions.

23 **CHAIRMAN GIOVANNI:** Okay.

24 Commissioners?

25 Let me just add that from my perspective,

1 this Commission, all of its Commissioners, and our
2 staff are very familiar with Ka Pa'akai and its
3 requirements.

4 **ASHLEY OBREY:** I'm sure. I know.

5 **CHAIRMAN GIOVANNI:** Thank you. But thank
6 you for bringing it to our attention.

7 **ASHLEY OBREY:** No problem.

8 **CHAIRMAN GIOVANNI:** One more?

9 **MS. KWAN:** Yes. We have one more, Cindy
10 Freitas.

11 **CHAIRMAN GIOVANNI:** Ms. Freedom (sic) --
12 Freeman?

13 **MS. KWAN:** Freitas.

14 **CHAIRMAN GIOVANNI:** Freitas.

15 **MS. KWAN:** She'll correct me.

16 **CHAIRMAN GIOVANNI:** Yeah.

17 Ms. Freeman (sic), please state your name
18 correctly and your address, and then I'll swear you
19 in.

20 **CINDY FREITAS:** Aloha he mele komo a he
21 mele aloha no na kupuna ie ka ao i hala, aloha mai
22 kakou.

23 **CHAIRMAN GIOVANNI:** Excuse me. May we
24 have your name --

25 **CINDY FREITAS:** Name is Cindy Freitas.

1 **CHAIRMAN GIOVANNI:** I'm sorry.

2 **CINDY FREITAS:** My P.O. Box is 4650 Kailua
3 Kona.

4 **CHAIRMAN GIOVANNI:** Thank you. Will your
5 testimony today be the truth?

6 **CINDY FREITAS:** Yes.

7 **CHAIRMAN GIOVANNI:** Please proceed.

8 **CINDY FREITAS:** My name is Cindy Freitas,
9 and I'm a Native Hawaiian descendant of the native
10 inhabitants prior to 1778 and born and raised in
11 Hawaii. I was also -- I'm also a practitioner who's
12 still practice the culture traditional customary
13 practices that was instill into me by my
14 grandparents at a young age.

15 From mauka to makai, in many areas, we
16 have family on the whole ko pae'aina I stand by the
17 LUC to deny petitioner's motion for reconsideration
18 of this decision as follow: This sixth extension, I
19 think the board needs to do a reanalysis on the
20 issue of extension. This is far gone 40 years. The
21 home crisis is here. Things has changed
22 dramatically.

23 My second issue is bonding. I understand
24 the bonding issue. My husband and I is -- we were
25 licensed contractor for 16 years, and we were

1 mandated for bonding. HRA Title 16, Department of
2 Commerce Affairs and Hawaii Code R-7077-76. There
3 is \$54.4 million project will have 99 family units
4 plus one for the manager unit, equals to a hundred
5 unit. Tax-exempt bonds, low income housing, tax
6 credit. Housing trust funds. Project-based housing
7 vouchers are providing funding for the project.

8 Two of this bond we put into the
9 taxpayers. That's unacceptable. Hawaii County
10 partners with RCFC Kaloko Heights, LLC to implement
11 a community facility direct district and issue over
12 13 million in special tax revenue bonds to finance
13 the project. Owners in the market rate development
14 will repay the bond in full.

15 My question is: So where is the RCFC
16 Kaloko Heights, LLC's bond to cover the \$54.4
17 million project in good faith? This sends an upset
18 to the construction level and my family, that we are
19 forthcoming people. We don't want to see something
20 fall through the cracks. County and state should do
21 a reanalysis to this bonding issue.

22 LUC Chapter 15, Administration Rule 15-15-
23 77, decision-making criteria for boundary amendment
24 section 205-2 HRS and is consistent with the policy
25 and criteria established pursuant to Section 205-16,

1 205-17, and 205A-2 HRS (b). In its review of any
2 petition for amendment of district boundary pursuant
3 to this chapter, the Commission considered the
4 following, (c), the impact of the proposed boundary
5 amendment on the following areas of state concern

6 (a) --

7 **CHAIRMAN GIOVANNI:** Excuse me. I need you
8 to summarize now.

9 **CINDY FREITAS:** Okay. (A), preservation
10 of maintain of important natural system or habitats,
11 (b) preservation and maintenance of value cultural
12 resource activities, historical or natural resource,
13 including the water resources.

14 **CHAIRMAN GIOVANNI:** Thank you.

15 **CINDY FREITAS:** Thank you.

16 **CHAIRMAN GIOVANNI:** Thank you very much.

17 Petitioner, do you have any questions for
18 this?

19 **MR. YUEN:** No questions.

20 **CHAIRMAN GIOVANNI:** County, any questions?

21 **MS. AHN:** No, thank you.

22 **CHAIRMAN GIOVANNI:** State?

23 **MS. KATO:** No, thank you.

24 **CHAIRMAN GIOVANNI:** Commissioners?

25 Thank you very much for your testimony

1 today.

2 That's it. Okay.

3 It's 11:26 right now, according to my
4 clock. One second. So I'd like to cover the
5 admission of exhibits.

6 Mr. Yuen, please describe the petitioner's
7 exhibits that you wish to have admitted to the
8 record at this time.

9 **MS. AHN:** Excuse me. I'm sorry for the
10 interruption. I just wanted to note for the record
11 and for the Commissioners that Planning Director
12 Zendo Kern had to leave and with me now is Deputy
13 Planning Director, Jeff Darrow.

14 **CHAIRMAN GIOVANNI:** Mr. Darrow, welcome.
15 Nice to see you.

16 Thank you for that clarification.

17 So back to the petitioner regarding
18 petitioner exhibits that you wish to have admitted
19 to the record at this time.

20 **MR. YUEN:** Petitioner submitted with its
21 motion for reconsideration Exhibit A, which is the
22 report by the County of Hawaii Department of
23 Environmental Management, dated July 30th, 2021 to
24 the County Council describing the proposed
25 construction to the wastewater treatment line.

1 **CHAIRMAN GIOVANNI:** So that's in the
2 record already as part of the motion.

3 **MR. YUEN:** Okay. So that's the only
4 exhibit we have.

5 **CHAIRMAN GIOVANNI:** Okay. So nothing new?

6 **MR. YUEN:** Nothing new.

7 **CHAIRMAN GIOVANNI:** Okay. Thank you.
8 So does the County have any exhibits it
9 would like to put on the record now that have not
10 previously been put on the record?

11 **MS. AHN:** No, thank you.

12 **CHAIRMAN GIOVANNI:** Thank you.

13 State?

14 **MS. KATO:** No exhibits. Thank you.

15 **CHAIRMAN GIOVANNI:** Okay. Very good.

16 So we'd like to now proceed to
17 presentations. I may take a break here, but I'd
18 like to ask the petitioner, what is your view of the
19 time you'll need and scope that you will intend to
20 present for your --

21 **MR. YUEN:** Probably five to ten minutes of
22 argument. No witnesses.

23 **CHAIRMAN GIOVANNI:** Five to ten minutes of
24 argument and no witnesses? Please proceed.

25 **MR. YUEN:** Thank you, Mr. Chair.

1 Petitioner submitted the motion for reconsideration
2 recognizing that the Commission's Rule 15-15-84
3 provides for reconsideration of an action that was
4 unreasonable, unlawful, or erroneous. We believe
5 that the decision was erroneous because the Land Use
6 Commission denied the motion for extension for two
7 reasons. First, the failure to prepare a Chapter
8 343 environmental assessment, and second, the
9 failure to provide a cultural assessment.

10 First, the Commission -- I'm sorry, the
11 petitioner believes that the motion for denial of --
12 because of failure to provide a Chapter 343 analysis
13 was erroneous because they both trigger the use of
14 state and county lands was considered by the County
15 of Hawaii's Department of Environmental Management
16 in the County of Hawaii's Department of
17 Environmental Management received the petitioner's
18 request to create the community facilities district
19 and to build the wastewater treatment transmission
20 line.

21 And the County Department of Environmental
22 Management was the applicable governmental agency
23 responsible for that project. In approving that
24 project and recommending approval to the County
25 Council, the Department of Environmental Management

1 was aware of the scope of the areas to be served by
2 the wastewater treatment line and found that the
3 Hawaii Housing Finance and Development Corporation's
4 environmental assessment and finding of no
5 significant impact in 2019 was a sufficient
6 consideration of the environmental effects of the
7 wastewater treatment line -- transmission line.

8 Once that decision was made by the
9 applicable governmental agency, that decision was
10 not appealed and is final regarding the use of state
11 and county land for the wastewater transmission
12 line.

13 With regard to the lack of a cultural
14 assessment, first, the petitioner has spent
15 considerable time and effort redoing the
16 archeological surveys, the burial treatment plans,
17 and the preservation plans for the phase 1 lands.
18 The petitioner believes that the appropriate time to
19 make a cultural impact survey and an archeological
20 survey of the phase 2 lands is at such time as the
21 petitioner moves to reclassify phase 2.

22 The hearing on the motion for extension
23 was not a motion for reclassification of phase 2
24 because the petitioner has not yet satisfied the
25 construction requirements imposed by the Commission

1 on phase 1 at such time as the petitioner satisfies
2 the construction and development requirements and
3 moves for a reclassification of phase 2.

4 The petitioner will prepare both an
5 archeological impact analysis of the phase 2 lands
6 and a cultural analysis that will involve consulting
7 with appropriate community members and parties and
8 analyzing any impact that the development of phase 2
9 may have on the Ka Loko i'a. At this time, though,
10 the petitioner believes that to conduct such
11 analysis would be premature until the petitioner has
12 satisfied the development conditions on phase 1 and
13 is therefore -- petitioner is therefore requesting
14 an additional time to complete the development of
15 phase 1, and we'll then proceed to provide the
16 necessary analysis.

17 **CHAIRMAN GIOVANNI:** Does that conclude
18 your presentation?

19 **MR. YUEN:** That concludes my presentation,
20 yes.

21 **CHAIRMAN GIOVANNI:** So Commissioners, any
22 questions for the petitioner?

23 I saw you with your tablet. I knew you
24 had something.

25 **COMMISSIONER OKUDA:** Yeah. Well, I was

1 going to defer if anyone else --

2 **CHAIRMAN GIOVANNI:** No. Go for it.

3 **COMMISSIONER OKUDA:** Okay.

4 **CHAIRMAN GIOVANNI:** Commissioner Okuda.

5 **COMMISSIONER OKUDA:** Thank you very much,
6 Mr. Chair.

7 Thank you, Mr. Yuen, for being present. I
8 apologize if --

9 **CHAIRMAN GIOVANNI:** Gary, you've got to
10 speak into --

11 **COMMISSIONER OKUDA:** I apologize if some
12 of my questions might seem a little bit tedious, but
13 I want to assure you that, at least for me
14 personally and, I know, the Commission as a whole,
15 we take these motions very seriously, and we pay
16 attention. We're not simply just going to say,
17 we've decided this already, so you know, don't waste
18 our time. That's clearly not what we're doing here.

19 But let me ask a preliminary question
20 first about the standard for reconsideration.
21 Bottom line question is, the presentation that you
22 just gave Mr. Yuen, what is new in what you're
23 presenting to us which either wasn't presented at
24 the last hearing or couldn't have been presented for
25 some reason at the last hearing?

1 **MR. YUEN:** At the last hearing we did not
2 present the approval by the Department of
3 Environmental Management of the project and finding
4 that the Chapter 343 requirement was satisfied.

5 **COMMISSIONER OKUDA:** And was there a
6 reason why that wasn't presented at the last
7 hearing?

8 **MR. YUEN:** It just was not presented.

9 **COMMISSIONER OKUDA:** Yeah, but the reason
10 why it wasn't presented; in other words, what's the
11 good cause evidence why it wasn't presented or
12 evidence similar to that wasn't presented?

13 **MR. YUEN:** We did not believe it was
14 relevant for presentation at the hearing and
15 therefore had not been prepared to present that
16 evidence.

17 **COMMISSIONER OKUDA:** Okay. Besides what
18 you just explained, was there any other reason why
19 that was not presented to us at the last hearing?

20 **MR. YUEN:** No.

21 **COMMISSIONER OKUDA:** Okay. You're asking
22 for reconsideration of the findings of fact,
23 conclusions of law, decision and order which is
24 dated August 5, 2023, and this is the copy of it?

25 **MR. YUEN:** Yes.

1 **COMMISSIONER OKUDA:** Okay. You know, the
2 term "quasi-judicial" has been bandied about in this
3 hearing, and frankly, in other hearings the Land Use
4 Commission operates as a quasi-judicial body, but in
5 plain English, or as plain as we can make it, that
6 basically means that the Land Use Commission has to
7 make its decisions consistent with the requirements
8 of HRS Chapter 91 and specifically we have to meet
9 the standards set forth in HRS 91-14(g), correct?

10 **MR. YUEN:** Yes.

11 **COMMISSIONER OKUDA:** In other words, the
12 Land Use Commission is not like a legislative body.
13 We're not like the City Council. We're not like the
14 Hawaii State Legislature. We can't just go make
15 decisions out of thin air just because we like
16 something or we don't like something. We have to
17 make our decisions based on what the law tells us
18 the standards are and what the evidential is whether
19 or not the standards are met or not met, correct?

20 **MR. YUEN:** Yes.

21 **COMMISSIONER OKUDA:** And this Section HRS
22 91-14(g), it spells out the times when a court can
23 reverse our decision. In other words, the
24 situations where a court could step in and basically
25 tell the Land Use Commission, hey, Land Use

1 Commission, we're going to change or reverse your
2 decision because you didn't meet some of these
3 standards and these standards are laid out or
4 reasons are laid out in HRS 91-14(g), correct?

5 **MR. YUEN:** I don't have that section in
6 front of me, so I can't comment.

7 **COMMISSIONER OKUDA:** Okay. Well, it --
8 let me just briefly read it because, you know, I
9 want to make sure the record is clear here. Okay.
10 What 91-14(g) says is that upon review of the
11 record, a court may affirm the decision of the
12 agency or remand the case with instructions for
13 further proceedings, or it may reverse or modify the
14 decision and order if the substantial rights of the
15 petitioners may have been prejudiced because the
16 administrative findings, conclusions, decisions, or
17 orders are," and then there's a laundry list of the
18 things that can reverse an agency's decision. Does
19 that help refresh your recollection about what that
20 section might say?

21 **MR. YUEN:** Yes.

22 **COMMISSIONER OKUDA:** Okay. And one of the
23 things is that there's a violation of the
24 constitutional or statutory provisions or, (2) in
25 excess of statutory authority or jurisdiction of the

1 agency, (3) made upon unlawful procedure, (4)
2 affected by other area of law, or (5) clearly
3 erroneous in view of the reliable, probative, and
4 substantial evidence on the whole record, or
5 arbitrary or capricious or characterized by abuse of
6 discretion, or clearly unwarranted exercise of
7 discretion.

8 Let me just ask you this because if you're
9 going to appeal our decision, the findings of fact,
10 conclusions of law, and decision denying your
11 request for extension, you're going to have to
12 specifically identify to the court that you appeal
13 to, whether it's the circuit court, maybe the
14 Supreme Court. I know that issue is kind of up in
15 the air where you go, but you're going to have to
16 identify the specific findings that you're
17 challenging, correct?

18 **MR. YUEN:** Yes.

19 **COMMISSIONER OKUDA:** Can you tell us right
20 now specifically which of the findings of fact,
21 conclusions of law -- in the findings and
22 conclusions which you are asking for
23 reconsideration, which specific findings do you
24 contend violate or do not satisfy the requirements
25 of HRS 91-14(g)?

1 **MR. YUEN:** We would contest conclusion of
2 law number 15 that the use of state funds and state
3 lands requires a Chapter 343 analysis. And we would
4 also contest the finding that -- the findings that
5 require -- or you concluded that the motion was
6 denied for failure to complete a Ka Pa'akai analysis
7 because we feel that the Ka Pa'akai analysis would
8 be premature.

9 **COMMISSIONER OKUDA:** Yeah. I'm just
10 trying so that I can -- I'm kind of simple-minded.
11 I'm just trying to identify the specific findings or
12 conclusions by number, so that I can focus my
13 attention specifically on kind of like what the beef
14 is here, yeah?

15 So you said conclusion of law number 15.
16 Why don't we just look at the conclusions of law
17 first. Which other conclusions of law besides
18 number 15 do you contest?

19 **MR. YUEN:** It would be 19 through 23.

20 **COMMISSIONER OKUDA:** Okay. So you contest
21 conclusion of law 15, conclusions of law 19 through
22 23. Any other conclusions of law you contest?

23 **MR. YUEN:** No.

24 **COMMISSIONER OKUDA:** Which findings of
25 fact do you contest?

