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**STATE OF HAWAII
LAND USE COMMISSION**

Meeting held on July 23, 2024

Commencing at 10:00 a.m.

Held at

Homer A. Maxey Center Conference Room

Foreign-Trade Zone No. 9

521 Ala Moana Boulevard

Honolulu, Hawaii 96813

I. CALL TO ORDER

II. APPROVAL OF MINUTES

July 10, 2024

III. TENTATIVE MEETING SCHEDULE

IV. COMMISSIONER TRAINING

The training session will provide the Commission an opportunity to consult with its attorney and LUC Staff regarding Hawaii Revised Statutes (HRS) Chapter 205, Hawaii Administrative Rules (HAR) Chapter 15-15. Topics also include district boundary amendments, special permits, declaratory rulings, important agriculture lands, and other types of Commission business. Additionally, the session will address the applicability of HRS Chapter 92 (State Sunshine Law), HRS Chapter 91 (Hawaii Administrative Procedure Act), HRS Chapter 92F (Uniform Information Practices Act), and Subsection 15-15-62 on ex parte communications.

VI. RECESS

BEFORE :

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PARTICIPANTS

LUC COMMISSIONERS:

Dan Giovanni, Chair

Brian Lee

Bruce U'u

Ken Hayashida

Michael Yamane

Myles Miyasato

Nancy Carr Smith

LUC STAFF:

Daniel Orodenker, Executive Officer

Scott Derrickson, Chief Planner

Martina Segura, Planner

Ariana Kwan, Chief Clerk

Dan Morris, Esq., Deputy Attorney General (via Zoom)

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HAWAII LAND USE COMMITTEE

JULY 23, 2024

CHAIRMAN GIOVANNI: Thank you. Aloha mai kakou. Good morning, everybody.

This is the July 23, 2024, Land Use Commission Meeting. This is an in-person meeting which is physically being held at the Homer A. Maxey Center Conference Room, Foreign Trade Zone No. 8. That's at 521 Ala Moana Boulevard in Honolulu. This meeting is open to the public.

Court reporting transcriptions are being done from this Zoom recording.

For all meeting participants, I would like to stress the importance of speaking slowly, clearly, and directly into your microphone. Before speaking, please state your name and identify yourself for the record.

Even though this is an in-person meeting, please be aware that all meeting participants are being recorded on the digital record of this Zoom meeting and it will be posted on YouTube. And it will be used for court reporting purposes. Your continued participation is your implied consent to be part of the public record of this event. If you

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

3 My name is Dan Giovanni and I have the
4 pleasure to serve as the LUC chair. And we
5 currently have nine seated Commissioners. Along
6 with me today are Commissioners Michael Yamane from
7 Kauai, Commissioner Brian Lee from Oahu, Commissioner
8 Nancy Carr Smith from Hawaii Island, Commissioner
9 Bruce U'u from Maui, Commissioner Myles Miyasato
10 from Hilo, and Commissioner Ken Hayashida from Oahu.

11 Mr. Lee -- Commissioner Lee, did you want
12 to say something at this point?

13 **COMMISSIONER LEE:** Yeah, thank you.

14 I just wanted to extend a welcome to the
15 three new members, Commissioner Hayashida,
16 Commissioner Bruce U'u, and Commissioner Myles
17 Miyasato. I'm really looking forward to working
18 with the new members and especially since you guys
19 have county experience and, you know, even
20 experience on the County Planning Commission, as
21 well as being active in your communities. So I just
22 wanted to extend that welcome.

23 Thank you, Chair.

24 **CHAIRMAN GIOVANNI:** Thank you,
25 Commissioner Lee.

1 I also want to extend -- I echo that and
2 welcome our new members here today.

3 Two Commissioners are excused from today.
4 Commissioner Kamakea-Ohelo and Commissioner Kahele.
5 They're excused from today's meeting.

6 Also in attendance is the LUC Executive
7 Director, Daniel Orodener; LUC Chief Planner, Scott
8 Derrickson; LUC Staff Planner, Martina Segura; LUC
9 Chief Clerk, Ariana Kwan. And joining us by Zoom is
10 LUC Attorney General Dan Morris.

11 Again, court reporting transcriptions are
12 being done from this Zoom recording.

13 Our first order of business is the
14 adoption of minutes from our meeting of July 10,
15 2024.

16 Ms. Kwan, has there been any written
17 testimony submitted on the July 10, 2024, minutes?

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

19 **CHAIRMAN GIOVANNI:** Thank you.

20 Are there any members of the public who
21 have signed up to testify on the adoption of the
22 minutes?

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

24 **CHAIRMAN GIOVANNI:** Thank you.

25 Commissioners, are there any corrections

1 of comments on the minutes?

2 If not, is there a motion --

3 **COMMISSIONER LEE:** Chair, I have a
4 comment.

5 **CHAIRMAN GIOVANNI:** Well, just a second.
6 I'll recognize you.

7 Let me just finish this statement.

8 Commissioners, are there any corrections
9 or comments on the minutes?

10 **COMMISSIONER LEE:** Yes, Commissioner.
11 Excuse me. Yes, I have a correction. It's a minor
12 one.

13 **CHAIRMAN GIOVANNI:** Commissioner Lee, go
14 ahead.

15 **COMMISSIONER LEE:** Sorry.

16 On page 2 of the minutes, the draft
17 minutes, under Presentation, the second paragraph,
18 second line, there should be a comma I think after
19 disclosures. "Disclosures, spouse involvement." So
20 it's a little -- I guess it was missing a comma just
21 I don't want there to be confusion. Thank you.

22 **CHAIRMAN GIOVANNI:** So do you want to make
23 a motion to adopt the minutes subject to that?

24 **COMMISSIONER LEE:** Yes. I move to -- I
25 move to approve the minutes subject to the

1 correction.

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

3 **CHAIRMAN GIOVANNI:** So moved by
4 Commissioner Lee and seconded by Commissioner
5 Yamane.

6 All in favor of the adopted minutes as
7 modified signify by saying aye.

8 **(All say "aye.")**

9 Is anyone opposed?

10 **Hearing none, the minutes are adopted with**
11 **that one correction. Thank you.**

12 **The next agenda item is a tentative**
13 **meeting schedule.**

14 **Mr. Orodenker?**

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

16 I would ask the Commissioners' indulgence
17 because at this time it is very tentative. Some of
18 you may have been contacted with regard to your
19 availability, or all of you should have been
20 contacted with regard to your availability on
21 alternate dates.

22 Right now, we have Waimanalo Gulch
23 Sanitary Landfill, the special permit, scheduled for
24 August 7th and 8th at the Honolulu Airport. Due to
25 some conflicts with some of the interveners, they

1 may not be able to attend and we've been asked to
2 see if we can move that meeting to the 8th and the
3 9th. We have -- we are tentatively looking at that.
4 The difficulty that we're having is with quorum. So
5 we will let you know as soon as we --

6 **CHAIRMAN GIOVANNI:** What's the difficulty?

7 **MR. ORODENKER:** With quorum. So we will
8 let you know as soon as we get responses.

9 **CHAIRMAN GIOVANNI:** Is there also a
10 question on notification?

11 **MR. ORODENKER:** No. No. We haven't sent
12 out the notification yet.

13 **CHAIRMAN GIOVANNI:** So when is the
14 deadline for that?

15 **MS. KWAN:** The notification is going out
16 Monday.

17 **MR. ORODENKER:** So we'll be working on
18 this this week and we will let you know as soon as
19 possible.

20 On August 21st, we will be on Oahu at
21 FilCom to take up the Makakilo Quarry matter. We've
22 been informed by all the participants to that
23 special permit that that should only take one day.
24 We are moving the adoption of the order for the
25 Waimanalo Gulch Sanitary Landfill to August 22nd.

1 If that turns out that that is the only thing on the
2 agenda for that day we will do it virtual.

3 We have tentatively scheduled an adoption
4 of the order for Makakilo Quarry for September 10th
5 but we may do that by Zoom sooner if we can get it
6 done.

7 Then September 11th, 12th, and 13th, we
8 will be on the Big Island at the Western Hapuna
9 Beach Resort for HCPO.

10 On September 25th and 26th, we will be
11 hearing motion by the Maui Public Works to do a
12 declaratory ruling to remove IAL on a portion of the
13 landfill property. And on the 26th, we will be
14 hearing motion by them to add lands into IAL to
15 replace those lands that they're removing at the
16 quarry.

17 **CHAIRMAN GIOVANNI:** So what if you have a
18 quorum issue on those dates, which I think you will
19 have a quorum issue on those dates? Is there an
20 alternative?

21 **MS. KWAN:** Which dates, Chair?

22 **CHAIRMAN GIOVANNI:** September 25 and 26.

23 **MS. KWAN:** Well, right now they did not
24 file the petition like they were supposed to so
25 those meetings might be removed.

1 **MR. ORODENKER:** Yes. We have to wait
2 until they file the petition to know what the
3 deadlines are. Once we do that we'll be able to
4 adjust the schedule. As I said when I started, this
5 schedule is very, very tentative right now. There's
6 a lot of --

7 **CHAIRMAN GIOVANNI:** Yeah, but my question
8 was about a quorum of Commissioners.

9 **MR. ORODENKER:** Yeah. Yeah.

10 **CHAIRMAN GIOVANNI:** That could also be a
11 reason --

12 **MR. ORODENKER:** To move it. Yeah.

13 **CHAIRMAN GIOVANNI:** Okay.

14 **MR. ORODENKER:** Yeah. That's always a
15 reason to move it. If on any of these hearing dates
16 we discover we do not have a quorum we will make
17 adjustments.

18 **CHAIRMAN GIOVANNI:** Thank you.

19 Let me encourage all Commissioners to be
20 very responsive to Ariana when she asks by email
21 about your availability and recognize it as a very
22 fluid situation.

23 So thank you, Ariana, for staying on top
24 of that the best you can.

25 **MR. ORODENKER:** On October 9th, we will be

1 on Oahu to hear the declaratory ruling request by
2 RK2 partners.

3 On October 23rd and 24th, we have
4 tentatively scheduled the Mahi Solar special permit
5 matter.

6 And on November 6th and 7th, we will be on
7 Maui on the A & B Properties, Inc.'s motion to
8 amend.

9 And on the 7th, we will be hearing the
10 Emmanuel Lutheran Church of Maui status report.

11 Our November 20th and 21st, and December
12 are open currently but we would ask you to hold onto
13 those dates just in case something comes up and we
14 have to schedule.

15 **CHAIRMAN GIOVANNI:** What's the December
16 dates you want us to hold?

17 **MR. ORODENKER:** Fourth and 5th and 18th
18 and 19th.

19 **CHAIRMAN GIOVANNI:** Commissioners, any
20 further questions on the tentative schedule?
21 Underlining tentative.

22 Thank you.

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

24 **CHAIRMAN GIOVANNI:** So our fourth order of
25 business is Commissioner Training. Commissioner

1 Training is being conducted by Land Use Commission
2 staff and provides the opportunity to consult with
3 its attorney and LUC staff regarding Hawaii Revised
4 Statutes Chapter 205, Hawaii Administrative Rules
5 Chapter 15-15, and other topics relating to Land Use
6 Commission Business.

7 Ariana, are there any members of the
8 public who wish to provide testimony on this agenda
9 item?

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

11 **CHAIRMAN GIOVANNI:** Thank you.

12 Mr. Orodenger, please introduce your staff
13 and proceed with your presentation.

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

15 Staff will be doing this presentation this
16 morning, and we're going to be taking turns on
17 various sections. Myself, the executive officer,
18 will be starting off and then I'll be turning it
19 over to Scott Derrickson for discussion on DBAs.
20 There will be a couple sections that Martina will
21 handle and Ariana has her time in the sun as well.
22 So we ask for your patience and indulge us with what
23 could be a very long day.

24 And also, I would like to emphasize that
25 we're not going to be asking you to hold your

1 questions to the end. If we're in the middle of
2 something just ask your question whenever and we
3 will proceed.

4 **CHAIRMAN GIOVANNI:** For Commissioners'
5 planning purposes we'll be taking short breaks on an
6 hourly basis, normally five minutes or so.

7 **MR. ORODENKER:** Yeah.

8 **CHAIRMAN GIOVANNI:** We'll be taking a
9 lunch break.

10 **MR. ORODENKER:** Yes, we will. We'll be
11 taking a lunch break somewhere between 11:30 and
12 12:00 depending on where we are.

13 **CHAIRMAN GIOVANNI:** And then we will
14 probably be adjourning in the 3:00 to 3:30 time.

15 **MR. ORODENKER:** That's correct. Thank
16 you, Mr. Chair.

17 Before I get started, we recognize that
18 many of you have served on Planning Commissions
19 before. And that will serve you well in your
20 positions as Land Use Commissioners.

21 With regard to the Sunshine Law and
22 Robert's Rules of Order and hearing procedure,
23 although you will notice or you may have already
24 noticed that the state AGs differ in their
25 interpretation of some of those provisions or

1 chapter 91 and chapter 92 from corporate counsel.

2 And we are stuck with what the AG tells us. I mean,
3 with regard to those things the AG's word is what we
4 have to go by.

