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**STATE OF HAWAII
LAND USE COMMISSION**

Meeting held on April 4, 2024

Commencing at 9:00 a.m.

Held at

Homer A. Maxey Center Conference Room

(Foreign-Trade Zone No. 9)

521 Ala Moana Boulevard

Honolulu, HI 96813

VIII. CALL TO ORDER

IX. A92-683 HALEKUA DEVELOPMENT CORPORATION (O'AHU)

Haseko Royal Kunia, LLC's Motion for Order Amending the Memorandum of Understanding's Offsite Infrastructure Date in Condition A.1. Approximately 503.886 Acres at Waikele and Ho'ae'ae, 'Ewa, O'ahu, City and County of Honolulu, State of Hawaii, Tax Map Key No. 9-4-02: 01, portion of 52, 70 and 71.

X. INTRODUCING THE LAND USE DEVELOPMENT COORDINATOR

XI. PROTOCOL ON LEGISLATIVE TESTIMONY AND MONITORING OF LEGISLATIVE MEASURES

XII. ADJOURNMENT

BEFORE :

1 **PARTICIPANTS**

2

3 LUC COMMISSIONERS:

4 Dan Giovanni, Chairman

5 Lee Ohigashi

6 Gary Okuda

7 George Atta

8 Mel Kahele

9 Michael Yamane

10 Kuike Kamakea-Ohelo

11 Nancy Carr Smith

12 Brian Lee

13

14 **LUC STAFF:**

15 Daniel Orodener, Executive Officer

16 Scott Derrickson, LUC Chief Planner

17 Martina Segura, LUC Planner

18 Ariana Kwan, LUC Chief Clerk

19 Daniel Morris, Esquire, LUC Deputy Attorney General

20

21 **PETITIONER-HASEKO DEVELOPMENT, INC.:**

22 Curtis Tabata, Esquire

23 Peter Kwan, Vice President

24 Kelly Uwaine, Esquire

25

1 **PARTICIPANTS (CONT'D)**

2

3 PETITIONER-HO'OHANA SOLAR 1, LLC:

4 Jennifer Lim Esquire

5

6 **PETITIONER-ROBINSON KUNIA LAND, LLC:**

7 Steven Mau, Esquire

8

9 **PETITIONER-RK II PARTNERS:**

10 Terry Lee, Esquire

11 Derrick Kobayashi, Esquire

12 Erick Elkind, Esquire

13 Ernie Martin, Esquire

14

15 **OFF OF PLANNING AND SUSTAINABLE DEVELOPMENT "OPSD":**

16 Allison Kato, Esquire, Deputy Attorney General

17 Katia Balassiano, LUD Program Administrator

18 Aaron Setogawa, Planner

19

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1 **PARTICIPANTS (CONT'D)**

2

3 **STATE DEPARTMENT OF AGRICULTURE:**

4 Kelcie Nagata, Deputy Attorney General

5 Brian Kau, Engineering Program Administrator

6 Janice Fujimoto, Engineer

7

8 **CITY AND COUNTY OF HONOLULU:**

9 Pono I. Arias, Esquire, Corporation Counsel

10 Dina Wong, Department of Planning and Permitting

11 Brad Saito, Deputy Corporation Counsel

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UNCERTIFIED ROUGH DRAFT

DEPOSITION OF MEETING

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1 **CHAIR GIOVANNI:** Good morning, everyone.

2 I call this meeting to order. Aloha mai kakou.

3 Good morning. Good morning.

4 This is the April 4th, 2024 Land Use
5 Commission Meeting. This is an in-person meeting.
6 It's being held at the Homer A. Maxey Center
7 Conference Room (Foreign Trade Zone No. 9. The
8 address is 521 Ala Moana Boulevard, Honolulu. And
9 this meeting is open to the public.

10 For all meeting participants, I'd like to
11 stress the importance of speaking slowly, clearly,
12 and directly into the microphone. Before you're
13 speaking, please state your name and identify
14 yourself for the record. And if you can, that would
15 be each time you speak.

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 it will be posted on YouTube. And it
20 will be used for court reporting purposes. Your
21 continued participation is your implied consent to
22 be part of the public record of this event. If you
23 do not wish to be part of the public record, you
24 should exit the meeting now.

25 I also want to advise that we will be

1 taking breaks throughout the meeting, nominally five
2 minutes or so every hour or so. And if the meeting
3 continues through the lunch hour, we will take a
4 lunch break as well.

5 My name is Dan Giovanni. I have the
6 pleasure to serve as the LUC Chair. We currently
7 have nine seated Commissioners. Along with me today
8 are Commissioner Lee Ohigashi from Maui;
9 Commissioner Gary Okuda; Commissioner Kuike Kamakea-
10 Ohelo; Commissioner George Atta; Commissioner Brian
11 Lee; and Commissioner Mel Kahele, all from Oahu. We
12 have Commissioner Nancy Carr Smith from Island of
13 Hawaii, and we have Commissioner Michael Yamane from
14 Kauai.

15 Also in attendance are LUC Executive
16 Officer, Daniel Orodener; LUC Chief Planner, Scott
17 Derrickson; LUC Staff Planner, Martina Segura; LUC
18 Chief Clerk, Ariana Kwan; LUC Development
19 Coordinator, Arnold Wong; and LUC Attorney General,
20 Dan Morris.

21 Our ninth order of business for this two-
22 day meeting is A92-683 Halekua Development Haseko
23 Royal Kunia, Motion for Order Amending the
24 Memorandum of Understanding. At this time, I'd like
25 the parties to introduce themselves, starting with

1 Mr. Tabata from -- please introduce yourself and
2 whoever you have with you.

3 **MR. TABATA:** Thank you, Chair. Good
4 morning. Curtis Tabata and Benjamin Matsubara for
5 Haseko. Also present with us to my left is Haseko
6 Vice President, Peter Kwan, and Haseko in-house
7 counsel, Kelly Uwaine.

8 **CHAIR GIOVANNI:** Thank you very much.

9 **MS. LIM:** Good morning, Chair and
10 Commissioners. This is Jennifer Lim representing
11 Ho'ohana Solar 1, LLC. Mr. Green, who was with me
12 yesterday for the status report, has had to get a
13 flight, so he's not with me today. I'm on my own.

14 **CHAIR GIOVANNI:** You're flying solo today?

15 **MS. LIM:** Correct. Thank you.

16 **CHAIR GIOVANNI:** Okay. Mr. Lee?

17 **MR. LEE:** Good morning, Chair,
18 Commissioners. Terry Lee, counsel for RK II
19 Partners. To my left is my co-counsel, Derrick
20 Kobayashi. Also I attendance are co- counsel, Erick
21 Elkind, Ernie Martin. Thank you.

22 **CHAIR GIOVANNI:** Thank you very much. I
23 see the chairs are absent for Robinson Kunia Land.
24 If they show up, we'll introduce them when they do.

25 Parties from the County, please introduce

1 yourselves.

2 **MR. ARIAS:** Aloha, Chair and
3 Commissioners. Pono Arias, Deputy Corporation
4 Counsel on behalf of the City. With me I have Dina
5 Wong from the Department of Planning and Permitting
6 and Brad Saito, Deputy Corporation Counsel.

7 **CHAIR GIOVANNI:** Great. Thank you.
8 From the Office of Planning and
9 Sustainable Development?

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

14 **CHAIR GIOVANNI:** Thank you very much.
15 And from the Department of Agriculture

16 **MS. NAGATA:** Good morning. Kelcie Nagata,
17 Deputy Attorney General. With me -- or sorry, for
18 the Department of Agriculture. With me is Brian Kau
19 and Janice Fujimoto.

20 **CHAIR GIOVANNI:** Thank you very much.

21 At this time, I'd like to briefly explain
22 our procedure for today's hearing. First, I will
23 ask the Commissioners if there are any disclosures
24 that they'd like to make, and then I will update the
25 record accordingly. Then I will recognize the

1 written public testimony that has been submitted in
2 this matter, identifying the person or organizations
3 who have submitted the testimony. Next, I will call
4 upon members of the public who wish to testify on
5 the motion.

6 Members of the public will have two
7 minutes to provide their testimony and to stand by
8 after their testimony to respond to any questions by
9 the parties or by the Commissioners. When questions
10 have been completed, the Chair will excuse the
11 witness and call the next witness into the witness
12 box. After completion of the public portion of the
13 testimony and these proceeding, the Chair would like
14 Petitioner Haseko to provide their presentation on
15 the motion. Following their presentation, other
16 petitioners will present.

17 The Chair will then call upon the County's
18 Planning Department, the Office of Planning and
19 Sustainable Development for their presentation on
20 the motion. Petitioner will then be allowed to
21 respond to comments made by the County, Department
22 of Agriculture, and OPSD. Similar to yesterday's
23 hearing, I will call on Department of Agriculture
24 prior to calling on the State and calling on the
25 County.

1 Commissioners will ask questions of the
2 parties at the conclusions of each of their
3 presentations. At the conclusion of the parties'
4 testimony and the Commissioners' questions, the
5 public will again be granted the opportunity to
6 provide additional and/or new public testimony in
7 the same manner as before. Once the public
8 testimony concludes, the Commission will enter into
9 deliberations regarding the motion and decide how to
10 proceed.

11 Again, I note we will be calling for short
12 breaks on an hourly basis and a longer one through
13 lunch, as necessary. Are there any comments or
14 objections to the procedures as I've laid them out?

15 Mr. Tabata?

16 **MR. TABATA:** No comments or objections.

17 Thank you.

18 **CHAIR GIOVANNI:** Thank you.

19 Ms. Lim?

20 **MS. LIM:** No, Chair.

21 **CHAIR GIOVANNI:** Mr. Lee?

22 **MR. LEE:** Nothing here.

23 **CHAIR GIOVANNI:** Thank you.

24 County?

25 **MR. ARIAS:** No, Chair.

1 **CHAIR GIOVANNI:** Thank you.

2 State?

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

4 **CHAIR GIOVANNI:** Department of

5 Agriculture?

6 **MS. NAGATA:** No, thank you.

7 **CHAIR GIOVANNI:** Great. Thank you.

8 Commissioners, do you have any disclosures
9 that you would like to make regarding this matter?
10 Seeing none, we'll proceed.

11 I'd like to make a reference for the
12 record. Please be informed that all relevant records
13 and documents pertaining to this matter can be
14 accessed for review on the LUC website. You can
15 find that at <https://luc.hawaii.gov/A92-683>.

16 Now I'd like to go over the reimbursement
17 policy for today's hearing. Good morning. Mr.
18 Tabata, again, have you reviewed HAR Section 15-15-
19 45.1 regarding the reimbursement of hearing
20 expenses?

21 **MR. TABATA:** Yes, Chair. And we will
22 comply.

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

24 I'd now like to recognize public written
25 testimony. Ms. Kwan, has there been any written

1 testimony submitted in this matter?

2 **MS. KWAN:** No, Mr. Chair.

3 **CHAIR GIOVANNI:** Thank you very much.

4 Next I would call on any members of the
5 public wishing to provide testimony on this agenda
6 item. Ms. Kwan, are there any members of the public
7 present who would like to testify?

8 **MS. KWAN:** No, Mr. Chair.

9 **CHAIR GIOVANNI:** Very good.

10 As I said earlier, if Mr. Mau shows up,
11 we'll give him a moment to introduce himself and who
12 he represents.

13 **MR. MAU:** Yes. Steven Mau on behalf of
14 Robinson Kunia Land, LLC. And I must apologize. I
15 was waiting outside. I thought it was starting at
16 9:30

17 **CHAIR GIOVANNI:** No problem. Thank you
18 for joining us today. We appreciate it.

19 Let me just -- it's very encouraging when
20 we have a matter that involves four different
21 property owners and all four show up. That's just
22 terrific, and I mean that. It's really appreciated,
23 so thank you all.

24 What did you say? Oh, yeah. Except for
25 the school. That's number five. Four out of five

1 ain't bad. Yeah, yeah. Okay. Where were we?

2 So now I'd like to turn to Haseko and for
3 them to make their presentation on the motion.

4 **MR. TABATA:** Thank you, Chair. Curtis
5 Tabata. We spent a lot of time yesterday talking
6 about this, about the MOU and everything, but I know
7 Commissioner Kamakea- Ohelo was not here, so let me
8 just briefly go over why are we here today.

9 So back in 2021, the LUC issued its order.
10 And in that order, there was a condition called
11 Condition A.1. And this condition required the
12 landowners to enter into an MOU, a Memorandum of
13 Understanding, with the Department of Agriculture
14 within six months of the order back in 2021.

15 And the Memorandum of Understanding, the
16 MOU, needed to contain a description of the offsite
17 infrastructure required for the agricultural park.
18 And that offsite infrastructure in the MOU needed to
19 have a deadline, and that deadline was June 30th,
20 2023. The landowners would need to complete the
21 offsite infrastructure for the agricultural park by
22 that date in June 2023.

23 That date came and went. The offsite
24 infrastructure was not built. We attempted to
25 negotiate an extension, but there just wasn't enough

1 time. So after the deadline lapsed, we continued to
2 work with the Department of Agriculture, and we
3 executed a Fifth Amendment to the MOU with three new
4 deadlines. So the offsite infrastructure comprises
5 of -- in Condition A.1, all utilities, electrical,
6 potable water, roadways, sewer lines, and
7 communications.

8 As we've been negotiating with the
9 Department of Agriculture, we learned that they had
10 a priority, okay. They needed -- they needed
11 functional electrical power and potable --
12 electrical power and potable water for agricultural
13 use. They needed that as soon as possible. And 2025
14 was -- the end of 2025 was their minimum
15 requirements. That's what they told us. So we had
16 to carve out that -- those two infrastructure
17 requirements, electrical power, and potable water
18 for agriculture, and we called it temporary, okay?

19 And we have to -- we have to complete
20 that. We have to complete that by the end of 2025,
21 December 31st. The -- everything else is going to be
22 provided by September 30th, 2028. We call that the
23 permanent infrastructure, okay? That's going to
24 have everything -- that's going to run along Road Y,
25 so it's going to be, you know, the normal -- normal

1 infrastructure runs underneath the roadway, and it's
2 going to have everything. And that's based on our
3 construction schedule, our master plan schedule that
4 that falls into 2028. And that was acceptable to
5 the Department of Agriculture.

6 A third category is the irrigation
7 infrastructure. So this is the non-potable water
8 that's going to be used for irrigation, and that
9 consists of a 12- inch water line that Ho'ohana
10 installed. Haseko is going to install the pump
11 station, which is going to pump out the water from
12 the adjacent reservoir number 225, and we are
13 required to complete the pump station installation
14 by the end of August of this year, 2024.

15 So we have to have -- we have to break
16 down the offsite infrastructure into those three
17 categories, those three different deadlines, and it
18 was agreeable to the DOA, so we signed off on that
19 MOU in the January 10th, 2024, this year. And then,
20 thankfully, we were then able to prepare this motion
21 to change the date in Condition A.1 because
22 Condition A.1 has that June 30th, 2023 deadline, and
23 -- but we had to basically expand the deadline, you
24 know, so that would be agreeable to the Department
25 of Agriculture.

1 And what we're doing now is trying to
2 amend this Condition A.1, change it so that the date
3 -- the deadline date in the -- for the completion of
4 the infrastructure matches the MOU we signed just
5 recently in January. So that's why we're here
6 today.

7 So the basis for our motion, the reason
8 why we would like our motion to be granted is
9 because we have signed the MOU. The Department of
10 Agriculture is in agreement with these deadlines.
11 And we would like Condition A.1 to be consistent
12 with those deadlines, so that's -- that's the basis
13 for our motion.

14 There are legal issues related to our
15 motion. There is -- Commissioner Okuda mentioned
16 yesterday that, you know, just to put me on notice,
17 Ka Pa'akai, Chapter 343, and I mean, we -- I write
18 about it in the motion, our position and why we're
19 not legally required to do a Ka Pa'akai analysis for
20 this motion, and a supplemental EIS is also not
21 legally required for this motion.

22 I mean, and the short of it, the basic
23 reason why we're taking these legal positions is
24 because the motion seeks to change the date in
25 Condition A.1 for the offsite infrastructure

1 completion. That's it. Okay? We're not asking for
2 permission to build the project. We already have
3 the obligation, really, and right, to construct the
4 project, build the infrastructure that's required
5 for our project and for other projects like for RK
6 II Partners, Department of Agriculture. So we
7 already have that right. That's our position.

8 And the motion that we're here for today
9 specifically is just to change the date in Condition
10 A.1. And because of that, we're not affecting
11 anyone's rights is what we're saying, because we're
12 just changing a date. We're not opposing any
13 construction today, any development. So I know
14 Commissioner Okuda has questions for me, so I won't
15 -- I'll let him ask his questions and address those
16 particular issues in that way. I think that's more
17 efficient. Thank you.

18 **CHAIR GIOVANNI:** Thank you, Mr. Tabata.
19 That concludes your presentation?

20 **MR. TABATA:** Yes, thank you.

21 **CHAIR GIOVANNI:** Thank you.

22 Commissioners, questions for Mr. Tabata?

23 Oh, Mr. Okuda, please proceed.

24 **COMMISSIONER OKUDA:** Thank you very much,
25 Mr. Chair. So Mr. Tabata, to sum up maybe the

1 bottom line of your presentation, are you basically
2 saying that what you're asking for -- the relief
3 that you're asking for is not material, and so it's
4 really no big deal.

5 **MR. TABATA:** I wouldn't say it's not a big
6 deal. If you denied the motion today, our position
7 is we still need to build the project and we still
8 have the right to build the project. So a natural
9 question is: Well, why'd you file a motion, then,
10 right? To be honest, it's because out of respect.
11 If we did not file the motion, if we ignored
12 Condition A.1 and the deadline and you guys brought
13 us in for a status hearing, we would face a very
14 angry Commission, okay? I mean, that's just based
15 on experience. So we -- this is important. We're
16 not taking this lightly. I don't know if that
17 answers your question.

18 **COMMISSIONER OKUDA:** Yeah. Well, maybe I
19 can be more specific. If, for some reason, the
20 Commission denies your motion at this point in time,
21 okay -- I'm not saying it's a denial with prejudice,
22 meaning you can't bring it again in the future. But
23 if it's denied at this point in time, does that
24 affect your ability to develop in any way?

25 **MR. TABATA:** The only impact I could see

1 it having is that we would be inconsistent with that
2 deadline, and I'm not sure if the Commission would
3 take further action against us.

4 **COMMISSIONER OKUDA:** Well, you agree that
5 the Commission is bound by the decision made
6 yesterday, that after hearing all the evidence that
7 was presented -- and me, personally, you know, I
8 would have made a factual finding that -- and I
9 think I did say that your witnesses are very
10 credible.

11 Based on the decision yesterday, the
12 Commission is really bound not to do anything
13 inconsistent with yesterday's decision, which is
14 basically take no further action on the fact that
15 certain deadlines might not have been strictly
16 complied with.

17 Let me break that up. Do you agree that
18 yesterday's decision indicates that the Commission
19 has decided that after hearing the evidence, no
20 further action should be taken, even though there
21 might be slippage or noncompliance with certain
22 deadlines?

23 **MR. TAPATA:** Yes, I would like to believe
24 that. Yes.

25 **COMMISSIONER OKUDA:** Yeah. And the

1 Commission is not supposed to be inconsistent,
2 especially in a specific docket. The Commission is
3 not supposed to be inconsistent with prior decisions
4 in that docket, correct?

5 **MR. TAPATA:** Yes.

6 **COMMISSIONER OKUDA:** So in other words,
7 would it be a fair statement to say that even if the
8 Commission were to deny your motion at this point in
9 time, based on yesterday's decision, the Commission
10 really cannot turn around and say in the future,
11 wow, we're now going to actually bring you forward
12 on an order to show cause because you didn't comply
13 with the deadlines which were actually discussed at
14 yesterday's hearing.

15 **MR. TAPATA:** Yes, I would agree with that.

16 **COMMISSIONER OKUDA:** Okay. So in other
17 words, if the Commission were to make a decision
18 that maybe certain things are deficient and there
19 should be time given to correct it, wouldn't you
20 agree that that really would not create any type of
21 legal barrier to your client or you moving forward
22 with this memorandum of understanding with the
23 Department of Agriculture?

24 **MR. TAPATA:** Okay. I think that would be
25 the case with Ka Pa'akai. You know, if you folks

1 tell us we need to do a Ka Pa'akai analysis, I think
2 we can do that and continue with the project.