1 **MR. YUEN:** I'd have to go through that
2 list because I basically focused on the conclusions
3 of law.

4 **COMMISSIONER OKUDA:** Okay. Well, maybe I
5 can help -- well, so right now, you wouldn't be able
6 to tell me right offhand specifically which findings
7 of fact you contest?

8 **MR. YUEN:** If you give me a few minutes'
9 recess, I will go through a list.

10 **COMMISSIONER OKUDA:** Okay. Well, let me -
11 - let me ask you more specifically here -- why don't
12 we look at findings of fact number 40 through 44
13 because that seems to be the guts of what some of
14 this decision deals with.

15 Can you turn to finding of fact number 40.
16 Do you see it in front of you?

17 **MR. YUEN:** Yes.

18 **COMMISSIONER OKUDA:** Okay. The first part
19 of finding of fact 40 says, petitioner never
20 conducted a HRS Chapter 343 analysis for the entire
21 project contemplated by the original petition,
22 period.

23 Before I ask the question that I have
24 regarding that, just by way of explanation, a
25 finding of fact is basically a statement, is it not,

1 of what the facts of the case purportedly were or
2 are; do you agree with that?

3 **MR. YUEN:** Yes.

4 **COMMISSIONER OKUDA:** It's sort of like if
5 this was a traffic accident case, the finding of
6 fact says the traffic light was red when Gary Okuda
7 drove his car into the intersection. Now, the
8 conclusion of law might say, therefore, Gary Okuda
9 is responsible for the accident which injured the
10 Executive Officer Dan Orodener. But the finding of
11 fact is just telling us what the color of the
12 traffic light was, so it's just saying what the
13 facts are. It's not what the ultimate conclusion is.
14 Is that a fair statement of what a finding of fact
15 is?

16 **MR. YUEN:** Yes.

17 **COMMISSIONER OKUDA:** Okay. So when we
18 look at this first sentence in finding of fact 40 --
19 or in fact, look at the -- all the facts that are
20 stated in finding of fact 40 -- it continues on.
21 Petitioner submitted a planning study for phase 1
22 and phase 2 prepared in December of 1981.
23 Petitioner submitted 45 exhibits. There was a
24 footnote, none of which include an HRS Chapter 343
25 analysis for phase 1 and phase 2.

1 Is -- do you challenge that finding of
2 fact 40 is an accurate statement of the facts? I'm
3 not getting to the conclusion of whether or not the
4 analysis is required as a conclusion of law but just
5 whether or not the traffic light was red, yellow, or
6 green. Do you agree that finding of fact 40 is
7 accurate as far as the statement of what the facts
8 were?

9 **MR. YUEN:** I agree that no Chapter 343
10 analysis was prepared. I don't know how many
11 exhibits were submitted.

12 **COMMISSIONER OKUDA:** Yeah. Well, it talks
13 about the exhibits you submitted, yeah?

14 **MR. YUEN:** Oh, that we submitted?

15 **COMMISSIONER OKUDA:** Yeah, yeah. It talks
16 about how many exhibits you submitted.

17 **MR. YUEN:** I thought you were referring to
18 how many exhibits were submitted in the original
19 petition.

20 **COMMISSIONER OKUDA:** No.

21 **MR. YUEN:** Yeah, we submitted 45 exhibits

22 --

23 **COMMISSIONER OKUDA:** Yeah, yeah. So in
24 other words -- or let me ask the question sort of
25 like in a negative way, do you know of any fact or

1 piece of evidence which indicates the finding of
2 fact number 40 is erroneous in any way?

3 **MR. YUEN:** No.

4 **COMMISSIONER OKUDA:** Okay. So then let's
5 look at finding of fact number 41. It says, the
6 petitioner completed an updated topographic survey
7 of the phase 1 project area in 2017 which resulted
8 in important changes, including relocation of the
9 affordable housing site as well as several other
10 factors.

11 Do you know of any evidence which
12 indicates that that finding is erroneous or wrong or
13 even misleading in any way?

14 **MR. YUEN:** No.

15 **COMMISSIONER OKUDA:** Okay. And I
16 apologize for being tedious here, but you know, this
17 is important thing about whether or not our findings
18 are erroneous or not.

19 Can you look at finding of fact number 42.
20 It says, the current phase 1 project as proposed by
21 petitioner includes critical changes that were not
22 in the original plan and planning study presented to
23 the Commission in 1981. One of the revisions
24 changed the method of sewage disposal for the entire
25 project from cesspools to having a sewer connection.

1 And then there's a reference to the transcript where
2 that finding is based.

3 Do you know of any evidence that indicates
4 that finding of fact number 42 is erroneous, wrong,
5 or misleading in any way?

6 **MR. YUEN:** No.

7 **COMMISSIONER OKUDA:** Okay. And then
8 finding of fact number 43 basically deals with the
9 environmental assessment that was involved. Let me
10 just read it because this is an important finding.

11 Number 43, petitioner for the affordable
12 housing project completed an environmental
13 assessment for a small portion of the total project
14 area that was accepted by the county. The
15 environmental assessment (EA) was triggered due to
16 the use of state and county funds as well as use of
17 state/county lands for sewer lines to connect the
18 entire project, including the affordable housing
19 component to the county wastewater treatment
20 facility. The EA only covered the ten-acre
21 affordable housing portion of the project, which
22 makes up approximately 4 percent of the total
23 project area. And then there's a citation or
24 reference to the transcript where that finding is
25 based.

1 Do you know of any evidence which
2 indicates that finding of fact number 43 was
3 erroneous, wrong, or misleading in any way?

4 **MR. YUEN:** I am not -- I'm trying -- I'm
5 struggling on how to phrase this. I don't -- I
6 think the finding may be misleading in that the
7 assessment was triggered due to use of state and
8 county funds, but I believe the Housing Finance and
9 Development Corporation was required to conduct the
10 analysis because the affordable housing project was
11 using state funds, and the use of the sewer line was
12 a second trigger. I can't say that the EA only
13 covered the ten-acre affordable housing project.

14 **COMMISSIONER OKUDA:** Okay. Well, let me
15 ask the question this way. Do you know of any
16 evidence which indicates anything stated in finding
17 of fact 43 was wrong or false?

18 **MR. YUEN:** I would have to look at the EA
19 to determine that.

20 **COMMISSIONER OKUDA:** Okay. But as you sit
21 here right now, you cannot tell us on the Commission
22 or you cannot point to any fact or evidence which
23 indicates that any statement in finding of fact 43
24 is wrong or erroneous, correct?

25 **MR. YUEN:** I can't agree with that without

1 examining the EA.

2 **COMMISSIONER OKUDA:** Okay. And then
3 there's finding of fact 44 that the commission finds
4 that the sewer connections for the entire project,
5 both phase 1 and phase 2, will require tunneling
6 beneath state highways as a connection to the
7 Kealakehe Wastewater Treatment facility --

8 **MR. YUEN:** That's a correct finding.

9 **COMMISSIONER OKUDA:** Okay. That's a
10 correct finding, okay. Okay.

11 **MR. YUEN:** It's a county highway -- I'm
12 sorry, it's a county highway. It's not a state
13 highway.

14 **COMMISSIONER OKUDA:** Okay. Okay.

15 Just so that we know how we have to treat
16 these findings that are made by the Land Use
17 Commission, you do agree that the Hawaii Supreme
18 Court has clearly stated that the findings that are
19 made by an administrative agency like the Land Use
20 Commission, as long as the agency is making the
21 findings within its authority that's given to it by
22 the legislature, those findings are presumed to be
23 valid. That's the law, correct?

24 Do you need me --

25 **MR. YUEN:** That's a presumption that we

1 would have to overcome, yes.

2 **COMMISSIONER OKUDA:** Yeah. In fact,
3 that's what the Hawaii Supreme Court said in a 2004
4 case in this case called Paul's Electric Service,
5 Inc. versus Befitel, 104 Haw. 412, at page 418. The
6 Pacific 3d citation is 91 P.3d. 494. This is what
7 the Supreme Court said. In fact, in that case
8 quoting from the In Re: Hawaii Electric Company,
9 Inc. case, and let me just quote it. "A presumption
10 of validity is accorded to decisions of
11 administrative bodies acting within their sphere of
12 expertise and one seeking to upset the order bears,
13 quote, 'the heavy burden of making a convincing
14 showing that it is invalid because it is unjust and
15 unreasonable in its consequences.'"

16 And, in fact, the Hawaii Supreme Court
17 cited back to a U.S. Supreme Court case, Federal
18 Power Commission versus Whole Natural Gas Company.
19 That's an accurate statement of the law that I just
20 read, correct?

21 **MR. YUEN:** I'm not going to contest your
22 statement of the law, but I'm not going to accept it
23 either. I mean, we're not -- I'm not going to argue
24 the law with you.

25 **COMMISSIONER OKUDA:** Yeah, yeah. But I'm

1 just trying to lay the foundation here that the
2 court is saying that unless you really come forward
3 with --

4 **MR. YUEN:** Well, we have a -- we have a
5 burden of proof, if that's what --

6 **COMMISSIONER OKUDA:** Yeah, and there's a
7 strong presumption we're right and that's what it's
8 saying. Okay.

9 Then let's first talk about what triggers
10 an environmental assessment. And by the way, Mr.
11 Yuen, I'm trying to ask these questions as if it's
12 like a de novo review. In other words, I'm not just
13 asking these questions saying, oh, we don't have to
14 ask you anything because, you know, you haven't
15 brought up anything new.

16 I'm trying to give you the benefit of the
17 doubt by asking these questions and also so that we
18 have a full record. But the environmental laws have
19 these things called triggers, correct?

20 **MR. YUEN:** Yes.

21 **COMMISSIONER OKUDA:** A trigger is that if
22 some element is met in the law that triggers certain
23 steps that have to be taken as part of an
24 environmental review, correct?

25 **MR. YUEN:** Yeah.

1 **COMMISSIONER OKUDA:** And these triggers
2 are set forth, for example, in HRS 343-5, which is
3 captioned applicability and requirements, correct?

4 **MR. YUEN:** Yes.

5 **COMMISSIONER OKUDA:** And if we looked at
6 subparagraph (a)(1), it says an environmental
7 assessment shall be required for actions that (1)
8 propose the use of state or county lands or the use
9 of state or county funds other than funds to be used
10 for feasibility or planning studies for possible
11 future programs or projects that the agency has not
12 approved, adopted, or funded, or funds to be used
13 for the acquisition of unimproved real property, so
14 forth and so on.

15 But basically, the bottom line is one of
16 the triggers is that if you use state or county
17 lands or use state or county funds, that triggers an
18 environmental assessment, correct?

19 **MR. YUEN:** That's a reasonably accurate
20 statement of 343.

21 **COMMISSIONER OKUDA:** Yeah. Well,
22 actually, I was quoting from 343, yeah? Okay.

23 So when we look at that, the question then
24 is do we really have a trigger, correct?

25 **MR. YUEN:** We admitted yes, there is a

1 trigger, but that the appropriate analysis was
2 conducted by both the Housing Finance and
3 Development Corporation as well as the County of
4 Hawaii Department of Environmental Management --

5 **COMMISSIONER OKUDA:** Okay. So let me get
6 to that. And since you agree that there was a
7 trigger, I can skip going over with you the boring
8 rules that come out in the Umberger, U-m-b-e-r-g-e-
9 r, versus Department of Land and Natural Resources
10 case, 140 Haw. 500, at pages 522, 523. I'm only
11 stating that for the record so that everyone knows
12 we actually, you know, looked at and paid attention
13 to that, okay?

14 But let's talk about whether or not a
15 further assessment needs to be made. You do agree
16 that if there is a material change in the project, a
17 new or additional environmental assessment may have
18 to be made, correct?

19 **MR. YUEN:** No.

20 **COMMISSIONER OKUDA:** You don't agree with
21 that?

22 **MR. YUEN:** No.

23 **COMMISSIONER OKUDA:** Okay. What is the
24 legal authority that you base your statement? What
25 Hawaii Supreme Court case or intermediate court of

1 appeals case says that?

2 **MR. YUEN:** I'm just not sure I agree with
3 how you've characterized the standard for when an
4 environmental assessment must be updated.

5 **COMMISSIONER OKUDA:** Well, can you give me
6 a citation to legal authority upon which your
7 disagreement is based on?

8 **MR. YUEN:** I think the only case that I'm
9 familiar with that addresses that question would be
10 the Kuilima case, Unite Here, which described the
11 standards for when an environmental assessment or
12 environmental impact statement would have to be
13 redone due to changed circumstances.

14 **COMMISSIONER OKUDA:** Yeah, and in fact, in
15 that case, Unite Here Local 5 versus City and County
16 of Honolulu, which we commonly call the Kuilima
17 case, that's found t 123 Hawaii Reports 150, at page
18 177. The Pacific 3d citation is 231 P.3d. 423. In
19 fact, didn't the Hawaii Supreme Court say that
20 environmental assessments or environmental impact
21 statements are inherently time- sensitive?

22 In other words, if subsequent actions or
23 later actions take place or circumstances change or
24 like decades pass, like what happened up at Kuilima,
25 a new environmental assessment has to be conducted.

1 Isn't that what the Hawaii Supreme Court said in
2 that case?

3 **MR. YUEN:** In that case it said that the
4 circumstances in that case justified a new
5 environmental impact statement.

6 **COMMISSIONER OKUDA:** But let me read from
7 that case from the pages that I cited to, and you
8 tell me whether or not what I'm going to read or
9 what I will have read is an accurate statement of
10 the law, okay? And I quote, "Based on the plain
11 language of Section 26, every EIS is inherently
12 'qualified' or limited by inter alia 'the timing of
13 the action,' i.e., some sort of timeframe."

14 And what the Supreme Court finally
15 concluded was for an EIS to meet its intended
16 purpose, it must address a particular project at a
17 given location, based on an explicit or implicit
18 timeframe."

19 Is that an accurate statement of the law
20 as stated by the Hawaii Supreme Court in the Kuilima
21 case?

22 **MR. YUEN:** Well, you just quoted from the
23 case, so I'd have to agree, yes.

24 **COMMISSIONER OKUDA:** Okay. And in fact,
25 isn't it true that the Hawaii Supreme Court has told

1 all of us in government we're supposed to do the
2 environmental assessment at the earliest possible
3 time, not defer it down the road. We're supposed to
4 do it as early as we can do it. Isn't that correct?

5 **MR. YUEN:** Yes.

6 **COMMISSIONER OKUDA:** Yeah. And just so
7 that, you know, you and I -- the people don't think
8 you and I just making this up, that's what the
9 Supreme Court said in this case Citizen for
10 Protection of North Kohala Coastline versus County
11 of Hawaii. That's 91 Haw., at page 94 and
12 specifically at page 105, where, and I quote, the
13 Supreme Court is saying that we have to do this,
14 quote, "at the earliest possible time to ensure that
15 planning and decisions reflect environmental
16 values." That's what the Supreme Court said. Do
17 the stuff earlier. Don't wait until later, correct?

18 **MR. YUEN:** Yes.

19 **COMMISSIONER OKUDA:** And because the
20 reason the Supreme Court laid out in that case is
21 that if we wait until later, as you know, one of the
22 -- I don't know if somebody mentioned here about
23 inertia, but once the ball kind of gets rolling and
24 we say, oh, we're going to do the review or the
25 study down the road at some later time, a lot of

1 stuff might have taken place, and then we start
2 hearing this argument saying, oh, all these things
3 took place so it's, you know, the environmental harm
4 might have already taken place or the agency, the
5 Supreme Court said, might feel that it's locked in
6 to what it decided, and they might have decided
7 something else with the proper review.

8 Is that a fair statement of what the
9 Supreme Court said in this Citizens for Protection
10 of North Kohala Coastline case?

11 **MR. YUEN:** What are you -- what are you
12 getting at?

13 **COMMISSIONER OKUDA:** I'm just saying the
14 rule is we're supposed to do these assessments
15 earlier --

16 **MR. YUEN:** Or at a government agency
17 that's responsible for the project is supposed to do
18 it.

19 **COMMISSIONER OKUDA:** No, no. It's -- we
20 are to require that these assessments are done
21 earlier than later. That's what the Supreme Court is
22 saying. Do you agree that that's what the Supreme
23 Court said?

24 **MR. YUEN:** I agree that the responsible
25 agency is supposed to conduct the assessment earlier

1 than later. I'm not agreeing that the Land Use
2 Commission is the responsible agency for purposes of
3 the wastewater treatment line.

4 **COMMISSIONER OKUDA:** Okay. Well, you
5 know, the findings of fact state what they state, so
6 let me move on because I don't want to belabor the
7 point. Let's switch to Ka Pa'akai.
8 Yes?