5 There are a lot of key differences between
6 planning commissions and the land use. The LUC is
7 mandated to protect the state's interest, protect
8 the county's interest, and to implement the state
9 plans and state policy.

10 But more importantly, we serve a little
11 bit of a different function when it comes to
12 projects. Since we're really talking about the land
13 (inaudible), our analysis is similar but more
14 complicated. And it looks at slightly different
15 issues.

16 Our view of petitions that are in front of
17 us are associated with what should focus on
18 constitutional and legal mandates for lack of a
19 better word. We are in front of the public trust
20 doctrine and upholding state policy when it comes to
21 things like the protection of agriculture land. The
22 protection of public trust resources and the
23 protection of Hawaiian cultural practices.

24 And with that we'll move into our
25 PowerPoint presentation. And we'll start off with a

1 little bit of some preliminary history.

2 Can I do it from here, Ariana?

3 Okay. Yeah, Scott got it.

4 So these are the topics we're going to
5 cover today and tomorrow. Some history, the role of
6 the commission, the types of petitions, other
7 proceedings, the Sunshine law, public trust
8 doctrine, ethics, sustainability, current issues,
9 and administrative matters.

10 The State Land Use Law: Hawaii Revised
11 Statutes Chapter 205 is unique in the history of
12 Hawaii and land use planning. It was originally
13 adopted by the State Legislature in 1961.

14 Got it? Oh, great. Okay.

15 It established a framework of land use
16 management and regulation in which all lands in the
17 State of Hawaii are classified into one of four land
18 use districts.

19 In 1961, the Hawaii State Legislature
20 found that insufficient land controls led to short-
21 term benefits for a few, but long-term economic
22 losses for the state.

23 Development of scattered subdivisions and
24 conversions of prime agriculture land to residential
25 use highlighted the need for a statewide land use

1 planning system.

2 Of course, they established the Land Use
3 Commission to administer this law.

4 If you look at some of the legislative
5 history that was surrounding the passage of this law
6 you'll see a lot of interesting things. One of them
7 was that there was a concern at the time that the
8 large landowners were controlling where development
9 was going to occur and how. And this was causing a
10 problem with infrastructure because they would
11 designate an area for urban development or subdivide
12 it and then the counties and the state were left
13 bringing the infrastructure to that location rather
14 than them building on infrastructure that was
15 readily available.

16 The other issue was speculation. There
17 was a feeling that large landowners were subdividing
18 their properties and then sitting on them to wait
19 for the value of the property to increase and then
20 spinning them. We have access to the legislative
21 history if you'd like to take a look at it. Anyway.

22 **CHAIRMAN GIOVANNI:** One second. A
23 question from Commissioner Lee.

24 **COMMISSIONER LEE:** Dan, at the last
25 meeting, Robert Harris mentioned that Hawaii was one

1 of the few states that had a statewide land use
2 body. Do you know what the other ones are or how
3 many there are?

4 **MR. ORODENKER:** Well, I think we're the
5 only state with a statewide land use planning --

6 **COMMISSIONER LEE:** That's what I thought.
7 I was just kind of wondering.

8 **MR. ORODENKER:** Yeah. There are other
9 states that have regional planning offices. And
10 actually, Canada has, what do they call their --
11 provincial land use planning organizations. We're
12 the only state with a statewide planning system.
13 Some of the southern states are so big that they
14 broke it up into regions but for all intents and
15 purposes we're the only one.

16 This you know. The Land Use Commission is
17 composed of nine members appointed by the governor.
18 One member at least from each of the four counties.
19 And unless you're getting a paycheck that I don't
20 know about you're volunteers.

21 Primary role. There it goes.

22 Okay. As I mentioned before, the
23 Commission's main responsibility is to ensure that
24 areas of statewide concern are addressed and
25 considered in the land use decision-making process.

1 And we'll get into that in detail. Obviously, the
2 purpose of this training session is to go through
3 those things so there's an understanding on the part
4 of the Commissioners as to what they need to be
5 looking at for criteria.

6 The Commission is tasked with preserving
7 and protecting Hawaii's lands and promoting their
8 best-suited uses.

9 The Commission establishes the district
10 boundaries for the entire state.

11 We also act on requests for special use
12 permits.

13 Commissioners act as judges. The closest
14 analogy would be U.S. District Court panel of
15 judges. You use the same methodology as a court
16 would to develop facts and to (inaudible).

17 Of course, we have to adhere to the
18 Sunshine Law and where the discussions are limited
19 to the subject matter outlined in the posted agenda.

20 Commissioners are strictly prohibited from
21 engaging in ex parte communications. If someone
22 contacts you with regard to a project, what you
23 should really tell them is to talk about this and
24 you should call the Land Use Commission staff, the
25 executive officer. You can refer them to me. If

1 they do try and engage you in a conversation with
2 regard to a project that comes up before the
3 Commission that's something that you have to
4 disclose at the time of the hearing and explain
5 exactly what happened. We've had that happen with a
6 number of Commissioners previously. So just be wary
7 of developers or planners from private planning
8 firms approaching you to talk about projects.
9 That's something you should strenuously avoid.

10 **COMMISSIONER CARR SMITH:** Dan?

11 **MR. ORODENKER:** Yeah.

12 **CHAIRMAN GIOVANNI:** Commissioner Carr
13 Smith.

14 **COMMISSIONER CARR SMITH:** I know that DLNR
15 doesn't agree with that. They've been advised by
16 attorney generals that they are free to talk with
17 Commissioners, applicants, whatever it is in their
18 case, and as long as the item is not agendized, up
19 until the time that it's agendized they're free to
20 gather information and talk. So I'm not sure --

21 **MR. ORODENKER:** I can't speak for that.
22 My suspicion is because we're quasi-judicial.

23 **COMMISSIONER CARR SMITH:** Dan probably
24 can.

25 **CHAIRMAN GIOVANNI:** So let's take that

1 question. Mr. Morris, are you -- did you hear the
2 comment?

3 **MR. MORRIS:** I did. And I will say that
4 it is not my understanding that Commissioners before
5 the board of Land and Natural Resources can discuss
6 matters that might come up before them just because
7 it hasn't been agendized. That is not my
8 understanding. I will try and find that out and
9 make sure I'm not incorrect but as I sit here that's
10 not correct. My understanding is that if there's a
11 matter that might come up before the board that they
12 are not supposed to talk about that as a matter of
13 Sunshine Law. But I will confirm that. You know, I
14 want to make sure we are consistent between our
15 boards and commissions. So I'm going to try and get
16 back to you on that.

17 **COMMISSIONER CARR SMITH:** Thank you.
18 Yeah, I don't -- I don't know how we as volunteers
19 should be expected to know what may or may not come
20 up for us. We don't always know that, so.

21 **MR. ORODENKER:** Well, in both cases in the
22 past what's happened is that someone has said, look,
23 I'm going to be coming before the Land Use
24 Commission for this. And you know, what's your
25 opinion? We've had Commissioners approached in that

1 manner. I mean, if you don't know, you don't know.
2 What you don't know, you don't -- what you don't
3 know, you don't know. But if there's any question
4 in your mind I think that you need to avoid it.

5 **COMMISSIONER CARR SMITH:** And Dan Morris,
6 I believe, Julie China might have been a part of
7 that conversation.

8 **MR. MORRIS:** Good. That was my question.
9 I was going to ask where you had gotten that, you
10 know, that sort of suggestion that's how we looked
11 at it. So I'll talk with Julie and get back to you
12 on that.

13 **CHAIRMAN GIOVANNI:** Commissioner Lee?

14 **COMMISSIONER LEE:** Thank you.

15 Isn't there an exception for if someone
16 approaches you and asks you procedural type
17 questions such as what are the steps -- if I'm
18 coming up before the LUC for something what are the
19 steps I need to take? What day or what's the
20 approach? Aren't procedural type questions allowed?

21 **MR. ORODENKER:** Do you want me to answer
22 that, Dan Morris?

23 **MR. MORRIS:** Go ahead, Dan O. I think
24 that is correct that things aren't -- substantive
25 matters is what you're not supposed to be discussing

1 so that is my understanding but I'll let Dan O
2 follow up on that.

3 **MR. ORODENKER:** I believe if you look at
4 our rules that I'm the one who's supposed to be
5 talking to them about procedure. To refer them to
6 me. I don't know where that boundary lies so it's
7 safer for you to send them to me if they have
8 procedural questions because the last thing in the
9 world we want is for a commissioner to have to
10 recuse themselves because somebody says, well, they
11 told me such and such. It gets dicey when it comes
12 to procedure, too, because if you give them the
13 wrong information somehow, you know, then we might
14 have a problem with that. So it's usually better to
15 refer them to staff.

16 **CHAIRMAN GIOVANNI:** So this is
17 Commissioner Giovanni. Let me summarize this
18 discussion which I think is important.

19 So Dan Morris will research and advise on
20 whether or not there are issues or exemptions for
21 Commissioners to speak with developers, whether they
22 know or don't know that those developers may be
23 coming forth in the future before this commission
24 with a specific petition. And so we'll wait for
25 some feedback on that.

1 Let me also say that there is some
2 question about if there is a procedural inquiry and
3 the guidance there is that the safest thing to do is
4 refer any procedural questions to staff.

5 Let me also say that the expectation is
6 that there will be circumstances where things are a
7 bit confused and I encourage all Commissioners on
8 any matter before us you'll be given an opportunity
9 to disclose whether or not you've had any
10 communications and whether or not those
11 communications in your mind present any real or
12 perceived conflict and then we'll deal with it on a
13 case-by-case basis.

14 **MR. ORODENKER:** The other issue is that I
15 believe there's some verbiage in our rules with
16 regard to ex parte communications that I don't have
17 at my fingertips but that may also govern how these
18 things have to be handled.

19 **CHAIRMAN GIOVANNI:** So I've got a related
20 question. So if there is a matter that may be
21 coming before this Commission, for example, you have
22 informed us today even though it's not yet
23 agendized, when you talked about our schedule that
24 we're going to have Waimanalo Gulch and Mahi Solar
25 and whatever coming in the near future before us, is

1 there -- what is the guidance relative to Sunshine
2 Law with regards to Commissioners speaking between
3 each other about those forthcoming?

4 **MR. ORODENKER:** Well, generally with
5 regard to the Sunshine Law, more than two
6 Commissioners talking about commission business is a
7 problem.

8 **CHAIRMAN GIOVANNI:** I want to talk the
9 other way. What's not a problem? In other words, I
10 have a commission -- I'm sitting on a commission
11 with five new people who have not directly
12 participated in the history of some of these matters
13 that are coming before us and they have questions.
14 They may want to reach out to those of us that
15 actually sat on the Commission and participated in
16 those hearings. Is it allowed that two of us --
17 just two -- any two can talk about that?

18 **MR. ORODENKER:** I believe so. I think
19 that the line that you can't cross is deliberating
20 towards a decision.

21 **CHAIRMAN GIOVANNI:** Correct. So for
22 example -- this is just a hypothetical but if Nancy
23 Carr Smith, Commissioner from Hawaii Island wanted
24 to ask and talk to me about background on say
25 Waimanalo Gulch because I was active in that

1 hearing, if just the two of us are having a
2 conversation there's no rule that says I cannot talk
3 to her; right?

4 **MR. ORODENKER:** Dan, you can -- Dan
5 Morris, you can stop me if I'm incorrect but I don't
6 believe so.

7 **MR. MORRIS:** Yes, that's fine.

8 **MR. ORODENKER:** That there's anything
9 prohibiting that conversation.

10 **MR. MORRIS:** Yes. If it's just the two
11 people I think, you know, it's sort of those group
12 discussions --

13 **MS. SEGURA:** Then it's in violation.

14 **MR. MORRIS:** More than two is in
15 violation.

16 **CHAIRMAN GIOVANNI:** My hypothetical was
17 Commissioner Carr Smith wants to ask me about my
18 experience and thoughts having participated in a
19 prior hearing and decision and order for Waimanalo
20 Gulch. Now, they're coming before us for a motion
21 for modification and she wants to talk about
22 background. The two of us can talk with each other.

23 Okay. Thank you.

24 **MS. SEGURA:** Yes. And we'll go through
25 that in the Sunshine Law section on slide 96.

1 **MR. ORODENKER:** With regard to ex parte
2 communications, yeah, we're going to go a lot
3 deeper. Just be patient.

4 With regard to ex parte communications, I
5 found the section in our rules that may
6 differentiate us from DLNR. It's 15-15-62 and it
7 does prohibit ex parte communications. With regard
8 to a party to a proceeding before the Commission
9 shall not make unauthorized ex parte communication,
10 whether oral or written, any member of the
11 Commission or hearings officer while they are
12 participating in the decision-making process or the
13 executive officer, although I can discuss procedure
14 with them.

15 And then there's a list of communications
16 that are permitted. In a case which relates solely
17 to matters which a commission member or a hearings
18 officer is authorized by the Commission to disclose
19 of on an ex parte basis, including communications
20 regarding scheduling or other procedural matters
21 regarding the course of a proceeding. So if this
22 Commission authorizes Brian, let's say, to go and
23 talk to somebody about procedure then he can do
24 that.