3 The supplemental EIS issue is a little bit
4 different, okay? Chapter 343, the way it's written
5 is if you have to do a statement -- you cannot
6 proceed with your action until your final
7 statement's accepted. Okay? That's in the statute,
8 all right? I mean, I -- so --

9 **COMMISSIONER OKUDA:** Well, yeah. I don't
10 mean to interrupt you, but we can cover the 343
11 issue because you -- but really quickly regarding
12 that, you agree right now no one, and I mean no one,
13 has made a statement on the record or anywhere else,
14 in public testimony or otherwise, that a lack of a
15 343 analysis or an update prevents you or your
16 client from moving forward in any portion of your
17 project, correct?

18 **MR. TABATA:** Correct.

19 **COMMISSIONER OKUDA:** Okay. You have many,
20 many years of experience in the land use area, do
21 you agree with that?

22 **MR. TABATA:** I have experience, yes.

23 **COMMISSIONER OKUDA:** Yeah, I -- and no --
24 and you're a modest guy, and I'm not trying to
25 stroke your ego or anything like that, but you're a

1 modest guy, but let's face it, you and Mr. Matsubara
2 are considered experts in this area. And I --
3 you're going to be modest, so you're probably going
4 to downplay that.

5 But let me ask you this, just to put my
6 next question in context, okay, without getting into
7 the argument regarding whether the Superferry was a
8 good idea or not, do you agree that one of the
9 things that torpedoed the Superferry was people's
10 just, you might call it, hardheaded insistence that
11 they just wouldn't do, for example, a Chapter 343
12 environmental impact statement. And if they had
13 just done the impact statement while all this
14 litigation regarding Superferry was pending, we
15 still might have a Superferry.

16 Sometimes, you know, to get a project
17 done, it's better to check off some of the boxes.
18 We might disagree as a matter of public policy
19 whether those boxes are there, but if the
20 legislature has set forth the boxes, then they
21 should be checked off. Otherwise, a good project
22 might be sunk in the end. Is that a fair statement,
23 just -- I'm not saying it applies in this case, but
24 just generally speaking, based on your experience in
25 this land use area?

1 **MR. TABATA:** In general, I -- I'd agree
2 that, you know -- I don't like shortcuts. I don't
3 like it. If a developer says, you know, I want to
4 try to take a legal shortcut and avoid an
5 obligation, just as you described, if there's a
6 challenge, you can get overturned, and it's going to
7 set you back timewise, okay?

8 So I'm not here to criticize the
9 Superferry project or how they handle their, you
10 know, handling of Chapter 343. But there are legal
11 requirements -- there are legal standards that then
12 make it applicable to require an environmental
13 assessment, okay/ I mean, there are tests that need
14 to be fulfilled in order for you to be legally
15 required to do an EA or EIS. And if you're not
16 legally required to do so, you should not then be
17 required to perform those statements.

18 So I mean, and we can discuss why we think
19 we're not legally required to do a supplemental EIS,
20 and that's -- I think that's how it should be
21 handled. We follow the law, basically.

22 **COMMISSIONER OKUDA:** Oh, okay. Let me
23 back up and first start with Ka Pa'akai, then, and
24 maybe we can -- you -- we'll go over the legal
25 standard there and you can help me out with, you

1 know, this area which seems to be open for
2 interpretation. And I won't go over the history of
3 Ka Pa'akai, because in this room and at other
4 hearings we've gone through the constitutional
5 provisions. We've gone through the historic reasons
6 why Article 12 was passed by the 1978 Constitutional
7 Convention. We all might have been working on staff
8 at that time, so I won't go over that.

9 What I'd like you to comment on is what
10 constitutes an act or action which triggers a Ka
11 Pa'akai analysis. And what I'm reading from is the
12 Ka Pa'akai case, you know, and that case, of course
13 is titled Ka Pa'akai versus Land Use Commission,
14 State of Hawaii. That's 94 Haw. 31. And this
15 portion of the case is found at pages 45 to 46.

16 What the Supreme Court said is, "As such,
17 State agencies such as the LUC may not act without
18 independently considering the effect of their
19 actions on Hawaiian traditions and practices."
20 Okay.

21 As that term "act" or terms "act" or
22 "actions" are used in that sentence, what do those
23 words mean?

24 **MR. TABATA:** The word "action" refers to a
25 project, okay? And so what it says what -- what the

1 -- how does -- it's a three-part test, right? First
2 you identify the cultural practices that are taking
3 place that are identified. And then a second test
4 is what impacts the action would have on those
5 practices. And then the third test, I believe, is:
6 Is there any mitigation that can be applied to
7 protect those right. So the action is a description
8 of the project. Will the project affect those
9 traditional and customary rights.

10 **COMMISSIONER OKUDA:** Yeah. But before we
11 get into the three-part test or analysis of Ka
12 Pa'akai, the first question is: Is the case or the
13 standards in the case triggered, correct?

14 **MR. TABATA:** Okay. The triggering for a
15 Ka Pa'akai analysis, in the Flores-Case 'Ohana, they
16 clarified that in Ka Pa'akai, it was -- the analysis
17 was required for a district boundary amendment
18 proceeding, which is a contested case proceeding, so
19 it's -- so what triggers the analysis in Ka Pa'akai
20 was the contested case. Okay?

21 And in Flores-Case 'Ohana, the trigger was
22 then expanded to rulemaking, okay? And so C.J.
23 wrote Flores- Case 'Ohana, and he laid it out
24 basically that the agency is required to protect
25 traditional and customary rights, and Ka Pa'akai was

1 for contested case hearings, which addresses past
2 events, adjudicate past events that has occurred,
3 and in rulemaking you cover future events. You
4 create law by rulemaking. And so you cover the past
5 and the future with Article 12, Section 7.

6 **COMMISSIONER OKUDA:** Yeah. Well, wasn't
7 the specific issue in the Flores-Case -- and just so
8 that we're clear on the record what we're talking
9 about. It's a case titled Flores-Case 'Ohana versus
10 University of Hawaii. That's found at 153 Haw. 76.
11 The P.3d citation is 526 P.3d 601.

12 That case, the issue there was whether or
13 not Ka Pa'akai applies to situations or cases in
14 addition to contested case proceedings because
15 wasn't the argument by the University of Hawaii in
16 that case -- this dealt with, what, Mauna Kea,
17 right. Wasn't the argument by the University of
18 Hawaii that, oh, Ka Pa'akai is only limited to
19 contested case types of hearings, not to rulemaking.
20 And, you know, the University had arguments why it
21 didn't apply. And what the Supreme Court said is,
22 no. Ka Pa'akai is not simply limited to contested
23 case hearings. It also applies to other things like
24 rulemaking.

25 Is that a fair statement of what happened

1 in that case?

2 **MR. TABATA:** There is a general statement
3 where they say that the Constitution does not limit
4 Ka Pa'akai to just contested case hearings, right.
5 But then in that same paragraph, it goes on to say
6 that: So therefore, we are extending the
7 requirements of Ka Pa'akai to rulemaking. So the
8 statement about it going beyond contested cases was
9 used as justification for going into rulemaking, for
10 making -- to make it apply to rulemaking so it's --
11 because what the court did in Flores-Case 'Ohana was
12 to extend the Ka Pa'akai requirements not only to
13 contested case hearings but to rulemaking. And not
14 --

15 **COMMISSIONER OKUDA:** Okay. Well --

16 **MR. TABATA:** -- and not -- it really
17 doesn't address anything else. And there's -- there
18 is a discussion that I would, you know, get into if
19 you want to cover, you know, everything else.
20 That's what I call it. If it's not a contested case
21 hearing and if it's not rulemaking, then it's
22 basically everything else.

23 **COMMISSIONER OKUDA:** Okay. Well, yeah --

24 **MR. TABATA:** But --

25 **COMMISSIONER OKUDA:** -- this is where you

1 can help me with this, okay? I really think the
2 controlling rule is what's set out in the -- that
3 sentence that I went over with you regarding Ka
4 Pa'akai, basically, which says: As such, State
5 agencies such as the LUC may not act without
6 independently considering the effect of their
7 actions on Hawaiian traditions and practices. Okay?

8 And I think that is the controlling rule.
9 Now, this is my question to you. Okay. Where do we
10 draw the line? Because setting an agenda and
11 agendizing your motion, that's an action, right? So
12 do we have to do a Ka Pa'akai analysis to set the
13 agenda?

14 Clearly, if you were coming in and asking
15 for a boundary amendment, you know, from ag to
16 urban, agriculture to urban, I don't think anyone
17 would argue that that wouldn't require a Ka Pa'akai
18 analysis. And I'm not sure anyone would really
19 argue that we have to do a Ka Pa'akai analysis to
20 set an agenda item, to agendize your boundary
21 application, so where is the line drawn, and what is
22 your legal authority that tells us where to draw the
23 line?

24 **MR. TABATA:** Well, the legal part is
25 basically Flores-Case 'Ohana. It is a case we're

1 talking about. And you know, the Land Use
2 Commission's duty to assess, protect traditional and
3 customary rights before it acts is a general
4 statement saying that if you need to do -- if you
5 need to comply with Ka Pa'akai, then comply with it.
6 Then you need to then do it. You need to comply
7 with it. It's that kind of a statement, okay?

8 But when they talk about triggers, that's
9 why the Circuit Court certified a question to the
10 Hawaii Supreme Court. It wasn't sure if you could
11 extend -- if they were required to extend Ka Pa'akai
12 to rulemaking. They didn't know. So they certified
13 their question, sent it to the Hawaii Supreme Court,
14 and they said yes, you have to do it for rulemaking.

15 So extending it beyond contested case
16 hearings, even the Circuit Court wasn't willing to
17 expand it beyond contested case hearings. It left
18 it to the Hawaii Supreme Court. So I think that's
19 what we're limited to. Until the Hawaii Supreme
20 Court expands the triggers for Ka Pa'akai, I think
21 that's what we're left with. I'm not sure if it's -
22 - I don't think it would be appropriate for the LUC
23 to make new law and to extend it beyond contested
24 case hearings and rulemaking. I mean, so that's how
25 I would -- that's our position on that.

1 Where do you draw the line? That's an
2 excellent question because if you do go beyond
3 contested case hearings and if you go beyond
4 rulemaking, then where do you draw the line? And
5 you're right, if you're going to do it for
6 everything, then you need to do a Ka Pa'akai
7 analysis whenever you adopt your minutes, take a
8 vote on personnel matters, everything, right? It's
9 not just -- you know, it's everything.

10 So it -- I mean, and that doesn't make
11 sense when you think about it because then it gets
12 unwieldy, but you know, the -- what the -- what C.J.
13 also said in Flores-Case 'Ohana was that, you know,
14 if it's clear that traditional and customary rights
15 are not going to be implicated, then you can just
16 say so in writing. And that ends the analysis, he
17 says. It's a real common sense type of solution.

18 So if the Commission today says, you know,
19 we need to do a Ka Pa'akai analysis, then you could
20 approach it in that way. You could look, okay,
21 Haseko wants to change the date for the
22 infrastructure deadline in Condition A.1. How does
23 -- could that affect -- just that, changing the
24 date, could that affect anyone's constitutional
25 rights? I think the common sense conclusion would

1 be no. Just changing a date is not going to do
2 that. And you can say so in a short statement. It's
3 in the case. I mean, I could --

4 **COMMISSIONER OKUDA:** No, no. I know what
5 you're saying and you don't have to cite to that.

6 One of the things that you submitted or
7 one of the arguments you submitted in your motion --
8 and you know, your motion and supplemental -- or
9 your -- not supplemental, but your memorandum, you
10 know, clearly discussed all of this, so you really
11 didn't need my notice yesterday to do this because
12 you already did it.

13 But you also reference the existing
14 cultural impact analysis, which was done for the
15 solar project, correct?

16 **MR. TABATA:** That's correct.

17 **COMMISSIONER OKUDA:** Now, the -- what
18 exhibit was that, CIA -- I should have wrote it
19 down. Was it 9 or 10? I can't remember. Well, it
20 was one of the exhibit you submitted with your
21 motion, correct?

22 **MR. TABATA:** Exhibit 10.

23 **COMMISSIONER OKUDA:** Exhibit 10. When you
24 look at the CIA, for example, page 1 in the
25 introductory section, the cultural impact analysis

1 focuses on a specific project area, correct?

2 **MR. TABATA:** Parcel 52, the Robinson land.

3 **COMMISSIONER OKUDA:** Right. It doesn't
4 specifically state that it applies to Haseko's
5 parcel, correct?

6 **MR. TABATA:** Right. I mean, we -- I cited
7 -- we cite it so that we could make use or talk
8 about how the CIA analyzed the entire ahupua'a,
9 which includes our land. So yes, it doesn't
10 specifically focus on our property. It focuses on
11 52, where it makes all of its conclusions.

12 So does it -- would it technically satisfy
13 the requirements for a CIA for our land? Probably
14 not. Like you're saying, it doesn't specifically
15 apply. But --

16 **COMMISSIONER OKUDA:** Well, okay. Let me
17 stop you right there. You don't have to concede
18 that it doesn't apply, okay, because -- and that's
19 why my question goes to that, okay? Because you
20 would agree that the Commission can look at all
21 evidence and draw reasonable -- or make reasonable
22 factual determinations from the credible evidence in
23 the record. Correct?

24 **MR. TABATA:** Right. And that's why we
25 refer to that CIA that talks about --

1 **COMMISSIONER OKUDA:** Okay. And I'm sorry
2 to cut you off, and you might continue on by
3 answering my next question. What evidence in the
4 record indicates that -- even though the
5 introductory portion of the CIA states that it was
6 done specifically for the Robinson parcel, what
7 evidence in the record indicates that you could
8 apply the analysis in Exhibit 10 to the Haseko
9 parcel? What evidence in the record shows that?

10 **MR. TABATA:** Well, there's -- you know,
11 there's discussion in the -- in the CIA that refers
12 to the CIA process, which is not limited just to
13 parcel 52. It mentions that -- you know, when you
14 do a CIA, you have to cover the whole area, okay?
15 You have to go beyond just a specific property, and
16 you have to -- you have to -- so what they did was
17 they looked at the entire ahupua'a, and their
18 conclusion was that all the culturally significant
19 sites were all located at Pearl Harbor makai -- in
20 the makai direction. So that area covers our
21 property, so I mean, as you said, the Commission can
22 look at all the evidence and draw reasonable
23 conclusions.

24 And you know, we both grew up in that
25 area, so we know that area as all been plowed over

1 many times over the -- I don't know -- past hundred
2 years for sugar cane. So you know, the land over
3 there, it's basically all the same. But that's not
4 evidence, I guess.

5 **COMMISSIONER OKUDA:** Well, okay. And the
6 CIA, at page 77, contains recommendations, but it
7 appears that the recommendations are -- were limited
8 specifically to the designated project area. What
9 evidence in the record indicates that the Commission
10 can make a finding that the recommendation section
11 in the cultural impact analysis, specifically page
12 77, can be applied to the Haseko parcel?

13 **MR. TABATA:** You know, I should back up a
14 little bit.

15 **COMMISSIONER OKUDA:** Sure.

16 **MR. TABATA:** So when we talk about the CIA
17 that Ho'ohana did, that's what we call an argument
18 in the alternative. Our primary argument is that
19 we're not legally required to do the analysis for
20 this motion, okay? That's our primary argument. So
21 when we talk about the CIA, what we're saying is
22 even if we were required to do so, even if this
23 Commission has the evidence to look at to see that
24 in this ahupua'a, there are no culturally
25 significant sites, at least, in this area except

1 closer to Pearl Harbor, makai of the property.

2 So is it a perfect match to our property?

3 No, it's not. I'll concede to that. But it's
4 something for the Commission to look at and
5 consider. I think it's relevant, and that's why
6 it's offered. But the primary argument is that
7 we're not legally required to do the analysis. But
8 in the alternative, at least, we have this CIA that
9 gives us some assurance, some comfort that people
10 were contacted, and there were -- you know, they did
11 the analysis, and they started the ahupua'a, the
12 whole region, and they came to their conclusions.
13 So that's why it's offered for your consideration.

14 **COMMISSIONER OKUDA:** And I'm not trying to
15 put words in your mouth, but to help me understand
16 the basis of your argument. So if you were to apply
17 the section that kind of concerns me, which is this
18 statement again, and I quote, "As such, State
19 agencies such as the LUC may not act without
20 independently considering the effect of their
21 actions on Hawaiian traditions and practices," your
22 contention is just changing the date of the
23 Memorandum of Understanding is not an act or an
24 action which falls within that statement in the Ka
25 Pa'akai case. Is that a fair statement or not a

1 fair statement?

2 **MR. TABATA:** It's not -- that statement is
3 not a trigger. That doesn't describe a trigger for
4 having to do a Ka Pa'akai analysis. I'm not sure if
5 I'm exactly understanding your question.

6 The trigger is contested case hearing or
7 rulemaking, okay? That's what Flores-Case 'Ohana
8 holds.

9 Now, the question is: Is our motion, the
10 changing of date, is that an act? I think, you
11 know, you don't get to that statement you read about
12 obligation to protect those rights without
13 considering the act, the action -- you don't get to
14 that unless there's a trigger. So we don't get
15 there.

16 But even if you do get there, there's a
17 trigger. Say there was a trigger, okay? Say this is
18 a contested case hearing, okay? And so you -- now
19 we're going to apply Ka Pa'akai. Now the question
20 is: Yeah, is our change of date an act, an action?
21 And let's assume it is something that we're going to
22 evaluate. Like the C.J. wrote, what then is the
23 implication? Is our -- are those rights being
24 implicated by what is being proposed, which is
25 changing the date? And I think the answer is,

1 obviously, no. And you can do -- you could then do
2 that short statement like the C.J. said, and that
3 will end the -- you don't have to do, you know, the
4 full three-part test.

5 You just say, you know, the change in the
6 date, and that's clearly not implicating anyone's
7 constitutional rights, and, therefore, the analysis
8 ends there pursuant to Flores-Case 'Ohana.

9 **COMMISSIONER OKUDA:** Okay. Let me move on
10 to the Chapter 343 issue or nonissue. In the
11 history of this docket, going back to the original
12 application for boundary amendment or petition for
13 boundary amendment, was an environmental assessment
14 or any evaluation under HRS Chapter 343 performed at
15 any time in connection with the boundary amendment?

16 **MR. TABATA:** Yes. There was a 1989 EIS
17 and a 1996 EA for this project.

18 **COMMISSIONER OKUDA:** Okay. You know, when
19 we look at that other case, Unite HERE! Local 5
20 versus City and County of Honolulu, better known as
21 the Kuilima case, what is the rule that comes out of
22 that case to your understanding?

23 **MR. TABATA:** Right. Okay. So the Kuilima
24 case was a supplemental environmental impact
25 statement case. In that case, Kuilima submitted a

1 subdivision application, and that triggered the
2 question. And then the plaintiffs in that case
3 demanded a supplemental EIS. The developer argued
4 that the project has not changed. Okay? The
5 project scope, the elements do not change;
6 therefore, a supplemental statement was not
7 required. The plaintiffs argued that, well, you
8 know, 20 years passed, so -- and there was changed
9 circumstances. There's new evidence, and because of
10 that you need to do a supplemental EIS.

11 The court agree with them, okay, and they
12 said -- the court said: When you look at the rules,
13 a change in timing is a change to project. Okay?
14 So if you have a change in timing, yes, your
15 project's changed, okay? That's the first part of a
16 two-part test, okay, in determining whether or not
17 you need to do a supplemental statement.

18 Okay. So if you have a change in timing,
19 you have to move to the second part of the test,
20 which is -- okay, because of that change, is there a
21 significant effect because of that change. And in
22 the Kuilima case, the plaintiffs were able to
23 provide evidence that there was increased traffic.
24 There were potential impacts to the monk seals and
25 the green sea turtles, okay? And this is new

1 evidence that wasn't considered back when the
2 original EIS was accepted.

3 So the court said, number one, there was a
4 change in timing, okay? So now -- and number two,
5 there was -- there's a significant effect or impacts
6 as a result of that change in timing because the
7 plaintiffs were successful in providing evidence
8 regarding those three new facts, increased traffic,
9 monk seals, and green sea turtles. And that's the
10 rule we live with today.

11 **COMMISSIONER OKUDA:** Okay. And just so
12 that we're clear, we're referring to the case Unite
13 HERE! Local 5 versus City and County of Honolulu,
14 which is filed at 123 Haw. 350 -- I'm sorry -- 150,
15 a 2010 Hawaii Supreme Court case.