9 **CHAIRMAN GIOVANNI:** Can we take a --

10 **COMMISSIONER OKUDA:** Yes, okay.

11 **CHAIRMAN GIOVANNI:** I think this -- as we
12 transition to your questions on Ka Pa'akai --

13 **COMMISSIONER OKUDA:** Yeah, okay. Thank
14 you.

15 **CHAIRMAN GIOVANNI:** So let's resume in --
16 it's 12:05. We'll recess for ten minutes and come
17 back at 12:15.

18 **COMMISSIONER OKUDA:** Thank you.

19 **(Recess taken at 12:05 to 12:14 p.m.)**

20 **CHAIRMAN GIOVANNI:** We're back on the
21 record. We'll resume with the questions by
22 Commissioner Okuda.

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

25 Mr. Yuen, I'm going to shift over now to

1 the questions I have relative to the Ka Pa'akai
2 case. And just so that the record is clear, we're
3 talking about Ka Pa'akai versus Land Use Commission.
4 That's 94 Haw., at page 31, 7 P.3d., at 1068, a 2000
5 Hawaii Supreme Court case.

6 Now, you heard me read to one of the prior
7 witnesses a quotation from the Flores, F-l-o-r-e-s,
8 case, Ohana versus University of Hawaii, Supreme
9 Court decision found at 153 Haw. 76, a 2023
10 decision. And what I read was -- and let me just --
11 I'm going to read it and ask you whether that's now
12 an accurate statement of the law as of 2023.

13 And I quote, "at its core, Ka Pa'akai
14 concluded the state's constitutional duty means that
15 its agencies, quote, "may not act without
16 independently considering the effect of their
17 actions on Hawaiian traditions and practices,"
18 closed quote.

19 And there's a citation to the Ka Pa'akai
20 case where that quote is found and then the -- the
21 Hawaii Supreme Court, in the Flores case, continues,
22 and I quote, "this procedural requirement, the
23 agency action must be preceded by consideration of
24 Native Hawaiian traditional and customary rights
25 should apply equally when agencies act in a quasi-

1 judicial manner (contested case hearings) and in a
2 quasi-legislative manner (administrative
3 rulemaking)."

4 Was that -- or what -- what I read to you
5 just now, is that an accurate statement of the law
6 as enunciated or stated by the Hawaii Supreme Court
7 just a few months ago in this year, 2023?

8 **MR. YUEN:** (Inaudible.)

9 **CHAIRMAN GIOVANNI:** Is your mic on?

10 **MR. YUEN:** The Flores case stated the law
11 in Hawaii, and that's the law.

12 **COMMISSIONER OKUDA:** Okay. And we kind of
13 covered some of this at the last hearing when I was
14 asking people whether or not the request for an
15 extension of time, is that an action or an act?
16 Okay? Do you agree that the request for us to
17 extend the time, your request, would have required
18 us to take an act or action?

19 **MR. YUEN:** We don't believe that the
20 request for an extension of time triggers the need
21 to do a Ka Pa'akai analysis because we're still
22 continuing to implement the Commission's previously
23 made decision to grant reclassification of phase 1.

24 **COMMISSIONER OKUDA:** And what authority
25 can you cite to, case or statute, that says your

1 request for us to either give you an extension -- or
2 actually, what authority can you cite which shows
3 that your request for us to give you an extension,
4 the action of giving you an extension is not an act
5 or action?

6 **MR. YUEN:** We just -- we believe that's a
7 procedural step, and I don't have any analysis --
8 any citation at this time.

9 **COMMISSIONER OKUDA:** Would we be -- the
10 Land Use Commission be clearly erroneous or
11 otherwise violate HRS Chapter 91-G -- or Section 91-
12 G if we used our discretion to decide that what you
13 are requesting would require us to take an act or
14 action?

15 **MR. YUEN:** I don't believe your action
16 would be clearly erroneous.

17 **COMMISSIONER OKUDA:** Okay. So we would
18 have the discretion as the agency entrusted with
19 these land use decisions to make a decision that a
20 Ka Pa'akai analysis is required, correct?

21 **MR. YUEN:** Yes.

22 **COMMISSIONER OKUDA:** Okay. And basically,
23 that's what we did, correct?

24 **MR. YUEN:** You did what you did.

25 **COMMISSIONER OKUDA:** Okay. Because -- and

1 I just want to -- last bunch of questions because I
2 want to clarify one thing, because I think at the
3 other hearing, you kind of mentioned that the Ka
4 Pa'akai analysis is just required in boundary
5 amendment cases and no other cases, but as the
6 Flores case, Ohana versus University of Hawaii case
7 shows, or decision shows that Ka Pa'akai analysis is
8 clearly now applicable when rules are being made by
9 the administrative agency, correct?

10 **MR. YUEN:** I'm not familiar with the
11 factual circumstances of the Flores case.

12 **COMMISSIONER OKUDA:** Yeah. Well, I think
13 that -- what happened in that case were the agency,
14 the University of Hawaii, was attempting to make
15 rule regarding the use of Mauna Kea with respect to
16 telescopes and the observatories, and the issue was
17 the lack of a Ka Pa'akai analysis.

18 But let me just -- just so that the record
19 is clear here, do you contest the fact that, for
20 example, in this case, In Re: 'Iao Ground Water
21 Management Area high level source water use permit
22 application, which is a Hawaii Supreme Court 2012
23 case found at 128 Haw. 228. The Pacific 3d citation
24 is 287 P.3d. 129. The court applied the Ka Pa'akai
25 framework to an agency's amendment of interim stream

1 flow standards, do you dispute that that's what was
2 going on in that case where Ka Pa'akai was applied?

3 **MR. YUEN:** I'm not sure you asked me a
4 question I don't -- the case involved, what it
5 involved. I'm not the -- I'm not capable of
6 answering any question regarding that case.

7 **COMMISSIONER OKUDA:** Okay. Or the Mauna
8 Kea versus Board of Land and Natural Resources case,
9 and that's 136 Haw. 376. That's a 2015 case where
10 the Hawaii Supreme Court affirmed that a contested
11 case hearing to determine Hawaiian -- Native
12 Hawaiian traditional and customary rights is a
13 matter of Hawaii Constitutional due process, and
14 that wasn't a boundary amendment case.

15 **MR. YUEN:** What's your question?

16 **COMMISSIONER OKUDA:** That that's -- that
17 that's what happened in the Mauna Kea 'Ainahou
18 versus Board of Land and Natural Resources case
19 which I cited. In other words, Ka Pa'akai was held
20 to apply as a matter of constitutional due process
21 in that case, and that case wasn't dealing with a
22 boundary amendment.

23 **MR. YUEN:** But that -- I'm not going to
24 argue with you about what that case said or didn't
25 say. I'm not familiar. I don't have that case in

1 front of me, and I'm not prepared to speak on it.

2 **COMMISSIONER OKUDA:** Okay. And then the -
3 - the contested case regarding the conditional use
4 permit for the 30-meter telescope at the Mauna Kea
5 Science Reserve. That's 143 Haw. 373. That's a 2018
6 Hawaii Supreme Court case. That wasn't a boundary
7 amendment case. It dealt with the Board of Land and
8 Natural Resources decision regarding the developer's
9 permit.

10 Now, in that case, the Hawaii Supreme
11 Court held that the Ka Pa'akai standards were
12 satisfied, but the bottom line is Ka Pa'akai was
13 applied in that case even though that wasn't a
14 boundary amendment, correct?

15 **MR. YUEN:** Well, the Ka Pa'akai analysis
16 applied in that case because it was an adjudication
17 of a substantive rights under a permit, whether the
18 University or whoever was applying for the permit
19 could be granted the permit so Ka Pa'akai analysis
20 was appropriate there.

21 In this case, we're saying this is a
22 procedural step we're taking. It's not the
23 substantive adjudication of the boundary change, and
24 we have not -- we have not contested the fact that a
25 Ka Pa'akai analysis would be appropriate at such

1 time as the petitioner comes in and says, we're
2 ready to develop phase 2, and we'd like the
3 reclassification of phase 2.

4 **COMMISSIONER OKUDA:** Okay. And my final
5 question or maybe it might be a statement, and you
6 tell me if I'm wrong. You know, this provision,
7 Article 12, Section 7, which requires the Ka Pa'akai
8 analysis and which enshrines in the State
9 Constitution protection and constitutional
10 recognition of Native Hawaiian cultural practices,
11 resources, the things that are stated in Article 12,
12 Section 7, this comes out of the 1978 Constitutional
13 Convention, correct?

14 **MR. YUEN:** I believe that's correct.

15 **COMMISSIONER OKUDA:** I actually went down
16 to the archives because I had some research I had to
17 do on something else, but I pulled out the journal,
18 and I think there were 103 delegates, and I was
19 looking at the pictures of the delegates. And there
20 were very, very few Native Hawaiians in the 1978
21 Constitutional Convention, do you agree?

22 **MR. YUEN:** I don't know how many Native
23 Hawaiians were delegates to that convention.

24 **COMMISSIONER OKUDA:** Yeah. Somebody told
25 me they were seven. I can only think of three or

1 four. So bottom line is this provision which
2 constitutionally protects these resources and
3 opposes this affirmative duty, as the Ka Pa'akai
4 case says, on state agencies. It's not just a
5 reflection of what maybe a small political group
6 wanted. It's a decision by the citizens of Hawaii
7 from all different ethnicities, religions,
8 backgrounds. It's a statement of what makes Hawaii,
9 in the eyes of the delegates of the convention,
10 unique and special.

11 And so all I'm saying is this. If it
12 seems like we're being very strict about the
13 application of what the supreme court is requiring
14 us to do, it's not only because the Supreme Court
15 has told us multiple times, we've got to be strict,
16 we have an affirmative duty, but I think it really
17 reflects the hopes and goals, community goals of the
18 members of the people who live in Hawaii, the
19 rainbow of people here.

20 And so I have no further questions, Mr.
21 Chair. Thank you very much.

22 **CHAIRMAN GIOVANNI:** Thank you,
23 Commissioner Okuda.

24 Commissioners, any other -- Commissioner
25 Ohigashi.

1 **COMMISSIONER OHIGASHI:** If somebody can
2 help me, I'm just trying to find out whether or not
3 the Environment of Hawaii article dated April of
4 2023 is in the record or not.

5 **(Inaudible.)**

6 **COMMISSIONER OHIGASHI:** So it's part of
7 the record.

8 So what I wanted to ask is the involvement
9 -- the allegation of the involvement of RCFC. Can
10 you explain to me what the involvement of RCFC is?

11 **MR. YUEN:** The property is owned by three
12 entities, RCFC, Kaloko Heights, LLC, Kaloko Heights,
13 a B1A Holdings, LLC, and Kaloko Heights Investors,
14 LLC. These are all subsidiaries and affiliates of
15 an entity called PCCP. Historically, there was an
16 entity named RCFC that was a prior owner of the
17 property.

18 **COMMISSIONER OHIGASHI:** Given an
19 opportunity, this environmental -- what concerned me
20 is this, this article indicated that RCFC was
21 involved in the Kehalani Development in Wailuku.
22 And it seems to indicate that they sold off that
23 land to a person who is not qualified to develop.
24 In fact, I think he's selling off pieces of kuleana
25 property too without subdividing it. He's building

1 houses without renting or without going through the
2 proper thing.

3 And I'm concerned that the import of this
4 article is that the intent of an extension would be
5 to follow the same avenue that happened in the
6 Kehalani on Maui, and so I'm giving -- I'd like to
7 give you the opportunity to correct any
8 misimpressions that this article seemed to have
9 given or explain --

10 **MR. YUEN:** I'm not familiar with the
11 circumstances of what occurred on Maui, so I can't
12 really comment on that.

13 The three entities that presently own the
14 property have nothing to do with RCFC.

15 **COMMISSIONER OHIGASHI:** And -- but there
16 was a previous owner --

17 **MR. YUEN:** RCFC was a previous owner of
18 the property -- of this property.

19 **COMMISSIONER OHIGASHI:** And your statement
20 is that there is no connection between the two?

21 **MR. YUEN:** That's what I understand,
22 correct.

23 **COMMISSIONER OHIGASHI:** Can we have him
24 under oath, though?

25 **CHAIRMAN GIOVANNI:** Please state your name

1 and address and affiliation for the record, and I'll
2 swear you in.

3 **MR. MAYER:** Mark Mayer. I reside at 140
4 Stonepine Lane in Menlo Park, California.

5 **CHAIRMAN GIOVANNI:** Mr. Mayer, will the
6 testimony you're about to give be the truth?

7 **MR. MAYER:** Yes.

8 **CHAIRMAN GIOVANNI:** Please proceed.

9 **MR. MAYER:** So I can't speak to all the
10 details of the Maui development. As Mr. Yuen
11 mentioned, these properties were owned by a certain
12 entity. They'd gone through various levels of --
13 there was a deed in lieu at one point where a prior
14 lender had to give up ownership of the property.

15 What I can speak to is the RCFC entities
16 here on this island and what's going on with these
17 particular properties. They're being developed.
18 We've gone through a substantial process over a
19 period of years to get them to the point where
20 they're ready to develop. We've done the work to go
21 put a sewer line in. And what we're doing here on
22 this piece of property is completely independent of
23 anything that's going on over on Maui.

24 **COMMISSIONER OHIGASHI:** So that doesn't
25 really answer the question that I had. The question

1 that I had is are these separate independent
2 entities that have nothing to do with each other;
3 they don't have like co-owners in terms of --

4 **MR. MAYER:** I can't -- I can't answer that
5 in enough detail to make sure I get it right. I
6 mean, these are -- these are owned by various
7 entities within this company -- like, the way to do
8 like this works is you piece things out into
9 different entities so that they're financially not
10 dependent on one another, right? So this project
11 over here stands on its own.

12 And I don't know the entire ownership
13 structure of every one of them. There's numerous
14 owners involved in something like this with an
15 equity structure where there are various ownership
16 pieces to various projects. I can only speak to
17 RCFC, Kaloko Heights, and the other owners on this
18 particular property right here.

19 I can tell you that what you're reading
20 over there on Maui, that that report was erroneous
21 in a lot of ways. I can't get into all the details
22 of it. It would be impossible for me to go through
23 all that. But I know that that property, I know
24 there was some controversy over there, and I know
25 that that property's been very successfully

1 developed. It's going well. It's been a good
2 project, and there's always going to be some
3 arguments around the edges about various details,
4 but there's no --

5 **COMMISSIONER OHIGASHI:** Except for the
6 (audio disruption) and housing. Isn't there the
7 affordable housing component, which was a critical
8 portion of the agreement, was never developed --

9 **MR. MAYER:** I --

10 **COMMISSIONER OHIGASHI:** -- is not being
11 developed --

12 **MR. MAYER:** I don't think that's true. I
13 think it will be or is, but I don't know enough of
14 the details to get into it.

15 Here's what I would see --

16 **COMMISSIONER OHIGASHI:** Well, here's what
17 I'm saying. I -- I -- we sat --

18 **MR. MAYER:** That's fair.

19 **COMMISSIONER OHIGASHI:** -- and we heard,
20 and they're far. In fact, the guy who has that
21 property wants to dump it --

22 **MR. MAYER:** So let me speak --

23 **COMMISSIONER OHIGASHI:** -- you know, so --

24 **MR. MAYER:** Let me speak to that concern
25 here because what you see here is that we have 100

1 units of affordable housing being very successfully
2 developed on our property --

3 **COMMISSIONER OHIGASHI:** I -- I -- your --
4 I -- I know what you're trying to say. I'm trying
5 to focus on my question. My question is the import
6 of this article --

7 **MR. MAYER:** Yep.

8 **COMMISSIONER OHIGASHI:** -- was that your
9 company or companies affiliated with your company or
10 companies that are linked to your company did this
11 on Maui, and that we should be careful. So I'm
12 giving you the opportunity to --

13 **MR. MAYER:** Yeah.

14 **COMMISSIONER OHIGASHI:** -- that has
15 nothing to do with us. We're separate companies.
16 We don't even know who those people are. And I'm
17 trying to give you that opportunity --

18 **MR. MAYER:** Oh --

19 **COMMISSIONER OHIGASHI:** -- you -- or
20 according to your testimony under oath that you
21 cannot give me that --

22 **MR. MAYER:** No. This is not a situation
23 where we don't know who any of them are. I can't
24 give you personally the entire --

25 **COMMISSIONER OHIGASHI:** Yeah, and I accept

1 that --

2 **MR. MAYER:** -- organizational of everyone
3 there, but what I can tell you is this project here
4 stands on its own, and we have 100 units of
5 affordable housing very successfully going up right
6 now, with one of the most reputable companies on
7 this island working with us.

8 **CHAIRMAN GIOVANNI:** Commissioners,
9 anything further?