25 Requests for information with respect to

1 the status of a proceeding. So if somebody says to
2 you when is this matter going to come up before the
3 Commission you can answer them.

4 Communications which all parties to the
5 proceedings agree to or which the Commission has
6 formerly ruled may be made on an ex parte basis. So
7 that's the situation where all of the parties agree
8 that they can talk to one of the Commissioners or
9 more about a proceeding.

10 And the final one is communications with
11 representatives of any news media on matters
12 intended to inform the general public. I would
13 caution the Commissioners with regard to that
14 because if the proceedings are not completed yet, if
15 you give an indication to the press as to what your
16 decision is going to be ahead of time before we've
17 completed the proceedings that can be a problem.

18 Okay. Any more questions with regard to
19 the Sunshine Law and communications?

20 Yes?

21 **MS. SEGURA:** Yeah, we have a Sunshine Law
22 section and we also have an ex parte slide on 123
23 that we'll get to.

24 **MR. ORODENKER:** Okay. Where are we?
25 Yeah.

1 Avoiding impropriety. This is an
2 interesting sort of differentiation. Commissioners
3 must reveal any relationships, professional or
4 otherwise, with any of the parties or witnesses.
5 The chair will ask the parties if they believe the
6 Commissioner should be recused based on the
7 disclosure. The chair decides whether the
8 Commissioner should continue in the proceedings if
9 concerns are raised.

10 We urge you for the sake of making sure
11 that you're not in violation of anything, if you
12 have a relationship with any of the parties or the
13 attorneys to reveal that. That's tough in Hawaii.
14 We've had situations where Commissioners have
15 revealed social relationships and we've had
16 situations where Commissioners have revealed
17 professional relationships that have no connection
18 to the matter. But it's always best for
19 transparency sake to get out that relationship and
20 then 99 percent of the time nobody has an objection.

21 The strangest one of these situations
22 arose in Waimanalo Gulch where one of the parties
23 requested that Jonathan Scheuer recuse himself
24 because he was a member of the Sierra Club which is
25 also a party to the proceedings. And we all took a

1 break and went out and all talked about it in
2 executive session and we concluded that almost every
3 one of the Commissioners was a member of the Sierra
4 Club so the chair made the decision to move forward.
5 And Jonathan was not the chair at the time.

6 So that's just an indication of somehow
7 things can go side sideways. But we really do urge
8 for transparency sake that you reveal those things
9 so it doesn't back end us later when someone says,
10 you know, Ken made a decision because, you know,
11 they play poker with this guy. So please keep that
12 in mind.

13 **CHAIRMAN GIOVANNI:** I have a comment.
14 This is Commissioner Giovanni.

15 Can you go back to that slide?

16 **MR. ORODENKER:** Sure.

17 **CHAIRMAN GIOVANNI:** So if someone -- if a
18 commissioner makes a disclosure, the first
19 expectation is that if it's of significance, or a
20 real or perceived significance, the consideration
21 would be for that commissioner, that he himself or
22 herself to directly recuse themselves. But in the
23 case that they recommend that they don't feel they
24 need to recuse themselves, the way I read this, the
25 chair will ask all Commissioners if any commissioner

1 has an issue and recommends that the Commissioner,
2 you know, not continue.

3 **MR. ORODENKER:** The parties. Not the
4 Commission or Commissioner.

5 **CHAIRMAN GIOVANNI:** Well, that's my
6 question. It says the parties.

7 **MR. ORODENKER:** Yes.

8 **CHAIRMAN GIOVANNI:** But what if -- what if
9 a fellow commissioner feels that I shouldn't ask the
10 Commissioners because --

11 **MR. ORODENKER:** Yes. You can. Each
12 situation is fluid. We've never had that arise but
13 if a commissioner objected to another commissioner's
14 continued participation in a hearing I think that
15 would be a matter for the chair to discuss with the
16 other Commissioners. It may be that in that
17 situation you have to ask the advice of counsel and
18 that would take place in executive session. But the
19 ultimate decision would be based on a discussion
20 with the Commissioners in open session.

21 **CHAIRMAN GIOVANNI:** Correct. And
22 according to this, the ultimate decision is solely
23 the decision of the chair?

24 **MR. ORODENKER:** Yes. That is correct.

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

1 Proceed.

2 Commissioner?

3 **COMMISSIONER CARR SMITH:** Follow up

4 question on that.

5 I wasn't sure if you clarified this but
6 all parties get the opportunity to weigh in as well;
7 correct?

8 **MR. ORODENKER:** Yeah. What usually will
9 happen as the chair has said, a commissioner would
10 say (inaudible) had to actually look back at some
11 real ones, Lee Ohigashi used to travel to Japan
12 where Jennifer Lim used to work here in front of us.
13 And so he would reveal that. And then the
14 Commissioner and the chair would then say does
15 anyone have a problem with Commissioner Ohigashi
16 proceeding? Mainly the parties who are
17 participating in the proceedings.

18 Obligations of the Commissioners.
19 Thorough Preparation. We do supply staff reports
20 but they're sort of cliff notes. And we urge the
21 Commissioners to actually look at the entire docket
22 record before to ensure that they understand the
23 record. This can be burdensome. And if you -- if
24 we have a large docket, like Waimanalo Gulch is
25 coming in front of us and that's a huge docket. I

1 mean, it goes back years and there's a lot of things
2 involved. If you want to know which documents you
3 should be focusing on you can call staff and ask us
4 and we'll direct you to the documents that are most
5 pertinent. Because sometimes there's a lot of
6 things in the record that don't have anything to do
7 with a motion that's in front of us or whatever. So
8 if there's any question in your mind on whether or
9 not you have to read the entire document or just
10 focus on something we urge you to call staff.

11 **CHAIRMAN GIOVANNI:** So I have a question
12 on evidence analysis. And I don't know if I should
13 ask it now or if there's another section of this
14 training. But let me throw it out there.

15 In some hearings that come before us, like
16 the Waimanalo Gulch, we are restricted to only
17 consider evidence that has been put forth through
18 the Planning Commission of the county versus taking
19 in any new information.

20 Could you explain -- is this the time to
21 ask?

22 **MR. ORODENKER:** Well, no. Actually, we're
23 going to go through special permits in detail. But
24 yeah, that is somewhat of a different situation.

25 **CHAIRMAN GIOVANNI:** Okay. So you're going

1 to talk about it later?

2 **MR. ORODENKER:** Yeah.

3 **CHAIRMAN GIOVANNI:** Okay.

4 **MR. ORODENKER:** Yeah.

5 Okay. And now we're going to go into the
6 different types of petitions.

7 The first thing that we're going to go
8 over is district boundary amendments. And Scott is
9 going to handle that. And I will be back when he's
10 done.

11 **MR. DERRICKSON:** Aloha kakou.

12 Can you all hear me okay?

13 Okay. District boundary amendments we
14 call DBAs. They've been the bread and butter of the
15 Land Use Commission for almost 60 years. They've
16 been the primary thing that the Commission has been
17 ruling upon.

18 However, in more recent times we've had
19 much, much fewer, pure district boundary amendments.
20 We had more motions to amend older district boundary
21 amendments. We've also had the newer type of DBA
22 petition, which is called a 201H, the Affordable
23 Housing Petition. I'll talk about those in a little
24 while.

25 Petitions, DBA petitions are ones that are

1 initiated by a landowner or developer that can be a
2 private party or a corporation but it could also be
3 a state agency. It can be a county agency. Whoever
4 owns and controls the land.

5 Generally, historically, these have been
6 movements, reclassifications from the conservation
7 or agricultural district into the urban district,
8 and very few into the rural district.

9 The proceedings are quasi-judicial in
10 nature. They're not legislative actions. The types
11 that are taken to change zoning on the county level,
12 those are legislative actions taken by the county
13 councils.

14 They are contested case proceedings. I'll
15 talk about that in a little bit as well.

16 There's three automatic parties to every
17 district boundary amendment. That's in statute,
18 Chapter 205-43(1). That's the applicant. It's the
19 State Office of Planning and Sustainable Development
20 on behalf of the state. That's also the County
21 Planning Department on behalf of a county. Those are
22 the three required parties. Everybody else, if they
23 want to be a party, we'll talk about that down the
24 road. That's termed intervention. There's a formal
25 process to be declared a new party to a proceeding.

1 As I said, district boundary amendments
2 can also be initiated not just by private
3 landowners; they can be initiated by state or county
4 departments or agencies, like Department of
5 Education.

6 Once a petition is filed with us it's
7 essentially a draft petition at that stage. And
8 I'll talk about this as well. But once a petition
9 is filed with us and we deem it complete, the
10 Commission has between 60 days and 180 days to start
11 hearings on it.

12 After we do a district boundary amendment,
13 then everything goes to the counties. And the
14 counties then have to --

15 **CHAIRMAN GIOVANNI:** This is the chair.
16 Dan Morris, are you still on board with us?

17 **MR. MORRIS:** Yes, I am. I had sort of a
18 moment where things seemed to have frozen. It's
19 just -- can you hear me now?

20 **CHAIRMAN GIOVANNI:** I can hear you now.
21 Yes.

22 **MR. MORRIS:** Okay. So your question --
23 was I asked a question?

24 **CHAIRMAN GIOVANNI:** Their PowerPoint is
25 interrupted. It's going in and out.

1 **MR. MORRIS:** Okay. That's what it is.

2 Thank you. I'm on board now.

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

4 So Scott, do you want to back up half a
5 step and then go forward?

6 **MR. DERRICKSON:** Okay. I'm not sure where
7 we cut out exactly but --

8 **CHAIRMAN GIOVANNI:** You were just starting
9 to talk about 343.

10 **MR. DERRICKSON:** Okay. So Chapter 343 is
11 the state's environmental review process,
12 environmental assessments or environmental impact
13 statements.

14 So often with district boundary
15 amendments, an EA or an EIS is required. It's not
16 required because it's a district boundary amendment.
17 It would be required because it triggers one of the
18 statutory triggers under Chapter 343.

19 We can talk -- we're going to have a
20 section on EAs and EISs in a little bit so we can
21 talk about that in more detail.

22 Again, I talked, it's a quasi-judicial
23 proceeding. We have to make our decision within 365
24 days or the decision -- or the petition gets
25 automatically approved.

1 **MR. ORODENKER:** If I may, Mr. Chair. One
2 thing, we were talking earlier about how do we know
3 whether or not something is going to come before the
4 Commission. Very often we will get a petition that
5 is knowingly incomplete by a petitioner two or three
6 years before they're even going to come in front of
7 us. So it's not a bad idea to contact us if you
8 have any question with regard to a land use -- being
9 approved by somebody with regard to a land use issue
10 because it may be that we've already got a
11 preliminary petition filed with us.

12 **CHAIRMAN GIOVANNI:** What's -- this is the
13 chair.

14 What's wrong with the staff somehow
15 keeping the Commissioners informed of potential
16 matters that might come before us by virtue of the
17 fact that an incomplete petition has been filed or
18 the staff has been notified or whatever? In other
19 words --

20 **MR. DERRICKSON:** I think -- I think -- I
21 think we are now doing that in a more concerted way
22 because now anything that gets filed with us we're
23 going to -- and Ariana can doublecheck me on this,
24 but if we get a filing, we're going to send out an
25 email letting you know that something's been filed.

1 **MR. ORODENKER:** The difficulty comes like
2 on Kauai -- we call it the Three Stooges project --
3 and then they don't do anything for 10 years. You
4 know, there may be new Commissioners. A
5 commissioner may have forgotten that something was
6 filed. You know, so it's always a good idea to
7 check.

8 **MS. KWAN:** Chair, usually if we do get a
9 filing, we start to put it on the calendar. So
10 you'll see it on the LUC calendar right when we hear
11 about it. We try to calendar it right away.

12 **CHAIRMAN GIOVANNI:** And I appreciate that.
13 And I do note that staff has been more proactive in
14 publishing what might be coming down the road. But
15 at the same time, if you're expecting the
16 Commissioners to police -- to "police" themselves
17 and not speak out of turn with a prospective matter
18 that may come before us then you can help us a lot
19 by proactively telling us what might be coming down
20 the road. And I think you're doing that. So
21 thanks.

22 **MR. DERRICKSON:** Yeah. And we'll -- and
23 that's why this training is good because it helps us
24 to find out what concerns you have and adjust our
25 process.

1 **CHAIRMAN GIOVANNI:** Yeah. Great.

2 **MR. DERRICKSON:** Or whatever. But I will
3 point out that just because someone files a draft
4 petition, as Dan said, many times, 80 plus percent
5 of the time, when we get a petition, that petition
6 is incomplete.

7 **CHAIRMAN GIOVANNI:** Yeah. But let's take
8 the hypothetical. Somebody files an incomplete
9 petition with you and then calls me up and wants to
10 talk about it and I don't even know it exists.

11 **MR. DERRICKSON:** Well, you -- okay, well,
12 hopefully now, if something gets filed with us like
13 that we will send out a notice that that's been
14 filed.

15 **CHAIRMAN GIOVANNI:** Then file it's
16 incomplete.