16 Well, Mr. Tabata, then let me ask you
17 this: What is the evidence in the record that
18 indicates that the Land Use Commission need not
19 require supplementation of the environmental impact
20 statement if you apply the rule from that Unite
21 HERE! Local 5 case? What is the evidence in the
22 record that you contend shows we don't have to apply
23 the requirement for supplantation of the EIS with
24 respect to the motion that you have filed here?

25 **MR. TABATA:** Okay. So the first part of

1 the analysis, I think, would start with the whether
2 or not there's an action. So 343 requires
3 environmental assessments when you have an action
4 that is -- that is one of the listed triggers, use
5 of State/County lands, use of, you know, State
6 monies, wastewater treatment plants, any action --
7 an action is basically a project that proposes any
8 of those things. You have to then do an EA if you
9 don't have an exemption.

10 So changing the date for infrastructure is
11 not one of those listed triggers. It's just not
12 there. But is it then an action? Is the motion an
13 action? And we say no, it's not. We're changing a
14 date. An action is a project where you're then
15 doing an activity. In Umberger, the question was:
16 Is collecting aquarium fish an action? And they said
17 -- because there was a permit applied for with the
18 DNLR to collect aquarium fish for personal and
19 commercial uses.

20 The court said, yes, it's an action. I
21 mean, it's an activity. I mean, you're -- they
22 could harvest hundreds of fish. And the plaintiffs
23 in that case claim that -- or asserted that they
24 were depleting the fish in the waters. It was
25 affecting their fishing. They were fishing for

1 subsistence. And the court said it's an action
2 because it authorizes the harvesting of fish.

3 So an action is some activity, actually
4 doing something, building -- developing real
5 property, collecting fish, those are examples in the
6 case law. In our situation, we're just changing a
7 date. It's not an activity. It's important. We're
8 seeking conformance, consistency, okay, between our
9 MOU and this Commission's order, but it's not an
10 action. And so if it's not an action, then you
11 don't need to do an EA under Chapter 343. That's our
12 argument, basically.

13 **COMMISSIONER OKUDA:** Okay. And this is my
14 final question. Kind of shifting back to the Ka
15 Pa'akai analysis, how much burden would it place on
16 your client just to have a qualified cultural
17 consultant give like a one-page statement saying
18 that the analysis that was prepared for the solar
19 farm parcel can carry over to the Haseko parcel? I
20 mean, how much of a burden would that really create?
21 In other words, sort of like to expand or to bring
22 into conformance the -- or clarify the scope of the
23 prior CIA? How much of a burden would that be?

24 **MR. TABATA:** Well, I can't really -- you
25 know, it's their money, you know, so I can't say,

1 well, it's nothing. I mean, maybe -- I don't know
2 what it would cost, 20, \$50,000, whatever. If the
3 Commission orders it, then we're going to do it, put
4 it that way. And a supplemental EIS would cost a
5 lot more. I think that would be a burden
6 financially. I think they could live with it if we
7 had to do a Ka Pa'akai analysis, yeah. It wouldn't
8 kill the project. But you know, it's another thing
9 to do.

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

12 Thank you, Mr. Tabata, for your very good
13 explanations.

14 **MR. TABATA:** Thank you.

15 **CHAIR GIOVANNI:** Thank you, both.

16 Commissioners, any further questions for
17 this witness?

18 Commissioner Ohigashi.

19 **COMMISSIONER OHIGASHI:** Mr. Tabata, I was
20 -- Mr. Tabata, I was -- I had a -- I went to bed
21 last night, and I didn't think about anything. Then
22 I woke up this morning and I thought about this
23 question that I -- that -- I don't know if it was
24 answered or not to satisfy me. Other temporary
25 utilities -- temporary utilities is being provided.

1 Would they run on the same area or use the same area
2 as the general --

3 **MR. TABATA:** No.

4 **COMMISSIONER OHIGASHI:** -- as a permanent?

5 **MR. TABATA:** No, no.

6 **COMMISSIONER OHIGASHI:** In my mind, I know
7 it was addressed, and I just -- maybe I forgot, but
8 I just wanted to be clear. The permanent --

9 **CHAIR GIOVANNI:** Mr. Kwan, I'll have to
10 swear you in.

11 **COMMISSIOER OHIGASHI:** -- a permanent area
12 -- and so, for the record --

13 **CHAIR GIOVANNI:** Hold up a sec.

14 Mr. Kwan, please state your name,
15 affiliation, and I'll swear you in.

16 **MR. KWAN:** Peter Kwan, Vice President with
17 Haseko.

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

20 **MR. KWAN:** Yes.

21 **CHAIR GIOVANNI:** Please proceed,
22 Commissioner Ohigashi. Restate your question.

23 **COMMISSIONER OHIGASHI:** I want to know
24 where the temporary and where the permanent will be
25 at.

1 **MR. KWAN:** Okay. Without bringing the map
2 up again, you know, we showed the diagram that
3 showed the yellow pathway, which was what we call
4 Road Y, Phase 2, which is the extension of the
5 existing Anonui Street to the north. That is a
6 pathway that we're going to install and build that
7 roadway, which will be a major roadway within -- a
8 spine roadway within our development. But it will
9 take paved roadway access and all of the major
10 utilities up to the, I guess it's the eastern and
11 southeastern property line of the Department of
12 Agriculture. That's the permanent path.

13 So our plan in the worst case, unless we
14 can find a better alternative, is to bring the
15 temporary potable water and temporary power from
16 Anonui Street, the current existing termination of
17 Anonui Street, which is just above the top of Royal
18 Kunia Country Club, and run it to the east of where
19 the pathway of Road Y, Phase 2 will be, you know, go
20 up through our parcels B and C, which are two
21 eastern parcels, because those are going to be
22 developed later on, find a pathway that will not
23 conflict with any -- any part of our development
24 that we intend to construct by the end of 2028,
25 which is when we're due to deliver their permanent

1 utilities. And then once we get up there, we'll
2 bring it in at the proper point.

3 **COMMISSIONER OHIGASHI:** So -- and the
4 permanent utilities, when they're brought in, would
5 they -- would that mean the temporary utilities will
6 be removed and returned to normal or they would be
7 continued to be used?

8 **MR. KWAN:** Yes. Once the permanent
9 utilities are brought online, you know, at whatever
10 date that is, basically would render the temporaries
11 unnecessary, and we would just cut it off and remove
12 it.

13 **COMMISSIONER OHIGASHI:** Because you're
14 talking about above-ground construction versus --

15 **MR. KWAN:** Most likely, yes. The
16 temporary water line, we may bury it just so
17 nobody's running over it, you know, maybe in a
18 shallow trench, but it would just be -- I don't know
19 if you've seen it at -- they call it a Drisco line.
20 It's kind of like a heavy black PVC, kind of a
21 flexible pipe. We're planning on using that to run
22 it all the way up to the property line, but we may,
23 you know, shall bury it just so it doesn't get run
24 over.

25 **COMMISSIONER OHIGASHI:** And just a -- just

1 a comment to Mr. Tabata.

2 I view your motion as like a motion to
3 continue, you know, in that thing, to add additional
4 time to some things that you need to at that time,
5 and I think of it more as a procedural motion rather
6 than a substantive motion. And I will be proceeding
7 on that thing. In a procedural motion, I believe
8 that it would make it easier because it's not a
9 substantive motion. And I think you address it
10 because in your argument or your memorandum that you
11 filed, you seem to indicate that no hearing was
12 necessary in this matter.

13 **MR. TABATA:** Yes, Commissioner, I would
14 agree with that. It's -- you know, we're walking a
15 fine line here. It's procedural. It's -- it almost
16 feels like housekeeping, but at the same time, it's
17 not unimportant. And that's - you know, we're here
18 for a reason, and we're not going to ignore the
19 Commission's conditions and the deadlines, so we're
20 taking this very seriously.

21 **COMMISSIONER OHIGASHI:** I understand that,
22 and I just wanted to let you know that I've had
23 procedural motions be very important, too.

24 **MR. TABATA:** Yes, sir.

25 **CHAIR GIOVANNI:** So I'm going to take a

1 five- minute recess. And when we come back, I have
2 a few questions. We are adjourned. It's 10:02.
3 We'll come back at -- we're not going to adjourn.
4 We're going to recess. It's 10:02. We'll come back
5 at 10:10. That's eight minutes.

6 **(Recess taken from 10:02 a.m. to 10:13**
7 **a.m.)**

8 **CHAIR GIOVANNI:** Okay. It's 10:12 --
9 10:13. We're back on the record. Are we recording?

10 **MS. KWAN:** Yes.

11 **CHAIR GIOVANNI:** Thank you. We are
12 recording.

13 Mr. Tabata, I just have a couple of
14 questions. Maybe they're related to what the
15 discussion was. I can appreciate that you're trying
16 to clean the record here and get the dates to all
17 coincide to reality, and that's what this motion is
18 about. I think it's housekeeping in some sense, but
19 it's very important housekeeping, and I appreciate
20 the fact you brought it forward proactively to clean
21 the record up.

22 Let me ask you about the delay itself. It
23 occurred during the period in which the whole world
24 was overconsumed with Covid. Did that have an
25 impact to the delay itself?

1 **MR. TABATA:** I'm not sure, Chair. Maybe
2 Mr. Kwan can answer that.

3 **CHAIR GIOVANNI:** Mr. Kwan?

4 **MR. KWAN:** I'm not sure I can answer that
5 question. I've been responsible for this project
6 since the beginning of 2023. There was another
7 gentleman that worked for our company who retired at
8 the end of 2022, so I stepped in and assumed his
9 responsibilities from that point going forward,
10 which is how I'm involved here with this project.

11 You know, we did continue our operations
12 during Covid, you know, especially our construction
13 site. It did not stop any of our design work.
14 During those years, 2020, 2021, we had actually
15 started submitting our master plan submittals,
16 drainage master plan, water master plan, sewer
17 master plan, et cetera. So we were working on this
18 project during that period.

19 **CHAIR GIOVANNI:** Are you aware of any
20 negotiations that were going on with DOA during that
21 period?

22 **MR. KWAN:** I was not involved with that at
23 that time, so I can't say. I mean, I could check
24 and follow up later --

25 **CHAIR GIOVANNI:** That's all right.

1 **MR. KWAN:** -- but right now, I'm not aware
2 of any.

3 **CHAIR GIOVANNI:** Okay.

4 Mr. Tabata, a generic question, and it's
5 just for my own -- it's hypothetical. I'm not a
6 lawyer, so I will defer to you and Commissioner
7 Okuda to have your own conversations and I will
8 listen in on those.

9 The question I have in my own mind is for
10 a project, and this is not necessarily specific to
11 this project, but for a project in general that
12 undergoes what I would call a significant delay,
13 like 20 years or more, for whatever reason, do the -
14 - does that in and of itself constitute
15 consideration for a Ka Pa'akai analysis or an
16 updated EIS or environmental assessment just by
17 virtue of the staleness or the length of the delay?

18 **MR. TABATA:** Okay. If he project grows
19 stale for 20 years or some period like that, first
20 Ka Pa'akai, you know, if there was not -- how it
21 would come up is there would be some kind of permit
22 application, say a motion to amend to change the use
23 of the land. And at that point in time, a person
24 may come forward and say: I have constitutional
25 rights, based on Article 12, Section 7, and this

1 developer should be required to do Ka Pa'akai, they
2 request a contested case. They could intervene.
3 And at that point, it would be a relevant issue.
4 That's normally how it would happen.

5 Or say it's a motion to amend or the
6 Commission may say, you know, you should do a CIA or
7 -- in that situation, I think Chapter 343 would then
8 be relevant, too. Right? And of course, if we do an
9 EIS or supplemental EIS, you're going to have to do
10 an updated cultural impact assessment which would
11 include a Ka Pa'akai analysis.

12 So that's all possible, but you know, with
13 343 there's a two-part test, you know. Is there a
14 significant effect as a result of the delay, the
15 time change, and the project? So yeah.

16 **CHAIR GIOVANNI:** So in this case, we're
17 talking about a couple-year delay that coincided
18 with Covid, couple-year delay that coincided with
19 new personnel changes within Haseko, et cetera. But
20 in the situation in which all of that occurred over
21 a much longer period, what you're telling me is
22 there's a much greater possibility that events
23 occurred during that time period or laws might have
24 changed or new -- people might find new things they
25 want to protest about and come forward, and that in

1 and of itself could trigger the need for a more
2 detailed 343 analysis, or Ka Pa'akai?

3 **MR. TABATA:** If there's a permit
4 application, you know, discretionary concern, like a
5 motion to amend --

6 **CHAIR GIOVANNI:** Yeah.

7 **MR. TABATA:** -- you then have to look at
8 Chapter 343, okay? If somebody comes forward and
9 makes that request or demand, that there be a
10 supplemental EIS or that they have constitutional
11 rights that need to be protected, then you would be
12 obligated to address those claims, yeah.

13 **CHAIR GIOVANNI:** Yeah, fair enough. Okay.
14 Different question, again, hypothetical, not
15 specific to this motion. In a situation in which a
16 project, an approve project commenced and was, let's
17 say, 75 percent completed -- you can look to the
18 solar project, for example, which is near completion
19 -- a lot of work's been done. A lot of money's been
20 spent on the land already. And then there's a need,
21 for whatever reason, to come for an amendment.
22 Amendment is scope, to add a well or whatever, that
23 hadn't been originally anticipated. Would that
24 trigger, in your mind, what I would -- what I'm
25 referring to as a full-blown Ka Pa'akai analysis or

1 potentially a 343?

2 In other words, is there any consideration
3 for the fact that the project -- the land has been
4 developed, partially developed to a very significant
5 degree?

6 **MR. TABATA:** When the project's been
7 developed to that extent or -- you know, then that
8 affects the issue of substantial commencement. I
9 mean, so that's different. That's order to show
10 cause.

11 **CHAIR GIOVANNI:** That's different, yeah.

12 **MR. TABATA:** Right. So I don't think it -
13 - the fact that partial construction, I don't think
14 that negates the possibility that you may need -- if
15 they come in, like you said, for a change, change in
16 a project element, then that would be like a permit
17 application, right, and then so that raises the
18 question. That's like the initial, you know,
19 trigger, so to speak. I hate to use that word, but
20 then you got to look at possibility of needing to do
21 updated studies, perhaps, Ka Pa'akai.

22 And again, it's normally situations where
23 somebody comes forward and says, look, you know,
24 that use that you're proposing at this time is going
25 to impact my rights. And at that point in time, and

1 yeah, they made need to do an update, if they
2 haven't already done one that covers that right
3 being claimed.

4 **CHAIR GIOVANNI:** Okay. I don't have any
5 additional questions. Thank you for your opinions.

6 **MR. TABATA:** Thank you.

7 **CHAIR GIOVANNI:** Commissioners, anything
8 further for Haseko at this time? Hearing none,
9 we'll move on to Ho'ohana.

10 **MS. LIM:** Chair, Commissioners, Ho'ohana
11 Solar has no opposition to what Haseko Royal Kunia
12 is requesting. We wish them the best of luck with
13 this project. We've had a cooperative arrangement
14 with them -- excuse me, cooperative relationship
15 with them on doing the installation of the non-
16 potable water line. And I'll just leave it at that.
17 We wish them the best of luck. We have no
18 opposition to the motion. I'm happy to answer any
19 questions that any Commissioners may have. Thank
20 you.

21 **CHAIR GIOVANNI:** Thank you, Ms. Lim.
22 Commissioners, any questions for Ms. Lim?
23 Commissioner Ohigashi

24 **COMMISSIONER OHIGASHI:** I just -- I want
25 to confirm for the purposes of the record in this

1 case because it was just stated in the last case and
2 I want to be sure that the -- that your portion of
3 the non-potable water line has been completed and is
4 now able to serve the parcel in question.

5 **MS. LIM:** Thanks, Commissioner Ohigashi.
6 So I confirm that the non-potable water line has
7 been installed. The grant of easement has been given
8 to Department of Ag. It's ready to go. So
9 Ho'ohana's obligation under the 2021 order Condition
10 B.1 has been satisfied except we have the ongoing
11 obligation to maintain the line, like we discussed
12 yesterday.

13 The line itself is not currently being
14 used --

15 **CHAIR GIOVANNI:** Operational.

16 **MS. LIM:** -- operational, thank you. My
17 understanding is because Haseko has yet to put the
18 pump, which is their obligation under the 2021
19 order, Condition A.1, to do that infrastructure, but
20 the non-potable water line is complete. It has been
21 complete since September of 2023, I believe.

22 **COMMISSIONER OHIGASHI:** And just to follow
23 up with Haseko, is that pump going to be installed
24 prior to December 2025, or is it --

25 **MR. KWAN:** The --

1 **CHAIR GIOVANNI:** This is Mr. Kwan.

2 **MR. KWAN:** -- schedule is to complete --
3 sorry. Peter Kwan.

4 The schedule is to complete the
5 installation of the mechanical pump and power
6 connection and have the system up and running by the
7 end of August 2024. So the water line pipe was put
8 in last, I want to say, August -- in September by
9 our contractor. We are going to join the contracted
10 -- a local contractor to construct this project.
11 Ho'ohana's responsibility was to install the piping,
12 the 12-inch piping. Haseko took the responsibility
13 of installing the mechanical pump electrical
14 connection and is a smaller four-inch strainer line
15 that also has to be installed. So all the piping
16 has been installed.

17 The mechanical pump, unfortunately, was
18 kind of a long lead item, so it went through
19 submittal process with a contractor and our
20 consultant. We got all of that cleared up by the
21 end of November and got all the parts approved.
22 Contractors that are ordering their materials in
23 early December, parts have been arriving since
24 February. It's a mixture of mechanical pump
25 components and some electrical equipment as well.

1 The last of the materials are scheduled to arrive by
2 mid-May.

3 We have also already had HECO onsite.
4 There were two existing wooden utility poles that
5 had to be replaced. It took a while to coordinate
6 that with HECO, but they actually did come in
7 February and did take care of that, so that part has
8 been completed. The last step we are actually
9 waiting for is clearance of our building permit for
10 that electrical connection from those poles to the
11 mechanical pump, but we should have that concluded
12 by the time the last equipment arrives.

13 The plan is to have our contractor
14 remobilize once all the materials are here and have
15 their electrical subcontractor and mechanical
16 subcontractor install the pump equipment, all the
17 underground electrical, including the concrete pads
18 for the equipment, and get the system up and running
19 so that we can turn everything over to the
20 Department of Agriculture by the end of August.

21 **COMMISSIONER OHIGASHI:** Thank you very
22 much. I just wanted to be -- I want to be sure that
23 we have sufficient evidence in this record versus
24 yesterday's record to make sure that we can proceed
25 in this case, so what -- getting back to Mr.

1 Tabata's analogy or statement, one out of the three
2 things have been -- is close to being completed, is
3 that right? One of the three requirements --

4 **MR. TABATA:** Right. The irrigation
5 infrastructure, correct.

6 **CHAIR GIOVANNI:** Commissioners? Nothing
7 further.

8 Thank you, Ms. Lim.

9 Mr. Lee, representing RK II Partners.

10 **MR. LEE:** Yes. RK II Partners has no
11 opposition to Haseko's motion; however, as I had
12 discussed yesterday, we do have some issues and
13 potential disputes to work out with Haseko relative
14 to the timing of certain other infrastructure work
15 that they committed to do under an agreement with us
16 that we refer to as the second ARIA, amended and
17 restated infrastructure agreement, and so I just
18 want to state for the record that we're not waiving
19 any of those right or claims.

20 **CHAIR GIOVANNI:** Thank you.

21 Commissioners, questions for Mr. Lee?

22 Commissioner Okuda.

23 **COMMISSIONER OKUDA:** But Mr. Lee, you at
24 least understood what I was saying yesterday, which
25 is that these conditions run with the land, and so

1 it would behoove all the current landowners to work
2 cooperatively together because if for whatever
3 reason Haseko decides not to perform a condition
4 which still runs with the land, your client might
5 end up performing conditions which don't even deal
6 with your land or your parcel because the conditions
7 run with the entire original parcel, so that's
8 clear, right?

9 **MR. LEE:** We understand that, yes.

10 **COMMISSIONER OKUDA:** Okay. Thank you very
11 much.

12 Thank you, Mr. Chair.

13 **CHAIR GIOVANNI:** Thank you.