10 Okay. So I just want to gauge the
11 additional testimony. So county, how much time
12 would you need for your presentation?

13 **MS. AHN:** Five minutes.

14 **CHAIRMAN GIOVANNI:** And state, how much
15 time would you need for your presentation?

16 **MS. KATO:** About the same.

17 **CHAIRMAN GIOVANNI:** So we're going to take
18 a lunch break. It's going to be brief, so I'm going
19 to go for -- it's 12:35. We'll be back on the
20 record at 1 o'clock, 25 minutes.

21 **(WHEREUPON, a recess was taken.)**

22 **MS. AHN:** Thank you. I'm going to let
23 Deputy County Director Jeff Darrow briefly give the
24 County's position on this project.

25 **CHAIRMAN GIOVANNI:** Mr. Darrow, would you

1 state your name and title and I'll swear you in.

2 **MR. DARROW:** Aloha. Jeff Darrow, Planning
3 Department.

4 **CHAIRMAN GIOVANNI:** Do you swear your
5 testimony will be the truth?

6 **MR. DARROW:** Yes, I do.

7 **CHAIRMAN GIOVANNI:** Please proceed.

8 **MR. DARROW:** We are in support of the
9 petitioner's request for a reconsideration of the
10 motion. As we've mentioned throughout the hearings,
11 we're in support of this project. It's -- from a
12 planning standpoint, this is located within the
13 appropriate area that we want to see growth in Kona.

14 It's within a low density urban general
15 plan. It's on the edge of the urban expansion area.
16 It's surrounded with smaller agricultural lots to
17 the -- to the east of mauka. To the north, there's
18 existing urban lands. We also see this as being
19 consistent with the Kona community development plan.
20 It's located within the Kona urban area. It's
21 within concurrency zone of the Kona development
22 plan. It's just mauka of one of the neighborhood
23 transit-oriented developments.

24 These petitioners, applicants -- maybe not
25 just including these but also past -- put in a

1 considerable amount of money into this project with
2 offsite and onsite improvements, including
3 affordable housing, including putting in a
4 connection for Hinalani, water transmission lines,
5 water, a one-million-gallon water tank, street
6 lighting.

7 They've expended multiple millions of
8 dollars up to this point. You know, overall, as we
9 hear on a regular basis, there's a housing crisis in
10 Hawaii. It's difficult -- each one of us here that
11 are sitting here live in a house. We're fortunate
12 to live in a house. We want to be able to continue
13 to have housing options available to the locals, to
14 our community. The only way that's going to happen
15 is if we have development occur.

16 This development is going to provide over
17 a thousand units, including the construction of the
18 affordable housing units that are underway at this
19 time. The petitioner has made known that they're
20 planning on doing additional affordable housing
21 units in phase 2. They also indicated that any
22 studies that need to be done can be done at the time
23 of reclassification of phase 2.

24 Again, we are in support of their motion.
25 Thank you.

1 **CHAIRMAN GIOVANNI:** Thank you, Mr. Darrow.
2 Commissioners, questions for the county?
3 Commissioner Ohigashi.

4 **COMMISSIONER OHIGASHI:** Jeff, I -- sorry.
5 Deputy Director, I just have a few questions about
6 this. There's a -- my first question is if we don't
7 grant them the extension of time, how does it affect
8 the county approvals for the existing project? Not
9 these two, but for --

10 **MR. DARROW:** Phase 1?

11 **COMMISSIONER OHIGASHI:** Yes.

12 **MR. DARROW:** Commissioner Ohigashi, my
13 understanding is that phase 1 will continue until
14 substantial completion or completion, and then the
15 applicant will come in for reclassification of phase
16 2.

17 **COMMISSIONER OHIGASHI:** So there is -- by
18 granting an extension of time, what he's telling me
19 is it doesn't affect the county approval for phase
20 1?

21 **MR. DARROW:** That's my understanding.

22 **COMMISSIONER OHIGASHI:** The second
23 question that I have is that in your -- this
24 document as well as the previous document you filed
25 on the original, you take the position that you have

1 no objection. You don't use the word "support."
2 You just use the word "no objection." I'm coming
3 from a lawyer point of view. When I say -- when you
4 say, "no objection," that means we're not standing
5 in the way of this.

6 However, your testimony now is that you
7 support that. And I view the two things as totally
8 different, no objections versus support. Can you
9 tell me what is the official position of the County
10 of Maui -- County of Hawaii because this was signed,
11 I think, by Michelle Ahn in this matter.

12 **MS. AHN:** The County of Hawaii Planning
13 Department --

14 **CHAIRMAN GIOVANNI:** Use --

15 **MS. AHN:** We support petitioner's request.

16 **COMMISSIONER OHIGASHI:** Because I haven't
17 seen that in any of the documents filed, but you're
18 just saying, "no objection."

19 **MS. AHN:** I understand, yes. Our
20 testimony is that we support it.

21 **CHAIRMAN GIOVANNI:** Commissioners?
22 Commissioner Carr Smith?

23 **COMMISSIONER CARR SMITH:** Sure. Yeah,
24 just to reiterate. So the petitioner has done many
25 things like you mentioned. You listed the

1 affordable housing is under construction. I saw
2 that as I came down Hina Lani. There must have been
3 70 pickup trucks, workers on that project. They are
4 putting in the sewer line, right, as we speak?

5 And it seems like phase 1, that's what I
6 needed clarity the same way that Lee just did, that
7 phase 1 won't be affected by whatever decision is
8 made today.

9 **MR. DARROW:** That is my understanding,
10 Commissioner Carr Smith, as well as my understanding
11 from the staff report that LUC is in agreement with
12 that.

13 **COMMISSIONER CARR SMITH:** So it's really
14 just a matter of what needs to be done to continue
15 their work on the phase 1 so that they can then go
16 into reclassifying phase 2, is that right?

17 **MR. DARROW:** I would -- they are actively
18 working on phase 1 as far as subdivision
19 applications, plan approvals for the multiple
20 family. They're actively constructing the
21 affordable housing, so there has been permitting
22 that has been ongoing. Again, my understanding is
23 once they're ready to proceed with phase 2, they
24 would apply for reclassification of phase 2. Or at
25 this point, I don't know if you would call it phase

1 2 but for the property across Hinalani.

2 **COMMISSIONER CARR SMITH:** Okay. Thank
3 you.

4 **CHAIRMAN GIOVANNI:** I'd just like the
5 petitioner to clarify, they're making
6 representations about the petitioner. Can you
7 clarify and confirm that Mr. Darrow's understanding
8 is correct or not regarding -- the question is will
9 phase 1 be affected by the decision to grant an
10 extension or not grant an extension?

11 **MR. YUEN:** We don't believe that the
12 decision to grant or deny the motion for
13 reclassification would have any adverse effect on
14 the Commission's reclassification of phase 1.

15 **CHAIRMAN GIOVANNI:** The motion not for
16 reclassification. A motion for time extension.
17 Will the motion for time extension approval or
18 denial and the reconsideration thereof affect phase
19 1?

20 **MR. YUEN:** No.

21 **CHAIRMAN GIOVANNI:** So Mr. Darrow's
22 understanding is correct?

23 **MR. YUEN:** Yes.

24 **CHAIRMAN GIOVANNI:** Thank you. Do you
25 want to add something to that?

1 **MR. MAYER:** From a legal standpoint, it
2 doesn't affect our ability to move forward on phase
3 1. And so we're able to continue developing the
4 phase 1 lands. Part of what makes this an
5 attractive project going all the way through,
6 provide all of the housing that we plan to provide
7 out here is the -- is knowing that if we meet
8 certain benchmarks, once we've finished the phase 1
9 lands, that then the remainder of the land gets
10 rezoned per the original agreement.

11 So from a standpoint of the long-term
12 viability of the entire thing, that's the reason why
13 we're here asking this -- making this request
14 because we made substantial investment of time,
15 effort, energy, and treasure to get to this point in
16 the process based on the fact that our plan was to
17 go ahead and develop the entire property out.

18 So from a standpoint of our ability to
19 move forward and provide the density on phase 2,
20 provide all the housing units, we're planning on
21 providing additional affordable housing units that
22 would be in proportion to all that. All those
23 things are affected due to long-term by this -- by
24 this extension decision. That's the reason why
25 we're here asking for --

1 **CHAIRMAN GIOVANNI:** So I want to clarify
2 because I'm not sure you and I have a common
3 understanding of the process.

4 **MR. MAYER:** Okay.

5 **CHAIRMAN GIOVANNI:** So this is not a
6 zoning question, first of all. It's a time
7 extension for consideration that was denied
8 previously, and they're asking us to reconsider that
9 time extension.

10 Under all circumstances, if you want to
11 build and go forward with your project on phase 2,
12 that land has to be reclassified as a district
13 boundary amendment and which you have to come before
14 this body and present your case for why and under
15 what circumstances phase 2 would be reclassified to
16 urban.

17 **MR. MAYER:** Correct. So the reason for
18 the request for the time extension is that there's a
19 very direct roadmap in place with the existing
20 agreement that says we need to finish X, Y, and Z in
21 order to then come back and have that --

22 **CHAIRMAN GIOVANNI:** Do you understand that
23 you can proceed with your request for district
24 boundary amendment for phase 2 right now?

25 **MR. MAYER:** We could, but we have an

1 agreement in place right now that says if we finish
2 certain things, then the boundary amendment happens.

3 **CHAIRMAN GIOVANNI:** No, you don't. What
4 agreement?

5 **MR. YUEN:** We have the conditions in the
6 decision and order granting approval of phase 1 that
7 says approval of phase 2 is conditioned upon a
8 satisfactory completion of phase 1. But we
9 recognize we still have to come before the
10 Commission for that approval.

11 **CHAIRMAN GIOVANNI:** That would be a
12 district boundary amendment, a DBA, for the property
13 for phase 2. It's not automatic.

14 **MR. YUEN:** I -- that's a statement or
15 question?

16 **CHAIRMAN GIOVANNI:** That's a statement.

17 **MR. YUEN:** Okay.

18 **COMMISSIONER OKUDA:** Chair?

19 **CHAIRMAN GIOVANNI:** Commissioner Okuda?

20 **COMMISSIONER OKUDA:** Mr. Darrow, thank you
21 for coming and appearing. A follow-up to that
22 question. Is it your understanding that district
23 boundary amendment for phase 2 is automatic and does
24 not have to go through the normal district boundary
25 amendment process?

1 **MR. DARROW:** No, that's not my
2 understanding.

3 **COMMISSIONER OKUDA:** Because if there's
4 some confusion about that, this would be possibly
5 another reason why not to grant a reconsideration,
6 just so that it's absolutely clear that the district
7 boundary amendments and all the legal requirements
8 have not been waived, and I'm not sure the Land Use
9 Commission, even if it wanted to, waive those
10 requirements, have the authority to waive it.

11 But anyway, let me ask this question,
12 getting to the heart of some of these things. You
13 know, I think it was maybe at one of the planning
14 seminars or maybe it was somewhere else, somebody
15 testified or said, going slow sometimes is actually
16 going fast.

17 You know, part of the problem when a
18 project is delayed or has a time history over 40
19 years or 30 years or even 20 years, the law changes.
20 The Supreme Court comes down with different
21 decisions. Sometimes, the legislature might pass a
22 statute. The county might pass different
23 ordinances, things like that. So circumstances in a
24 legal situation changes.

25 If -- you know, that just seems to be the

1 nature if you delay moving forward with your
2 project, that the law changes and sometimes you've
3 got to comply with the new legal landscape. Do you
4 agree that's a fair statement?

5 **MR. DARROW:** Overall, I would agree. I --
6 I'm -- if you're trying to apply it to a specific
7 subject in relation to this application, that might
8 be something we can further discuss.

9 **COMMISSIONER OKUDA:** Yeah. I was just
10 mentioning that as a general statement. But let's
11 talk more specifically here. Would it be totally
12 out of the box, as far as possible outcomes, that if
13 we ignore the Ka Pa'akai requirements, as the -- as
14 it's been repeated or clarified by the recent Hawaii
15 Supreme Court case in the Flores case, if we ignore
16 that, if we ignore the series of Chapter 343 cases
17 starting with the Kuilima case and going up to
18 Umberger and these other cases, wouldn't that put
19 any project, not only this specific project, but
20 expose a project to future litigation by, you know,
21 lawsuits filed by members of the community or other
22 organizations and, in fact, delay, ultimately
23 getting the housing that everyone needs or the
24 development that's intended or planned for?

25 In other words, if you ignore the

1 requirement of law, it really doesn't make the
2 process faster. It actually slows things down. Is
3 that an unreasonable view of what can be one of the
4 possible outcomes of ignoring the law?

5 **MS. AHN:** Respectfully, Commissioner, I
6 understand that's a hypothetical because the County
7 of Hawaii is not proposing that anybody ignore any
8 applicable case law or constitutional requirement or
9 rule or ordinance.

10 In this instance, it doesn't seem that Ka
11 Pa'akai analysis or the 343 triggers have been met.
12 It seems like this is not the appropriate time for
13 that to occur. We're not saying ignore anything
14 that applies. But when the time comes, certainly
15 that work needs to be done.

16 **COMMISSIONER OKUDA:** Well, you heard me
17 read that section out of the Flores case, Ohana
18 versus University of Hawaii case where the Hawaii
19 Supreme Court said, and I quote, "at its core, Ka
20 Pa'akai concluded the state's constitutional due
21 process means that its agencies, quote, 'may not act
22 without independently considering the effect of
23 their actions on Hawaiian traditions and
24 practices.'"

25 We're being asked to take an action here,

1 correct?

2 **MS. AHN:** I'm not sure that the Land Use
3 Commission is being asked to take an action at this
4 time, and I don't have a copy of the Flores decision
5 with me, so I'm certainly not going to dispute the
6 wording that you just read.

7 But my understanding of the Ka Pa'akai
8 case is that that analysis doesn't mean that just
9 because Native Hawaiian or traditional or customary
10 practices will be affected or impaired, that
11 development has to stop. There are those three
12 prongs, right? The first is the scope of the
13 existence of any such practices. The second is,
14 will they be affected or impaired? And the third
15 is, if they exist in this land area, what feasible
16 actions could the Land Use Commission take that
17 would reasonably protect them, so it's not --

18 **COMMISSIONER OKUDA:** Okay. Let me stop
19 you right there because that's going off focus. And
20 by the way, you know, I kind of forget things, so
21 I'm not sure if you were here at the original
22 hearing, but I ask this question because -- and this
23 is even before Flores was decided -- because in Ka
24 Pa'akai, the Hawaii Supreme Court used the word
25 "act" or "actions." And I asked everyone here, you

1 know, what does the word "act" or "action" mean
2 because usually an act or action means that you're
3 asking somebody to do something, and we were being
4 asked to do something here, which is grant an
5 extension.

6 So the question really is, what's your
7 legal authority that you can point to which
8 indicates that asking us to -- or the Land Use
9 Commission granting an extension of time is not an
10 act or an action? And I don't want, oh, I think
11 that's what it means or it doesn't mean. What I
12 want is citation to legal authority, because
13 otherwise -- well, let me ask you just that limited
14 question. Can you cite to legal authority that
15 states or holds that the Land Use Commission
16 granting an extension of time is not taking an act
17 or doing an action?

18 **MS. AHN:** As far as I know, there is no
19 legal authority saying either way that it is or is
20 not an act or an action. I do know that the
21 Attorney General's Office has issued opinions on
22 whether certain other types of governmental
23 activities are acts or actions that trigger relevant
24 analyses such as subdivision approvals or issuing
25 building permits. I know we have opinions on those.

1 As far as I know, there's not an opinion
2 or a case about whether or not an extension is such
3 an act, but arguably, it would be whatever the
4 underlying request is that would be the act. An
5 extension would give more time, but it's not -- it's
6 not, you know, giving anyone permission to do
7 anything that they didn't already have permission to
8 do.

9 **COMMISSIONER OKUDA:** So in other words, if
10 we grant the extension, that's not an act or that's
11 not taking an action?

12 **MS. AHN:** I'm sorry. Excuse me. Hold on
13 just a moment, please. I think -- no, I'm sorry. I
14 don't know of any legal authority that states for
15 sure whether or not this is -- or a request for an
16 extension is an act or an action.

17 **COMMISSIONER OKUDA:** Okay. Now, just to
18 affirm a matter of foundation, you heard me ad
19 nauseum read the statements of law, and I was asking
20 Mr. Yuen whether I accurately stated the law in
21 these various thing that I read. Can you -- can you
22 point to anything that I quoted or said which was
23 not an accurate statement of law? Because I don't
24 want to go over all those same questions with you.

25 Is there anything that pops out in front

1 of you that you recall that, you know, I misstated
2 the law or misstated a statement of the law?