17 **MR. DERRICKSON:** Exactly. And or that
18 it's been filed and it's under review by staff,
19 which we have -- I'll get into this in a minute
20 about --

21 **MS. KWAN:** A couple examples is when we
22 had RK2 filed. It was on the calendar but it wasn't
23 -- it was kicked back because it was an incomplete
24 filing. And we also received the draft filings from
25 Central Maui Landfill in add of IAL but that hasn't

1 been officially filed yet. But most of the
2 Commission should be aware of those filings on its
3 way. So those are little examples of things down
4 the road that aren't officially filed with our
5 office yet.

6 **MR. ORODENKER:** If I may, this backs up to
7 what I was saying before. That the worse thing, I
8 mean, if you talk to somebody about something that
9 eventually comes before us you're going to have to
10 reveal it and you may have to recuse yourself. To
11 avoid that type of situation, if anybody approaches
12 you with regard to anything that concerns the
13 Commission or, I mean, I've never heard of a
14 situation where someone approaches a commissioner
15 without telling them that they're probably going to
16 be coming in front of us at some point. And under
17 those circumstances, as I mentioned before, you
18 should refer them to me directly so that you don't
19 run the risk of having to recuse yourself.

20 Maybe this person approaches you and then
21 they never file a petition. You just don't know.
22 The safe thing to do is to refer them to staff.

23 **CHAIRMAN GIOVANNI:** Yeah. I would agree.
24 Go ahead.

25 **COMMISSIONER LEE:** I have a question.

1 In regards to your 365 days to make a
2 decision with a 90-day possible extension, what
3 makes it possible?

4 **MR. DERRICKSON:** What makes it possible?
5 I can tell you that in 35 years of either being on -
6 - been working for Office of Planning in the past
7 and representing before the Land Use Commission or
8 being staff with the Land Use Commission, there's
9 only been one example where I've had a DBA that took
10 365 days and then requested at the petitioner's
11 request a 90-day extension.

12 **MR. ORODENKER:** If I may, Scott is
13 correct. It almost never happens. The way I
14 understand the rules, however, is that it has to be
15 -- the request for an extension has to be because
16 the Commission cannot complete its business. If a
17 party says, well, you know, we're two months out but
18 I'm going to be on -- my attorney is going to be on
19 vacation for, you know, a month and a half, that's
20 not a legitimate reason. It has to be for something
21 associated with the Commission's ability to complete
22 its proceedings.

23 **CHAIRMAN GIOVANNI:** So in 35 years, Scott,
24 have you ever seen an automatic approval (inaudible)
25 a petition?

1 **MR. DERRICKSON:** No. Never been an
2 automatic approval. Only that one instance of a 365
3 day, you know, getting close to it and the
4 petitioner said, look, we don't want to -- we don't
5 want to deal with an automatic approval. Please,
6 let's extend the time and we'll be able to fit in
7 some additional hearings.

8 We've looked back to try to identify,
9 okay, how often do we come close to 365 days?
10 Almost never. Most of our DBAs have been finished
11 in about six months or less. Most less. Most around
12 four months' time. That's pretty fast. So that's
13 from the time it's been deemed complete, hold
14 hearings. Get the decision in order. Draft out.
15 All parties get to comment on it. It gets
16 consolidated. Have a hearing. Have a hearing to
17 make a decision, and then we have a hearing to adopt
18 the order.

19 **CHAIRMAN GIOVANNI:** So Scott, one of the
20 time consuming steps is actually, for a lot of these
21 major projects, is an EIS. So I presume that you're
22 not going to deem an application complete unless the
23 EIS has been completed and accepted; is that
24 correct?

25 **MR. DERRICKSON:** That correct. If Chapter

1 343 is triggered for a given district boundary
2 amendment, that has to come before we can deem an
3 application complete. When we deem an application
4 complete, that's when the 365 day clock begins. The
5 EA/EIS if it's required happens before.

6 **CHAIRMAN GIOVANNI:** So is there a section
7 in this training that identifies all the elements
8 that have to be completed before?

9 **MR. DERRICKSON:** Yes. I can -- we, yeah.
10 I can -- we can talk through it. I'll keep going
11 and then if it's still not clear I'll --

12 **CHAIRMAN GIOVANNI:** Like, for example, is
13 a Ka Pa'akai analysis required before?

14 **MR. DERRICKSON:** That's a separate issue.

15 **CHAIRMAN GIOVANNI:** I'm just saying is an
16 analysis required to be complete and filed before
17 you deem an application for DBA to be complete?

18 **MR. DERRICKSON:** No, it's not.

19 **CHAIRMAN GIOVANNI:** Okay.

20 **MR. ORODENKER:** No, it's not. I mean,
21 they have -- usually, it's the Chapter 343 analysis
22 that prevents a petition from becoming complete.
23 Sometimes it's because they didn't pay their fee but
24 other times it's usually the Chapter 343 analysis.
25 And we have a section on Chapter 343. And that --

1 the satisfaction of Chapter 343 is separate from the
2 requirements for a petitioner to present a complete
3 case before the Commission.

4 **MR. DERRICKSON:** So I'll try and -- so the
5 Ka Pa'akai analysis, the information that's
6 necessary in a Ka Pa'akai analysis is generally the
7 information that has to be generated through doing
8 an EA or an EIS. In those instances where an EA or
9 EIS is not triggered, a Ka Pa'akai analysis is still
10 going to be necessary but the question then is where
11 and when have you put together the information
12 that's necessary to do the Ka Pa'akai analysis? And
13 so when EA or EIS is not triggered, part of the
14 petition, in our rules, the form and contents of a
15 petition lays out and it includes that you have to
16 provide that kind of information. It's consistent
17 with a Ka Pa'akai analysis.

18 **CHAIRMAN GIOVANNI:** So let me just share
19 with you something that might come into effect in
20 how you view this very question.

21 **MR. DERRICKSON:** Okay.

22 **CHAIRMAN GIOVANNI:** Now that Ka Pa'akai
23 analyses are being required for virtually every
24 permit or action by counties and state, there's a
25 backlog and a delay in getting Ka Pa'akai analyses

1 actually completed. For a very simplified Ka
2 Pa'akai analysis on Kauai for a very simple project
3 it took seven months just to do it where I think if
4 I had looked at it two years ago it would have been
5 one month. So I don't want -- what I'm saying is a
6 Ka Pa'akai analysis might be a backlog of those that
7 takes longer than 365 days.

8 **MR. DERRICKSON:** Okay. So first, I would
9 say that if you're applying for a district boundary
10 amendment or virtually any county or state level
11 permit that you know is going to trigger Ka Pa'akai
12 --

13 **CHAIRMAN GIOVANNI:** Start.

14 **MR. DERRICKSON:** -- start before. Yeah.
15 I mean, that's -- if you want to --

16 **CHAIRMAN GIOVANNI:** But when I just asked
17 you the question, if you need it to start to be
18 complete you said no, which gave the impression that
19 you could start it after you deemed the thing
20 complete. I think the sooner you start a Ka Pa'akai
21 the better.

22 **MR. ORODENKER:** Yeah. There's a
23 difference between practice and the requirements for
24 complete petition. I mean, if an EA or an EIS is
25 required it's a disclosure document. I think we

1 have to differentiate between disclosure documents
2 and the petitions. The EA and EIS is this is all
3 the possible impacts. And that can be the
4 foundation for a Ka Pa'akai analysis that comes
5 later on in the proceedings but it does not prevent
6 -- not having a Ka Pa'akai analysis done under
7 Chapter 343 does not prevent an EIS from being
8 accepted.

9 **MR. DERRICKSON:** Right.

10 **MR. ORODENKER:** But a petitioner is
11 risking a delay if they don't -- if they haven't
12 done that.

13 **CHAIRMAN GIOVANNI:** To the contrary. The
14 scenario that I worry about is that you deem an
15 application complete because they've done 343 and
16 other things. And then the clock starts on the 365.
17 Then they go out to start a Ka Pa'akai analysis and
18 it takes 500 days and we have to approve this thing
19 without even having a hearing.

20 **MR. DERRICKSON:** Right. Well, I would say
21 that they don't start a Ka Pa'akai analysis after a
22 petition has been deemed complete because, again,
23 what I was saying is the studies that formed the
24 backbone and the basis for a Ka Pa'akai analysis are
25 things like the archaeological inventory survey or

1 reconnaissance. And that's a process that sometimes
2 has taken longer periods of time for DLNR's State
3 Historic Preservation Division to review and
4 approve. But there's a lot of other issues that are
5 going on. It's not so much that DLNR SHPD has been
6 (inaudible) slow walking approvals of those things
7 but that's one of the core pieces that's involved
8 with a Ka Pa'akai analysis. But so is biological
9 surveys.

10 **CHAIRMAN GIOVANNI:** My concerns are the
11 consultants that perform the analysis are
12 backlogged.

13 **MR. ORODENKER:** I understand what you're
14 saying, Chair.

15 First of all, I want to emphasize that the
16 parties don't do a Ka Pa'akai analysis. The
17 Commission does the Ka Pa'akai analysis based on the
18 information that's presented to them. And I
19 understand what your concern is. I think that in a
20 DBA, which is what we're talking about, not a motion
21 or anything else but in a DBA where an EIS is
22 required or an EA is required, those components will
23 have to be done prior to approval or adoption of
24 that EA or EIS. All that information would be
25 there.

1 If, and this is kind of the convoluted
2 nature of the whole thing, if the EA or EIS does not
3 contain enough cultural resource analysis and
4 environmental resource analysis for the Commission
5 to do a Ka Pa'akai analysis, then we probably won't
6 accept the EA or the EIS and the clock won't start
7 to tick.

8 **CHAIRMAN GIOVANNI:** Let's talk about it
9 further later.

10 **MR. DERRICKSON:** Okay. I will also say
11 that there are times when we have a challenge
12 because the EA or EIS has been approved not by the
13 Commission but by either another state agency or a
14 county-level agency. And when we go back to take a
15 look at it there's insufficient information in there
16 to form the basis of a Ka Pa'akai analysis. And
17 that's a problem. But the Commission has the
18 authority and the ability to require the petitioner
19 to conduct the studies that are necessary for the
20 Commission to do the Ka Pa'akai analysis and render
21 that decision.

22 **CHAIRMAN GIOVANNI:** Okay. I was going to
23 defer this but now that you've said it twice I'm
24 going to dig in.

25 **MR. DERRICKSON:** Okay.

1 **CHAIRMAN GIOVANNI:** What do you mean by
2 the Commission is going to do the Ka Pa'akai
3 analysis?

4 **MR. ORODENKER:** The -- okay. We'll go
5 through that in detail when we get to the Public
6 Trust Doctrine. But the thing -- generally what I
7 can tell you is that the Commission has to do the
8 analysis itself. It cannot defer that analysis to a
9 petitioner. So based on the information that's
10 provided to the Commission, the Commission must go
11 through the three steps to determine whether a Ka
12 Pa'akai has been satisfied. It cannot punt that to
13 a third party.

14 **CHAIRMAN GIOVANNI:** Commissioner Carr
15 Smith?

16 **COMMISSIONER CARR SMITH:** Thank you.
17 Yeah. I remember in previous meetings
18 where our former Commissioners who were attorneys
19 required the petitioner to go do a Ka Pa'akai.
20 That's one thing.

21 **CHAIRMAN GIOVANNI:** Yep.

22 **COMMISSIONER CARR SMITH:** Second thing is,
23 whatever checklist you guys use to deem whether an
24 application is complete, can we have a copy of that
25 so we understand what it is exactly that you guys

1 are looking at?

2 **MR. DERRICKSON:** Sure.

3 **COMMISSIONER CARR SMITH:** And then it
4 helps us.

5 **MR. DERRICKSON:** Sure. And I'll speak to
6 that --

7 **COMMISSIONER CARR SMITH:** Okay.

8 **MR. DERRICKSON:** -- shortly. Yeah.

9 **COMMISSIONER CARR SMITH:** I have two more
10 things.

11 Are there any DBA applications in right
12 now?

13 **MR. DERRICKSON:** No.

14 **COMMISSIONER CARR SMITH:** No?

15 **MR. DERRICKSON:** No.

16 **COMMISSIONER CARR SMITH:** Okay. Yeah,
17 there's only a handful that's even happened over the
18 last 5, 10 years.

19 **MR. DERRICKSON:** And as I was saying, the
20 Traditional District Boundary Amendment, greater
21 than 15 acres, reclassification, we've seen those
22 things trickle down to very minimal levels.

23 **COMMISSIONER CARR SMITH:** Right.

24 **MR. DERRICKSON:** The 201H petitions, those
25 are the ones that we've seen more and more recently.

1 But the main thing that we've been doing is with
2 respect to District Boundary Amendment motions,
3 motions with respect to, you know, changing the
4 timeframes, getting rid of conditions, putting new
5 conditions on, things like that.