14 Commissioners?

15 Okay. Thank you, Mr. Lee.

16 So Mr. Mau from Royal Kunia.

17 **MR. MAU:** Chairman and Members, Steven Mau
18 on behalf of Robinson Kunia Land, LLC. Yes, we not
19 only have no objection to the motion, we support the
20 motion, and we'd like to see the motion granted and
21 the parties proceeding under the new amended MOU.
22 Thank you.

23 **CHAIR GIOVANNI:** Very well. Thank you.

24 Commissioners?

25 Thank you, Mr. Mau. Appreciate your being

1 here and your comment.

2 So I'll now turn to the Department of
3 Agriculture.

4 **MS. NAGATA:** Good morning. Kelcie Nagata,
5 Deputy Attorney General. Department of Agriculture
6 supports Haseko's motion to amend the 2021 order.
7 The -- if the Commission grants this motion to amend
8 the order, then the Department will be able to build
9 another agricultural park badly needed by local
10 farmers. As previously stated, the Department needs
11 this agricultural park, including the operating
12 infrastructure. Development of the Royal Kunia
13 Agricultural Park will greatly help the Department
14 and is really important towards the Department's
15 goal of increasing agricultural self-sufficiency.

16 Just to digress briefly, based on what we
17 discussed yesterday, the plans to develop
18 agricultural park are shovel ready. Although the
19 Department is beholden to the legislature for
20 funding to develop the agricultural park, this new
21 fifth amended MOU greatly strengthens the
22 Department's position seeking funds for the park.
23 Specifically, the bonding of the project and the
24 accelerated timeline of the temporary infrastructure
25 are incredibly strong arguments for the Department

1 to leverage additional funding in its favor.

2 Any delays in completing the
3 infrastructure are not in the best interest of the
4 Department. And the -- as previously stated, the --
5 without the infrastructure, the Department lacked
6 any leverage at the legislature for appropriations.
7 Thank you.

8 **CHAIR GIOVANNI:** Thank you very much.
9 Commissioners, questions, comments?
10 Seeing none.

11 Thank you very much.

12 So County -- City and County of Honolulu?

13 **MR. ARIAS:** Hi. Pono Arias. The City
14 does not oppose the motion and the City in fact
15 actually supports the motion. Thank you.

16 **CHAIR GIOVANNI:** Thank you very much.
17 Questions for the City and County? Seeing
18 none.

19 Thank you very much.

20 OPSD, Ms. Kato?

21 **MS. KATO:** Allison Kato, Deputy Attorney
22 General for OPSD. As stated yesterday, OPSD
23 supports this project and also supports Petitioner's
24 requested amendments, which reflect the agreement
25 between DOA and Haseko regarding Condition A.1.

1 The intent of that condition was to
2 benefit DOA to support agriculture, and it was based
3 on the MOU between them. So it's appropriate to set
4 the deadline to conform to Condition A.1 to reflect
5 the current agreement, which would allow Haseko to
6 move forward with providing temporary utilities,
7 with bond requirements to DOA for the Kunia ag park,
8 and also for the construction of much needed
9 housing. The LUC has previously granted the same
10 amendment of Condition A.1 to conform to its
11 deadline before.

12 As stated in our written submission
13 regarding the Commission's constitutional obligation
14 and the Ka Pa'akai analysis, OPSD believes that
15 granting Petitioner's requested amendment is
16 consistent with the Ka Pa'akai decision. To reach
17 this conclusion, OPSD has conducted its own
18 independent review of the available documents and
19 information, which include -- and all the various
20 documents that are available on the LUC's website
21 and other locations, including the environmental
22 documents, the cultural impact assessment for the
23 solar farm, the D and O and subsequent amendments,
24 and all the materials that Petitioner submitted as
25 well, which include their reconnaissance level

1 survey and their archeological inventory survey and
2 testing strategy.

3 Regarding the Chapter 343 environmental
4 review, you know, we just want to know the -- that
5 the evaluation of whether a supplemental EIS was
6 needed -- was conducted by DPP in their evaluation
7 2021. And they issued termination that was
8 published in the environmental notice the additional
9 environmental review under Chapter 343 was not
10 required based on the current requirements for an
11 SEIS.

12 After reviewing the environmental
13 documents and DPP's published termination, OPSD
14 agrees. I'm available for questions. Thank you.

15 **CHAIR GIOVANNI:** Thank you, Ms. Kato.
16 Appreciate it.

17 Commissioners, any questions for OPSD?
18 Seeing none.

19 Thank you very much.

20 Oh, Mr. Lee Ohigashi has a question. He
21 did his Columbo on us.

22 **COMMISSIONER OHIGASHI:** I am Columbo.

23 **CHAIR GIOVANNI:** You are Columbo, yeah.

24 **COMMISSIONER OHIGASHI:** My first comment
25 is you've got to get a better signing pen on your

1 agreement because the Deputy Attorney General is
2 like a microscope.

3 But the second comment that I have is that
4 do you believe that there's sufficient evidence in
5 this record that we are not -- that the Land Use
6 Commission can -- is not -- does not have to address
7 the 343 issues as well as Ka Pa'akai analysis in its
8 decision? And if so, can you please point to the
9 evidence in the record so that we can have a good
10 record or a good decision if we decide to go that
11 way.

12 **MS. KATO:** Yes. So I'm hearing two
13 different subjects, so the Chapter 343 and Ka
14 Pa'akai. Regarding Chapter 343, the analysis of --
15 you know, I think Curtis explained it earlier, the
16 analysis for one supplementation is required. And
17 looking at the two documents that are available, the
18 one in '89 and '96, the EIS in '89 and the
19 subsequent EA for the changed project in 1996, if
20 you review those, DPP did a full analysis comparing
21 those documents to the situation in 2021, and they
22 issued a writ of termination that no supplementation
23 is required based on that review. We have also
24 reviewed their environmental documents and find that
25 to be accurate.

1 **COMMISSIONER OHIGASHI:** Would it be fair
2 to say since if we did require a 343 analysis, that
3 the Ka Pa'akai review would be as part of that 343
4 analysis, is that right? A cultural impact review
5 is normally this case, isn't it?

6 **MS. KATO:** I mean, it -- if one is
7 required is normally in there.

8 **COMMISSIONER OHIGASHI:** Right. So the
9 review done by DPP in this case, you believe
10 sufficiently supports a finding that such an
11 analysis need not -- a 343 analysis, including --
12 which would include a Ka Pa'akai analysis, would not
13 be necessary to be addressed by the Land Use
14 Commission in this particular motion?

15 **MS. KATO:** The two issues are separate,
16 but OPSD feels that they have been satisfied.

17 **COMMISSIONER OHIGASHI:** And the only
18 reason I'm asking is I'm trying to figure out what
19 in the record supports that position you take.
20 Because my understanding was -- and I like your
21 argument, and I like about this argument about that
22 -- about DPP's analysis on 343.

23 The question I have is: What in the
24 record allows us to not consider a Ka Pa'akai
25 analysis at this time? I'm careful with saying,

1 "not consider" because, essentially, if we were to
2 consider that, well, it's an in the alternative
3 argument, so that -- because if we consider it, we
4 may have to say why we're not requiring it. So I'm
5 looking for evidence to say that we don't have to
6 even consider it in our proceedings today.

7 **MS. KATO:** Thank you for the question,
8 Commissioner. I can elaborate. So the Ka Pa'akai
9 analysis, the reason we believe it's consistent is
10 the framework set out in Ka Pa'akai was created in
11 the context of DBA. And as we've consistently
12 stated, it's applicable in other similar types of
13 situations and other types of government actions.

14 And we've seen the court modify this
15 analysis to be appropriate to other types of
16 actions, and that's the Fores case which modified
17 the analysis to be applicable to rulemaking. It
18 examined the impacts -- the impacts to resources
19 that cause by -- that may be caused by the rules
20 that are being proposed.

21 Similarly here, the current matter to date
22 is a motion to amend a deadline in a condition.
23 It's not a new district boundary amendment. This is
24 not a petition for a district boundary amendment.
25 This is a motion to modify a condition. So we think

1 the appropriate analysis would be to look at the
2 potential impact from this motion. And the
3 documentation that is available currently, we
4 believe, is sufficient to make that determination
5 and determine that it will not have that kind of
6 impact. And that's based on the various documents,
7 including the 2020 CIA, which, while prepared for
8 parcel 52, did look at the general area, including
9 Haseko's property.

10 Also, the Petitioner did have a
11 reconnaissance level survey which looked at the
12 property and found that it went through over a
13 hundred years of sugar cane plantation use, and it
14 made certain determinations that we think can
15 indicate that this property, there isn't a potential
16 for impact.

17 **COMMISSIONER OHIGASHI:** The reason why I'm
18 asking this is that I think you're both saying
19 different things to testify. I think Mr. Tabata is
20 saying that, hey, this is a procedural motion.
21 We're not doing anything. We -- it doesn't even
22 require us to look into an analysis of Ka Pa'akai
23 and 343 analysis because there's nothing in this
24 motion that has anything to do with that. But in
25 the alternative, he said, even if you do, we meet

1 the test -- we don't meet the test that requires
2 these analyses.

3 Is it your position that the alternative
4 argument that Mr. Tabata has proposed, is that
5 OPSD's argument, or is it the latter, the one -- the
6 first argument saying this is really a procedural
7 motion. We're not doing anything anymore. We're
8 just going forward.

9 I'm just curious because when I read your
10 paper, I wasn't clear whether or not you took that.
11 And Mr. Tabata seems to be clear in his statement
12 about saying that, hey, this is procedure, but even
13 if it wasn't, it falls within this that you have to
14 take note that these are the reasons why, okay?

15 **MS. KATO:** Commissioner, you're correct.
16 We are saying something a bit different, but we
17 reached the same conclusion. OPSD is focused on Mr.
18 Tabata's alternative argument that we have reviewed
19 the documents available that in the record, and we
20 find that to be sufficient for purposes of this
21 motion.

22 **COMMISSIONER OHIGASHI:** Do you agree,
23 then, that his first argument is the position that
24 OPSD would support?

25 **MS. KATO:** We don't find it necessary, and

1 we're not -- we have not taken a position on that.

2 **COMMISSIONER OHIGASHI:** Thank you.

3 **CHAIR GIOVANNI:** Thank you very much.

4 Any further questions for OPSD? No?

5 Thank you, Ms. Kato.

6 So at this time, Mr. Tabata, would you
7 like to make any further comments based on the
8 testimony of the other parties?

9 **MR. TABATA:** No. I think that's about it.
10 Thank you.

11 **CHAIR GIOVANNI:** So I'd like to have one
12 follow-up question with you, Mr. Tabata. I find it
13 -- in my hypothetical about when there's an
14 extensive delay, what might trigger Ka Pa'akai, and
15 I think you said -- I don't want to misstate what --
16 my interpretation of your remarks, so I might ask
17 you to repeat them.

18 But if a third party came forward and said
19 that during this intervening period of the delay,
20 that they discovered or they had issues, they could
21 come forward and make the case, and that may trigger
22 the requirement for a Ka Pa'akai at that time.

23 **MR. TABATA:** If the developer was coming
24 forward with a permit application, like a motion to
25 amend, then that would be a -- that would probably

1 be a contested case hearing. So I mean, my first
2 argument is that Ka Pa'akai is required whenever an
3 agency does a contested case hearing or rulemaking,
4 so yes, it -- that could be.

5 I mean, there would be a claim made -- if
6 there is a claim made that Article 12, Section 7
7 rights are being impacted in connection with the
8 permit application like a motion to amend, I think
9 the Commission needs to look at that situation. I'm
10 not saying what the ruling should be, but yes, then
11 it becomes an issue.

12 **CHAIR GIOVANNI:** But in a motion to amend
13 a condition, like in the case here, would that not
14 also apply?

15 **MR. TABATA:** There's different kinds of
16 motions to amend. I mean, if you're amending the
17 project composition, you're changing the use,
18 basically --

19 **CHAIR GIOVANNI:** I'm not changing the use.
20 I've just got a long delay.

21 **MR. TABATA:** In this situation where our
22 motion is procedural and we're not changing the use,
23 we're not affecting anybody's rights or privileges,
24 our position is this is not a contested case hearing
25 in connection with the fact that we did not request

1 a hearing. So in our situation, it is -- because
2 it's not a contested case hearing, it's -- a Ka
3 Pa'akai analysis is not required.

4 **CHAIR GIOVANNI:** Understood. But this --
5 but we have a hearing, and it's been agendized, and
6 the public and third parties have had every
7 opportunity to come forward and make a case and
8 demand that a Ka Pa'akai, that it did not happen,
9 isn't that relevant?

10 **MR. TABATA:** Absolutely. If -- this would
11 be another alternative argument. If this was a
12 contested case hearing -- say you disagreed, and the
13 Commission rules this is a contested case hearing
14 for whatever reason, you could then take the next
15 step and analysis and say, well, then nobody showed
16 up to assert those rights, and therefore, there is
17 no need for a contested case hearing -- I mean,
18 there's no need for a Ka Pa'akai analysis.

19 Or maybe there's a third -- a second
20 alternative argument where you -- you do what the
21 C.J. wrote in Flores- Case 'Ohana, in that you apply
22 the requirements of Article 12, Section 7 in a
23 situation where there's no rights being implicated
24 at all. So in effect, you're doing a Ka Pa'akai
25 analysis at that point.

1 **CHAIR GIOVANNI:** You are.

2 **MR. TABATA:** And so this is like a third -
3 - a second alternative argument. You do that
4 analysis by noting there's no implication
5 whatsoever, and the analysis ends at that point. So
6 in effect, you've done a Ka Pa'akai analysis.

7 **CHAIR GIOVANNI:** That's my point.

8 **MR. TABATA:** Yes. You could just take it
9 to that level and say, you know, even if -- even if
10 there's all these -- even if it was required -- even
11 if there was a contested case, even if there was a
12 person claiming rights, if you do a Ka Pa'akai
13 analysis as required -- as described by Flores-Case
14 'Ohana, in this situation because there's no rights
15 being implicated at all, we could end our analysis
16 at that point. So yes, you could take it all the
17 way to that level.

18 **CHAIR GIOVANNI:** Okay.
19 Commissioners, anything further?
20 Commissioner Okuda.

21 **COMMISSIONER OKUDA:** A follow-up question
22 to the Chair's question. The fact that no one shows
23 up from the public or elsewhere and raises a Ka
24 Pa'akai issue, that doesn't absolve the government
25 agency from not exercising its obligations under Ka

1 Pa'akai, correct?

2 **MR. TABATA:** It's a complicated question.
3 The first holding in Flores-Case 'Ohana is that the
4 plaintiff has the burden of proof to establish an
5 impact to their Article 12, Section 7 rights. Okay?
6 I mean, what does that mean, right? That means
7 plaintiff or the intervenor needs to come forward
8 and properly set the -- lay the evidentiary
9 foundation to satisfy that burden.

10 At the same time, there is the public
11 trust doctrine, right, where, you know, you just
12 can't be the umpire. You have to take affirmative
13 action to protect rights like Article 12, Section 7.
14 So like the Chair noted, that, okay, you can still
15 do that Ka Pa'akai analysis by looking at exactly
16 what are they asking for in the motion. And in our
17 situation, where rights are not being implicated
18 because it's basically procedural; we're just
19 changing a date, you can complete that Ka Pa'akai
20 analysis by noting that fact, that no rights are
21 being implicated or impacted and, therefore, we can
22 end the analysis right there. And that constitutes
23 a Ka Pa'akai analysis.

24 **COMMISSIONER OKUDA:** But again, the fact
25 that no one shows up doesn't, for example, absolve

1 the Land Use Commission from exercising and
2 complying with its obligations, for example, under
3 the public trust doctrine, correct? I mean, there's
4 certain things we've got to do because we sit on the
5 Commission whether people are watching us or not
6 watching us.

7 **MR. TABATA:** I don't know how you
8 reconcile the public trust doctrine with that first
9 holding in Flores- Case 'Ohana. Burden of proof is
10 they said it. They have the burden of proof, okay?
11 I mean, I --

12 **COMMISSIONER OKUDA:** Okay. No, that's --

13 **MR. TABATA:** -- so that's an interesting
14 question because -- okay, so the Hawaii Supreme
15 Court said in, I think it's the 'iao water case, the
16 agency just can't be an umpire. You have
17 affirmative duty. That was -- the Water Commission
18 made a ruling that Well 7 did not need to be
19 improved, okay?

20 I mean, in that case, the plaintiffs, the
21 farmers were saying that, you know, each seen as
22 surface water allocation should be decreased because
23 they can increase the pumping at Well 7, the ground
24 water, but HCNS said, but that's going to make us
25 spend more money. It's going to have economic

1 impacts, right? So the Commission said, okay, we're
2 not going to make HCNS make the capital
3 improvements, increase pumpage because of their
4 economic impacts, but nobody quantified those
5 economic impacts, right. So the court said you
6 can't just assume that there's going to be economic
7 impacts. You have to quantify. You need evidence.
8 You can't just be an umpire and just, you know, take
9 the lack of evidence as sufficient reason, okay?

10 In our situation if somebody comes forward
11 and makes a claim that their rights are being
12 impacted, then, you know, and if there's a lack of
13 evidence to absolve the developer, then perhaps
14 there shouldn't be an assumption that the lack of
15 evidence is reason to absolve the developer. But
16 the fact that there's nobody here, right, can you
17 assume that there are people out there that are
18 being impacted? I'm not sure if that -- if it goes
19 that far, is what I'm saying.

20 **COMMISSIONER OKUDA:** Yeah. And no, I
21 understand your argument, and I guess that's why
22 there are lawyers to reconcile these differing
23 cases. Thank you very much, Mr. Tabata.

24 **MR. TABATA:** Thank you.

25 **CHAIR GIOVANNI:** Thank you.

1 Commissioners, any final comments or
2 questions on the declaratory portion of this
3 meeting?

4 Commissioner Carr Smith?

5 **COMMISSIONER CARR SMITH:** Thank you. I
6 just had some comments and non-attorney comments. I
7 feel like all of the hypothetical situations that
8 have been raised today are confusing the record a
9 lot. It's hard to keep it all straight when we talk
10 about things, what if, what if, because I think that
11 what we have in front of us is what we should be
12 talking about.

13 I think the Petitioner stated that there
14 is no legal trigger for this, and I believe that Mr.
15 Tabata would say otherwise if that were the case.
16 Changing a date does not affect anyone's rights as
17 it relates to the case Flores-Case. And just
18 because the Petitioner is cooperative and stated
19 that they would be willing to do something, I don't
20 think that that means that they should be required
21 to if it's not the right thing to do or if it's not
22 required.

23 And I feel like if we're going to start
24 talking about setting precedent for insisting on Ka
25 Pa'akai or 343 for changes of dates, that we're kind

1 of setting ourselves up for some issues in the
2 future. Those are my comments for now.

3 **CHAIR GIOVANNI:** Thank you. Appreciate
4 it.

5 So given that the parties have finished
6 presenting their cases and final arguments before
7 the Land Use Commission, I declare the evidentiary
8 portion of the proceedings have been completed.

9 I'd like now to do public testimony, a
10 final call. So once again, are there any members of
11 the public who wish to provide additional and/or new
12 testimony on the motion? Seeing none.

13 So at this point in time, we'll enter into
14 deliberation. The Chair will entertain a motion on
15 how the Commission should proceed in this matter.
16 Commissioners, what's your pleasure?

17 **COMMISSIONER OHIGASHI:** Mr. Chair.

18 **CHAIR GIOVANNI:** Commissioner Ohigashi.

19 **COMMISSIONER OHIGASHI:** I move that we
20 approve the motion -- or grant the motion.

21 **CHAIR GIOVANNI:** Thank you. And do I have
22 a second?

23 **COMMISSIONER YAMANE:** Mr. Chair, second.

24 **CHAIR GIOVANNI:** Commissioner Yamane
25 seconds the motion.

1 Commissioner Ohigashi, can you speak to
2 your motion?

3 **COMMISSIONER OHIGASHI:** Yes, I'm going to
4 speak to it. I believe that this is a procedural
5 motion and that it doesn't affect any rights or
6 liabilities of any other parties. I think that
7 there's good cause that exists to adopt this motion.
8 The good cause is, essentially, the fact that the
9 agreement has been reached between the Department of
10 Agriculture and Haseko Development in order to
11 pursue or complete a long-needed agricultural 150-
12 acre park.