3 **MS. AHN:** I can't answer that question.
4 I'm sorry. I was present, and I heard you reading
5 to Mr. Yuen. I didn't have the case law in front of
6 me, so I wasn't following along verbatim. I cannot
7 say for sure --

8 **COMMISSIONER OKUDA:** Well, do you recall
9 that I read the statements of law, the decisions of
10 the Hawaii Supreme Court about the discretion that
11 is given to agencies to make decisions within the
12 scope of their authority?

13 **MS. AHN:** I recall you speaking with Mr.
14 Yuen on that topic.

15 **COMMISSIONER OKUDA:** Yeah. And do you
16 agree that the Land Use Commission has the
17 discretion to determine whether or not what we are
18 doing is an act or an action, as that term is used
19 not only in Ka Pa'akai but in Flores? That we have
20 the discretion because it's within what we're doing
21 to make a determination whether we're taking an act
22 or an action?

23 **MS. AHN:** I think that it is arguable at
24 this time. Arguably, yes.

25 **COMMISSIONER OKUDA:** Arguably, yes?

1 **MS. AHN:** Arguably, yes. The Land Use
2 Commission does have that --

3 **COMMISSIONER OKUDA:** Do you know of any
4 case -- yeah, arguably. Well, do you know of any --
5 so the record's clear, do you know of any legal
6 authority that says we don't have the discretion to
7 determine what is an act or an action?

8 **MS. AHN:** None that I can cite right now.

9 **COMMISSIONER OKUDA:** Okay. Do you see any
10 harm really if a Ka Pa'akai analysis is required to
11 be done more sooner than later?

12 **MS. AHN:** I think that the laws need to be
13 equally applied to everyone, and there's a stage in
14 the process at which it's appropriate in that most
15 people who go through the process, at least with the
16 County of Hawaii, you know, they have to go through
17 the steps in the same order, so --

18 **COMMISSIONER OKUDA:** That wasn't my
19 question. That wasn't --

20 **MS. AHN:** Well, requiring it now, I think,
21 would potentially be a harm to say that this
22 petitioner needs to do something now and other
23 people that want to develop don't have to do it
24 until a later time.

25 **COMMISSIONER OKUDA:** When have we at the

1 Land Use Commission ever told any other petitioner
2 that they didn't have to do a Ka Pa'akai analysis
3 under any circumstance? When did we ever tell them
4 we don't have to do a Ka Pa'akai -- or they don't
5 have to do a Ka Pa'akai analysis?

6 **MS. AHN:** I don't know of such an instance
7 at this time.

8 **COMMISSIONER OKUDA:** Okay. So --

9 **MR. DARROW:** Commissioner Okuda, I don't
10 think it's the matter of whether or not you told
11 somebody they didn't have to do it. I think what
12 the issue here is, is that this particular
13 application has been before the Commission since
14 1981. It's come before the Commission a number of
15 times.

16 The last time it came before the
17 Commission in 2012, for this similar request of a
18 time extension, there was information within the
19 report detailing all of the work that the applicant
20 had done. It detailed all of the studies that were
21 done, and it was accepted by the Commission without
22 a request to do a Ka Pa'akai analysis.

23 So the question is, why at this time
24 versus any other time prior to this. Ka Pa'akai has
25 been around for decades. Again, you have the -- you

1 have the information to make the Ka Pa'akai
2 determination. The information has been provided.

3 For us at the county, when we receive an
4 application, we do the Ka Pa'akai analysis with the
5 information provided. If we feel we don't have that
6 information, we request the applicant to provide
7 additional information and won't accept the
8 application.

9 **COMMISSIONER OKUDA:** Okay. Well, for me
10 personally, I apologize to the community if I didn't
11 raise the Ka Pa'akai requirements in a situation
12 where I should have raised it based on the standards
13 that I'm enunciating now.

14 Thank you, Mr. Chair. No further
15 questions.

16 **CHAIRMAN GIOVANNI:** Thank you,
17 Commissioner Okuda.

18 You know, the look on the faces of the
19 petitioner when I made my statement a moment ago
20 about the absolute requirement caused me to go back
21 and take another look at the original petition and
22 order from 40-some years ago. And it does state
23 that, in essence, and I'll paraphrase, it does
24 state, and it is arguable that merely by completing
25 phase 1 and meeting all the conditions of phase 1,

1 the redistricting of -- for phase 2 would be
2 automatic, and you wouldn't have to go through the
3 process.

4 But by virtue of the fact that -- and that
5 was if phase 1 was completed originally within the
6 five years. But it wasn't completed within five
7 years. Instead, it's been time extension after time
8 extension after time extension after time extension,
9 without extending the original five years.

10 And then the time extension was denied.
11 And now, the real crux that I think you guys are
12 trying to fight for was the opportunity to proceed
13 with phase 2 without doing a DBA. So I do think
14 it's material -- that my reading of it and my
15 takeaway from it, it sounds material to you folks.
16 That if we stand with our prior decision not to
17 grant an extension and you want to proceed with
18 phase 2, you have to go to a DBA.

19 If we reconsider and extend it further, I
20 think it becomes arguable whether you have to do a
21 DBA or not because of that five-year term. So I
22 think that's what this is about. So my question to
23 you is, am I reading this the way -- can you correct
24 me in how I'm interpreting this recent read of the
25 original decision from 42 years ago?

1 **MR. YUEN:** I think you're right that if
2 you essentially grant us another extension, there's
3 the presumption that the DBA would be granted;
4 however, the Commission always has the discretion to
5 impose additional conditions and the changing
6 circumstances such as the Ka Pa'akai decision which
7 had not been rendered in 1983. Arguably, we would
8 have to comply with that analysis, but perhaps other
9 analyses such as the requirement to study
10 transportation improvements which essentially have
11 been completed pursuant to the original decision or
12 the water situation which we have addressed and
13 improved.

14 Some of those requirements may not be
15 present in a subsequent boundary amendment
16 proceeding, should we be granted another time
17 extension.

18 **CHAIRMAN GIOVANNI:** So I just want to
19 follow up on that line of thought and suggestion.
20 So if this Commission grants a time extension with
21 the condition that it would require you to seek a
22 district boundary amendment that included a full-
23 blown Ka Pa'akai analysis and a full- blown 343
24 analysis, is that something that is within our
25 jurisdiction to, in your view, to make the

1 appropriate conditions?

2 **MR. YUEN:** The Ka Pa'akai analysis, yes.
3 The 343 analysis, no, because we -- to require a 343
4 analysis would require a trigger. And as our
5 position is that the County of Hawaii and the
6 Housing Finance and Development Corporation have
7 already satisfied the trigger of the use of state
8 and county lands for the wastewater treatment --

9 **CHAIRMAN GIOVANNI:** Okay. So if I say it
10 a different way, if we deny the extension and your -
11 - and the petitioner decides that they want to
12 pursue a district boundary amendment and a
13 requirement in that process is a 343, would it be
14 your argument today that it's unnecessary?

15 **MR. YUEN:** Our argument would be a 343
16 would be unnecessary unless there were another
17 trigger. You know, if we were going to --

18 **CHAIRMAN GIOVANNI:** You would rely on
19 whatever analysis has been done by others and
20 previously?

21 **MR. YUEN:** For the wastewater transmission
22 line, yes.

23 **CHAIRMAN GIOVANNI:** Okay.
24 Commissioners, any further questions for
25 the county, actually?

1 MR. DARROW: Chair, I do have a question.

2 CHAIRMAN GIOVANNI: Where are you?

3 MR. DARROW: Right here. Sorry. Over
4 here.

5 CHAIRMAN GIOVANNI: Oh, Jeff.

6 MR. DARROW: Yes. Thank you.

7 CHAIRMAN GIOVANNI: Mr. Darrow, please.

8 MR. DARROW: You've got me questioning
9 now. So maybe originally in the original docket it
10 might have been, you know, in five years you
11 complete this, you're automatically receive
12 redistricting on phase 2. I'm looking at the last
13 application for a motion or a findings of fact for
14 the time extension. And the wording says, order
15 granting petitioner's motion for extension of time
16 to apply for redistricting.

17 So it seems like at some point along the
18 way, there was an understanding that when the
19 applicant had done what was required in the original
20 order to be able to do the substantial completion,
21 it could apply for the redistricting. And so it
22 seems like it was -- I'm not sure if anyone
23 understood that the way I do, but I've always felt
24 up to this point that the applicant was going to be
25 coming in for an application once substantial

1 completion had been reached.

2 **CHAIRMAN GIOVANNI:** An application under
3 normal circumstances as if it was a stand-alone
4 application?

5 **MR. DARROW:** But it would be phase 2 of
6 this particular project, yeah.

7 **CHAIRMAN GIOVANNI:** Right. And I -- and I
8 share that view.

9 **MR. DARROW:** Thank you.

10 **CHAIRMAN GIOVANNI:** I'm not sure that
11 every Commissioner who's been watching this project
12 for 40 years views it the same, but I read now that
13 with the original decision and order, that if phase
14 1 would have been completed within five years, as it
15 was proposed and as it was represented to be done,
16 with compliance with all intendend conditions at
17 that time, then it would have been straightforward
18 that the district boundary amendment would have been
19 granted for phase 2. But a lot has happened in 35
20 years.

21 **MR. DARROW:** Yes. Thank you.

22 **CHAIRMAN GIOVANNI:** Yeah. Okay.

23 Commissioners, anything further?

24 Okay. We'll move to the state.

25 **MS. KATO:** Good afternoon, Commissioners.

1 Alison Kato, Deputy Attorney General for the Office
2 of Planning and Sustainable Development. Regarding
3 today's motion for reconsideration, OPSD recommends
4 that the LUC approves petitioner's motion for
5 reconsideration.

6 We recognize that a motion for
7 reconsideration should not be an opportunity to
8 revisit the same arguments and issues that were
9 fully argued and considered. But in this case, the
10 Commissions now rest on issues that were raised by
11 the Commission that the parties did not previously
12 identify as major issues, so we didn't address it in
13 our written submissions to the Commission.

14 Given that the petitioner has significant
15 interests at stake in this motion to extend time,
16 OPSD feels that they should be afforded the
17 opportunity to properly research and present
18 arguments regarding the issues that were raised,
19 which they have done in their motion for
20 reconsideration.

21 Having reviewed and considered the issues,
22 OPSD does not agree with the application of certain
23 laws, and it's the same issues that have been
24 discussed throughout this meeting.

25 Regarding the Chapter 343 requirements --

1 I'm sorry, I'm going to be restating some of this,
2 but just to be clear, a Chapter 343 review was
3 neither triggered nor required by LUC at the time of
4 the original district boundary amendment petition in
5 1981. Since that time, things have changed.

6 There was a change in the method of sewage
7 disposal from cesspools to water transmission line,
8 which was intended to service both the affordable
9 housing project and the larger Kaloko Heights
10 project. So this did trigger EA', which was
11 completed and accepted by the appropriate agencies
12 in 2019.

13 This determination of that Chapter 343 was
14 satisfied with respect to, specifically, the
15 wastewater transmission line, was made by the
16 appropriate agencies in 2019 and attempt to appeal
17 that decision has long passed.

18 So I'm just talking about the wastewater
19 transmission line and affordable housing project.
20 For that, the Chapter 343 analysis was done and
21 resulted in FEA findings, so we do not believe it's
22 appropriate to go back and use that as a current
23 trigger for an EA.

24 However, if some other component of the
25 construction is proposed on either phase 1 or phase

1 2 that does trigger Chapter 343, then at that time
2 we feel an EA would be necessary. But at this time,
3 there's no trigger that we are aware of.

4 Regarding cultural resources, OPSD
5 recognizes the importance of the State's
6 constitutional duty to preserve and protect
7 customary and traditional right of Native Hawaiians
8 under Article 12, Section 7 of the Hawaii
9 Constitution.

10 The Ka Pa'akai case articulates an
11 analytical framework for the State in making certain
12 actions to ensure that this obligation is met.

13 While the Ka Pa'akai case involved a boundary
14 classification, the analysis in that case is not
15 limited to such actions. That was pointed out by
16 Commissioner Okuda.

17 There are equivalent actions that have the
18 potential to impact customary and traditional rights
19 of Native Hawaiians, for which a full Ka Pa'akai
20 analysis is necessary, such as the granting of
21 special permits and many other examples that we've
22 seen in case law and opinions.

23 That being said, not every action of the
24 LUC has that potential impact working a Ka Pa'akai
25 analysis. And this is kind of a silly example, but

1 for example, the Commission acts to approve minutes;
2 that that is there was a vote taken and an action
3 taken. So there is no clear answer of what actions
4 are required to meet the requirement of Ka Pa'akai,
5 and this should be determined on a case-by- case
6 basis in your best judgment, which I believe is
7 within the discretion of the LUC.

8 And so the motion here today at issue is a
9 motion to extend time to achieve substantial
10 construction on phase 1 in order to apply for phase
11 2. Let's be clear, in my understanding, a denial
12 here does not impact phase 1. That is going to
13 continue on. That is going to be constructed. It's
14 not impacted by this denial.

15 And this decision also does not grant
16 petitioner the ability proceed with phase 2. I --
17 my understanding is also that once substantial
18 completion of phase 1 is completed, then the
19 petitioner would come back to apply for phase 2.

20 And I have not compared the incremental
21 districting requirements to the regular DBA
22 requirements. I assume there is some difference, but
23 I do believe that at that time, the petitioner, at
24 the time of application for phase 2, the petitioner
25 will be required to analyze the potential impacts

1 and mitigation of the phase 2 development. And the
2 LUC may impose revised or additional conditions upon
3 petitioner's application for redistricting of phase
4 2.

5 So in my view, this motion merely gives
6 petitioner the ability to apply for phase 2 once it
7 meets the condition of substantial completion. And
8 I believe that review is subject to a full-on
9 current Ka Pa'akai analysis which mean assisted,
10 updated studies, including a cultural assessment.

11 And the public testifiers today raise
12 important issues that must be addressed in
13 connection with that review. But again, OPSD does
14 not believe that the immediate motion, not the
15 motion -- but the motion to extend is an appropriate
16 action for this analysis.

17 And so OPSD recommends that the LUC
18 approve petitioner's motion for reconsideration so
19 that the Commissioners may consider the petitioner's
20 more detailed informed response and the things that
21 were discussed here today.

22 OPSD -- with respect to the motion to
23 extend time, OPSD's position has not changed on
24 this, and it remains partial approval with
25 modification, specifically a shorter time extension

1 of three years, which would give the LUC an
2 opportunity to weigh in at an earlier time if the
3 project is further delayed. Although, if you had
4 different ideas on ways to ensure this, such as what
5 we stipulated to in the previous hearing, OPSD may
6 find that acceptable as well. Thank you.

7 **CHAIRMAN GIOVANNI:** Thank you, Ms. Kato.
8 Commissioners?

9 Commissioner Lee?

10 **COMMISSIONER LEE:** This question is for
11 Alison.

12 **MS. KATO:** Mm-hmm.

13 **COMMISSIONER LEE:** So it sounds like
14 you're not agreeing that if the conditions are
15 fulfilled on phase 1, that phase 2 would be
16 automatic or ministerial, is that correct?

17 **MS. KATO:** Correct.

18 **COMMISSIONER LEE:** So you differ from the
19 county's interpretation?

20 **MS. KATO:** They think -- sorry, I might
21 have missed that. I thought they said something a
22 little different. They said that they think it's
23 ministerial?

24 **CHAIRMAN GIOVANNI:** Let's hear from the
25 county. I heard it. I did not hear that it's

1 ministerial. I heard Mr. Darrow say that it would
2 be a normal district boundary application at the
3 time it went forward, is that correct?

4 **MR. DARROW:** Well, again, that's where the
5 confusion lies. When we look at the original
6 petition, that was the understanding. But as we
7 look at the original petition, that was the
8 understanding. But as we look at the motions for
9 time extension, the language indicates that the
10 applicant will apply for redistricting.

11 **COMMISSIONER LEE:** Okay. I think I was
12 confused because your answer may have evolved a
13 little bit, so I appreciate that.

14 No more questions, Chair. Thank you.

15 **CHAIRMAN GIOVANNI:** So I think both -- I
16 just want to get it clear on the record as well,
17 Commissioner Lee.

18 So county is saying that an application
19 for a district boundary amendment would be required.

20 **MR. DARROW:** I -- I'm going off what I'm
21 reading.

22 **CHAIRMAN GIOVANNI:** Yeah.

23 **MR. DARROW:** And to apply for a
24 redistricting, that would be the normal course of
25 action. I don't see a ministerial action to apply -

1 -

2 **CHAIRMAN GIOVANNI:** Automatically grant
3 you --

4 **MR. DARROW:** -- yeah.