6 **MR. ORODENKER:** If I may, one of the
7 things that's been happening and I think you've
8 heard me use these numbers before is that there is
9 somewhere between 45,000 and 60,000 units that we've
10 approved that haven't been built. And most of the
11 developers on 201H projects are different so I would
12 separate those out. But most of the developers who
13 are looking at projects have either been involved in
14 these older projects and just put them on the back
15 burner or they now have an interest in purchasing
16 those projects from somebody else. So with all that
17 inventory out there that hasn't been built and all
18 that land that is already urbanized, the developers
19 are not coming forward with new DBAs for the most
20 part. They're trying to resuscitate old projects
21 because it's easier to do that than it is to go
22 through an entire DBA process.

23 **CHAIRMAN GIOVANNI:** Commissioner Carr
24 Smith, you had one more?

25 **COMMISSIONER CARR SMITH:** I have one more

1 comment. I'm sorry but I can't really let this go.
2 I heard the executive director refer to a petition
3 as the Three Stooges. I don't know. I guess you
4 guys think it's funny.

5 **MR. ORODENKER:** No, that's the way they
6 originally --

7 **COMMISSIONER CARR SMITH:** If it was a
8 petitioner from my island I wouldn't be happy about
9 that.

10 **COMMISSIONER LEE:** No. The petitioner was
11 from the Island of Kauai.

12 **MR. ORODENKER:** Yeah.

13 **COMMISSIONER LEE:** And the project, the
14 corporation's name was Three Stooges.

15 **COMMISSIONER CARR SMITH:** Okay. Then I
16 rescind my comment.

17 **MR. ORODENKER:** It's changed names a
18 couple of times since.

19 **COMMISSIONER LEE:** It changed names a
20 couple of times but that is --

21 **COMMISSIONER CARR SMITH:** Okay.

22 **COMMISSIONER LEE:** When we first saw it we
23 thought it was a joke to begin with.

24 **COMMISSIONER CARR SMITH:** Yeah.

25 **COMMISSIONER LEE:** And then we got

1 contacted and they were absolutely serious.

2 **COMMISSIONER CARR SMITH:** Okay. Very
3 good. I take that back. Thank you.

4 **CHAIRMAN GIOVANNI:** Commissioner U'u?

5 **COMMISSIONER U'U:** Yeah, thank you.

6 You know, again, first day for me. Or
7 second day I would say for me to easily understand,
8 you know, Ka Pa'akai and the EA/EIS processes, I
9 would love a checkpoint list as what is needed prior
10 to here, whether it be 343, Ka Pa'akai, you know,
11 the process. And again, the checklist of what
12 Commissioner Carr brought up I think would be, you
13 know, easily digestible if I get something that I
14 can visually see and kind of check off the list as
15 what's doable, what's not. You know, the
16 requirements of time. And again, I understand the EA
17 process to a certain point and I understand there's
18 a time limit on that, too. But even the timeline
19 that I can get in my mind for the entire process,
20 like we talked about earlier there's hardly anyone
21 coming before the DBA -- for DBAs. And I know you
22 brought up 201H. On Maui, they don't have much
23 201H. There's been a few, but still, not enough to
24 even come close to the housing shortfall. So I'm
25 trying to piece together a puzzle as this process,

1 the 201H process and the lack of homes. So if I
2 could get the visual part with the checkoff list --

3 **MS. SEGURA:** We do have on slide 19 the
4 DBA amendment process that we will get to in like
5 two more.

6 **COMMISSIONER U'U:** Thank you so much.

7 **MS. SEGURA:** You guys are just so far
8 ahead.

9 **COMMISSIONER U'U:** Thank you.

10 **MR. DERRICKSON:** I understand. Buckle up.
11 It's coming. It's coming fast.

12 **MS. SEGURA:** Also on that note, for the
13 deem incomplete list, it's in front of you in our
14 rules handout that we printed. It's 15-15-50, which
15 is the content and form of petitions in front of the
16 Commission.

17 **CHAIRMAN GIOVANNI:** So, yeah. We need a
18 break. So let's take a five minute recess or so.
19 It's 11:08. Pardon me. Yeah, 11:08. We'll be back
20 at 11:15. Take a recess.

21 **(Recess taken from 11:08 a.m. to 11:19**
22 **a.m.)**

23 **CHAIRMAN GIOVANNI:** Okay. We're going
24 back on the record. It's 11:19. Back in session.

25 Scott, please proceed.

1 **MR. DERRICKSON:** Okay. Thank you.

2 Okay. Back to the slide. Just briefly.

3 Three hundred sixty-five days to make a
4 decision. A 90-day extension is possible by request
5 or by the Commission determining that it's
6 necessary.

7 If a decision isn't made it gets
8 automatically approved subject to Chapter 91-13.5.
9 If a petition gets automatically approved, our rules
10 provide for automatic conditions, generic conditions
11 to protect the public resources and public trust.

12 You can see that in our rules. The
13 citation is 15-15-90. That's in our administrative
14 rules which you guys have in front of you.

15 To Commissioner Carr Smith's question
16 about the contents of a petition, they're set forth
17 in 15-15-50. It's titled form and contents of
18 petition. Those are all the components that are
19 necessary to be included in a petition filed before
20 us. It's what the staff reviews when we look to
21 deem complete a petition.

22 **COMMISSIONER CARR SMITH:** Follow up
23 question, Scott?

24 **MR. DERRICKSON:** Sure.

25 **COMMISSIONER CARR SMITH:** If I may. But

1 do you have a list that you use?

2 **MR. DERRICKSON:** I created my own little
3 checklist. But basically, what it does is it takes
4 each of these components.

5 **COMMISSIONER CARR SMITH:** Right. But --

6 **MR. DERRICKSON:** And creates a cell. And
7 then I have another cell next to it to be able to
8 check off, yes, this was included. Good. Or if
9 not, I have another cell that I write myself notes
10 because ultimately what happens is the staff has 30
11 days once a petition is filed with us to review it
12 for completeness. And we either tell them it's
13 incomplete and we identify each of the pieces that's
14 required that's not there or insufficient.

15 **COMMISSIONER CARR SMITH:** So what if a
16 potential petitioner comes to you and says I want to
17 make sure that my application is complete when I
18 give it to you. Can you give me a list of
19 everything I need to do so that I'm successful?

20 **MR. DERRICKSON:** Well --

21 **COMMISSIONER CARR SMITH:** You're going to
22 hand them the rules?

23 **MR. DERRICKSON:** Generally what I tell
24 them is, while I've got them on the phone usually,
25 let's go to our rules. Let's go to this. Work

1 through it. If you have any questions about what we
2 think is entailed by any one of these pieces. But
3 yeah. Look, most -- most petitions are being put
4 together by a combination of land use attorneys or
5 consultants. Most of the consultants, they're not --
6 - this is not their first time around. They know --
7 they know the rules. They know what's necessary.
8 And I just point them out to the rules. So the form
9 and contents are there. If they need me to give
10 them a checklist sheet, I can do that but it's the
11 same one I use. It doesn't tell them how to
12 formulate the answers to each one of these
13 questions. They've got to use their own expertise.

14 **COMMISSIONER CARR SMITH:** I understand.
15 But I mean, if you have a lot of people that provide
16 you with incomplete applications then you have to
17 wonder why. Right? So I'm just -- I'm just trying
18 to figure out how it can be smooth sailing.

19 **MR. DERRICKSON:** We don't -- we don't have
20 -- okay. As Dan mentioned earlier, one of the
21 primary things that is the incomplete portion is the
22 lack of an EA or EIS that's been done. Has to be
23 done prior to -- prior to us deeming it complete.
24 And sometimes that's because we are the accepting
25 authority. Other times, it's another agency that is

1 the accepting authority. They have to complete that
2 process and then it becomes part of our records
3 here. So in that form and contents petition, one of
4 those -- one of those pieces is, you know, Chapter
5 343 compliance. And there are cases where sometimes
6 there's a petition that doesn't trigger Chapter 343.
7 And then it can move forward. That's not a stumbling
8 block for it. But it's not a matter that there's a
9 lot of people who are trying to give us petitions
10 and they're getting deemed incomplete. And most, as
11 I said, most of the petitions that we get, these are
12 not, you know, somebody's doing them on a napkin.
13 This is hired professionals, consultants that are
14 doing these.

15 But yeah. We -- if you talk to somebody
16 at one of the firms that's had experience with the
17 Land Use Commission staff, I think most of them will
18 agree that we are extremely helpful. If they've got
19 questions they call us. We try to point them in the
20 right direction. We refer them to rules. We refer
21 them to statutory requirements when necessary when
22 they have questions.

23 **MR. ORODENKER:** Yeah. I'd like to
24 emphasize that. I mean, what we spend most of our
25 days doing is helping people through this process.

1 I mean, we don't just say, well, go look at the
2 rules and walk away. I mean, we get very involved
3 in this stuff because we don't want to see petitions
4 fail. We don't want us to have to keep sending back
5 a petition to a petitioner saying, look, you didn't
6 do this or you didn't do that. We get very involved
7 in the petition process.

8 **MR. DERRICKSON:** Yeah. Okay. Next slide.
9 We're moving on now. We're going to gather some
10 steam, hopefully.

11 DBA Process. This is how we as planners
12 think about the process and break it down. I'll
13 give you -- you'll see our chart but -- in a couple
14 more slides. But the process is really -- there's
15 an initial filing and that's what we've been talking
16 about. There's a 30-day review that the staff does
17 and it's either incomplete, and we tell them why
18 it's incomplete and what they need to do to make it
19 complete. Or we deem it complete and our 365- day
20 clock starts. When the clock starts there's a whole
21 number of different things that get triggered, one
22 of which is that within that 60-day minimum period
23 where we cannot hold a hearing, we often have what's
24 called a pre-hearing conference. It's where we sit
25 down with the parties, which again, is the

1 petitioner, Office of Planning and Sustainable
2 Development, a County Planning Department, and
3 sometimes there's some additional parties. That's
4 where we sit down and we talk to them about, okay,
5 you're going to present your case, petitioner. How
6 long do you think it's going to take? How many
7 witnesses do you intend to call? And then we set out
8 some timeframes about when you have to provide all
9 the parties and the Commission your witness list,
10 your exhibit list, and any testimony, summarized
11 testimony that's going to be presented by your --

12 **MR. ORODENKER:** You're getting ahead of
13 yourself, Scott. We actually have slides that list
14 this.

15 **MR. DERRICKSON:** I know. I know.

16 Once we get through that 60-day minimum
17 window -- and what we try and do is, okay, we have
18 between 60 and 180 days to hold our first hearing.
19 We really aim to be as efficient as possible so we
20 really try to work with the petitioner and the
21 parties to have our first hearing as close to that
22 61st day as possible. We don't try to drag it out.
23 We try to get it going right away. That's the
24 contested case process.

25 Then there's a post-hearing process. Then

1 there's the process where you guys come and you have
2 your hearing to render a decision. And then there's
3 a separate hearing to adopt the form of the order.
4 And I'll go into that.

5 I think the next two slides we can skip
6 over.

7 **MR. ORODENKER:** Actually, I wanted to talk
8 --

9 **MR. DERRICKSON:** You want to talk on
10 those?

11 **MR. ORODENKER:** Yeah.

12 **MR. DERRICKSON:** Okay.

13 **MR. ORODENKER:** This is really important.
14 When we're doing evidence gathering to keep in mind
15 where we've been appealed from successfully. We're
16 successfully appealed from when our decisions lack
17 supporting evidence for the Public Trust Doctrine or
18 that we fail to show good cause or do not adhere to
19 Chapter 205 procedures or our rules.

20 The Supreme Court has established
21 interpretive laws for contested case hearings. And
22 the reason that they've done that is that due
23 process requires the presentation of evidence and
24 the ability to cross-examine and so forth and so on.
25 So if we don't give the parties due process, they

1 have a constitutional reason for appealing our
2 decision and for forcing us to do it all over again.

3 The good cause requirement is very
4 important. The parties -- the burden is on the
5 parties to show good cause to grant the petition.
6 Good cause can be anything from, you know, we need
7 housing in this area to, you know, this is a better
8 use to the land than agriculture because it's all
9 lava rock. I mean, you know, good cause is based on
10 the evidence that's presented and the Commission's
11 interpretation of it. But that burden is on the
12 petitioner.

13 At those hearings, I mean, as you know,
14 all of our decisions and orders contain conditions.
15 It's usually -- we don't make that stuff up. I
16 mean, sometimes we will have -- it'll come out in
17 the course of a hearing that a condition is
18 necessarily but generally, OPSD and the counties
19 present the conditions that are necessary to address
20 their concerns. Once again, even if the county
21 comes forward or the state comes forward with a
22 suggested condition, if there's no evidence to
23 support that condition we can't put it in. It's got
24 to be supported by the evidence.

25 Yes?

1 **COMMISSIONER U'U:** I just have a quick
2 question on that previous slide.

3 So, okay, it's the burden of proof. Well,
4 the burden is on the petitioner to show good cause.
5 And in the last statement, any decision by the
6 Commission must be supported by the evidence. So
7 let's say it's a controversial project that's being
8 proposed and you have 200 people coming in to
9 testify against the project and the majority of the
10 testimony is opinion or emotional. How does that
11 play into being supported by evidence?