13 And I believe that there's sufficient
14 basis in the record to find that Haseko's motion can
15 be supported absent -- or does not require a 343
16 analysis as well as a Ka Pa'akai further analysis.

17 Because this is comments, I can -- I'm
18 going to make a comment that this is not the case
19 for all this changing dates. As the Chairman has
20 indicated in his questioning, if we have a long -- a
21 30-year project that's been sitting idle, the
22 changing of the dates becomes substantive. So I'm
23 limiting myself to this particular motion. I'm
24 limiting my comments to this particular motion, with
25 this particular development, under these particular

1 circumstances.

2 And I see the need for future -- and I see
3 the need for future discussions as to changing the
4 dates issues regarding long-term -- what would we
5 say, the long-term projects that have not been
6 developed for any reason.

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

8 Commissioner Yamane, do you want -- in
9 support of your second.

10 **COMMISSIONER YAMANE:** Thank you, Mr.

11 Chair. First of all, I'd like to accept my
12 appreciation for all parties. This started really
13 complicated, and it got a little more convoluted
14 with the hypotheticals, but to me, the ask is
15 simple. I'm not a lawyer. I'm just an engineer
16 here. But listening to the request, it's a simple
17 request. I think it's a practical request and
18 appreciate that the Petitioners did come forward.

19 In my mind, I would fully support this
20 motion, to grant this change in date. To me, it
21 just makes sense, and I think we've talked about it
22 enough. Thank you, Mr. Chair.

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

24 Commissioner Okuda?

25 **COMMISSIONER OKUDA:** I'd like to make a

1 request first. Among the various commissions, the
2 statute specifically requires certain commissions to
3 have a cultural or a designated cultural
4 commissioner because of the potential impacts on
5 Native Hawaiian practices, resources, and the other
6 items that are required for protection under Article
7 12 of the Hawaii State Constitution.

8 So if he doesn't mind, I would ask
9 Commissioner Kamakea-Ohelo to give us some of his
10 thoughts right now, because that would -- or may
11 affect what I would decide, and I would make that
12 request, Mr. Chair, if the Commissioner is willing
13 to do so.

14 **CHAIR GIOVANNI:** I will forward your
15 request to the Commissioner.

16 **COMMISSIONER KAMAKEA-OHELO:** Mahalo,
17 Chair. Mahalo, Commissioner Okuda.

18 I just want to mahalo everyone here today.
19 You know, it's been a bunch of hypotheticals, and as
20 -- I'm not trained in law in any way; however, I do
21 receive and acknowledge that the motion is very
22 simple, an extension of time for alignment.
23 However, I must say -- and if I could just please
24 place it on the record, if it pleases you, Chair, in
25 my personal capacity and in my professional

1 capacity, I witness CIAs be insufficient in the
2 past.

3 And I've actually experienced CIAs be
4 weaponized, yeah, against communities, especially
5 targeting Native Hawaiian communities, you know, so
6 while I do recognize that the evidence, you know,
7 should be sufficient in this case and the motion is
8 very simple, a Ka Pa'akai analysis should not be
9 limited to physical structures on land.

10 I'll give an example. In 2019/2020, the
11 community of Waimanalo was up in arms against the
12 City and County of Honolulu at Waimanalo Bay Beach
13 Park. Through their master plans, they also had a
14 CIA. And they leaned heavily on that CIA, yeah.
15 And their statements were from the County's
16 Administration at that time was there is in fact no
17 iwi kupuna. There is in fact no cultural
18 significance to those spaces.

19 When in fact, Waimanalo Bay Beach Park was
20 previously part of the Bellows Air Force
21 archeological site, in totality 1,200 acres, which
22 is still the largest land mass on the federally
23 recognized historical places, yeah? So in their --
24 when they resume construction within three hours,
25 they found iwi kupuna, and that's in fact what

1 stopped the project today.

2 So I just want to say it's not just about
3 the physical, you know, evidence of what our kupuna
4 of yesterday practiced and where they lived and how
5 they lived. It's really about the pilina in our
6 relationship between the Native Hawaiians and their
7 'aina.

8 And I just want to point out, I've heard
9 it iterated many times today that these are in fact
10 previously farmed sugar lands. And in the 1920
11 Hawaiian Homes Commissions Act, it clearly states,
12 as well as reiterated in the 1959 Admissions Act, as
13 well as in the 1978 Constitutional Convention, that
14 30 percent of all sugar lands and the water leases
15 attached to, yeah, are set aside for a fund for
16 Native Hawaiians, as identified in the 1920 Hawaiian
17 Homes Commissions Act.

18 So this in fact impacts Native Hawaiians,
19 as a whole, as a Lahui, as a nation, you know, so
20 again, I will recognize a two day's motion is very
21 simple and an extension of time; however, please,
22 for the record and on the record, in the future,
23 consider, yeah, all decisions and all acts for the
24 Land Use Commission. So mahalo again, Commissioner
25 Okuda, for calling me out.

1 I give it back, Chair.

2 **CHAIR GIOVANNI:** Thank you, Commissioner
3 Kamakea- Ohelo, for your remarks.

4 So back to you, Commissioner Okuda. Any
5 follow- on?

6 **COMMISSIONER OKUDA:** Yes. Taking into
7 consideration the statements of the designated
8 Cultural Commissioner, I do agree that the
9 Petitioner here, Haseko, has me its burden of proof.
10 I believe a common-sense reading of that one
11 sentence that I read from the Ka Pa'akai case about
12 the fact that a Ka Pa'akai analysis or requirement
13 is triggered by an act or action, the government
14 agency requires a common-sense plain English
15 interpretation of the words, and I agree and I would
16 find, based on the discretion given to the Land Use
17 Commission and as a government agency, I would find
18 as a matter of fact that what the -- what Petitioner
19 Haseko is asking for at this point in time does not
20 constitute an act or an action, as stated in the Ka
21 Pa'akai Case to keep into account the caveats and
22 warnings that the Cultural Commissioner has reminded
23 us all on the record.

24 For the similar reasons, I would also find
25 that at this point in time, any requirements of

1 supplemental environmental assessments is not
2 required under the Unite HERE! Local 5 versus City
3 and County of Honolulu case because the actions
4 being requested is simply an extension of time.

5 And finally, to be consistent with what
6 the Land Use Commission did yesterday in finding
7 that no further action need be taken with respect to
8 otherwise potentially delinquent status reports and
9 items regarding deadlines, to be consistent with
10 that. This simply an extension of time, as
11 Commissioner Ohigashi has stated. So recognizing
12 the fact that the Land Use Commission, under Ka
13 Pa'akai and the Flores 'Ohana case, cannot delegate
14 its obligations.

15 Even taking into that account, I believe
16 that the evidence supports the granting of the
17 Petitioner's motion. Thank you, Mr. Chair.

18 **CHAIR GIOVANNI:** Thank you, Commissioner
19 Okuda.

20 Commissioners, anybody else like to speak
21 to the motion?

22 **COMMISSIONER KAHELE:** Chair, I don't want
23 to speak to the motion. I just want to make a
24 comment and a statement. You know, I guess after we
25 leave today we're all going to get a certificate on

1 Section 343 and the Ka Pa'akai analysis.

2 But I believe that this housing that
3 Haseko's going to be looking at building is long
4 overdue. We've got a lot of Native Hawaiians, a lot
5 of road closures, moving up to the mainland. In
6 fact, a survey was done. We had over 15 to 17,000
7 Native Hawaiians moving up to LA, up to Las Vegas,
8 and other parts of the mainland. I think this
9 project is long overdue. It's going to provide many
10 affordable housing units. And of course, I believe
11 it's going to be close to 13, 1,400 total units
12 that's going to be built in this area. Let's get RK
13 II going. Let's get that ag park going. And I
14 believe this project's going to be very helpful for
15 the people here in Hawaii. Thank you.

16 **CHAIR GIOVANNI:** Thank you, Commissioner
17 Kahele.

18 Commissioner Carr Smith?

19 **COMMISSIONER CARR SMITH:** I just want to
20 go on the record saying that I support the motion.
21 Thank you.

22 **CHAIR GIOVANNI:** Thank you.

23 Anybody else?

24 So the Chair will support this motion as
25 well. I commend the party Haseko and your counsel

1 for bringing the motion forward. I would not have
2 been surprised if this project would have continued
3 and we learned about it after the fact, so I do
4 think that the fact that you are showing respect for
5 the importance of this motion and to bring it before
6 us is very much appreciated. It's the right thing
7 to do.

8 At the same time, I think you've heard
9 that it's kind of a common-sense consideration that
10 we're applying to it, that it's a delay or your
11 missing of a date in the condition that is
12 explainable, understandable, and not consequential
13 in terms of its potential impact, its impacts. And
14 I appreciate the positions taken by the other
15 parties, including OPSD and the Department of
16 Agriculture, in support of the motion. That's
17 important to me, as well.

18 I also want to re-emphasize a point made
19 by Commissioner Ohigashi in his remarks, at the
20 ending of his remarks, which is this is not a
21 precedent, in my mind, that says if there's a delay,
22 we can fix the delay and it's not consequential.
23 But if that delay is long-term, 20 years, 30 years,
24 40 years, and in particular if there wasn't any
25 substantial development on the project in those

1 years, this -- what we're doing today does not
2 affect that. That would be a totally different set
3 of circumstances, and I would expect a totally
4 different result.

5 Mr. Orodenger, please take a roll call
6 vote.

7 **MR. ORODENKER:** Thank you, Chair. The
8 motion is to grant the motion to amend.
9 Commissioner Ohigashi?

10 **COMMISSIONER OHIGASHI:** Aye.

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

12 **COMMISSIONER YAMANE:** Aye.

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

14 **COMMISSIONER OKUDA:** Yes.

15 **MR. ORODENKER:** Commissioner Kamakea-
16 Ohelo?

17 **COMMISSIONER KAMAKEA-OHELO:** (Inaudible.)

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

19 **COMMISSIONER LEE:** (Inaudible.)

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

21 **COMMISSIONER KAHELE:** Aye.

22 **MR. ORODENKER:** Commissioner Carr Smith?

23 **COMMISSIONER CARR SMITH:** Aye.

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

25 **COMMISSIONER ATTA:** Aye.

1 **MR. ORODENKER:** Chair Giovanni?

2 **CHAIR GIOVANNI:** Aye.

3 **MR. ORODENKER:** Thank you, Mr. Chair. The
4 motion passes unanimously.

5 **CHAIR GIOVANNI:** Commissioner Ohigashi?

6 **COMMISSIONER OHIGASHI:** I just have a
7 short comment. I'd like to thank Commissioner
8 Okuda. He placed on the record to make sure that
9 our decision should not be scrutinized in any other
10 matter, and I commend him for placing these issues
11 on the record so we have a record that we can rely
12 upon when making this decision. And I will miss
13 that from him. Thank you.

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

15 Parties, I have some requests relative to
16 the proposed decision and order. If any of the
17 parties, any of you parties -- any of the parties
18 desire to stipulate to any portion of all the
19 findings of fact, conclusions of law, and decision
20 and order, you are encouraged to do so. If you
21 desire, you're encouraged to do so.

22 Regardless of whether the parties pursue a
23 partial or a stipulated order, each party is
24 directed to file its proposed findings of fact,
25 conclusions of law, and decisions and order with the

1 Commission Staff, and to serve copies on the other
2 parties no later than May 15th. That's -- this is
3 an option you have now. It's not a requirement.

4 That concludes the business on the ninth
5 order of business for this, so I will take a -- it's
6 now 11:13. We're going to take a recess. It's too
7 early for lunch. We're going to do something else.
8 Are you hungry? Yeah, okay. It's 11:13. We'll
9 take a recess until 11:25.

10 **(Recess taken from 11:13 a.m. to 11:26**
11 **a.m.)**

12 **CHAIR GIOVANNI:** I am reconvening -- end
13 of recess. We will reconvene the meeting. And our
14 tenth order of business is the introduction of the
15 Land Use Development Coordinator, a member of our
16 LUC Staff. Mr. Orodenger, please proceed with the
17 introduction of the Land Use Development
18 Coordinator.

19 **MR. ORODENKER:** Thank you, Mr. Chair.

20 We -- Arnold, stand up. Arnold Wong is
21 our new Development Coordinator. And this is
22 actually an exciting and, we think, long-term,
23 hopefully, solving a lot of problems that we've had
24 with developing housing. And what we have
25 discovered in review of our records was that there

1 are approximately 40,000 to 65,000 housing units
2 that were promised that are unbuilt on various
3 projects all around the state.

4 So what we decided to do was to venture
5 into a new program, a new activity for the Land Use
6 Commission and hire someone to go out and find out
7 why these projects aren't moving and what can we do
8 to help them move, to be proactive in trying to get
9 units built that we'd already approved. I think
10 that we all recognize that if we could build 45,000
11 units in the next several years, that it would make
12 a big impact on housing.

13 We hired Arnold to take on this role in
14 part not only because he had a good understanding
15 being a former commissioner of how the Commission
16 works but also because he has a good understanding
17 of how the private sector works and the legislature
18 works. He has good connections in State and County
19 government, and he was the best candidate for the
20 job out of all the people that we interviewed.

21 This position or what Arnold is going to
22 be doing is basically shaking the trees to see if he
23 can work things out. We've already had some
24 successes, and, not surprisingly, we found that one
25 of the biggest problems is us, and I mean, when I

1 say, "us," the State. There were certain things
2 that were just not getting done for various reasons,
3 for instance, agreements with the Department of
4 Transportation.

5 Nobody knew what to do about some of our
6 conditions, how to effectuate them, for instance,
7 the requirement to build a -- what do you call it --
8 emergency siren and dedicate it over to HI-EMA and
9 things like that. It's been fun for the past several
10 months. Arnold came on in December -- November, and
11 he's already had, like I say, had a big impact.

12 Not surprisingly, Maui was the first
13 island reviewed because of the sudden need for more
14 housing. Arnold immediately had success in helping
15 to facilitate a backlog of 3,000 homes, and I can be
16 a little bit more specific about that. We're
17 working with State and County agencies to ensure
18 that we can get these projects built.

19 We've established a working relationship
20 with Commission of Water Resource Management, HI-
21 EMA, HHFDC, and DOH, to name a few, that now allow
22 us to work with them to work -- to help developers
23 facilitate with developers to get things moving.
24 It's contemplated that if some of these developments
25 require amendments to the decisions and orders to

1 move forward, that Arnold will help bring those to
2 the Commission. Maybe not necessarily present them,
3 but he will help in facilitating the developers to
4 come forward and resolve the problems.

5 We've started looking at other counties as
6 well. Right now, we're looking at five projects on
7 Kauai that could result in several thousand units
8 being built. On Maui, we're looking at five
9 projects. We're looking at one project on Lanai and
10 one project on Oahu. And that's about -- when you
11 add all those up, if we have success with those
12 projects, we're looking at about 10 to 15,000 units.

13 I just wanted to bring Arnold here and
14 explain to you what we're doing and see if you have
15 any questions for us.

16 **CHAIR GIOVANNI:** Thank you, Dan.

17 Arnold, did you want to say anything?

18 **MR. WONG:** Thank you, Chair. I just
19 wanted to say thank you to the Commission and the
20 Executive Officer and the Staff for allowing me to
21 take this position. It's been a different -- being
22 on this side of the mic has been very different from
23 being on where you guys sit, so I just wanted to say
24 thank you. And it is a learning experience for me
25 also, but thank you.

1 **CHAIR GIOVANNI:** So do you mind if we open
2 it up to questions from the Commissioners for you or
3 for Dan?

4 **MR. WONG:** Please, Chair. It's your
5 preference.

6 **CHAIR GIOVANNI:** Okay.
7 Commissioners, any comments, questions?
8 Commissioner Carr Smith.

9 **COMMISSIONER CARR SMITH:** Thank you.
10 So Executive Director, you didn't mention
11 Hawaii Island.

12 **MR. ORODENKER:** We're beginning to work on
13 that. You know, it's only been a few months that
14 Arnold's been here, but we will be working on Hawaii
15 Island as well.

16 The Oahu project, we weren't even really
17 working on Oahu and somebody brought it to us. The
18 Kauai projects are a result of our conversations
19 with Kaina Hale on other matters and, you know, he
20 brought up these projects that weren't moving.

21 But Arnold's real heavy work and his heavy
22 lifting has been on Maui right now, for obvious
23 reasons. But we will get to the Big Island --

24 **COMMISSIONER CARR SMITH:** Understandable.
25 I just wondered if there was a reason that you left

1 it out.

2 **MR. ORODENKER:** No.

3 **COMMISSIONER CARR SMITH:** The only other
4 question I had is you said that you had had some
5 good success recently with this already, so I was
6 wondering if you could speak more to that.

7 **MR. WONG:** Thank you, Commissioner. So
8 what occurred is, as the Executive Officer said, we
9 were looking on Maui, especially closer to the
10 Lahaina area and, you know, Kihei, et cetera because
11 it's closer on that side of the island. We were
12 looking at different cases outside of Lahaina
13 because of all the issues with the water, you know,
14 the dust and everything else.

15 So we looked at one project in Kihei, and
16 pretty much it was close -- really close to shovel
17 ready and the issues was pretty much as Executive
18 Officer said. In Kihei it had the HI-EMA problem,
19 dating HI-EMA and the developer just stopped talking
20 for a reason. So we facilitated the discussion
21 again.

22 I can say for a fact that HI-EMA went last
23 month on the 19th to try and pin where they should
24 have an emergency siren. So that has been done, so
25 that's pretty much they're going to shovel ready

1 because also the DOT memorandum has been working on,
2 but it's hard to say. As we know, different
3 attorneys have different styles of thinking. So it
4 has been slowed down, but it's in progress to be
5 signed like by the end of the year. So it's -- if
6 not sooner. I would say in a couple months that the
7 MOA's going to be done with DOT.

8 **MR. ORODENKER:** Yeah. The specific
9 projects were Lipoa, Makena, and we were working
10 very hard on Pulelehua for a while, and this is one
11 of the things that we think is valuable, Arnold's
12 activity is valuable. Pulelehua stalled because of
13 the water situation on the -- on Maui. And so
14 Arnold has been -- both of us, actually, have been
15 in conversation with Commission on Water Resource
16 Management bringing to their attention, so to speak,
17 that this issue needs to be resolved and that
18 finding out that they're holding up 3,000 units
19 until they do, and trying to stimulate some
20 activity, I guess, is the best way to put it.

21 **UNIDENTIFIED COMMISSIONER:** What's the
22 issue?

23 **MR. ORODENKER:** Well, it's a special
24 management area for water, and there are a lot of
25 demands for that water right now. Before the fire

1 occurred, there was a cap on how much water could be
2 taken out of that particular water management area
3 for things other than, for lack of a better word,
4 downstream cultural activities.

5 It's different from other areas. Once you
6 designate an area, you have to get permission from
7 the Commission of Water Resource Management for any
8 allocation. And there's a limitation on diversion of
9 groundwater. So it gets complex because with what
10 FEMA is doing and the temporary housing, there's --
11 they're chewing up a lot of the allocation that's
12 available. Let me put it that way, and that's only
13 temporary. And so all the developers -- potential
14 developers of housing on Maui are not clamoring for
15 water, either what's left or what is going to happen
16 with that allocation once it's done, can they get a
17 piece of it. It's almost -- it's very ironic
18 because it's almost like a gold rush.

19 **CHAIR GIOVANNI:** So let's take this
20 project. When this project was approved, weren't the
21 water issues addressed up front as being adequate
22 and --

23 **MR. ORODENKER:** Pulelehua or for the
24 project today, the Ho'ohana?

25 **CHAIR GIOVANNI:** No. The Pulelehua.

1 **MR. ORODENKER:** Yeah, Pulelehua. Well,
2 yes and no.

3 Arnold, why don't you speak to that.

4 **MR. WONG:** Yeah. So the Pulelehua project
5 was interesting in the fact that they did not apply
6 for -- with the Commission for Water Resource
7 Management for a permit to use water, but also they
8 were thinking of tapping the County's water supply,
9 which -- so it's an existing permit. However, the
10 County has maxed out their allocation, so it will
11 either be a new well or a new tap on the
12 groundwater. There's two different water supplies.

13 And new permits will take a longer time
14 than existing permits, so that's the reason that
15 Pulelehua has been stalled.

16 **CHAIR GIOVANNI:** So what's your advice to
17 this Commission when a project comes before it and
18 water is needed for he project to be successful?
19 What should we require of the developer when they're
20 coming before us?