5 **CHAIRMAN GIOVANNI:** Yeah.

6 And the state agrees with that position or
7 is different?

8 **MS. KATO:** I mean, regardless of what this
9 decision order says, you're right that this isn't
10 five years later and a lot of things have changed
11 since then. And there are a lot of considerations,
12 especially Ka Pa'akai and other constitutional
13 requirements that we have to consider. So I guess
14 the bottom line is I see it as an application for
15 incremental districting.

16 I'm not exactly sure -- I mean, it is in
17 the rules, but I think that would need to be looked
18 at closely as to what the specific permits are, but
19 I do think that it is not a ministerial thing. I
20 think that you can use your judgment to see if
21 certain additional things are required, if certain
22 times have changed and mitigation is required.

23 And certain other studies are required, so
24 I'm not sure if it's necessarily the full district
25 boundary amendment process, which is very long. It

1 might be something shorter procedurally, but I do
2 think that the Commission can use its discretion and
3 judgment if the application is sufficient, is
4 justified.

5 **CHAIRMAN GIOVANNI:** Commissioner Lee,
6 anything further?

7 **COMMISSIONER LEE:** No, thank you, Chair.
8 Thank you, Madam Deputy.

9 **CHAIRMAN GIOVANNI:** Mr. Ohigashi?

10 **COMMISSIONER OHIGASHI:** So I'm going to
11 put it kind of more simply than maybe everybody
12 else. My understanding of what your testimony is,
13 is that if we say, give them the extension, then
14 we're in this fuzzy, not sure what's going to happen
15 in the future kind of event, but we're not sure what
16 exactly will be -- requirements will be placed upon
17 them. What do they have the right to under the
18 ministerial decision, et cetera?

19 Is that my understanding of what you're
20 saying?

21 **MS. KATO:** I'm saying that I have not
22 looked at it closely enough to tell you -- or to
23 tell you exactly what the requirements --

24 **COMMISSIONER OHIGASHI:** So we don't know.

25 **MS. KATO:** -- districting are, but that is

1 something that the LUC can interpret its rules to --

2 **COMMISSIONER OHIGASHI:** However, if we
3 say, let's not give them this extension, then we all
4 know what they have to do. They have to apply.
5 They have to go through the regular process and
6 obtain a district boundary amendment for this case,
7 too. Is that right --

8 **MS. KATO:** Yes. If this is denied, then
9 they lose that --

10 **COMMISSIONER OHIGASHI:** -- that you can
11 tell me for certain that that will happen.

12 **MS. KATO:** Yes. If you deny this, then
13 they do not have the opportunity to apply for the
14 incremental districting. That's gone, and they
15 won't have to do an entirely new district boundary
16 amendment, which they may or may not do.

17 **COMMISSIONER OHIGASHI:** Given the amount
18 of time -- given the amount of over 40 years and the
19 changes that the law has taken place, as a planner
20 this goes to the planner --

21 **MS. KATO:** I'm sorry, I'm not the planner.

22 **COMMISSIONER OHIGASHI:** Yeah, but as a
23 planner, your department has planning into it,
24 Office of Planning --

25 **MS. KATO:** I'm not --

1 **COMMISSIONER OHIGASHI:** -- but as a
2 planner, wouldn't it make sense to take a guarantee,
3 knowing what everybody has to do versus this fuzzy
4 litigation type of future event? I'm just asking
5 that question.

6 **MS. KATO:** I'm not sure how to answer that
7 because I'm not sure -- you said that that's --

8 **COMMISSIONER OHIGASHI:** That's okay
9 because it was just a rhetorical question.

10 **MS. KATO:** Oh, okay.

11 **MS. AHN:** Commissioner --

12 **MS. KATO:** I mean, you said that you want
13 a planner to respond. My client is available.

14 **COMMISSIONER OHIGASHI:** It was just a
15 rhetorical question.

16 **MS. AHN:** Respectfully, I appreciate that
17 question. I think the fact that these questions are
18 being raised and are being asked right now goes
19 towards whether or not the motion for
20 reconsideration should be granted.

21 **CHAIRMAN GIOVANNI:** I agree.

22 **MS. AHN:** Because right now, we're just --
23 right.

24 And then we will have a full opportunity
25 to do the research and solidify our positions and

1 come back before the Commission, and then have this
2 conversation with your rhetorical questions being
3 actual questions on the record that we can answer,
4 after having prepared for them.

5 **CHAIRMAN GIOVANNI:** So I think we've
6 interjected a fair amount of confusion along the
7 way, and we've clarified a great amount as well.
8 But one point that I want to confirm on an absolute
9 basis, at least the way I've heard it from all three
10 of you, is that if we deny the extension or deny the
11 motion to reconsider our denial of the extension,
12 phase 1 will not be affected and will continue?

13 **MS. KATO:** That's my understanding, yes.

14 **CHAIRMAN GIOVANNI:** Petitioner?

15 **MR. YUEN:** Phase 1 can continue with the
16 approved plans and the approved zoning by the County
17 of Hawaii.

18 **CHAIRMAN GIOVANNI:** County?

19 **MS. AHN:** That is our understanding as
20 well.

21 **CHAIRMAN GIOVANNI:** Okay. Thank you.
22 Commissioners, anything further for the
23 state?

24 Commissioner Lee?

25 **COMMISSIONER LEE:** Chair --

1 **CHAIRMAN GIOVANNI:** Turn on your mic.

2 **COMMISSIONER LEE:** Chair, should I wait
3 for later to ask Mr. Morris a question? Because
4 right now, the question is for OPSD, correct? I
5 have a question for Mr. Morris to also add his
6 opinion into this. So would this be the time or
7 should I wait --

8 **CHAIRMAN GIOVANNI:** It depends on the
9 question. Certain types of questions we have to go
10 into executive session, so --

11 **COMMISSIONER LEE:** Okay. So basically,
12 what my question would be is, what does Mr. Morris
13 think, is Chapter 343, in his opinion, could it be
14 triggered, and also does he agree that phase 2 would
15 not be ministerial. So that would be my question.

16 Commissioner Okuda, for a comment?

17 **COMMISSIONER OKUDA:** Yeah. My comment
18 would be I'm not sure if that's, number one, a
19 question we can ask Mr. Morris in executive session
20 because that would be dealing with deliberations, so
21 I think that's got to be out in the open. And
22 secondly, I think that's really within our purview
23 since all the parties seem to agree that we have
24 discretion to make that decision. At least, that's
25 what I heard.

1 **COMMISSIONER LEE:** I guess my desire is to
2 have Mr. Morris earn his pay today, so that's why I
3 asked the question.

4 **COMMISSIONER OHIGASHI:** Mr. Chair.

5 **CHAIRMAN GIOVANNI:** Commissioner Ohigashi?

6 **COMMISSIONER OHIGASHI:** I don't see
7 anything wrong with asking the question, but my
8 experience with the Attorney General's Office that
9 if it's an opinion that you are requesting, they
10 will ask for time to see whether or not they can
11 prepare one.

12 **CHAIRMAN GIOVANNI:** You're not going to --
13 I mean --

14 **COMMISSIONER LEE:** Commissioner Lee
15 speaking. Thank you, Commissioner Ohigashi.

16 Yeah, that's always the danger when you
17 ask the Attorney General's Office, but I'm willing
18 to take that risk. Thank you.

19 **MR. MORRIS:** And if I may respond briefly?

20 **CHAIRMAN GIOVANNI:** Mr. Morris, please.

21 **MR. MORRIS:** Thank you. I think the best
22 way I can respond is that I have reviewed the
23 decision denying the extension request, and that
24 decision includes findings of fact and conclusions
25 of law that I have reviewed and approved and agree

1 with, including the findings in that decision, that
2 343 would apply, and that the Ka Pa'akai -- and that
3 it is within the discretion and appropriate to
4 require the Ka Pa'akai analysis at this point in the
5 proceeding.

6 **CHAIRMAN GIOVANNI:** Thank you, Mr. Morris.

7 **COMMISSIONER LEE:** Commissioner Lee.

8 Thank you, Mr. Morris. That's helpful to me.

9 **CHAIRMAN GIOVANNI:** Okay.

10 **COMMISSIONER CARR SMITH:** Chair?

11 **CHAIRMAN GIOVANNI:** Who's that coming
12 from?

13 **COMMISSIONER CARR SMITH:** Me. Over here.

14 **CHAIRMAN GIOVANNI:** Commissioner Carr
15 Smith? I don't a screen in front of me.

16 **COMMISSIONER CARR SMITH:** Mr. Morris, so
17 you're saying that a decision to extend time
18 triggers those two items?

19 **MR. MORRIS:** Well, again, I'm going to
20 refer to the findings of fact and conclusions of law
21 that I approved and assisted with. And that for a
22 343, where you are tunneling under state land, that
23 there's a sufficient trigger for a 343 analysis at
24 this point. And with respect to the interpretation
25 of the Ka Pa'akai case that has been broadened to

1 include rulemaking and other actions.

2 And as Commissioner Okuda points out, that
3 even can be read to say that any affirmative action
4 taken by the Commission would require that type of
5 analysis. I support the conclusion that the Ka
6 Pa'akai is appropriate at this stage given
7 circumstances that we have here with the length of
8 delay and with the intervening law and
9 interpretation of Ka Pa'akai.

10 **CHAIRMAN GIOVANNI:** Good?

11 **COMMISSIONER CARR SMITH:** Yes.

12 **CHAIRMAN GIOVANNI:** Commissioner Lee?

13 **COMMISSIONER LEE:** Mr. Morris, so do you
14 also agree that the petitioner will have to reapply
15 for the district boundary amendment and that it is
16 not ministerial? Do you also agree with that?

17 **MR. MORRIS:** Well, that's more of a
18 question of looking at the entirety of the orders.
19 That is not addressed in the findings and
20 conclusions. And so I don't really want to
21 speculate about a future circumstance of a DBA
22 application. I will say that if the request for
23 extension is denied and the reconsideration is
24 denied, that, again, it's appropriate to say we're
25 all clear on what will be required in terms of

1 coming back for a new DBA request.

2 **COMMISSIONER LEE:** Okay. So it sounds
3 like you're not prepared to make a definitive
4 opinion on whether the -- they would have to reapply
5 for district boundary amendment if they get the
6 extension, is that correct?

7 **MR. MORRIS:** That's correct.

8 **COMMISSIONER LEE:** Thank you.

9 **MS. KATO:** Sorry, could I offer one more
10 comment just about the tunneling. I mean, I agree
11 that tunneling in state or county or road or lands
12 would trigger an EA, and in this case it did, and
13 then that's why the environmental assessment was
14 done to address that. Thank you.

15 **CHAIRMAN GIOVANNI:** Thank you, Ms. Kato.

16 At this point, I'm going to give the
17 petitioner an opportunity for rebuttal testimony.

18 **MR. YUEN:** Could I ask for a brief five-
19 minute recess before I do it?

20 **CHAIRMAN GIOVANNI:** You may.

21 **MR. YUEN:** Thank you.

22 **CHAIRMAN GIOVANNI:** So we will be back on
23 the record at 2:03.

24 **(Recess taken from 1:58 to 2:03 p.m.)**

25 **CHAIRMAN GIOVANNI:** Okay. Mr. Yuen.

1 **MR. YUEN:** Mr. Mayer is going to make the
2 presentation.

3 **CHAIRMAN GIOVANNI:** Please proceed.

4 **MR. MAYER:** Mr. Chairman, Councilmembers -
5 - Commissioners, thank you very much for your time
6 here. It's been a good lively discussion.

7 I hear a lot of discussion about a concern
8 that we might potentially develop the phase 2 lands
9 under kind of the zoning of what had been approved
10 in the past. And that is our intent. That's what
11 we'd like to do. That's what we hope to do.

12 At a prior meeting, we heard concern that
13 by not maxing out the density in phase 1 because we
14 felt it was better to not max it out, that that
15 would result in fewer affordable housing units being
16 built.

17 Certainly, if we are able to get this
18 extension, if we're able to proceed systematically
19 through our development and then get the resulting
20 redistricting in zone 2 lands, phase 2 lands, and
21 continue to develop those at the moderate density
22 that we have planned for this size, it results in a
23 lot more overall housing for the community and
24 certainly a lot more affordable housing for the
25 community.

1 If we don't have that in place, then we
2 have to explore all options of other ways to develop
3 the property, potentially, which include developing
4 under the existing ag zoning. I think it's not a
5 better solution for the County of Hawaii, for the
6 state, for the housing need that's around here to
7 have to go in that direction versus being able to go
8 in a direction where we have the ability to develop
9 at the density that this property has always been
10 planned for.

11 With regard to things like the cultural
12 resources and the 343, there are a number of things
13 that we will be applying for that we have to go
14 through a full regulatory process to do. Locking in
15 or satisfying all the requirements of phase 1 and
16 then getting our redistricting of phase 2 doesn't
17 open up some "wild west" go develop whatever we want
18 out there, as you guys know.

19 You guys have really good organizations,
20 both state and county, in place, to make sure that
21 what we develop is responsible development. And
22 we're working well with them right now on phase 1,
23 and we're seeing that come to fruition with the
24 first thing coming out of the ground being a hundred
25 units of affordable housing and which we think is a

1 very responsible, appropriate plan on the rest of
2 the land that's going to speak to a range of housing
3 and income levels.

4 We would like to see ourselves put in
5 position to continue that plan through the entire
6 property. Totally understand the deal fatigue of
7 40-plus years. We haven't been around that long in
8 this deal. We've been around a shorter time. In
9 that time, we've completed important infrastructure
10 improvements that were left undone for a while.
11 We've made significant contributions to the area,
12 affordable housing being, obviously, the most
13 significant one.

14 We've gone through the process of creating
15 a CFD to answer one of the concerns that an earlier
16 commenter had that's a valid concern. I understand
17 these things are not transparent to everybody how
18 they work. That CFD doesn't put us -- take us off
19 the hook or that -- that bond is secured by our
20 property. We put our entire property up to secure
21 that CFD, to secure that financing mechanism. It's
22 not secured by anybody else in Kona or by anybody
23 else's homes or anything like that.

24 Yes, our homeowners will eventually pay
25 for it. Right now we pay for the whole load of it.

1 And if we don't perform and we don't get homes built
2 out there to satisfy it, we lose. And the -- and
3 the county still has a sewer line and everybody else
4 is in great shape.

5 So I guess the ask here is we have been,
6 we feel like, doing the right things for this past
7 several years to move this thing in the right
8 direction. We think it's going in the right
9 direction. And this property is set up for success.

10 To not -- to deny this motion, to not give
11 us a time extension doesn't make it impossible that
12 we go develop it the way we've always planned, at
13 the density we've always planned, but it makes it
14 way harder. I mean, you guys have seen it. It
15 takes a long time to get through this process.
16 People spent a lot of time getting to this point
17 where we have zoning in place that will allow us to
18 methodically move through the project and provide
19 what we think is going to be the right answer out
20 here.

21 If that's not there, that gets harder to
22 accomplish that. And all the other options have to
23 be on the table to look at, are there other ways
24 that we need to develop this property because we
25 don't see the ability to get through that other

1 process.

2 So I feel like there's still plenty of
3 protections along the way to make sure that we're
4 not harming the watershed, we're not harming the
5 community. We're responsible developers. We don't
6 want to do that either. We're trying to create a
7 place that drives value.

8 My company has a long history of
9 development. We don't do deals where we're -- where
10 we have to go back later and apologize for them. So
11 I think you guys have the discretion. I mean, I've
12 listened to legal minds who are smarter than me. I
13 think you guys have the discretion to grant this
14 extension. I think it would be the best thing for
15 the chances of developing good solid housing stock
16 in this community that needs it, including
17 affordable housing. And the proof will have to be in
18 the pudding.

19 We will have to have accomplished all
20 these things on Phase 1 and develop them in a timely
21 manner in order for this stuff to happen. If that
22 happens, I think everybody's going to want it to
23 keep going. So that's my ask. Take a look at the
24 long -- all the consequences of an approval or a
25 denial. Thank you very much for your time.

1 **CHAIRMAN GIOVANNI:** Thank you, Mr. Mayer.
2 I appreciate where you're coming from. I really do
3 on a personal level. And I appreciate you putting
4 it in your own words.

5 I'm not a lawyer. There's plenty of them
6 in the room, but I'm not one, as you can probably
7 tell.

8 **MR. MAYER:** (Inaudible.)

9 **CHAIRMAN GIOVANNI:** Yeah. No. But I'm
10 trying to figure out -- to distinguish what really
11 is the difference here between what you call your
12 proceed in an orderly fashion as planned and the
13 disruption that would be caused if we do not grant
14 the time extension.