12 **MR. ORODENKER:** Well, that's where your
13 discretion comes in. I will say that the Supreme
14 Court has determined that public testimony can be
15 evidence. We have had situations where the public
16 has come in and testified and it is just emotional.
17 And sometimes it's factual. I mean, we've had
18 situations where they all come in and said, hey,
19 look, in their, you know, EIS analysis they
20 incorrectly said this or we had -- I mean, I know
21 we're talking about DBAs but we had an SP that came
22 in one time where somebody said, well, look, you
23 know, there's a Na Ala Hele trail through here that
24 was not revealed and, you know, we had to delay the
25 proceedings until that analysis was done.

1 So public testimony can be valuable. It
2 can be evidence. But it also can -- one of the
3 biggest values of public testimony is it gives the
4 Commissioners the ability to say, hey, we heard the
5 public say such and such, petitioner. What about
6 that? You know, is there any basis? Is that true?
7 You know. And it can result in evidence being
8 presented by the petitioner that they had not
9 thought they were going to have to present.

10 Very quickly why a contested case, and I
11 talked about that already, the Supreme Court has
12 determined that contested cases are the best way to
13 satisfy due process. And there are a lot of
14 balancing factors to determine the specific
15 procedure. Sometimes with motions and things like
16 that we won't go through a full contested case
17 hearing because the courts have said, you know,
18 first you have to determine what interest is
19 involved. What personal interest will be impacted.
20 And then the risk of erroneous deprivation, meaning
21 the potential for the Commission to make
22 administrative decisions so to speak and inconsistent
23 with the facts in the record.

24 And of course, the governmental interest.
25 The government's interest is including the burden of

1 implementing additional procedural safeguards.

2 Contested case hearings, what the courts
3 have said is, if I can be brutally honest about this
4 is that, well, our process is the best process. It
5 gives the best due process. So if you have a due
6 process issue you have to follow our process. So
7 that's why a contested case.

8 **MR. DERRICKSON:** Okay. Here it is. If
9 you follow this biblically you will arrive at the
10 end result you're seeking.

11 I'm trying this -- is that working? Okay.

12 So the 30 day, that's the initial petition
13 gets filed. The petitioner has to file a
14 notification that they filed a petition. One of the
15 things we're looking at, is an EA or EIS required?
16 That's not the only thing but that's one of the
17 primary things and that's what we are saying.
18 That's one of the reasons why most are deemed
19 incomplete in the beginning. And they file the
20 petition knowing that it's going to be incomplete
21 but they want to get their foot in the door, make
22 the notice of filing. And then that notice of
23 filing triggers a time period where if some
24 individual or group wants to potentially intervene,
25 they file a notice of intent to intervene. It's not

1 make or break. It's just a, hey, I think we might
2 want to intervene and become parties in the petition
3 when it actually starts. And what that means is
4 then any time the petitioner files additional
5 documents, this individual or group is going to get
6 a copy of that so they can stay abreast of things.
7 Because as Dan said, sometimes, a petition gets
8 filed and years go by. Two years, 10 years. And so
9 if someone who is interested in what's going on has
10 filed this notice of intent to intervene, they're
11 going to at least get, anytime something comes
12 through for that potential project, they're going to
13 know that it's moving or it's not moving.

14 You know, if we say that it's incomplete
15 then they're going to have to go back, fix what's --
16 the additional information that's necessary, refile
17 it with us. Usually, they're only -- usually,
18 they're only amending the pieces that we identified
19 as not sufficient. So it's not like it's a
20 wholesale refiling. It's just usually additional
21 information, maybe a couple of studies. Maybe it's
22 the EA or EIS. So we review it. We deem it
23 complete. That starts that 365 day process.
24 Everything that happens in that 60-day window here -
25 - 60 to 180 days before we start our contested case

1 hearing, there's all these different things.

2 There's statements of position that are due from the
3 parties. That's the state and the county.

4 Exhibits are due by a certain date unless
5 -- unless the executive officer allows for a
6 slightly different filing.

7 Amended pleadings. Oftentimes parties, as
8 well as the petitioner, amend their pleadings. So
9 that has to come in before. We have to file notice
10 of hearing 30 days prior to a hearing. Petitions to
11 intervene have to be heard. Opposition has to be
12 heard. Then we hold a pre-hearing conference. We
13 do all of that in that 60-day window before we can
14 actually hold our first hearing.

15 So hopefully, if we do everything correct,
16 if the petitioner follows directions, we're going to
17 be all set to go on day 61 and we can get moving.
18 And usually, we do get to move very quickly once we
19 get started.

20 And this diagram is up on our website for
21 the public to see but it's also on the
22 Commissioners' Checkpoint as well for you guys to
23 look at.

24 I'll try and do this quickly if I can but
25 the initial filing, I think we've talked about this

1 mostly. Thirty day staff review. As Nancy elicited
2 from me, we do use a checklist. It's a basic
3 checklist but really all it does is takes the form
4 and contents in our rules that are required, that
5 we've identified as required. And I just made it so
6 that I can go through and look and check off, yes,
7 this is here. This is missing. Or I think this
8 part needs more information. It might be
9 inadequate. That way when we send our letter of our
10 review, and if it's deemed incomplete at this time,
11 here's all the sections in our rules for the form
12 and contents that you're missing or that we need
13 additional information or some clarification on. So
14 it's pretty specific. We're not just saying, oh,
15 this is incomplete. Do it again. We're saying
16 these are the specific pieces of information that
17 are either inadequate or missing that is required
18 before we can deem it complete.

19 If we get to that point, usually that's
20 when we get a call from the consultant saying, hey,
21 got the deemed incomplete. We know that this is
22 maybe, you know, not up to speed. What do you think
23 we should do? So staff can usually interact with
24 petitioner and consultants to help them, steer them
25 in the right direction.

1 Okay. We'll go to the next.

2 I spoke about this before. Pre-hearing
3 conference. This is extremely helpful. This is
4 really the opportunity for all the parties to get
5 together and try to figure out, okay, how long do we
6 think this petition process is going to take? How
7 many hearing days are going to be necessary? And
8 the petitioner says, okay, I'm going to -- I'm going
9 to call 20 expert witnesses. Okay. Well, how long
10 -- how long do they think they're going to need to
11 present their case? How many days?

12 Office of Planning, same thing. County,
13 same thing. And if there's intervening parties at
14 this point, you know, they're also going to be
15 involved in the discussion. Then the executive
16 officer sets out the timeframe for when -- when do
17 you have to -- when do the parties have to file
18 their exhibit lists and their witness list, as well
19 as their -- any other documents that are necessary?
20 This is the opportunity where we tee up everything
21 so that we know we're going to be good to go on this
22 date to start our hearings. This is how many
23 hearing days we're going to have to ask you guys to
24 set aside and when looking out into the future.

25 Okay. Next slide.

1 Okay. Staff. Staff then prepares a
2 report at the start of each docket. Okay, what we
3 do is based on all the pleadings that we get, we
4 basically run through everything and we summarize
5 for you the high points of the petition, as well as
6 the positions that are expressed by the state
7 through the Office of Planning, as well as the
8 county through the County Planning Department. Part
9 of what they have to provide to us are position
10 statements. And those are usually initial positions.
11 They support, they don't support the petition. They
12 have issues that they bring up. So we lay that all
13 out for you guys in a hopefully easy to read format
14 with links back to the specific documents, the
15 pleadings that are filed.

16 This slide indicates the staff, we don't
17 make the decisions. We're not going to tell you to
18 approve this petition, don't approve this petition.
19 Our role is to give you as much of the information
20 as we can, and also point out any inconsistencies
21 that might be there. Evidence that is not --
22 doesn't appear to be on the record that is critical.
23 You know, you folks have that decision-making
24 authority. You guys make the final decision.

25 Our staff reports hopefully are

1 comprehensive enough to help you guys out. I would
2 recommend don't just rely on our staff report. It's
3 a good summary and it identifies issues but you
4 really do need to read the record. Read what the
5 petitioner puts in. Read what OPSD puts in and the
6 counties as well.

7 **MR. ORODENKER:** I wanted to talk to this
8 slide a little bit.

9 Staff is a little bit different for the
10 Planning -- for the Land Use Commission than some of
11 the other boards and commissions. We do analysis.
12 We're analytical. We try -- our role is to make
13 sure that things are done according to the rules and
14 to statutes. And to keep the Commission apprised of
15 what is happening. Once again, you know, we do not
16 in any way make decisions. That's up to the
17 Commission. We will give you -- our role is to give
18 you all the information that you need and to work
19 with the parties to make sure that their petitions
20 will move through in an easy manner.

21 We do not do policy. I mean, a lot of the
22 Commissions in the state will direct their executive
23 officer or executive director -- they'll make the
24 policy and then tell the executive officer or the
25 executive director to go and implement it. We do

1 not do that. You guys make the policy. You guys
2 make the decisions. We are instrumental in making
3 sure that you don't make mistakes, legal mistakes.
4 But we do not in any way get involved in the final
5 decision-making or direct policy.

6 **MR. DERRICKSON:** Yeah. And I will say
7 that, you know, there are times within our staff
8 reports that we do make recommendations. And we try
9 to be as balanced as we can. We are professionals.
10 Okay? We have the background with the legal
11 training as well as the subject matter background to
12 provide you with recommendations. But usually,
13 we'll recommend if you're going to approve it,
14 here's some specific things that you need to make
15 sure is on the record to support the decision. If
16 you're thinking of not approving it, you have to
17 make sure that you put on the record the reasons why
18 you're not approving it.

19 Yep. Next slide.

20 **CHAIRMAN GIOVANNI:** One second.

21 Commissioner Yamane, do you have a
22 question?

23 **COMMISSIONER YAMANE:** Just a question.

24 When you say the Commission makes the
25 decision, what vote count is that decision based on?

1 **MR. ORODENKER:** It depends on the
2 petition. Okay? Technically, everything but
3 contested case hearings, and I think IAL need six
4 Commissioners, six affirmative votes.

5 No, I said that backwards. Contested --
6 DBAs and IAL need six affirmative votes. Everything
7 else technically can be done with five affirmative
8 votes. We are uncomfortable with a motion with
9 regard to a district boundary amendment only being
10 approved with five votes. I mean, I think
11 technically you can make the legal argument that you
12 only need five but since it revolves around a DBA,
13 our experience with the Supreme Court is that even
14 just simply the adoption of an order needs six votes
15 if it concerns a DBA. So for going on 10 years now
16 we've been overly cautious and suggesting to the
17 Commission that if it in any way involves a district
18 boundary amendment that you need six affirmative
19 votes.

20 **CHAIRMAN GIOVANNI:** Commissioner Lee?

21 **COMMISSIONER LEE:** Yeah. Isn't that part
22 of the reason why the past couple of legislative
23 sessions there have been bills to specifically say
24 that five votes would be enough?

25 **MR. ORODENKER:** We've never had a problem

1 with the six vote/five vote thing. I mean, that has
2 actually come from a few parties who think that
3 they're trying to streamline the procedure. But in
4 actuality, 90 percent of the time we easily get six
5 votes. I mean, there's only been a couple of cases
6 and it is before my time where we've had a split
7 decision by four, so.

8 **COMMISSIONER LEE:** Yeah. Sometimes that's
9 quorum issues, too; right? So I mean, having enough
10 -- let's say there's only six or seven people then.
11 That's where that might come into a problem.

12 **MR. ORODENKER:** Yeah. Theoretically,
13 that's what happens. But once again, if you'll
14 notice with (inaudible) we try and avoid that
15 situation, so.

16 **CHAIRMAN GIOVANNI:** Commissioner Carr
17 Smith?

18 **COMMISSIONER CARR SMITH:** Is it true that
19 you testified against that? Against changing it
20 from six to five?

21 **MR. ORODENKER:** Yes.

22 **COMMISSIONER CARR SMITH:** On behalf of the
23 Commission?

24 **MR. ORODENKER:** Yeah. And there were two
25 reasons for that. That wasn't the only provision in

1 that bill that we were testifying against.

2 But second of all, my testimony in
3 opposition to that was just what I just said now.
4 It's never happened. And I don't know what you're
5 trying to accomplish with this. Nobody -- with
6 regard to -- I think it was Grassroots Institute
7 that was behind that bill. They couldn't give me an
8 answer. And that's why it died. I mean, we weren't
9 necessarily opposed to moving it down to five and I
10 told the legislators that. It's just that I didn't
11 see the reason. It was the rest of the bill they
12 had opposition to.

13 **COMMISSIONER CARR SMITH:** So the
14 legislature is the one that has to -- if that were
15 to be changed, it's them. That's not a policy of
16 the Commission?

17 **MR. ORODENKER:** No. That's not a policy
18 of the Commission. It's not even something that we
19 could change by rule making. It's in Chapter 205
20 and the legislature would have to --

21 **MR. DERRICKSON:** And there's also a
22 provision in the constitution.

23 **MR. ORODENKER:** Yeah.

24 **MR. DERRICKSON:** With respect to, you
25 know, changing important agricultural lands. You

1 need six votes.

2 **MR. ORODENKER:** Yeah.

3 **MR. DERRICKSON:** So that's something that
4 even the legislature can't change through a bill.
5 It's a constitutional change.