21 **MR. WONG:** So the good thing about my job
22 that Executive Officer has been sitting with us,
23 with -- and also Mr. Derrickson -- is that we have
24 met with Commission on Water Resource Management,
25 and we have opened a better - - I shouldn't say a

1 better -- an open dialogue in terms of our projects
2 to say if someone comes in, we want you here at the
3 table at the beginning of this state. Not, you
4 know, to know that this is coming up and what do
5 they have to do -- tell the developer what they have
6 to do. Not what did they have to do in hindsight,
7 but what -- right, you know, be proactive.

8 **MR. ORODENKER:** If I can speak to that,
9 Chair. What happens, we require -- Staff requires
10 the developers, when they file their DBAs, to show
11 that they have water, right? Very often, what
12 happens -- or sometimes what happens is their
13 assertion is that they're going to drill a well or a
14 -- even if it's offsite, to provide water to the
15 project or to replace the water they're going to
16 take out of the County system.

17 Sometimes the projects that come before us
18 simply say, well, the County's giving us an
19 allocation of X. And in most cases, that's
20 sufficient, but sometimes, like what we're seeing in
21 West Maui situation, is that all of a sudden,
22 something changes and that allocation is no longer
23 there or it's insufficient.

24 We've been struggling to get -- to develop
25 a relationship between Commission of Water Resource

1 Management and the County Boards of Water Supply to
2 get them to talk to each other more so that County
3 doesn't make a representation that they have water
4 and then all of a sudden they find out that they
5 don't. So what we're doing is kind of breaking down
6 barriers.

7 **CHAIR GIOVANNI:** I appreciate that, but,
8 you know, from a practical matter for a particular
9 developer, it's one thing this this Commission to be
10 attempting to make decisions with uncertainty about
11 water allocations, but I can only imagine what that
12 uncertainty presents for the developers themselves.
13 So this seems like a real -- I mean, I appreciate
14 your trying to unscramble the eggs after they've
15 smashed, and we've got problems on a project, but to
16 the extents these things could be addressed, and I
17 guess you are in some extent up front --

18 **MR. ORODENKER:** Yeah. That is what we're
19 working on is to have Commission on Water Resource
20 Management work more closely with developers to --

21 **CHAIR GIOVANNI:** Yeah.

22 Commissioner Ohigashi?

23 **COMMISSIONER OHIGASHI:** Yeah. I just want
24 to compliment our Executive Officer and Arnold. You
25 know, the Commission made a decision a long time ago

1 or a few years ago or even yesterday, let's say, to
2 grant DBAs. And we leave that to themselves. And
3 according to our numbers, it's between 40 and 60,000
4 units that are being developed, so we get all --
5 everybody says, hey, LUC, you are holding up
6 development when we have 40 or 60,000 approvals for
7 housing already in -- on the books.

8 Our problem is we don't have enforcement
9 powers under Bridge Aina Le'a case. We don't have --
10 - we can't do it. We can't go and go out there and
11 force them to get a bond or force them to do
12 anything once it evolved. So this is the next best
13 way is to try and utilize the Commission's resources
14 or to try and get them to see how they can comply.

15 I would -- the problem, though, is that if
16 we are working with them, it's maybe more difficult
17 to bring -- well, the problem is how far can you
18 work with them and then to -- and to taint them
19 filing for a motions for subsequent changes to their
20 DBA. So it's good that you guys are doing this.
21 It's great, but I'm hoping that once -- that this
22 results in positive things rather than a flood of
23 new amendments to the existing motions.

24 Because if we have like -- like, one of
25 the projects, I know, is like 20 years -- 20-

1 something years. Yeah. And --

2 **MR. ORODENKER:** If I can, Commissioner.

3 **COMMISSIONER OHIGASHI:** -- you have a --
4 you have -- those are the kinds we want to get
5 started. No -- and that's all I wanted to say, that
6 you guys are doing a -- I think this is the second
7 best way that you can do it, because we don't have
8 any other power.

9 **MR. ORODENKER:** Yeah, yeah. Thank you,
10 Commissioner. I appreciate that.

11 One of the best examples that we have of
12 what is being done, without having to involve the
13 Commission, concerns one of the projects on Maui
14 where we discovered that our requirement was for the
15 condition that was contained in the D&O was for the
16 developer to resolve the roadway improvements. And
17 the way the condition read was with the approval --
18 you know, by approval of DOT. It wasn't like they
19 already had a plan when we did the DBA.

20 And what we discovered was that DOT had
21 told the developer that, oh, don't worry about it,
22 we're going to build it. But then they stalled.
23 They never entered into the agreement. Yeah, yeah.
24 And so you know, by pushing a few buttons, we were
25 able to get DOT to move on that MOA. You know, it's

1 that type of thing. I mean, I don't think that our
2 experience so far is going to implicate the
3 Commission all that much because, you know, as you
4 pointed out, there's a limit.

5 **COMMISSIONER OHIGASHI:** I think that you
6 shouldn't get involved with any Commissioner on that
7 particular island doing these things because that
8 would taint them coming to the Commission, and so I
9 think that this type of activity that you can report
10 to us is the best type of activity versus some
11 direct involvement with the Commission going over
12 there and saying, hey, you guys got to do this and
13 do that, you know, and it taints the subsequent --
14 if you have to modify a condition or something like
15 that in the future. That was my only concern.

16 And now -- can we sic him on Kihei School?
17 No, I'm kidding.

18 **CHAIR GIOVANNI:** Commissioner Okuda.

19 **COMMISSIONER OKUDA:** Yeah. I think this
20 is a really good idea. I think on one of our trips
21 that we took to a planning conference, where we
22 actually attended the conferences and we don't just
23 waste taxpayer money, this was a type of thing that
24 was suggested, almost like a concierge where you get
25 people together from various agencies to just get

1 the nuts and bolts done. And the fact that
2 communication or just being in the same room does
3 really good things to moving projects forward.

4 You know, at the very beginning when
5 Governor Green was elected, a person from is housing
6 task force contacted me, and I put together a short
7 memo which I'm sure was ignored, but one of the
8 things in the short memo to get housing going was
9 doing something that you're doing here, which is
10 just get people in the same room and find out what
11 has to be done. And as the Chair always says, since
12 he was the operations guy at Hawaiian Electric, you
13 know, if you're going to get something done, just go
14 get it done.

15 And so you know, I think this thing about
16 just getting it done, you know, gets it done. So I
17 think it's a really good idea, good for the
18 community.

19 **CHAIR GIOVANNI:** Commissioner Lee.

20 **COMMISSIONER LEE:** Thank you. So I want
21 to make sure that Arnold doesn't get distracted by
22 too much manual labor, other duties from his primary
23 duty, although lunch is okay if you want to bring
24 lunch.

25 Have you detected so far any consistent

1 themes for some of the delays? I know you've just
2 started doing this, but I'm interested to hear what
3 you think.

4 **MR. WONG:** Not really. Each docket is
5 different, and so, you know, it's just looking at
6 the docket and seeing what is the problem there is.
7 So each one has a different issue.

8 **COMMISSIONER LEE:** And so you would --
9 you're not just restricted to working with other
10 State agencies like CWRM, you'd also be tasked to
11 work with County agencies as well?

12 **MR. WONG:** Yes, Commissioner. So we --
13 for example, the Maui one, we did work with the
14 Department of Water Supply, so --

15 **COMMISSIONER LEE:** How about nonprofit and
16 public groups?

17 **MR. WONG:** We haven't come to that point
18 yet, but if -- let's say, for example, Habitat as a
19 nonprofit or private developers do come up in part
20 of the docket, we'll work with them.

21 **COMMISSIONER LEE:** I guess there's some
22 potential liability if you maybe talk to certain
23 groups and they feel that they are hearing certain
24 pledges or commitments, so I guess there's some
25 places to be careful about, is that correct?

1 **MR. ORODENKER:** Yeah -- yes, Commissioner,
2 and we're very well aware of that. And I've
3 counseled Arnold that we don't take commitments; we
4 just bring people into the room to see if they can
5 resolve the problems between themselves.

6 **COMMISSIONER LEE:** Okay. And one last
7 thing. I have heard some wary comments that to hear
8 from someone from the LUC, not just Arnold, it's
9 like the cops asking you, so what are you doing, you
10 know? So just be prepared that there's that
11 dynamic. Thank you.

12 **CHAIR GIOVANNI:** Commissioner Ohelo.

13 **COMMISSIONER KAMAKEA-OHELO:** Mahalo,
14 Chair.

15 I guess my question is for Arnold more
16 than the executive team. How often will you be
17 reporting to this Commission?

18 **MR. ORODENKER:** That's up to the
19 Commissioners. I mean, we can make it a monthly or
20 couple of months. Things don't move that quickly, so
21 I suggest wait a few months in between --

22 **CHAIR GIOVANNI:** I would suggest
23 quarterly. It could be -- you know, depending on
24 our meeting schedule. Just agendize it every three
25 months or so. Does that work?

1 **COMMISSIONER KAMAKEA-OHELO:** Yes, Chair.
2 I'd also recommend quarterly. (Inaudible) on past
3 and future projects, especially in the case of any
4 Maui projects with the County's show me the water
5 law. You know, it's -- a lot of our dockets it
6 comes through and a lot of the decisions we make is
7 very humancentric, but the very title of our agency
8 is the Land Use Commission, and we also need to take
9 into account, right, 'aina or landcentric, right,
10 and if in fact, you know, future projects cannot,
11 you know -- if aquifers or water systems does not
12 currently have the sustainable draw, right, then we
13 need to be informed as Commissioners what that looks
14 like for future sustainable developments. So
15 mahalo.

16 **CHAIR GIOVANNI:** Commissioner, who's that,
17 Kahele down there?

18 **COMMISSIONER KAHELE:** Yes, Chair. Are we
19 on record?

20 **CHAIR GIOVANNI:** Yeah.

21 **COMMISSIONER KAHELE:** Aw, shucks. You
22 know, actually I just wanted to make several
23 comments about Arnold. He and I worked together for
24 the Ironworkers Stabilization Fund for 20 years, and
25 he and I had some accomplishments while worked with

1 the legislators, with the governor, with the mayors.
2 And he's always been a professional. He always got
3 the job done. He was straightforward. And if he
4 wasn't able to complete whatever assignment, he
5 always asked for help. He's been the Chair for the
6 Land Use Commission at one point in time. And for
7 me, I don't believe I have any concerns about Arnold
8 fulfilling his duties as the Development
9 Coordinator.

10 **CHAIR GIOVANNI:** He is a Dodger fan, you
11 know.

12 **COMMISSIONER KAHELE:** Yeah, but too bad
13 we're on record. Shucks, if we wasn't on record, I
14 would have had some bitter words, but Arnold,
15 congratulations. I'm happy for you.

16 **CHAIR GIOVANNI:** Yeah, he wore red just to
17 hide the fact that he's a Dodger --

18 **MR. WONG:** Thank you, Commissioner.

19 **CHAIR GIOVANNI:** I have a different
20 question or - - I love the process that you're being
21 proactive and you kind of target a project or two
22 that -- you know, whether it be on this island or
23 that where you've heard and you start digging,
24 right?

25 But as it becomes known in a broader

1 audience that we're -- that the Land Use Commission
2 is doing this sort of thing to help move projects
3 forward, I'm going to put my hat on as a developer.
4 If I'm a developer and my project is stalled for
5 whatever reason, this government agency or that
6 government agency or this permit being stalled, or
7 whatever it might be, do you think it would work
8 that they would have an opportunity to contact you
9 for assistance?

10 **MR. WONG:** That's what we hope for. I
11 mean, we wanted to be that we are here to help the
12 developers for the people of Hawaii. That's the
13 main thing. It's to ensure that the people will get
14 housing.

15 **CHAIR GIOVANNI:** Then we need to get the
16 word out.

17 **MR. WONG:** Yes. And I think --

18 **CHAIR GIOVANNI:** At the appropriate time
19 and et cetera.

20 **MR. WONG:** Yes.

21 **CHAIR GIOVANNI:** And it's usually best to
22 do that when you've got a couple of successes in
23 your pocket that you can show the type of thing that
24 you can accomplish.

25 **MR. WONG:** Yes, Chair. And we hope that

1 through these successes, as you say, it will go out.
2 I mean, a couple of developers have already
3 contacted us to work with them, so thank you, Chair,
4 for that.

5 **CHAIR GIOVANNI:** Well, I think to -- you
6 know, Commissioner Ohelo's request, the fact that
7 it's going to be a regular part of our meeting on a
8 quarterly basis, that in and of itself will start
9 propagating the understanding that we're here to
10 serve and do this function. And I think as part of
11 that, we could, when you're ready, help -- I hate to
12 use the word advertise, but advertise that we are
13 available to help.

14 **MR. WONG:** The good thing about this,
15 Chair, is we already started talking to, as you see,
16 some of the attorneys here. So they already know it
17 and --

18 **CHAIR GIOVANNI:** Sure, sure.

19 **MR. WONG:** -- they can talk to their
20 clients.

21 **CHAIR GIOVANNI:** Yeah, yeah. It will grow
22 in time.

23 **MR. WONG:** Thank you, Chair.

24 **CHAIR GIOVANNI:** Commissioner Atta.

25 **COMMISSIONER ATTA:** Yeah. You know, I'm

1 thinking that it's good to be responsive for the
2 developers, but I hope that you do some research
3 about -- with each of the County Planners, and among
4 then, especially long-range plans so that you folks
5 know what the City's -- each County has a long-range
6 plan and that I think the Land Use Commission should
7 be very close with the people on the County that --
8 looking forward.

9 And I mean, I knew Steve Young was working
10 at Oahu, and you know, he looks for 10, 20 years in
11 the future, and that the -- that the Land Use
12 Commission should be working closely about what we
13 anticipate in 20 years and that you folks will be
14 working with them a lot.

15 **MR. WONG:** Thank you, Commissioner. Yes,
16 we have started that discussion, and it has been
17 very fruitful, and we are working with different
18 County agencies at this time.

19 **CHAIR GIOVANNI:** Commissioner Yamane.

20 **COMMISSIONER YAMANE:** How did you know I
21 wanted to talk? I just have a question for you the
22 Executive Officer, Arnold. I'm assuming you're
23 working off of a list of projects that have the
24 dates of the D&O, number of units that impacted --
25 that's kind of an exciting list I wouldn't mind

1 seeing that in the quarterly reports.

2 **MR. ORODENKER:** Well, we'll give you what
3 we're working on. Some of what's happening is that
4 Arnold is digging into the D&Os to find out which
5 ones haven't (audio disruption), so we don't have a
6 list right now. But as we dig into it more, we can
7 bring that forward.

8 **CHAIR GIOVANNI:** Thank you. Just a
9 message to my fellow Commissioners, you know. As
10 Commissioner Ohigashi mentioned, you know, we as
11 Commissioners got to be careful. We can't get
12 involved. But on our respective turf, we do run
13 into people who know we're Commissioners, and they
14 know we're Land Use, and the questions might come to
15 us, and they do come to us, hey, can you help with
16 this or can you help with that. And generally, we
17 say we can't get involved because of this or that.
18 But is there any problem in us steering them to you?

19 **MR. WONG:** Chair, no. I mean, we open
20 dialogue with anyone to help facilitate projects.

21 **CHAIR GIOVANNI:** Right. So to my fellow
22 Commissioners, when you get tapped on the shoulder
23 or someone asks you about a project, you may or may
24 not know what the issue is, but certainly there's no
25 hesitation on your part it should be in place, you

1 can refer them to Arnold. Right?

2 **MR. WONG:** That is correct, Chair. And
3 you know, I mean, I'm going to say truthfully that
4 without the Executive Officer and Staff to help me
5 and guide me, I wouldn't be able to do things, and
6 the Commissioners, they help me a lot to just get up
7 and running to this point. And hopefully, with help,
8 we'll continue this process.

9 **CHAIR GIOVANNI:** I'm sure that will work.
10 Is there anything -- this is to you or the Executive
11 Officer. Is there anything as a Commission or as
12 Commissioners that we can do to help the process?

13 **MR. ORODENKER:** I'll be very blunt. I
14 would hope the Commissioners would stay out of this.
15 I don't want to run into a situation where a
16 Commissioner is compromised as a result of being
17 involved in what Arnold is doing. We actually have
18 somewhat of a Chinese wall set up in the office. I
19 mean, I talk to Arnold on a regular basis and he
20 gets assistance from Scott and Martina when he needs
21 to ask questions about a D&O, but we're not
22 involving Scott and Martina in any of these. I
23 think that the more separation there is, the better
24 it will be.

25 **CHAIR GIOVANNI:** I think you're right, but

1 let's dig a little deeper here. You know, we just
2 kind of concluded that if a Commissioner hears about
3 something he could refer it, but he's got to respect
4 that Chinese wall, right?

5 **MR. ORODENKER:** Well, the standing -- our
6 standing advice is --

7 **CHAIR GIOVANNI:** Not Chinese, not in your
8 sense, but --

9 **MR. ORODENKER:** Ethical law.

10 **CHAIR GIOVANNI:** It's a firewall.

11 **MR. ORODENKER:** I'm sorry. I'm going to -
12 -

13 **CHAIR GIOVANNI:** Yeah. Call it Italian
14 wall if you want.

15 **MR. ORODENKER:** Yeah, whatever. As we've
16 said in our orientations, if anybody approaches a
17 Commissioner about a potential project, proposed
18 project, a project that's going to come before us,
19 or a problematic project, they're to just refer them
20 to myself. I mean, that's not new. So it's the
21 same thing.

22 The difference now is that a Commissioner
23 can say, why don't you call Arnold because he can
24 probably help you.

25 **CHAIR GIOVANNI:** Okay. Anything further?

1 **MR. ORODENKER:** No.

2 **COMMISSIONER CARR SMITH:** Chair? Just
3 briefly.

4 **CHAIR GIOVANNI:** Commissioner Carr Smith.

5 **COMMISSIONER CARR SMITH:** I just wanted to
6 comment that I'm glad that you are the one that's
7 here doing this. I commend the Staff for wanting to
8 improve relations and appear to be trying to be
9 cooperative with petitioners and find out why things
10 have stalled.

11 You know, I can't help but think of a
12 couple of meetings that we had in Kona, and those
13 were long, stalled petitions that had new owners and
14 coming before us, and I didn't see a lot of
15 cooperation on those levels, and so I - - I'm not
16 sure how this is different.

17 If we're not doing all we can to help
18 people be successful in the meetings and the
19 petitioners that come before us, but yet we're
20 trying to go back and find old ones, I'm not sure I
21 fully understand that. But I wish you great
22 success, and I'll look forward to hearing from you.

23 **MR. WONG:** Thank you, Commissioner.

24 **COMMISSIONER CARR SMITH:** Yeah.

25 **CHAIR GIOVANNI:** Okay. Anything else?

1 Anyone?

2 Thank you, Arnold. Welcome aboard. I'm
3 glad to see you going full speed again.

4 **MR. WONG:** Thank you, Chair.

5 **CHAIR GIOVANNI:** Yeah.

6 And thank you, Dan, for making this
7 happen.

8 So with that, I'm going to call a lunch
9 recess. It's now 12:03, and we'll be back at 12:30.

10 **(A luncheon recess was taken from 12:03**
11 **p.m. to 12:31 p.m.)**

12 **CHAIR GIOVANNI:** So it's 12:31, and we're
13 back in session.

14 So the next agenda item is the discussion
15 on the protocol for legislative testimony and
16 monitoring of legislative measures.

17 So Commissioners, I would like to have
18 just an open discussion among us and Staff regarding
19 this practice of presenting testimony to the
20 legislature on pending bills and the associated
21 methodology. And my understanding is that there was
22 discussion of this topic, inquiry into this topic at
23 the last LUC meeting at which I was not in
24 attendance, and so that -- but that was kind of the
25 starting point of where this agenda item came from.

1 And I think that, Commissioner Lee, you
2 were the one that kind of brought it up if I'm not
3 mistaken. I did have the opportunity to watch the
4 recording that Ms. Kwan prepared for us from that
5 meeting, so I'm kind of up to speed with that.

6 Can you share with us kind of your -- just
7 kind of take a half step back before we probably
8 take a couple steps forward here.