15 And the only thing that I can -- that I've
16 heard so far is the 343 analysis. So other than the
17 343 analysis, which your attorney said that you
18 would argue is unnecessary because it's already been
19 done by others as part of the sewer thing, other
20 than that, what would you -- what would be
21 disrupted? What are you avoiding by a time
22 extension?

23 **MR. MAYER:** That's a great question. So
24 in development, in large-scale development, we're
25 required to make plans for capital allocations that

1 go out quite a long ways, right, and figure out how
2 are we going to develop things in a way that we
3 don't run into gaps where you're going along doing
4 well, you're proceeding through something, and then
5 all of a sudden you've got a two-year hole in the
6 window where, oh, man, we're doing really well,
7 we're selling homes, we've got builders in here
8 doing a good job, and all of a sudden now we're
9 stopped for a period of time.

10 One of the things that's very attractive
11 about this property, from a development standpoint,
12 is having the boxes checked, having the water in
13 place, having done the offsite improvements, having
14 put all that stuff in place so that we can move, as
15 I said before, in an orderly manner. A boundary --
16 what's the name of the --

17 **CHAIRMAN GIOVANNI:** District boundary
18 amendment.

19 **MR. MAYER:** A district boundary amendment,
20 as I understand it, is a long and potentially drawn
21 out process that would bring doubt, questions into
22 how we could proceed in the long run. So it makes
23 it harder to plan an entire truck through the
24 development, and it makes you have -- it makes us
25 have to go look at, all right, is this the best way

1 to go. Can we afford to hope that we're going to
2 get a favorable outcome from a boundary amendment
3 but that might add two or three years to our process
4 versus knowing for some certainty that if we can get
5 through -- if we are responsible and we get through
6 this development in a reasonable amount of time, we
7 know that that next piece is there, that we don't
8 have this other step we have to go through.

9 I don't think there's any way I could sit
10 here right now and say there will never be a 343 for
11 any reason. Who knows? Something we might do could
12 trigger that.

13 **CHAIRMAN GIOVANNI:** So the -- I think we
14 got off track a little bit there. So in my mind,
15 we're not talking about an opportunity for
16 ministerial or check the box district boundary
17 amendment for reclassification. Under any
18 circumstances, you're going to have to go for a
19 district boundary amendment.

20 The argument that's been put forth is that
21 it would not require a 343 environmental analysis.
22 That's the stumbling block that I'm hearing because
23 I'm not hearing the sentiment of the county or the
24 State or my fellow Commissioners that it's a
25 ministerial DBA under any circumstance.

1 **MR. MAYER:** Well -- so I would say from my
2 point of view, as a developer, not the lawyer, we
3 have a roadmap here of this document that gives us
4 some clarity as to where we all believe we're going
5 that says if the Land Use Commission gives the
6 extension, it feels like we're all saying, okay, if
7 we do what we're supposed to do, you guys are
8 saying, yep, this is the roadmap by which you get to
9 that next phase.

10 And I feel like that -- we feel like, as a
11 company, that that's a much better position to be in
12 for us to be able to make -- to commit the time,
13 energy, resources, and all that to make that next
14 phase go.

15 **CHAIRMAN GIOVANNI:** So -- and I know
16 you're relatively new owners for this project. But
17 that same argument has been made five times before
18 for time extensions.

19 **MR. MAYER:** Fair statement. I think you
20 can look at us and see there's real progress going
21 on. There's dirt being moved out there. There's
22 people that are going to be living in those houses.

23 **CHAIRMAN GIOVANNI:** Fair enough. Fair
24 enough.

25 **MR. MAYER:** And we've invested, you know,

1 \$12 million out of our pocket to go put a sewer line
2 in. People say oh, it's a bond. Well, it's out of
3 our pocket. It's secured by our land. It's just a
4 finance that we're paying for. So that's a big
5 difference.

6 **CHAIRMAN GIOVANNI:** Okay.

7 Fellow Commissioners, questions for
8 petitioner?

9 **CHAIRMAN GIOVANNI:** One second.

10 **MR. MAYER:** Oh.

11 **CHAIRMAN GIOVANNI:** I called on
12 Commissioner Carr Smith first.

13 **COMMISSIONER CARR SMITH:** Thank you,
14 Chair.

15 Actually, I kind of wanted to ask Jeff
16 just because I know Jeff's been around forever on
17 this. It seems like where we get caught is the
18 incremental aspect of the -- of the development, and
19 that it seems like maybe the petitioner assumed that
20 because of this two-increment process, that there
21 was some automatic understanding of what was going
22 to happen with phase 2.

23 What's your experience on how increments
24 work?

25 **MR. DARROW:** Aloha, Commissioner Carr

1 Smith. You know, ironically, we were talking about
2 that earlier. This is -- I don't know how it works
3 on the other islands, but in regards to incremental
4 redistricting of a state land use boundary
5 amendment, this is one of the few or only ones I'm
6 aware of, so it's very unique. And that's why I
7 think we're all kind of trying to figure this out.
8 And I'm just, again, going on basic language here,
9 but thank you.

10 **COMMISSIONER CARR SMITH:** Thank you. So
11 what do you feel about that? If -- if maybe what
12 you thought was to be something automatic and it's
13 not, how does that work for you?

14 **MR. DARROW:** I feel like there's real
15 value in having this document that lays out the
16 roadmap that we're all agreeing to, basically, that
17 says, if you do X, then you can do Y. And so we
18 have to hold to that.

19 To the Chairman's point, it should have
20 been -- it was supposed to be within a certain
21 amount of time. I guess what we're saying is we
22 still think it's a good idea. We still think it's
23 the right thing for the property, so we think it
24 make sense for all parties concerned to continue
25 that agreement.

1 **COMMISSIONER CARR SMITH:** So if you do not
2 get your extension, will you still proceed and come
3 back with the DBA?

4 **MR. MAYER:** I don't know for sure. If we
5 don't have that extension and we don't have the same
6 kind surety of what the process, at least of what
7 everybody is basically agreeing to, then we have to
8 examine all the options. And one of those options
9 is developing under the current zoning.

10 **COMMISSIONER CARR SMITH:** Right. And so
11 if you do get an extension, do you agree with, I
12 think, what everybody is pretty much saying is that
13 you need to come back for redistricting and a DBA
14 anyway.

15 **MR. MAYER:** I think we need to come back
16 and work under the rules of the existing document.
17 And I think everybody will have to figure out
18 exactly what that is. I don't -- I don't know if
19 it's exactly the same process that you would
20 normally do, but I think there's a document here
21 that we've been working under that we would come
22 back and work under.

23 I mean, I feel like nobody in here -- from
24 what I've seen today, there's -- there's a number of
25 opinions of exactly what that is. So maybe what we

1 need to do is take some time to consider this and
2 come to some agreement of what that is.

3 **CHAIRMAN GIOVANNI:** Commissioner --

4 **COMMISSIONER CARR SMITH:** I'm good for
5 now.

6 **CHAIRMAN GIOVANNI:** Thank you.

7 Commissioner Lee?

8 **COMMISSIONER LEE:** Thank you, Chair.

9 There's probably no one more disappointed
10 than my mother when I state that I'm also not an
11 attorney in this room. But fortunately, my siblings
12 bailed me out on that as they are, unfortunately,
13 lawyers.

14 I guess what I wanted to ask you is that
15 it sounds like what you're saying is that getting
16 the extension has value to you, even if later on,
17 whether through litigation or whatever, it's
18 determined that you'll still need to apply for a
19 district boundary amendment, is that correct?

20 **MR. MAYER:** I think it allows the
21 conversation to move forward. It's going to have to
22 be a conversation that moves productively between
23 all of us.

24 **COMMISSIONER LEE:** Okay. And then can you
25 refresh our memory -- because it sounds like you're

1 saying if you don't get it, you'll go back to the
2 original zoning, which is ag, so you'd be selling ag
3 lots, then. Is that correct?

4 **MR. MAYER:** To be clear, I don't want to
5 be saying I would or wouldn't do anything. I'm
6 saying our surest route to developing as planned is
7 to have this extension and have this sort of general
8 framework agreement. And obviously, the reason I
9 bring that up is because I think -- I hope that some
10 of you might agree that that's the right answer
11 here, that that density serves this place better.

12 If people don't agree, then maybe I'm
13 making the wrong argument. But to me, that's the
14 reason why you guys would go in this direction. And
15 if we don't have that surety, then other -- we have
16 to take a look at other options. We can't be in a
17 position of going, well, I don't know what's ever
18 going to happen out there.

19 So like any property that we have for
20 development, we have to figure out any given time
21 what's the highest and best use, what's a likely
22 path to success that we might have. And so that
23 would lead us to explore those kind of things also.
24 But there's no -- I don't know where we'll end up.

25 **COMMISSIONER LEE:** Okay. So finally, can

1 you refresh our memory as to if you were to go the -
2 - if you were to go to the ag lot route, how many
3 lots that would be, at what size versus what you
4 wish to do, how much housing would the density you
5 want -- I want to see what the comparison is if you
6 can refresh our memory.

7 **MR. MAYER:** So I could easily be not
8 exactly right on this, but I'll give you roughly
9 what we think. It would be something like five-acre
10 zoning, so we would have something like 40 lots on
11 that 200 acres. I think the current plan is --

12 What do we have, like 400?

13 Maybe as many as 600. And certainly, a
14 percentage of that would be, obviously, affordable
15 housing. So I think it probably would -- honestly, I
16 think it would be less than 600 because, as we found
17 on this side, with the topography and stuff, it
18 makes sense to not push it all the way to the
19 maximum density, but it would be something like
20 that.

21 **COMMISSIONER LEE:** Thank you.

22 Thank you, Chair.

23 **CHAIRMAN GIOVANNI:** Thank you.

24 Go ahead, Commissioner.

25 **COMMISSIONER OHIGASHI:** Just following up

1 on Commissioner Lee's questions. When you say 58,
2 would that be phase 2 you're talking about, or is
3 that phase 1?

4 **MR. MAYER:** No. Phase 1 we have a plan in
5 place that we're --

6 **COMMISSIONER OHIGASHI:** Okay. So phase 2
7 you're talking about additional --

8 **MR. MAYER:** We're talking -- I'm sorry.
9 Yeah, we're talking about -- I assume that's what
10 you were asking.

11 **COMMISSIONER OHIGASHI:** Okay. I just
12 wanted that clear in my mind.

13 **MR. MAYER:** Yeah, of course.

14 **COMMISSIONER OHIGASHI:** Okay.

15 **CHAIRMAN GIOVANNI:** Commissioner Atta?

16 **COMMISSIONER ATTA:** Yeah. I just was
17 wondering if you -- we're talking phase 2 now, yeah?
18 Then what do you -- if -- one of the option is doing
19 ag land, and then that's -- that doesn't come --
20 that doesn't conform with the -- the county zoning
21 because you're -- this -- of an expansion, so then
22 what would the county do then?

23 **CHAIRMAN GIOVANNI:** Mr. Darrow?

24 **MR. DARROW:** Thank you, Commissioner Atta.
25 The applicant -- you know, it wouldn't be consistent

1 with the general plan and the CDP for the area, so
2 this area is for higher density, for urban growth.

3 We -- we can't stop anybody from
4 subdividing and doing -- if they're existing zoning.
5 One comment I would like to make just to correct the
6 record. When you have ag- 5 zoning or any zoning
7 above five acres, it doesn't trigger affordable
8 housing requirements, so there wouldn't be any
9 affordable housing connected to that project. There
10 wouldn't be any zoning requirements or conditions,
11 no state land use boundary conditions, those kind of
12 things.

13 **CHAIRMAN GIOVANNI:** Okay.

14 **COMMISSIONER ATTA:** (Inaudible.)

15 You know, if -- if -- that means that there's some
16 advantages to just going with the existing zoning,
17 then.

18 **CHAIRMAN GIOVANNI:** Correct.

19 **MR. MAYER:** There are certainly plusses
20 and minuses to any direction we go. We believe the
21 best direction is to keep going down the path that
22 we've been on, and that's what we'd like to do.

23 **CHAIRMAN GIOVANNI:** Okay. Thank you.

24 We're going to take a second time through
25 public testimony. Ms. Kwan, is there anybody signed

1 up for public testimony?

2 **MS. KWAN:** Yes, Mr. Chair. First up we
3 have Janice Palma Glennie.

4 **CHAIRMAN GIOVANNI:** Is she here? She
5 left.

6 **MS. KWAN:** Just kidding. The next we have
7 Chuck again.

8 **CHAIRMAN GIOVANNI:** So Chuck, you're still
9 under oath and limit your comments to two minutes.
10 Please proceed.

11 **CHUCK FLAHERTY:** Thank you, Mr. Chair and
12 Members of the Commission. I'm listening to this
13 and the thing that comes up for me, first of all,
14 I'm hoping -- I haven't heard a clarity about this,
15 but my understanding is that the environmental
16 assessment was for the affordable housing project
17 that the Hawaii Housing and Finance Corporation, it
18 was basically sold to them, and they are the ones
19 that are developing this, and that the sewer line
20 was -- the EA was triggered because of the sewer
21 line, but it was just for the flows of water to the
22 sewer line from the affordable housing project and
23 did not consider phase 1 or phase 2 of the Kaloko
24 Heights project.

25 If that's the case, then the question

1 becomes should the Land Use Commission require phase
2 1 to have an environmental assessment because the
3 flows of water from that were not considered in the
4 affordable housing EA and is flowing into a
5 wastewater treatment plant, that -- we may find out
6 is not in compliance with the Clean Water Act as
7 well as the State Constitution for state and
8 county's requirement to protect near-shore marine
9 sources.

10 So I guess that's my -- my biggest concern
11 right now is, again, about 343. I think it
12 definitely -- it should be triggered. And for me,
13 the question that's come up, listening to the
14 hearing today is should phase 1 actually have a 343
15 trigger applied to it because the EA was for the
16 affordable housing project and not the remainder of
17 the development. Thank you.

18 **CHAIRMAN GIOVANNI:** Thank you. Stay
19 tuned.

20 Petitioner, any questions? Petitioner?

21 **MR. YUEN:** No.

22 **CHAIRMAN GIOVANNI:** State? County?

23 Either one of you?

24 **MS. KATO:** No questions.

25 **MS. AHN:** No, thank you.

1 **CHAIRMAN GIOVANNI:** Okay. Thank you.

2 Any other additional? Okay.

3 We're going to proceed with deliberations.

4 Commissioners, the Chair will entertain a
5 motion regarding how -- for a second round?

6 **MS. KWAN:** Okay. We have two more on the
7 list. First up, Kimberly Crawford.

8 **CHAIRMAN GIOVANNI:** Oh, we've got a 2:30
9 hard stop on this thing that I'm really trying to
10 work towards, which is five minutes away, so please
11 be brief.

12 **KIMBERLY CRAWFORD:** Yep. My comment is
13 really similar to Chuck's, and I was just going to
14 ask for correction if I'm wrong, but it seems that
15 the EA adjusting the 343 for connection to the
16 county wastewater plant through county right-of-way
17 over Hinalani and Ana Keohokalole only addresses
18 five million gallons of wastewater from the
19 affordable housing unit.

20 There's an MOA agreement with the
21 wastewater treatment plant and the developer that
22 says there will be over ten million gallons of
23 wastewater going to the wastewater treatment plant,
24 so I was wondering why it seems that the phase 1 and
25 phase 2 are piggybacking off of an EA done by the

1 affordable housing units, and is it reasonable to
2 say -- or how can we be sure that the petitioner
3 will act in good faith on phase 2 to develop
4 potentially more affordable housing to be sure to do
5 a good and thorough Ka Pa'akai and an environmental
6 archeological assessment and be good stewards of our
7 land if they are missing some important details?

8 **CHAIRMAN GIOVANNI:** Thank you for being
9 brief.

10 Any questions for this witness,
11 petitioner?

12 **MR. YUEN:** No.

13 **CHAIRMAN GIOVANNI:** County?

14 **MS. AHN:** No thank you.

15 **CHAIRMAN GIOVANNI:** State?

16 **MS. KATO:** No, thank you.

17 **CHAIRMAN GIOVANNI:** Thank you.

18 Commissioners?

19 Thank you very much.

20 Is there anybody else? Okay.

21 **MS. KWAN:** Last up we have Loke Aloua.

22 **CHAIRMAN GIOVANNI:** Loke, you're still
23 under oath, so please proceed.

24 **LOKE ALOUA:** Thank you. I just want to
25 tell you folks thank you first. I always learn from

1 you folks, and thank you for all the discussion.

2 But I echo Uncle Chuck and also Kimi
3 because that MOA, that amount that's allotted, not
4 even half of that was looked at in the EA, which is
5 a huge issue if we're going to say that that's the
6 satisfaction for the environmental review process.