6 **CHAIRMAN GIOVANNI:** Yeah.

7 Commissioner Lee?

8 **COMMISSIONER LEE:** Yeah. I think that's
9 true with IAL but for DBAs that would be the
10 legislature. But I guess I wanted to reiterate what
11 we -- previous discussions we had (inaudible) since
12 you brought up that, with regards to DBAs that the
13 staff doesn't dictate policy, I think for the newer
14 Commissioners we also want, you know, we had a
15 discussion about whether the executive director
16 should be testifying at the legislature on stuff
17 without us having input and giving direction first.
18 So I just wanted to state that for the people who
19 weren't here.

20 **CHAIRMAN GIOVANNI:** So I have a question.
21 And again, if this is not the right time and you're
22 going to deal with it later let me know.

23 So I'm going to ask it in the form of
24 another hypothetical. I'm a landowner and I have
25 agricultural land and I want to do a project. I

1 don't know if I need to do a DBA or a special
2 permit. And will the Commission help me figure that
3 out or do I have to go get a consultant and wing it?

4 **MR. DERRICKSON:** You call our office.
5 Call our office and talk to staff.

6 **MR. ORODENKER:** Yeah. We do that on a
7 regular basis. We get those calls.

8 **MR. DERRICKSON:** Every day. Almost every
9 day.

10 **MR. ORODENKER:** Yeah.

11 **CHAIRMAN GIOVANNI:** So I guess in that
12 case where we had that petition in Hilo where I
13 believe a DBA was thought to be appropriate but they
14 went for a permit, a special permit instead on the
15 advice of -- I think it's in the transcript -- on
16 advice of somebody from the Planning Department in
17 Hilo; is that right?

18 **MR. DERRICKSON:** Yeah. Not LUC staff.

19 **CHAIRMAN GIOVANNI:** It was not LUC staff
20 that made that incorrect recommendation. So were
21 you ever, I mean, do people know that they can
22 contact you and get guidance?

23 **MR. DERRICKSON:** I will say that quite
24 often we get contacted with questions that are
25 appropriate for a county planning department to

1 address because honestly, people find it very
2 difficult to get a hold of anybody at the county
3 planning departments.

4 **MR. ORODENKER:** I know what case you're
5 referring to and I know the planning director who
6 you're referring to as well. We'll talk about this
7 when we talk about SPs a little bit.

8 **CHAIRMAN GIOVANNI:** It wasn't the planning
9 director. It was a staff person.

10 **MR. ORODENKER:** Yeah. But special permits
11 are kind of the Wild Wild West. And there's a
12 difference in opinion between the way -- what is
13 appropriate for a special permit and what is not
14 between the counties and the Land Use Commission.
15 To be honest with you, there was a period of time,
16 and this has been disabused and the counties have
17 come to realize based on some court cases that they
18 were wrong. There was a belief that you could do
19 anything with a special permit that you wanted to
20 regardless of whether or not it was specifically
21 prohibited in Chapter 205. And we've had those
22 discussions with the county planning departments and
23 they have come around to realize that there actually
24 are constraints. If it's specifically prohibited,
25 you can't use a special permit to get around it.

1 You know. And so there has been an evolution of the
2 advice that the planning commissions give out with
3 regard to that.

4 But one of the other things that you have
5 to realize that happens is that, especially if
6 there's no attorney involved or a planning group
7 involved, homeowners will forum shop. They will
8 keep asking the question of different organizations
9 until they get the answer they want to hear. You
10 know? So --

11 **CHAIRMAN GIOVANNI:** So you just mentioned
12 -- I think you mentioned that the Land Use
13 Commission has its own interpretation of when it's
14 appropriate to do, or necessary to do DBA versus a
15 special permit?

16 **MR. ORODENKER:** Yeah.

17 **CHAIRMAN GIOVANNI:** Is that clarified
18 anywhere for this Commission to see?

19 **MR. ORODENKER:** Yeah. When we get to the
20 special permit section I'll talk about that a little
21 bit. But the courts have supported us on that. And
22 that if it is specifically prohibited, then you
23 can't use the special permit process to go around
24 it. There's also some case law that suggests that
25 the special permit is -- a special permit is

1 appropriate for -- for instance, you couldn't --
2 it's clear that the special permit process is
3 inappropriate for building housing. All right? And
4 the way that the court cases have come down is that
5 special permits are appropriate in situations. If
6 you look at 205 it actually lays it out pretty well
7 and that is what the courts have adhered to is that
8 special permits are appropriate for those uses that
9 are not agricultural in nature but are, what's the
10 word I'm looking for? Agricultural district.

11 If it's an urban use, and this is where we
12 got tangled up with that church that was trying to
13 use it, get a special permit for their church, if
14 what you're proposing to do is actually an urban use
15 then you should probably do a DBA. And one of the
16 things --

17 **CHAIRMAN GIOVANNI:** (Inaudible)

18 **MR. ORODENKER:** Yeah, well, I mean,
19 because it's a gray area. I mean, and that's why we
20 say probably. And what we tell petitioners who come
21 to us is that, look, you could do this with a
22 special permit but if somebody objects and, you
23 know, gets involved or takes it to the Supreme
24 Court, you could lose. If you want to be sure, you
25 should do a DBA, or vice versa. You know, no, you

1 don't need to do a DBA, you know, even if somebody
2 challenges you on this, you know, you're fine.

3 It is -- it is one of those areas that the
4 legislature has not been willing to clarify. The
5 use of the special permit to get around the DBA is
6 where we kind of draw the line. I mean, if it's
7 clearly an urban use then it should be a special
8 permit. One of the telling factors is that is this
9 ever going to end? I mean, if you're talking about
10 --

11 **CHAIRMAN GIOVANNI:** Like a landfill?

12 **MR. ORODENKER:** Like a landfill. I mean,
13 if there's no drop dead date on the landfill then it
14 probably should be a DBA.

15 **CHAIRMAN GIOVANNI:** I think we're probably
16 again.

17 **MR. ORODENKER:** Yeah, well, you know, I
18 mean -- and the reason that I say that is because --

19 **CHAIRMAN GIOVANNI:** Well, I mean, the word
20 "probably" means we have discretion. But do we have
21 discretion is my question.

22 **MR. ORODENKER:** Yes.

23 **CHAIRMAN GIOVANNI:** Or is it --

24 **MR. ORODENKER:** Yes. Yes. You have
25 discretion.

1 **CHAIRMAN GIOVANNI:** So in other words,
2 what you're telling this Commission is --

3 **MR. ORODENKER:** Yeah.

4 **CHAIRMAN GIOVANNI:** -- that when an owner
5 wants to do, you know, agricultural things on its
6 agricultural land they have a choice. They can go
7 as a special permit or they can go DBA.

8 **MR. ORODENKER:** Right.

9 **CHAIRMAN GIOVANNI:** They can choose on
10 their own which way they want to go. And then we
11 can, in our own discretion, accept it or not.

12 **MR. ORODENKER:** Correct. Correct.

13 I mean, when I say, you know, what is
14 appropriate, we have to advise a lot of petitioners
15 as Scott has pointed out. That's what we spend most
16 of our days doing. And we also have to advise the
17 planning commissions. So they will call us and ask
18 us, you know, is this okay for a special permit or
19 should we tell them that they've got to do a DBA?
20 Because with a special permit, the first place they
21 go is the counties regardless of what size it is.
22 Right?

23 So, ultimately, is this Commission's
24 decision in that gray area. We will give advice to
25 petitioners and county planning departments on what

1 is appropriate based on our analysis but they can
2 disagree with us. As I've said many, many times, we
3 can't stop anybody from filing any petition. That
4 doesn't mean it's going to be successful but if they
5 file it and they want to do it, it's got to come
6 before you guys, not us. We can't reject it out of
7 hand.

8 **MR. DERRICKSON:** Yeah. And I'll just add
9 that --

10 **CHAIRMAN GIOVANNI:** Well, it sounds to me
11 like there's guidance on what might be the most
12 appropriate way to go, DBA versus special permit but
13 there aren't any hard and fast rules, you've got to
14 do it this way versus that way.

15 **MR. ORODENKER:** That's correct. That's
16 correct. I mean, the proliferation of landfills
17 under special permits is an example. I mean, there
18 was a period of time when it was deemed that
19 landfills were an exceptional -- acceptable special
20 permit application. And I would argue that, I mean,
21 you know, this is just my personal opinion. But in
22 certain circumstances an SP is appropriate for a
23 landfill if it's going to be way out in the middle
24 of nowhere and there's nothing else around it and
25 the Department of Environmental Management comes in

1 and says we're going to do this for 20 years and
2 then we're going to close it. That's okay for an
3 SP. But if it's apparent that it's going to be
4 permanent and it's relatively close like Waimanalo
5 Gulch to residential uses then it probably should be
6 a DBA. But that's for you to decide, not for us.

7 We will give our advice on what we think.
8 And a lot of times I'm asked, well, how would the
9 Commission feel about this? And I will have to say,
10 well, you know, based on the current set of
11 Commissioners this is the route you can go. You
12 know, my feeling is the route you can go or they
13 won't accept this or they will accept that. But we
14 don't make final decisions. We don't at all. I
15 mean, there have been times where somebody has come
16 in and said to us, well, we want to do an SP for
17 this, that, or the other thing on our particular
18 piece of property. How do you think the Commission
19 is going to react to that? And my response to them,
20 it's always very guarded, is that given the current
21 group of Commissioners and the way I understand
22 their policy and the direction they've been going
23 and that they'll respond in such and such a manner.
24 But that doesn't -- and I always say, but you can
25 bring it before the Commission but I'm just, you

1 know, telling you but --

2 **CHAIRMAN GIOVANNI:** Yeah. It's pretty
3 dangerous territory to speculate on how a commission
4 is going to --

5 **MR. ORODENKER:** Oh, and I understand that.
6 But I do get asked the question constantly so, you
7 know, I have to come up with a response.

8 **CHAIRMAN GIOVANNI:** The response is I
9 don't know.

10 **MR. ORODENKER:** More often than not my
11 response is I don't know.

12 **CHAIRMAN GIOVANNI:** Yeah. I don't know is
13 a good answer.

14 **MR. ORODENKER:** Yeah. I mean, with
15 something that's been made very clear, like
16 Waimanalo Gulch and, you know, an SP is probably not
17 the route to go I can answer them, yeah, the
18 Commission has said that, you know, they're
19 uncomfortable with a special permit for this. But 9
20 times out of 10 I end up saying I don't know.

21 **CHAIRMAN GIOVANNI:** Okay. We're looking
22 at noon.

23 You got a breaking point here imminently
24 or should we take a break now?

25 I mean, if you've got one more slide we'll

1 watch it in this section.

2 **MR. DERRICKSON:** No, there's more than one
3 slide.

4 **CHAIRMAN GIOVANNI:** So we'll take a break.
5 So how much time should we take? Maybe an
6 hour?

7 Okay. We'll reconvene at one o'clock.
8 We're recessed.

9 **(Recess taken from 12:03 p.m. to 1:07**
10 **p.m.)**

11 **CHAIRMAN GIOVANNI:** We're back on. 1:07,
12 we're back in session.

13 So let me just ask that question up front.
14 I've got a couple things before we dive into the
15 slides.

16 If we had asked for lunch to be served
17 today at the last meeting could it have been or is
18 this not the type of thing that works?

19 **MR. ORODENKER:** Yeah. Well, yeah. I
20 mean, technically.

21 **CHAIRMAN GIOVANNI:** That's my question.
22 It's a remote location.

23 **MR. ORODENKER:** Yeah.

24 **CHAIRMAN GIOVANNI:** It's remote for us.

25 **MR. DERRICKSON:** You know what, Chair? I

1 think the chair has the prerogative to dictate.

2 **MR. ORODENKER:** Well, we've come under
3 some scrutiny by RISO (phonetic) and being affluent
4 on some of this stuff because technically, I mean,
5 when we're on a neighbor island, technically you're
6 supposed to -- that's what your per diem is for;
7 right?

8 **CHAIRMAN GIOVANNI:** This is a neighbor
9 island to me.

10 **MR. ORODENKER:** Yeah. So it's your per
11 diem that you're supposed to rely on. So we try not
12 to do that too often. And since, you know,
13 everything was right across the street in this case
14 we felt like we might have had a difficult time
15 justifying bringing lunch in.

16 **CHAIRMAN GIOVANNI:** Well, the contrary
17 argument though is I could have taken a half hour
18 for lunch instead of an hour.

19 **MR. ORODENKER:** I understand. But our
20 accountants are not so --

21 **UNIDENTIFIABLE SPEAKER:** Pass the menu
22 around and just order and we pay for it out of --

23 **MR. ORODENKER:** Yeah. We can do that next
24 time, too.

25 **CHAIRMAN GIOVANNI:** Okay.

1 **MR. ORODENKER:** No, we can get a little
2 bit more creative with it but we have to be careful
3 with our --

4 **UNIDENTIFIABLE SPEAKER:** Someone with a
5 carving station and --

6 **MR. ORODENKER:** We can bring in the sushi
7 guy, whatever, whatever.