9 **COMMISSIONER LEE:** Yes. Thank you, Chair.
10 I guess sometime prior to the last LUC meeting some
11 of us, we work with the legislature and we follow
12 bills and measures and different boards and
13 commissions have different policies, i.e., I'm a new
14 person here, and I didn't know if we had a policy.
15 It sounds like we didn't. Or if there had been one,
16 it hadn't been updated.

17 And so I noticed that there was testimony
18 on a certain bill that stated that the Land Use
19 Commission was in strong support of it, and I
20 thought, well, that's surprising to me because I
21 don't think we took a position on anything. And
22 understand the circumstances around that and how
23 time is of the essence sometimes with the way the
24 measures move at the legislature, short notice of
25 hearings, things like that, but I know that in other

1 boards they have different ways of approaching that
2 issue.

3 Whether it's getting -- polling the
4 members or taking a formal vote or sometimes, you
5 know it's a little bit difficult with the way things
6 move to coincide with the monthly meetings. And
7 also, even if it's a good practice just to -- if
8 there's foreknowledge, to update us on things that
9 we might want to weigh in on or not, but at least be
10 aware of what's coming down the pipe.

11 And so even in a sense of protecting the
12 Executive Officer and people from outside pressure,
13 I thought there would be a better -- there are
14 better ways to handle the situation. And I have
15 some ideas on that, but I'll let other people speak
16 if they wish.

17 **CHAIR GIOVANNI:** Thank you, Commissioner
18 Lee.

19 So I have on my own thought about, you
20 know, the items that you brought up and discussed
21 with -- at the last hearing. I've also discussed it
22 with Mr. Orodener. I think it would be helpful if
23 I could ask the Executive Director -- Executive
24 Officer to share kind of like what is the approach
25 history, you know, even if not formalized policy,

1 but what is kind of -- how does it work? If you
2 could share with us.

3 So pretend we're at the beginning of a new
4 legislative session and there may be bills of
5 interest that -- you know, to members of the LUC.

6 **MR. ORODENKER:** Well, first of all, let me
7 talk a little bit about what happens in the past and
8 then I'll talk about what happens to Staff as part
9 of the Administration and then talk about what we've
10 been doing, what we're doing now.

11 There have been several different ways of
12 handling testimony at the legislature throughout the
13 years. My predecessor's way of handling it was to
14 not testify on anything under any circumstances,
15 which was not serving the Commission well.
16 Subsequent to that, when I first started, I was
17 following a procedure that was handed down to me
18 from the Governor's Office as to how to testify on
19 bills.

20 The communication with the Commission was
21 to bring a list of bills that we were going to
22 testify on to the Commission ahead of time or at the
23 beginning of session. And that was back at a time
24 when we were meeting once every two weeks. You
25 know, it was regular meetings. And explaining what

1 Staff's position was on the various measures and how
2 we intended to testify.

3 From there, it was just a free for all
4 because, as those of you who work with the
5 legislature know, you never know what's going to
6 happen on a day-to-day basis and amendments are made
7 to bills and you have a day to figure out how you're
8 going to testify on it or whatever. So Staff was
9 given a lot of leeway with regard to how to testify
10 on bills.

11 And I should caveat that by saying that we
12 have -- Staff has a methodology by which we choose
13 bills to testify on, and I'll explain that in a
14 minute. Subsequently, we tried to put out a PIG
15 (phonetic), which was a subcommittee of
16 Commissioners to work on legislation, but under
17 advice from the Attorney General, since it was sort
18 of an open-ended PIG and had no defined real purpose
19 other than to just generally talk about legislation,
20 we were told we couldn't do that.

21 And then subsequent to that, the practice
22 has been to -- and we were recalcitrant this year in
23 that we had -- didn't have enough meetings. We
24 probably should have scheduled a special meeting
25 just to talk about legislation, but usually what

1 happens is that we talk about the legislation at the
2 beginning of the year with the -- or the beginning
3 of the session with the Commission, and then
4 throughout the session I'm in constant contact with
5 the Chair to explain to him what's happening and,
6 you know, what we're doing.

7 There are some exceptions to that. There
8 are bills that we are told by the Governor's Office
9 we must testify in support of, which we usually
10 wouldn't even get involved in. And I think the bill
11 that Commissioner Lee mentioned was one that we
12 never would have gotten involved in if we hadn't
13 been instructed to.

14 There are times when legislators have
15 requested us to do things almost on a tit-for-tat
16 basis, and those I get uncomfortable with, but --
17 and we very rarely do that. But usually, and this is
18 what I was alluding to earlier, Staff doesn't
19 testify -- we get -- as part of the Administration
20 and as part of the Department of Business and
21 Economic Development, we have a legislative
22 coordinator who -- she'll go through all the bills
23 and then directs bills to the various agencies and
24 boards and commissions that she thinks might be
25 important to us.

1 It's very broad brush, and we get a lot of
2 stuff that really doesn't impact us at all or we
3 don't have any desire to testify on. But then Staff
4 goes through those measures, and we only testify on
5 measures that in some way impact Chapter 205. And
6 usually, it's to protect the Commission in one way
7 or another. We're not trying to create new law.
8 We're not trying anything. We're just trying to
9 point out to the legislators the impacts of some of
10 their legislation and how it may negatively impact
11 the operations of the Commission or whatever.

12 We stay out of bills. Like you know,
13 ethics practices and Sunshine Law bills and even
14 bills with regard to what can and cannot be done in
15 the agricultural district because, as I've told the
16 legislators, that's a policy call. That's not
17 something that we get involved in. We leave that to
18 the legislators to decide what's best. I mean, this
19 transient vacation rental argument is one of those
20 where we just simply said it's up to you.

21 But that's pretty much what we've been
22 doing and how we've been doing it over the past
23 several years. We -- the only time that we have
24 gone further than that and gotten the Commission
25 more involved was when we were trying to -- right

1 after the Bridge Aina Le'a case when we were trying
2 to fix that problem that Bridge Aina Le'a created,
3 and that was brought before the Commission. They
4 approved our moving forward with that because it was
5 a -- we instigated it. It wasn't something we were
6 reacting to.

7 **CHAIR GIOVANNI:** So take it one step
8 further, if you will. When you make the decision to
9 testify or be -- or when you've been asked and you
10 agree to testify, what's the protocol for you making
11 that testimony in writing and in person?

12 **MR. ORODENKER:** Well, when we testify on a
13 measure, we're required by the Governor's Office to
14 testify in a certain manner. We have to say certain
15 things. There has to be certain opening paragraphs
16 and ending paragraphs, and we follow that protocol
17 and submit written testimony. We then attend the
18 hearing where we submitted written testimony to
19 answer any questions that the legislators may have.

20 **CHAIR GIOVANNI:** So Commissioner Lee
21 mentioned, I think, a phrase that was problematic
22 for you in this particular case. Would you restate
23 that, what that phrase was?

24 **COMMISSIONER LEE:** Yeah. Thank you,
25 Chair. I think the phrase was the Land Use

1 Commission strongly supports Bill X. And to me,
2 that's a misrepresentation because we didn't opine
3 on anything. And we might agree with it; we might
4 not, but people will read that and assume that that
5 is our stated and voted on position or official
6 position.

7 Now, I don't think it's a problem if the
8 Executive Officer testifies and even on LUC
9 letterhead that he supports this bill. In fact, it
10 might even be more credible than all of us combined,
11 possibly, you know. And it carries weight, so I
12 think that that's appropriate. But I'm not
13 comfortable with someone speaking on my behalf on
14 something when I didn't take any position on it.
15 And if I'm outvoted on something, that's fine, you
16 know. But that would be the official position. But
17 in the case where no vote was taken, I'm not really
18 comfortable and I think there should be a better
19 way.

20 **CHAIR GIOVANNI:** So Mr. Orodenger, are you
21 familiar with the phrase that was sited there, and
22 is that part of the pro forma that you use or are
23 directed to use?

24 **MR. ORODENKER:** Yes.

25 **CHAIR GIOVANNI:** Please explain.

1 **MR. ORODENKER:** The Governor's Office has
2 always given us direction on how and what we're
3 supposed to say in our opening paragraphs. This
4 Administration has -- for instance, has told us that
5 we're not to oppose any measure, we're just supposed
6 to put comments. But we are supposed to put our
7 support or our -- the methodology in which we're
8 testifying; in other words, if we have concerns to
9 start out by saying that.

10 Now, with that being said, I understand
11 what Commissioner Lee is saying and perhaps we can
12 wordsmith some language that would be acceptable to
13 the Governor's Office or to the Director's Office,
14 in this case.

15 **CHAIR GIOVANNI:** Which Director?

16 **MR. ORODENKER:** The Director of the
17 Department of Business and Economic Development,
18 because all our testimony has to go be approved by
19 the Director of DBEDT before it can be submitted.

20 **CHAIR GIOVANNI:** (Inaudible.)

21 **MR. ORODENKER:** Yes, that's correct. So I
22 mean, I'm sure I could work with the Director's
23 Office to come up with some different language.

24 I mean, I can do it. I can probably find
25 some way to amend the testimony or to amend that

1 opening paragraph so that it's palatable to the
2 Governor's Office. I think that from a practical
3 standpoint, the legislators view me as the Land Use
4 Commission. I mean, that's part of what happens.
5 And I don't think it will change their perception
6 much, but I can put that in there if it makes the
7 Commissioners more comfortable.

8 **CHAIR GIOVANNI:** Commissioner Okuda.

9 **COMMISSIONER OKUDA:** It probably doesn't
10 make any difference to me because I turn into a
11 pumpkin in 15 minutes probably. But I think maybe,
12 Dan, the Executive Officer, one concern may be that
13 because the Land Use Commission is quasi-judicial,
14 if there's affirmative statements saying the
15 Commission takes this specific position and is not
16 qualified, you know, a devious attorney later might
17 say, well, you can't render a decision differently
18 than that in my DBA or my special permit application
19 because you have stated for the record that this is
20 the Land Use Commission's position.

21 So I think in explaining it to the
22 Governor's Office or the head of DBEDT, it's just
23 that because the Commission is quasi-judicial, it
24 kind of requires, I think, a little bit different
25 way of presentation, but I do agree with

1 Commissioner Lee that if a vote was taken, you know,
2 and that -- assuming that vote was from a proceeding
3 or hearing that was Sunshine Law compliant properly
4 agendized and things like that, then that's a
5 different situation. But absent going through a
6 formal process, I think it might be worthwhile just
7 being a little bit more paranoid, you know, like me,
8 about what statements could be misconstrued, yeah.

9 **MR. ORODENKER:** Thank you, Commissioner
10 Okuda. I actually agree with you on that. I don't
11 -- I mean, part of what's happened here is habit.
12 This is just the way we've been doing it for 20, 30
13 years, and I'm not adverse to changing it at all.
14 And I think that I can make a very strong argument,
15 and that was one that I was already contemplating in
16 my discussion with the Director of the Department of
17 Business and Economic Development.

18 **CHAIR GIOVANNI:** So what I'm hearing, and
19 I agree with, is that we do need to revise that
20 first paragraph if it's being used generically or
21 commonly to better represent the actual situation.
22 I mean, it's fair to say, you know, if we've been
23 briefed on the measure, you know, that there's
24 testimony to be offered, but you -- we need to be
25 careful that you don't convey that we've actually

1 had an under Sunshine Law meeting and we, as a
2 Commission, endorsed or taken a position.

3 **MR. ORODENKER:** Yeah. I don't have any
4 problem with changing the first paragraph, for
5 instance. I'm fighting to be able to do this to say
6 that I'm -- this testimony is submitted by Daniel
7 Orodenker, the Executive Officer of the Land Use
8 Commission --

9 **CHAIR GIOVANNI:** Because you're
10 interpreted to be us, but these guys --

11 **MR. ORODENKER:** And so -- and saying that,
12 you know, Staff's position -- Land Use Commission
13 Staff's position is -- and you know, I'll ask the
14 Director if that's okay, and if he says fine, then
15 I'm good with it.

16 **CHAIR GIOVANNI:** Commissioner Ohigashi.

17 **COMMISSIONER OHIGASHI:** I'm just --
18 everybody's dancing around this pin. There's --

19 **MR. ORODENKER:** Except for me. I'm stuck
20 with it.

21 **COMMISSIONER OHIGASHI:** No. There --
22 there's -- and I'm not a pumpkin until June, so I'm
23 good. I mean -- anyway, there's this -- there's
24 this -- yeah. You shouldn't be saying these things
25 without our approval, right? And we can -- we can -

1 - you can pass a rule. You can pass a resolution.
2 You can pass whatever we want to pass or whatever we
3 want to say. In order to represent the Commission
4 before the legislature, the Executive Officer must
5 receive a vote from the Commission.

6 Then the Governor comes up and tells you,
7 hey, I want this and this and this testimony. Are
8 we going to expect Dan to say, no, my Commissioner
9 says I can't do that. Or are we going to punish
10 him, the Executive Officer, if he follows the
11 Governor's rules, knowing that we're just one cog in
12 this whole place. It creates, in my mind, a
13 difficult position for the Executive Officer.

14 It is better to follow that regulation
15 that we're required basis for dismissal, for
16 suspension, for anything like that, or is it
17 something that everybody will say, okay, well, we
18 understand because the Governor told you to do it.
19 If that is the case, this discussion kind of is
20 senseless because democracy doesn't work unless
21 people are sensible about it and self-restrained
22 about it. So I'm just pointing that out. I'm a
23 short timer. It doesn't bother me because I won't
24 be around.

25 But we're failing to discuss this. What

1 is the reality of this situation? How are we going
2 to deal -- how are you guys going to deal with a
3 Governor who says -- or even a DBEDT guy says, no, I
4 want it this way. And what if he can't change it?
5 He says, I want it this way. Are we going to say,
6 no, but our rules require it. I don't know the
7 answer to that.

8 **CHAIR GIOVANNI:** Yeah.

9 **COMMISSIONER OHIGASHI:** And I just bring
10 that up because --

11 **CHAIR GIOVANNI:** No. I appreciate that.
12 I do. It's an important point of view. And I don't
13 think it makes sense for us to create a bunch of
14 rules and regulations internally if we govern
15 testimony to be made. But I do think we need to be
16 cognizant of the issue that has been presented and
17 come up -- and as Dan -- as Mr. Orodenker has said,
18 you know, he thinks he can find the words and make
19 the case to satisfy the situation.

20 So what I'd like to propose for general
21 discussion and maybe concurrence is kind of a four-
22 part approach. And Commissioner Lee, you said
23 you've been thinking about this, so if you want to
24 modify my four-part to add a fifth or sixth, you're
25 welcome to do that.

1 So part one, I think it's really important
2 that at the beginning of a legislative session, that
3 the Staff, as part of its internal review, prepare a
4 document that informs the Commission of what bills
5 might be relevant and what bills you might be
6 testifying on and what impact they might have.

7 And my understanding, Mr. Orodenger, is
8 that you kind of do that internally anyway, is that
9 right?

10 **MR. ORODENKER:** That is correct. And I
11 will be very honest with Commissioner Lee. This is
12 the first year we haven't presented the list to the
13 --

14 **CHAIR GIOVANNI:** Okay. Well, so be it.
15 So part one is like inform us as a group what's
16 coming down the pike at the legislature. And within
17 that review, do you tend to indicate whether there's
18 an issue in a particular bill and whether you tend
19 to -- you propose to testify or not?

20 **MR. ORODENKER:** Well, there -- my
21 suggestion, because there's so many bills that are
22 put in front of us, is that we bring in front of the
23 Commission the bills that we are proposing to
24 testify and why and how our -- what our testimony is
25 going to be.

1 **CHAIR GIOVANNI:** Yeah, that's what I'm
2 asking for. Yeah. So step one is that you would
3 bring before the Commission at the beginning of a
4 session the relevant bills that you intend to
5 testify on and on what perspective. Right?

6 Part two is an opportunity for
7 Commissioners and Staff to exchange Q and A with
8 each other. So whether you present that in a
9 meeting and we do it in on an agendized basis or you
10 -- that's obvious, we can have a discussion about
11 this bill or that. But if we don't have that
12 opportunity like we didn't this year just due to our
13 calendar, but you send that out to all of us, then
14 if -- I'm just going to use your name, Commissioner
15 Lee -- then if Commissioner Lee has a question or a
16 concern, there's nothing to prevent Commissioner Lee
17 from contacting Mr. Orodener and having a
18 discussion about it. So -- but it will be an
19 informed discussion because you know it's on the
20 list and you know he intends to testify, right?

21 As a practical matter, it's going to be,
22 I'm going to say, impossible -- not virtually
23 impossible. It's going to be impossible for this
24 group to meet under Sunshine Law to discuss on a
25 bill-by-bill basis in a manner that's timely and

1 supports the calendar of hearings and testimony that
2 occurs at the legislature. So we've got to give
3 some leeway to those who choose to testify.

4 So I would say that there's two
5 opportunities. Number three is testimony by
6 Executive Officer. He's notified us. He's given
7 each Commissioner opportunity to discuss concerns
8 about it. Yet, he's being directed or he has
9 concluded on his own and then he's testified. And
10 the important thing, I think, is what you just said.
11 You can modify that testimony to make it clear that
12 we haven't voted on it and you're not speaking for a
13 voted consensus of the Commission, but you're
14 speaking as the Executive Officer, and in that
15 respect, probably the most informed person in Hawaii
16 about these issues. And you've got the freedom to
17 do that, but subject to that -- those modifications
18 you talked about.

19 The fourth part is, and I don't know the
20 rules on this, so it's part suggestion and part
21 question, if at the end of the day any Commissioner
22 feels that unsatisfied and they want to testify on
23 their own, they can do that. They can do that not
24 as a Commissioner. They can mention that they're a
25 Commissioner on their resume, but got to just

1 testify, if I understand correctly, as an individual
2 like we have public testimony. And you can do that.
3 And you have the freedom to testify in opposition to
4 whatever Mr. Orodener said, correct?

5 So that's my four-part plan for how we go
6 forward. Does that make sense, or does anybody want
7 to add a part to that?

8 Mr. Lee?

9 **COMMISSIONER LEE:** Thank you, Chair. And
10 I appreciate the comments from the Executive
11 Officer. I know he's in a very delicate position,
12 and it's not easy, and I respect that. I think
13 there's room for the Executive Officer to discuss
14 with the leadership of the Department that it's in
15 their interest to find and craft a way to do this
16 that doesn't hurt our operations and present us with
17 liability or other problems as Commissioner Okuda
18 has brought up.

19 Yeah, these things kind of change. We can
20 all testify in our individual capacity, but we might
21 now know unless we're informed that -- you know,
22 some of the steps you brought are great that we --
23 you know, a lot of times it's only three or four
24 issues that are really that contentious. And you
25 know, other stuff is not as important.

1 But if we know that this is where -- I
2 don't want to prescribe any solution because some
3 boards, they notify -- they send out a copy of the
4 testimony to all their board members when they do
5 submit something and say, you know, FYI, we just
6 submitted this testimony. Some boards, even within
7 DBEDT, will bring up these are the bills and they
8 agendize it and they have discussion on every single
9 one, and sometimes they even have it every month,
10 you know. I don't know that that's the practical
11 answer for us, but I just wanted to have some
12 discussion of what the policy is and that we're
13 informed if something happens that a position is
14 taken.

15 Sometimes positions can be very
16 controversial. Sometimes, like you said, you know,
17 we might be able to finesse a better answer, you
18 know, with all the minds here and provide input.
19 That would relieve some of the pressure from the
20 Executive Officer to take the sole brunt of any
21 criticism. So I think it works both ways, you know,
22 and I do appreciate having this discussion. And I
23 hope that the powers that be will see the wisdom of
24 taking a different approach. Thank you, Chair.

25 **CHAIR GIOVANNI:** Thank you.

1 Anybody else?

2 Commissioner Carr Smith.

3 **COMMISSIONER CARR SMITH:** Yeah. Just
4 briefly. So when the Governor asks you to testify on
5 something, is that one of those items that you've
6 learned about at the beginning of the session or is
7 it something that comes along midway, random? And
8 I'm just curious what if the Commission wasn't in
9 favor of that? Would you -- how would you feel
10 about that?

11 **MR. ORODENKER:** Well, as far as what if
12 the Commission wasn't in favor of it, I don't know
13 an answer to that. We do live and swim in the
14 Governor's pool, you know, so we have to be
15 cognizant that we are a part of the Administration,
16 although the Commission is granted a lot of
17 independence, but we are a part of the
18 Administration. So you know, if there's something
19 that I get instructed to testify on in a certain
20 matter, that's what I do.