7 Somebody -- I don't know if that's how it
8 works. Can we just sign agreements and then just
9 pick a random number and not assess the rest of it
10 that we agreed to, even though the agreement also
11 says we just satisfy Chapter 343. And the thing for
12 the EA, which really is the impact, is the nitrogen
13 and the phosphorus because it didn't assess that ten
14 million gallons. It didn't consider, which is
15 really big deal for me as an ocean user and for a
16 steward of our kai area.

17 So if I could have help with understanding
18 how this actually works, that would be really great.
19 Thank you.

20 **CHAIRMAN GIOVANNI:** Thank you.

21 Questions for Loke?

22 **MR. YUEN:** None.

23 **MS. AHN:** No, thank you.

24 **MS. KATO:** No, thank you.

25 **CHAIRMAN GIOVANNI:** Thank you.

1 Thank you, Loke.

2 Anybody else? Okay.

3 Now we'll proceed to deliberations.

4 Commissioners, the Chair will entertain a motion

5 regarding how we should proceed on this matter.

6 What is your pleasure?

7 **COMMISSIONER CARR SMITH:** Chair?

8 **CHAIRMAN GIOVANNI:** Commissioner Carr

9 Smith?

10 **COMMISSIONER CARR SMITH:** I'd like to make

11 a motion to -- sorry. I'd like to make a motion to

12 reconsider the decision for the extension of time.

13 **CHAIRMAN GIOVANNI:** You want us to grant

14 the request?

15 **COMMISSIONER CARR SMITH:** Grant the

16 request. Thank you. I'll explain why more later.

17 **CHAIRMAN GIOVANNI:** Do I have a second?

18 **COMMISSIONER LEE:** Chair, I will second.

19 **CHAIRMAN GIOVANNI:** Commissioner Lee will

20 be a second.

21 So Commissioner Carr Smith, will you speak

22 to your motion?

23 **COMMISSIONER CARR SMITH:** Sure. I think

24 that this applicant, they haven't been doing this

25 for 40 years. I didn't get complete clarity as to

1 how long, but I know that they've invested a lot in
2 the community and I think that the housing is
3 needed, and I think as the county explained, that
4 the place for the housing is correct.

5 I appreciated the State's thoughts on the
6 matter as well. I don't necessarily think that Ka
7 Pa'akai and the 343 should be triggered until such
8 time as they come in for redistricting. That's all
9 I have right now.

10 **CHAIRMAN GIOVANNI:** Thank you.

11 Commissioner Lee?

12 **COMMISSIONER LEE:** Thank you, Chair. I
13 appreciate that Commissioner Carr Smith is the
14 commissioner for this island, and so I take it
15 seriously that she made this motion, so that's why I
16 seconded.

17 I'm kind of torn because I hear the
18 complaints of the community, but I'm kind of swayed
19 by the testimony from OPSD and from the county, as
20 well as the fact that the petitioner has put in ten
21 million or more in money, which is something that
22 the previous owners did not do. And I'm swayed
23 because of the housing situation that's so
24 desperate. 40 lots versus 600, I think that sways
25 me on this one. Thank you.

1 **CHAIRMAN GIOVANNI:** Thank you.

2 Commissioners, other thoughts? No?

3 Commissioner Okuda?

4 **COMMISSIONER OKUDA:** I'm going to vote

5 against the motion, and this is the reason why.

6 Even assuming -- and I will assume that we have what
7 you could describe as a good developer here who's
8 coming into this with good intentions with competent
9 counsel, but frankly, and I apologize if I -- if I
10 offend people's political views, but this is just
11 like the Super Ferry. You know, I thought the super
12 ferry was a good idea, but people who are pushing
13 that good idea took shortcuts on the 343
14 environmental impact statement, cut corners, and
15 what happened was a good idea is no longer here.

16 You know, it's unfortunate that the
17 entitlement process in Hawaii takes so long. And
18 frankly, at some of these public gatherings, I've
19 been critical of the Land Use Commission. But the
20 problem here is that we are just staring right in
21 the face of the Supreme Court cases which have these
22 eyeballs looking at us.

23 And what's going to happen here or there's
24 a high likelihood here is if we grant this request
25 for reconsideration, everything moving forward is

1 going to be tainted. Even if the developer goes out
2 and now later on gets Ka Pa'akai analysis done or a
3 cultural impact assessment done or a 343
4 environmental assessment, the argument that's going
5 to be made in court is that it wasn't done before we
6 acted.

7 And so there's -- again, there's no harm
8 in taking time and making sure that these boxes are
9 checked off. I'm not personally agreeing that these
10 boxes might make good public policy sense or good
11 for housing, but the problem is as long as it's the
12 law, we've got to follow the law. And I think the
13 cases are really clear.

14 So that's the unfortunate thing sometimes
15 about the rule of law. Rule of law means sometimes
16 we have to go along with a decision that we don't
17 like, but if we don't have the rule of law, then
18 it's anything goes. And I think at this point in
19 time the Hawaii Supreme Court has made it very, very
20 clear it's going to strictly apply these rules, and
21 so actually, to move this project forward
22 successfully, I'm going to vote no to the motion
23 because, frankly, granting this motion is going to
24 delay needed housing in the community. Thank you.

25 **COMMISSIONER YAMANE:** Mr. Chair?

1 **CHAIRMAN GIOVANNI:** Commissioner Yamane?

2 **COMMISSIONER YAMANE:** Thank you, Mr.

3 Chair. I'll also will be not in favor of this
4 motion. I think the fact that we've spent the last
5 three-quarters of this meeting talking legal
6 language shows the ambiguity of the previous orders.
7 And the discussion between the state and county kind
8 of going back and forth says that, you know, in ten
9 years, another Land Use Commission could be sitting
10 here, talking about the same thing on whether the
11 original motion was automatic redistricting and the
12 supplemental of 2012 was an application and whether
13 they tie those two together.

14 And you know, from our last meeting from
15 my chair kicking the can on the road, I don't think
16 is the time. I think it is the time, in fact, to
17 disconnect the time request for the phase 2 and to
18 ensure that an application for DBA comes in with all
19 the Ka Pa'akai, whether it be EA or, you know, 343
20 has triggered that, I think, will be decided at that
21 time. And with that reason, that's why won't be
22 supporting this motion. Thank you, Mr. Chair.

23 **CHAIRMAN GIOVANNI:** Thank you,

24 Commissioner Yamane.

25 Commissioner Atta?

1 **COMMISSIONER ATTA:** Yeah. I, you know,
2 speak against the motion because for the first
3 thing, I think the project is a good project, but I
4 think from a planning perspective the area is -- I
5 think the county has chosen the area as a site for -
6 - so I think there's a good project there. But I
7 agree with Gary that for the very reasons that if we
8 go about trying to cut corners and stuff like that,
9 a good project can die. Yeah, if you want a good
10 project, you have to go through the steps, step by
11 step, and that's why, so.

12 **CHAIRMAN GIOVANNI:** Thank you,
13 Commissioner Atta.

14 Anybody else?

15 Commissioner Kahele?

16 **COMMISSIONER KAHELE:** Thank you, Chair.
17 You know, I've been sitting here quiet, listening,
18 observing, and I think Mr. Yuen did an excellent job
19 in representing the petitioner.

20 I want to thank all of the people coming
21 up and testifying. They've been here all day.
22 Bringing a baby out here and getting involved with I
23 wouldn't say politics but with democracy. You know,
24 that's what it's all about.

25 I went through the staff notes. We -- I

1 believe we may have run into a problem. You know, I
2 believe the next option you have is try to see what
3 we can do to fix the issue regarding the Ka Pa'akai
4 requirements. You can also take it to court.
5 That's another option. But I'm against the motion
6 also, and again I appreciate all the people who came
7 out to testify. Thank you.

8 **CHAIRMAN GIOVANNI:** Anybody else want to
9 speak? Okay.

10 I'll speak. So I'm against the motion
11 also. It's not because I don't think it's a great
12 project, and it's not because -- I think we've got a
13 damn good developer who's well intentioned and will
14 follow through.

15 But I agree with Commissioner Yamane.
16 This is not going to be straightforward if you get a
17 time extension. You're going to end up in court.
18 You're going to end up wrapped around the wheel, and
19 you're going to be Super Ferried. In my opinion,
20 this commission did not -- was not erroneous in its
21 prior decision as first stated by Mr. Yuen, has not
22 shown me that it was erroneous in that decision.

23 It's not a basis for reconsideration.
24 This is not going to go -- I do not think that we
25 want to go forward through any possibility of a

1 ministerial DBA or anything like that because I
2 think it will be challenged, fought, and you'll end
3 up with a three-year delay in front of the Supreme
4 Court or something crazy like that.

5 In my view, the most straightforward way
6 is to finish, number one, phase 1 and start the
7 process on phase 2. And it's not going to be that
8 much different than what you envision right now
9 except for the consideration for some environmental
10 stuff to be included. You guys are going to have to
11 Ka Pa'akai. Absolutely. So I'm going to vote
12 against it.

13 Take a roll call, please.

14 **MR. ORODENKER:** Thank you, Mr. Chair. The
15 motion is to grant the request for the motion for
16 reconsideration.

17 Commissioner Carr Smith?

18 **COMMISSIONER CARR SMITH:** (Inaudible.)

19 **MR. ORODENKER:** Commissioner Lee?

20 **COMMISSIONER LEE:** Aye.

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

22 **COMMISSIONER YAMANE:** No.

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

24 **COMMISSIONER OKUDA:** No.

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

1 COMMISSIONER OHIGASHI: No.

2 MR. ORODENKER: Commissioner Kamakea-

3 Ohelo?

4 COMMISSIONER KAMAKEA-OHELO: 'A'ole.

5 MR. ORODENKER: Commissioner Kahele?

6 COMMISSIONER KAHELE: (Inaudible.)

7 MR. ORODENKER: Commissioner Atta?

8 COMMISSIONER ATTA: No.

9 MR. ORODENKER: Chair Giovanni?

10 CHAIRMAN GIOVANNI: No.

11 MR. ORODENKER: Thank you, Mr. Chair. The
12 motion fails by a vote of 7 to 2.

13 CHAIRMAN GIOVANNI: So we still don't have
14 a decision today, so is there -- commissioners, do
15 we have a motion -- another motion to go forward?

16 COMMISSIONER OKUDA: Chair?

17 CHAIRMAN GIOVANNI: Commissioner Okuda?

18 COMMISSIONER OKUDA: Chair, thank you. I
19 make a motion that the request for reconsideration
20 be denied.

21 CHAIRMAN GIOVANNI: Do I have a second?

22 COMMISSIONER KAHELE: Second, Chair.

23 CHAIRMAN GIOVANNI: Second by Commissioner
24 Kahele.

25 Commissioner Okuda, it may be redundant,

1 but do you want to speak to your motion?

2 **COMMISSIONER OKUDA:** Yes. I don't want to
3 be redundant. I've stated and listed the various
4 cases, legal authority which I believe compels us to
5 deny the motion. Again, I think the best way of
6 bringing truly a good project to fruition is to
7 unfortunately -- not unfortunately -- just comply
8 with the rule of law, and I think I've said enough
9 already in this hearing, so I'll incorporate my
10 earlier statements by reference. Thank you.

11 **CHAIRMAN GIOVANNI:** Commissioner Okuda,
12 your comments are always welcome in this Commission.
13 Commissioner Kahele?

14 **COMMISSIONER KAHELE:** I have no comment.

15 **COMMISSIONER OHIGASHI:** Chair?

16 **CHAIRMAN GIOVANNI:** Commissioner Ohigashi?

17 **COMMISSIONER OHIGASHI:** I wanted to thank
18 testifiers today. And to answer one of your
19 questions, the answer is that's not before us today.
20 The only question is whether or not we will
21 reconsider the motion or not. Whether or not other
22 issues, scope of a 343 analysis, whether or not that
23 was correct, that's not before us today, and we
24 don't have -- I don't believe we can address it
25 today. That may be unsatisfying, but that's the

1 answer to the question.

2 I'm going to vote yes on this motion. The
3 reason why is this. It's not that I'm against this
4 project or against what they're doing. What I
5 really am looking for is certainty. Everybody has a
6 different idea of what this (inaudible). And I
7 think that one of the things that puts in mind is
8 that there's a certain path that all the agencies
9 know must be followed.

10 Now, the developer can take whatever path
11 he chooses. That is his choice. He can take one
12 now and make a decision now. He can look into the
13 future and make a decision. We cannot stop that.
14 But we have on the record his assurances that phase
15 1 will go through. We have his assurances that
16 pretty soon, the affordable housing units will be
17 built. We have that in hand versus 10 to 15 to 20
18 years from now when everything changes.

19 I look at certainty, and certainty is
20 phase 1 is going to be built. We know what he has
21 to do to comply with us in the future, and we have
22 affordable housing. That's why I'm voting yes on
23 this.

24 **CHAIRMAN GIOVANNI:** Thank you,
25 Commissioner.

1 Anybody else?

2 Commissioner Lee?

3 **COMMISSIONER LEE:** Thank you, Chair. I
4 respect the views of all the fellow Commissioners.
5 I don't disagree with what anyone has said. I hope
6 that the petitioner will come up with a good idea to
7 move forward because I would like to see this
8 happen. And I -- I wanted to defer to the island
9 commissioner, Commissioner Carr Smith, and as well
10 as the State agencies and the county agencies, but I
11 don't disagree with what any of the commissioners
12 have said.

13 There's some troubling elements to this
14 application, but I will be voting against the motion
15 to deny. Thank you.

16 **CHAIRMAN GIOVANNI:** Commissioner Carr
17 Smith?

18 **COMMISSIONER CARR SMITH:** Yeah, just
19 briefly. Yeah, there's always some heartburn when
20 people from other islands like to make decisions for
21 your island. Yeah.

22 I think that everyone says that this is
23 such a great project, but nobody wants to give you
24 the opportunity to take those next steps to make it
25 successful, and I think that's unfortunate, but it

1 is what it is, and we'll just move forward. Thank
2 you.

3 **CHAIRMAN GIOVANNI:** Anyone else? Okay. I
4 will also be voting in favor of the motion to deny,
5 but I hope that's not interpreted to be that I'm
6 against this project because I'm not.

7 I do think the most orderly way is the way
8 to proceed with some certainty has been expressed by
9 Commissioner Ohigashi and Commissioner Yamane. I am
10 very - - I also understand where Commissioner Carr
11 Smith is coming from. She's closest to the
12 situation. She feels the need. I also live on a
13 neighbor island, and I have a very similar situation
14 on my island, and I feel the need. But I actually
15 believe in my heart that the fastest way to the
16 finish line is the way that we're suggesting that
17 you might proceed by denying this motion.

18 Take the rollcall.

19 **MR. ORODENKER:** Thank you, Mr. Chair.

20 The motion is to deny the motion for
21 reconsideration.

22 Commissioner Okuda?

23 **COMMISSIONER OKUDA:** Yes.

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

25 **COMMISSIONER KAHELE:** (Inaudible.)

1 MR. ORODENKER: Commissioner Atta?

2 COMMISSIONER ATTA: Yeah.

3 MR. ORODENKER: Commissioner Carr Smith?

4 COMMISSIONER CARR SMITH: No.

5 MR. ORODENKER: Commissioner Kamakea-

6 Ohelo?

7 COMMISSIONER KAMAKEA-OHELO: Aye.

8 MR. ORODENKER: Commissioner Lee?

9 COMMISSIONER LEE: No.

10 MR. ORODENKER: Commissioner Ohigashi?

11 COMMISSIONER OHIGASHI: Aye.

12 MR. ORODENKER: Commissioner Yamane?

13 COMMISSIONER YAMANE: Aye.

14 MR. ORODENKER: Chair Giovanni?

15 CHAIRMAN GIOVANNI: Aye.

16 MR. ORODENKER: Thank you, Mr. Chair. The

17 motion passes by a vote of 7 to 2.

18 CHAIRMAN GIOVANNI: Thank you.

19 All right. Before we adjourn, I want to

20 extend my appreciation to the members of the

21 community, the local community, that came forward

22 with very impactful and influential testimony today.

23 You're part of this process. I hope you feel

24 welcome. I hope you felt that you were listened to.

25 It's very important to us, so thank you for that.

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And with that, this meeting is adjourned.

(Meeting concluded at 2:47 p.m.)

CERTIFICATE

I, Jodi Dean do hereby certify that the proceeding named herein was professionally transcribed on the date set forth in the certificate herein; that I transcribed all testimony adduced and other oral proceedings had in the foregoing matter; and that the foregoing transcript pages constitute a full, true, and correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of December, 2023.

A handwritten signature in black ink, appearing to be 'Jodi Dean', is written over a horizontal line.

Jodi Dean