21 As far as when and how those things
22 happen, sometimes we get a lot of heads-up. We get
23 -- in the summertime when everybody's putting their
24 packages together, the Governor says, okay, I want
25 an initiative from this organization or that

1 organization and I want everybody to jump onboard.
2 And I get this through the Director's Office.
3 That's how I get the communications is the Director
4 will call me usually.

5 Sometimes I get calls from the Governor's
6 Office, but a lot of times it's just the Director
7 will tell me, you know, this is what the
8 Administration's position is. We want you to
9 support it. The difficulty comes when a bill is
10 submitted at the end of the allowed submission time
11 because there's a deadline on when bills have to be
12 submitted. And it's not something that anybody
13 contemplated or was discussed with us or anything
14 like that, and then I start getting calls from --
15 usually from legislators and sometimes even from a
16 congressional delegation on, you know, they want me
17 to support it or they want me to make comments that
18 will allow for amendments or -- and things like
19 that.

20 And then I get -- I mean, that's -- I
21 don't have a lot of time. I mean, I usually
22 communicate with the Chair what's happening. But
23 those are very -- as Brian pointed out, that puts me
24 in a very awkward position because, as I say, on the
25 one hand we're swimming in the Administration's pool

1 and on the other hand we are a nine- member
2 Commission, so there are different views on things.

3 It's very fluid, and we really -- the only
4 things -- this one particular measure was an
5 oddball, and we didn't get the request to testify in
6 support of it until it was --

7 **CHAIR GIOVANNI:** Is that (inaudible).

8 **MR. ORODENKER:** Yeah, until actually, you
9 know, it was brought to our attention and then I got
10 a phone call afterwards and -- you know, it's just
11 one of those political things. But usually the only
12 things worth testifying on are bills that impact
13 Chapter 205. And for the most part, unless all of a
14 sudden this Commission decides it wants to dissolve
15 itself, what we're basically doing is trying to
16 support the Commission as an entity.

17 There are a lot of bills that I testify
18 on. I -- over the years, not in any one particular
19 session, but there are a lot of bills that I've
20 testified on where we haven't weighed in on the
21 measure at the beginning. But an amendment is made
22 and all of a sudden, we look at it and we say,
23 there's no way we could implement this. We've got
24 to get the language to change, you know, and so a
25 lot of our testimony is basically helping --

1 assisting the legislators in crafting something that
2 makes functional sense.

3 **CHAIR GIOVANNI:** So Dan, tell the
4 Commission -- I think each of us have heard pieces
5 of it, but at the end of last legislative session
6 there was that bill that underwent major rewrite
7 right before the last day of the leg. And you got
8 involved. How did you get involved, and what was
9 the circumstance?

10 **MR. ORODENKER:** Okay. So there was a
11 measure last year that was moved just right through
12 the legislature that would have raised -- in a
13 nutshell, it would have raised the minimum from 15
14 acres to, through most of the legislative session,
15 some negotiated larger number. And as it moved
16 through the legislature, on the House side it was
17 still amorphous, but when it crossed over to the
18 Senate, one particular Senator negotiated, I think
19 it was, 30 acres for the new cap.

20 And then it went into -- it passed both
21 houses in different forms, and then it went into
22 conference. And two days before the session ended,
23 we got a copy of what had been -- the Conference
24 Committee was coming out with, and initially, it was
25 an amendment -- we could make an amendment that can

1 make it work. So we contacted the Conference
2 Committee Chairs and said, look, you know, if you
3 change this line into that line, it might be
4 palatable.

5 Well, they then went back in and gutted it
6 even more and basically reinserted a bill that had
7 died in place of the bill that had passed. And that
8 popped out the day before session ended, and it was
9 -- I started getting phone calls from all sorts of
10 people involved in land use who were upset about it
11 and so forth and so on, and asking me to help them
12 in getting the measure held until the following
13 session when it could be fixed.

14 And I had 24 hours to act, and that was my
15 position that, hey, look, you know, it's not that
16 this is a bad idea. It's just the way that it's
17 currently written, it doesn't work, and you should
18 hold it over until next year when we can fix it.
19 But I didn't have any time to talk to anybody about
20 that. That was -- you know, I woke up in the
21 morning and there it was, and I immediately had to
22 jump into it, so, you know, that's the kind of thing
23 that I have to deal with sometimes.

24 **CHAIR GIOVANNI:** So what happened to the
25 bill?

1 **MR. ORODENKER:** Well, the bill -- we got
2 the bill held in the end. And it died on the floor,
3 actually, because it -- the Conference Committee had
4 already voted it out, and it died on the floor in
5 both houses. Or actually it was -- I don't think it
6 died on the floor. I think that it was decided that
7 it was not going to be put to vote. I think that's
8 more accurate. It was decided by both houses that
9 it was not going to be put to vote. The next
10 session came around, and the authors of the bill
11 decided that they just didn't want to pursue it, and
12 so it didn't move.

13 **CHAIR GIOVANNI:** And so the first I -- as
14 Chair, you know -- and Dan, you do a great job
15 proactively giving me heads-up on things. This
16 happened so fast, I heard about it after the fact.
17 It had already died by the time you came up for air
18 to tell me about it. So I mean, that's the reality
19 of the world we live in.

20 **MR. ORODENKER:** Yeah. It's not fun. My
21 wife starts feeding me stress release vitamins at
22 the beginning of every session, and my Staff tiptoes
23 around me for a few months. It's -- you never know
24 what's going to happen on a day-to-day basis. I
25 mean, I literally get calls from legislators saying,

1 hey, look, I need your input on this. I want you to
2 come to the hearing and explain to me why this is
3 not a good idea so we can amend it and implement it.
4 You know, I mean, and it happens that quickly.
5 Usually, I have enough time to call the Chair and
6 tell him what's happening, sometimes. But
7 sometimes, it's the morning of the hearing, you
8 know, and they ask me to come because they want me
9 to straighten something out.

10 **CHAIR GIOVANNI:** But it's an FYI. It's
11 not a what do you think, how should I testify. It's
12 just an FYI.

13 **MR. ORODENKER:** Because as I said, 90
14 percent of my testimony is, look, if you're going to
15 do this, the way you've got it written doesn't work.
16 You have to do it a different way, you know.

17 **CHAIR GIOVANNI:** Commissioner Lee?

18 **COMMISSIONER LEE:** Yeah. I appreciate
19 this discussion. And I like the Governor. I don't
20 agree with him on everything, but he appointed me.
21 And I think if the Governor or the Director of DBEDT
22 were to understand some of the issues that we face
23 that Commissioner Ohigashi and Commissioner Okuda
24 brought up, that it has ramifications beyond just
25 simple written words, you know, I think that they

1 would then be more amenable to some of the ideas on
2 how we could temper the testimony.

3 And yeah, there's no time to be directing
4 the Executive Officer every little step. I mean,
5 you know, on the whole, he knows what he's doing,
6 you know, and he has more knowledge than, like I
7 said, probably all of us combined on these issues.
8 And so I think his testimony carries weight without
9 presenting liability to us, and I'm pretty sure that
10 you can come up with a way to present a way to
11 testify that wouldn't cause harm to what we want to
12 do, and that you would be able to explain that.

13 **MR. ORODENKER:** I propose, Commissioner,
14 that by next September, October, that we come up
15 with language and I get it approved and get this
16 Commission to approve it, and then when session
17 rolls around, as soon as we possibly can, we come
18 with the bills and talk about them.

19 **COMMISSIONER LEE:** Yeah. And written
20 testimony is different than when you have private
21 discussions with legislators as well, so you know
22 there's a different avenues of presenting what your
23 position would be on things.

24 **CHAIR GIOVANNI:** Yeah, I like that. Let
25 me just add, though, in contrast that if you see a

1 bill that is very much something you'd like to
2 testify in support of and you have time to bring it
3 before this Commission and request the support of
4 this Commission, under Sunshine, I don't, you know -
5 -

6 **MR. ORODENKER:** Most certainly.

7 **CHAIR GIOVANNI:** Yeah. And then you could
8 write that letter that says we discussed it, we
9 voted on it, we like it as a Commission. But at
10 least we've gone through the process, right? So
11 that option is there if time presents itself and it
12 can be done.

13 Commissioner Yamane.

14 **COMMISSIONER YAMANE:** Thank you. I just
15 wanted to state I've been in our Executive Officer's
16 shoes. My last 18 years at KUC was strictly
17 legislative affairs and representing our company and
18 talking to our Board of Directors on positions that
19 we're going to take on bills, so I really appreciate
20 what you have to go through.

21 I can tell you right now, I fully support
22 our Executive Officer saying the Land Use
23 Commission. I don't have any problem -- whatever we
24 do, I'm okay with. But just for the record, I mean,
25 it's hard enough already with all the other issues

1 that Commissioners will agree or disagree on.

2 But I just wanted to go on record that
3 whatever our Executive Officer does at the
4 legislature, I believe is in the best interest of
5 the Land Use Commission. And it's not opinion on
6 any petition request or anything. It's something
7 that will protect the Land Use Commission, so I
8 fully support our Executive Officer representing the
9 Land Use Commission. I don't think we need to make
10 special languages. We should have a backup if the
11 DBEDT Director or Governor doesn't accept that as a
12 possibility, but what I have learned and it is
13 helpful having to deal with our legislators is some
14 blowbacks of positions of the company or the
15 Commission.

16 And one thing that helps is what we're
17 talking about, is here are the bills that are coming
18 up. Here's the position that Land Use Commission is
19 going to take. This is why it helps the Commission,
20 so that's -- we already talked about one. And then
21 we can have discussion and Commissioners can agree
22 or disagree or fine.

23 But I think more importantly than that is
24 the potential of our own legislators representing
25 our islands coming to us and saying, hey, Mike, what

1 is the Land Use Commission doing supporting this?
2 You're on the Land Use Commission, do you support
3 this? And what is helpful if - and our Executive
4 Officer being around the legislature for so long, I
5 think he can kind of tell that this might be a
6 sensitive issue with this legislator, this
7 legislator, so here, Mike, this is a heads-up that
8 this is what we're doing. So if you get any kind of
9 blowback from other legislators, this is what you
10 can tell them; in other words, inform us so that
11 when that happens we can say, this is why we're
12 doing it.

13 That is -- that was, I think, in my years
14 of experience, the best thing I can do. It's not --
15 because they're going to -- you know, you guys are
16 the experts on the land use, on what is best for the
17 Commission, but we just need to know why that is so
18 that when we're tapped on the shoulder or yanked on
19 the ear and says, you're on the Land Use Commission,
20 what did you guys do, we know what to do say. I
21 think that was the most help for me when I'm dealing
22 with representing a company on behalf of the whole
23 company, but yet, knowing that this legislator knows
24 this Board of Director, and that they might approach
25 us, but I need to make sure our Board of Directors

1 know that this is a potential, so that we're
2 informed and ready to answer and defend, honestly,
3 our position. That's what I wanted to say. Thank
4 you.

5 **CHAIR GIOVANNI:** That's very helpful.

6 **COMMISSIONER OHIGASHI:** One more comment.

7 **CHAIR GIOVANNI:** You're not a pumpkin yet?
8 Okay.

9 **COMMISSIONER OHIGASHI:** I agree with Mike,
10 but what struck me was that Dan utilizes. Dan O.
11 utilizes all possible levers to try and see if he
12 can understand or try and see if he can fix an
13 issue. I know he has called me, but I referred him
14 to my wife, concerning certain issues with certain
15 legislators. And I think his ability to find out
16 true positions and try and help and contact all
17 these legislators, whatever assistance he gets, is
18 one of the attributes of it that I think is
19 important in this case.

20 I think this is an excellent discussion as
21 to what the reality in life as the EO does, and I
22 think that it's important that we don't leave out
23 the fact that we are political animals. We are.
24 And that this -- that -- and it's not a bad word,
25 "political." It means we're people and we have all

1 different interests or all different competing
2 interests, and we try to leverage whatever we can to
3 try and see if our position comes correctly.

4 And for our Executive Officer, I think,
5 his motive is what is best for the Land use
6 Commission, like Mike Yamane says. And I think that
7 this kind of discussion shows that he has that
8 ability to care for what the organization is and to
9 keep it running. For him to defy the Governor, for
10 him to defy his DBEDT would not -- would reflect
11 badly on the Commission's work and not in overt ways
12 but in subtle ways. And that's, I think, the
13 balance, and I like to congratulate you for trying
14 to keep that balance in this kind of situation.

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

16 I mean, I think this has been a really
17 healthy discussion, and I've learned a lot from it.
18 And hopefully, Mr. Orodenger, you've gotten the -- a
19 little bit of guidance that will help your job be a
20 little bit easier.

21 **MR. ORODENKER:** Yes, Chair. Thank you.

22 **CHAIR GIOVANNI:** And I think it's about
23 communication. Just keep us informed and especially
24 at the beginning of a session.

25 **MR. ORODENKER:** I most certainly will do

1 so.

2 **CHAIR GIOVANNI:** Yeah, great.

3 Any additional comments on this by anyone?

4 Okay. We're good. We'll move on. I'm going to do
5 this first.

6 **MR. ORODENKER:** Okay.

7 **CHAIR GIOVANNI:** Okay. Our May 8th
8 meeting will be held at the University of Hawaii-
9 Maui College. Their cafeteria is expected to be
10 closed, so this Commission intends to work through
11 lunch. I would request Staff to arrange for a lunch
12 to be provided to the full Commission to facilitate
13 that meeting. Can I ask for that? Thank you.

14 We have one more agenda item, and this one
15 comes with a heavy heart. It's aloha to Gary. So
16 this is Gary's last official --

17 This is your last meeting, huh? So Gary,
18 when does your term end officially?

19 **COMMISSIONER OKUDA:** I think April 28th.

20 **CHAIR GIOVANNI:** April 28th. We're not
21 scheduled to have another meeting in April, so this
22 might be the last opportunity that we're here as a
23 group. It looks like Dan wants to do something.

24 So Dan, do what you're going to do, and
25 then --

1 **COMMISSIONER OHIGASHI:** As the oldest
2 member of the Commission -- as the oldest member of
3 the Commission, I'm going to give you my personal
4 gift to you.

5 **MR. ORODENKER:** (Inaudible.)

6 **COMMISSIONER OHIGASHI:** You're welcome.

7 **MR. ORODENKER:** Gary is famous for you
8 have a spread instead of just individual sandwiches.
9 (Inaudible.)

10 **COMMISSIONER OHIGASHI:** How about the
11 cheapest one.

12 **COMMISSIONER OKUDA:** Thank you very much,
13 Commissioner Ohigashi. I promise that I will stay
14 in touch with you in the future because you are one
15 of my truly people that I really, really look
16 forward to seeing you, so I really appreciate this
17 from the bottom of my heart. I can't tell you how
18 much I do.

19 **MR. ORODENKER:** And then I just wanted to
20 say that it's been a pleasure having Gary on the
21 Commission. He came on reluctantly, but he has been
22 a welcome addition. We are -- I respect his
23 intellect and his dedication and his commitment to
24 the community and what's doing best -- what was best
25 for the community, and he will be sorely missed. I

1 hope we will stay in touch and we'll stay friends.

2 He has been a wonderful addition to the Commission,
3 and I -- it's a pleasure getting to know you.

4 And with that, we have a plaque for your
5 participation, which you're free to --

6 **CHAIR GIOVANNI:** Oh, that's my new gavel.
7 That's what you did with it.

8 **MR. ORODENKER:** -- which you're free to
9 plant with your naupaka.

10 **COMMISSIONER OKUDA:** I have nothing to
11 say.

12 **CHAIR GIOVANNI:** Well, we're not going to
13 let you get out of here without saying something.
14 But before we give you the microphone, I mean,
15 anybody can speak, but I just want to put a couple
16 of words out there from myself, Gary.

17 I mean, I didn't -- I knew that LUC stood
18 for Land Use Commission, but that's about the extent
19 of my knowledge of how this place operated and what
20 its business was and, you know, at this point in my
21 life, I just want to do things that are meaningful
22 and meaningful to Hawaii. And I can say quite simply
23 and honestly that you showed me the way, personally.
24 You took me under your tutorage and educated me
25 incredibly, and I just thank you for that, and I

1 thank you for your patience with me and your support
2 every step of the way. We've never had a hearing in
3 which you chose to speak that I didn't learn
4 something, so -- and more than anything, you taught
5 me boy, am I glad I didn't ever become a lawyer
6 because I don't want to be one of those. But I do
7 absolutely respect and appreciate what you've done
8 for this Commission and for this community and for
9 our State. Thank you very much, Gary.

10 Anybody else want to say anything?

11 Okay. Commissioner Ohigashi.

12 **COMMISSIONER OHIGASHI:** I want to thank
13 Gary. He did the tough work sometimes. A lot of it
14 is because we're lawyers. And what we know is that
15 if there is -- nowadays, you can -- you can appeal -
16 - anyone can appeal anything. Technically, this --
17 today's hearing, it can be appealed by somebody
18 sitting outside, and they'll have standing.

19 Through the time that I've been on the
20 Commission, Gary has made sure that there is a
21 record that we can follow. He has made sure that
22 there are points that we can rely upon. And one of
23 the best things I've known about him, and I'll say
24 this truthfully, the best thing I know of him is in
25 the Hawaiian Memorial case, when he voted against

1 the issuance of the DBA, he assisted in writing the
2 findings of fact to make sure it stands up. And his
3 feet was very little. He -- before that, so I
4 commend him for his service on this Land Use
5 Commission.

6 And for all of us who had to endure the
7 constant and long questioning that he had, huh? And
8 what made the snide remarks that I have made about
9 him, I want you to know that I appreciate and I
10 appreciate him -- I appreciate him from the very
11 beginning, and he's voted with me a couple times
12 when I was alone, and I want to thank you. And I'm
13 going to miss you, Gary, but not that much.

14 **CHAIR GIOVANNI:** Okay, Gary.

15 **COMMISSIONER OKUDA:** Yeah. I won't take
16 more than half an hour. But --

17 **CHAIR GIOVANNI:** Take all the time you
18 want.

19 **COMMISSIONER OKUDA:** No, no. I'd like to
20 thank everyone. I'd especially like to thank the
21 Staff. I told Dan Orodener before that I believe
22 the Land Use Commission Staff is the best planning
23 firm in town.

24 When I first came on the Commission, which
25 I've told everybody was a fluke, and that I wasn't

1 supposed to be appointed, I was just picked because
2 at that time, the first preference person decided at
3 the last minute not to serve, my first comment to
4 Dan Orodener was something on the lines like, I
5 don't know why I'm appointed to this Commission.
6 It's just full of crooks, yeah? And my citation to
7 that is Gavin Daw's book, Land and Power in Hawaii,
8 yeah?

9 Well, I found that my assumption, like
10 many things, was wrong about that. And in fact, a
11 lot of assumptions that I've had going into these
12 hearings were wrong after I listened to the
13 evidence, so I really shouldn't have been here for a
14 lot of reasons.

15 I can tell Nancy Carr Smith later on some
16 stories of my grandparents, you know, in the Waiakea
17 house lots, you know, before the ILWU had organized
18 the docks and how the luna would come over to the
19 house, and you know, you don't bribe the luna, you
20 don't work the next day, so you know, I shouldn't be
21 here. But I guess, you know, when you say this is
22 America, that's the good thing about being in
23 America, so I thank everybody.

24 It's been a great experience. I know the
25 Commission is in good hands going forward with a lot

1 of people who have experience here, but I promise I
2 will try to avoid seeing all of you so you don't
3 have to be stuck listening to me for the last half
4 an hour. Like my wife always says, why do you keep
5 repeating the same story twice. But my answer to
6 her is, you could have been married to these other
7 guys and she would still be working, so -- anyway,
8 with that, plenty, plenty thanks to everyone, and I
9 appreciate all the good things that have happened
10 over the last eight years.

11 **CHAIR GIOVANNI:** Gary, would you mind if
12 we collected and ask maybe for somebody to take a
13 photograph of us?

14 **COMMISSIONER OKUDA:** That's fine.

15 **CHAIR GIOVANNI:** When I adjourn the
16 meeting. Thanks, Ariana.

17 Anybody else want to say anything? Okay.

18 This meeting is adjourned.

19 **(The meeting adjourned at 1:28 p.m.)**

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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 HEREOF, I have hereunto set my hand this 26th day of April, 2024.

A handwritten signature in black ink, appearing to be 'Jodi Dean', is written over a horizontal line.

Jodi Dean