8 **CHAIRMAN GIOVANNI:** Yeah. Okay. So
9 fellow Commissioners, I wanted to just do an FYI,
10 again, in the spirit of keeping everybody informed.

11 So at our last meeting we had what I
12 considered personally, and I've heard from several
13 of you a very worthwhile presentation from CWRM
14 about the water issues. And subsequently, I was
15 contacted by OPSD and they offered to make a similar
16 presentation on their activities and the work scope.
17 And I have accepted that and asked them to
18 coordinate with Dan and his staff to get it on our
19 schedule. So that's just an FYI.

20 **MR. ORODENKER:** Yeah. Our plan is to have
21 them come in as soon as possible but the only firm
22 date that I could give them was October because
23 everything else --

24 **CHAIRMAN GIOVANNI:** Yeah. Yeah.

25 **UNIDENTIFIABLE SPEAKER:** Thank you.

1 **CHAIRMAN GIOVANNI:** You're welcome.

2 Dan?

3 **MR. ORODENKER:** Yeah.

4 **CHAIRMAN GIOVANNI:** Go.

5 **MR. ORODENKER:** Okay. Before we go on,
6 does somebody else have a -- okay.

7 I just wanted to back up to something that
8 I think I kind of misstated a little bit. When I
9 said that I get questions from petitioners on how
10 the Commission would feel, the only time I give them
11 an answer is when they ask me something like, well,
12 do you think the Commission would be okay if we only
13 gave them part of this and then the rest of it
14 later? Or how about if we just do our environmental
15 analysis after they approve the petition. Those are
16 the types of things where I say, no. You know, the
17 Commission is not going to go for that. If there's
18 anything else, like what do you think the Commission
19 -- how do you think the Commission is going to
20 approve this petition, or do you think they'll, you
21 know, be okay with this motion? I never answer
22 those. Never answer those. So I just wanted to be
23 clear.

24 The only time I say the Commission, you
25 know, venture to say what the Commission might think

1 is if it's something so obvious that it's like, come
2 on, guys. You know, use your heads. Anyway. I
3 just wanted to correct that.

4 We're going to try and burn through these
5 a little bit more quickly because we're a little
6 behind schedule. But go ahead, Scott.

7 **MR. DERRICKSON:** Okay. Contested Case
8 Hearing Procedure.

9 What I talked about before is mostly what
10 the staff handles coming up to the actual hearings.
11 Now this is what happens when you guys sit in the
12 hearing.

13 First what happens is we hit public
14 testimony. And now the laws change slightly. So now
15 we not only have public testimony in the front end,
16 we also have public testimony in the back end
17 afterwards.

18 After public testimony, then you know, DBA
19 petition. Each of the parties asks for the
20 Commission to accept their exhibits that they've
21 already put in the record. That's exhibits, their
22 pleadings, and any testimony from their experts.

23 Then we start a process of questioning by
24 the parties. What we have is the case presentation.
25 The petitioner goes first, brings up their experts.

1 Each of the parties gets to cross-examine. The
2 Commissioners get to cross-examine. Then the
3 counties present their position and any witnesses
4 that they might have. Same ability of the parties
5 to cross-examine. Commissioners to cross-examine.

6 Then finally, the Office of Planning and
7 Sustainable Development brings the state's case.
8 Any time during that proceeding, if the Commission
9 has a question that's legal in nature, they may go
10 into executive session to consult with their
11 attorney. That does happen from time to time.

12 After we get through each of the parties'
13 presentations, the petitioner gets to kind of come
14 back and say, okay, here's our case. This is
15 everything we know. That's the final oral arguments
16 by each of the parties. Once all the evidence is
17 there, the chair closes the case, closes the
18 evidentiary portion of the hearing. And then he
19 gives directions to each of the parties. The
20 petitioner is required under our statute and our
21 rules to provide us with a proposed decision and
22 order, and each of the parties as well. Then, each
23 of the parties gets to look at that and they can
24 file any exceptions they might have, any concerns
25 they might have, or any corrections they think

1 should be made. Then the petitioner themselves then
2 gets to actually rebut any of those if they feel
3 it's necessary.

4 All of that, at the end of the hearing,
5 the chair provides a schedule. You know, two weeks
6 for the petitioner to give us the proposed decision
7 and order. Another two weeks for all the parties to
8 provide any concerns or issues. And then another,
9 say another two weeks for the petitioner to rebut
10 and do any kind of final argument.

11 The next one. Post-Hearing. The staff --
12 what the staff then does is it takes the proposed
13 decision and order. It takes any comments from each
14 -- any of the parties, which might include rewording
15 of conditions or new conditions or added language to
16 either conclusions of law or findings of fact. We
17 present -- we put together a staff report that
18 compares and contrasts all that stuff. And our
19 analysis and provides that to you folks ahead of a
20 decision hearing where you guys come and you guys
21 make a decision for, against, and specifically, the
22 kinds of conditions that you want.

23 Once you've done that, you make your
24 decision. Well, let's see. Go on to the next slide.
25 Yeah.

1 When you guys enter into your decision-
2 making, the chair is going to ask whether or not you
3 guys have all had the opportunity to review the
4 entire record, the transcripts, and if you are ready
5 to deliberate.

6 The decisions that you make and the
7 conditions have got to be based on evidence in the
8 record.

9 The chair calls for the question.
10 Somebody makes a motion. Then there's a second.
11 And then there's discussion by the Commissioners.
12 This is the time when there's possible amendments
13 proposed. There's also opportunities to withdraw
14 the motion or amend the motion. This is important.
15 This is an important part of the process. It's
16 important that the Commissioners at this point in
17 time, if they're going to vote in favor of something
18 that they state why. Put it on the record
19 specifically. And if there are specific conditions
20 you are pushing for, get them on the record.

21 **CHAIRMAN GIOVANNI:** Hold up a second
22 there, Scott.

23 Commissioner Yamane?

24 **COMMISSIONER YAMANE:** So a question,
25 Scott. On the deliberation part where -- so this is

1 where we, you know, you said that if we're going to
2 approve we need to state the reasons why.

3 **MR. DERRICKSON:** Correct.

4 **COMMISSIONER YAMANE:** But if you're going
5 to deny, do you also --

6 **MR. DERRICKSON:** Yes.

7 **COMMISSIONER YAMANE:** -- have to state --

8 **MR. DERRICKSON:** Yes.

9 **COMMISSIONER YAMANE:** So like you know how
10 normally on our status reports we kind of -- it's
11 just the person that makes the motion and seconds
12 talks about why? In this case, everybody goes on the
13 line and says I'm voting to approve and this is why.
14 It's not the chair goes down the line to ask all the
15 Commissioners?

16 **MR. DERRICKSON:** Well --

17 **COMMISSIONER YAMANE:** How does that work?

18 **MR. DERRICKSON:** -- yeah. Usually --
19 usually, whoever makes the motion and then there's a
20 second.

21 **COMMISSIONER YAMANE:** Right.

22 **MR. DERRICKSON:** And then you open for
23 discussion. That's usually when whoever made the
24 motion says, okay, this is why I made the motion.
25 These are the reasons why I'm supporting or saying

1 to deny. And usually then whoever seconded it does
2 the same thing. The other Commissioners after that
3 can if they want add to that record. And I think
4 that's useful. If you guys are going to deny
5 something then it's also extremely important to put
6 on the record the specific reasons why you are
7 denying. And it may be that you don't believe the
8 petitioner has provided good cause. And if you want
9 to elaborate on that, that's fine. Part of the
10 reason behind that is because in any petition, it's
11 really geared up to -- for the petitioner to be
12 seeking approval. So they're trying to put
13 everything on the record leading towards approval.
14 They're not putting stuff on the record to try to
15 get you to deny it. So if you are going to deny it,
16 you are going to have to identify why. Why their --
17 maybe they didn't provide you with evidence that
18 swayed you. There wasn't a preponderance of
19 evidence. There wasn't good cause. That kind of
20 information. Because otherwise, staff then has to
21 write up say a denial and it's hard for us to find
22 why you guys are denying it.

23 **CHAIRMAN GIOVANNI:** So a couple points.
24 I'll start with this one. And I echo Scott's
25 position that it's important for Commissioners to

1 elaborate on their reasons why in part because you
2 should assume that, especially if you deny, it might
3 be appealed. And the appellate organizations,
4 courts, whatever, they're looking at those reasons
5 closely. And if you're silent on it, it's not
6 helpful. So I would agree that it's helpful to
7 state the reasons why you vote one way or another.

8 The second thing, if you go back one
9 slide. One more, maybe. Yes.

10 So I have a question and a comment.

11 So I have found that testimony following
12 the petitioner by the state and by the county is
13 often very useful in moving the petitioner's
14 position to encourage them on one condition or
15 another. And you'll see that when the petitioner
16 comes back at the end and says I have agreed to this
17 condition by the state or by the county. I've found
18 that to be very useful. So that's why this
19 narrative process works.

20 My specific question, Scott, is an
21 evidence question. You stated that up here that
22 exhibits, pleadings, and testimony, that we actually
23 have -- the chair actually has to admit them to the
24 record.

25 **MR. DERRICKSON:** That's correct.

1 **CHAIRMAN GIOVANNI:** And those are the
2 exhibits, pleadings, and testimony that's been
3 provided in advance for the most part?

4 **MR. DERRICKSON:** For the most part, yes.

5 **CHAIRMAN GIOVANNI:** But for evidence like
6 an exhibit that a party in the hearing wants to now
7 include on the record during the midst of a hearing,
8 how does that work? Is that up to me, the chair, to
9 accept or not? Do we have to vote on it? Or what?

10 **MR. DERRICKSON:** Yeah. Generally, it's up
11 to the chair to allow it or not. And say a party
12 wants to put a piece of evidence in. The other
13 parties have the opportunity to object to it or to
14 ask, you know, for -- I can't remember the term -- a
15 show of proof. Basically, to show why you're
16 submitting evidence after the time period where
17 you're supposed to have put it in. And what's the
18 basis for it? But it's the chair who makes the
19 determination of whether to allow it or not. And
20 oftentimes, the chair will, you know, will ask the
21 other Commissioners, do you have any problem with
22 this? Is everyone okay with this? And oftentimes,
23 the chair has also asked the parties do they have
24 any objections as well. So.

25 **MR. ORODENKER:** To further answer that

1 question, there's an obligation on the part of the
2 chair to ask the other parties what they have.

3 The term that Scott was searching for was
4 offer of proof. And that occurs when one of the
5 other parties objects. And it's sort of like, you
6 know, in the old Perry Mason days where, you know,
7 there's an objection and then the judge asks them,
8 you know, well, you know, what's the basis of your
9 objection? So you're asking the parties to prove up
10 why this out of the ordinary thing that they're
11 asking you to do is required. But we are very
12 lenient with regard to evidence, introducing
13 evidence. We have been in the past.

14 **CHAIRMAN GIOVANNI:** So I recall, and I
15 think it was the first time I had the gavel, I was
16 vice chair and I was filling in for Jonathan. And
17 somebody wanted to submit evidence on the fly. And
18 it seemed reasonable to me. And he gave his reasons
19 why. And I accepted it. And then I had two
20 Commissioners object. How should -- how do we --
21 how do I -- can I just rule on their objection
22 independently or how does that work?

23 **MR. ORODENKER:** Well, according to the
24 rules, the introduction of evidence and its
25 acceptability is at the discretion of the chair. So

1 if --

2 **CHAIRMAN GIOVANNI:** So their objection
3 would be noted in the record?

4 **MR. ORODENKER:** Yes.

5 **CHAIRMAN GIOVANNI:** So be it?

6 **MR. ORODENKER:** I mean, if you disagree
7 with them, if the chair disagrees with them that's
8 the way it would go now.

9 **CHAIRMAN GIOVANNI:** Okay.

10 **MR. ORODENKER:** I wanted to add to the
11 slide that we were on with regard to decision-making
12 is that there is a third thing that we don't mention
13 in here and that is that if the Commissioners feel
14 that not enough evidence has been presented to
15 render a decision they can request a continuance,
16 you know, until those questions be answered. We have
17 had situations where the Commissioners have said,
18 look, we're not going to rule on this until you
19 answer this, this, and this, and asks the executive
20 officer to put those things in writing and send them
21 to all of the parties for them to answer in writing
22 before the Commission renders a decision.

23 **CHAIRMAN GIOVANNI:** So, for example, if
24 the Commission feels that Ka Pa'akai is inadequate
25 we could either deny on that basis or we could give

1 them time to correct it?

2 **CHAIRMAN GIOVANNI:** Exactly.

3 **COMMISSIONER YAMANE:** I have a follow up,
4 Mr. Chair.

5 **CHAIRMAN GIOVANNI:** Commissioner Yamane.

6 **COMMISSIONER YAMANE:** So just trying to
7 understand the process.

8 Since we need to deliberate in public and
9 no more than two Commissioners can talk story so to
10 speak, we're not knowing how anybody's going to vote
11 until we deliberate. How is it, do you add
12 conditions? Let's say since you need six votes for
13 approval, if four people deny then it doesn't pass
14 unless someone changes his mind. How does that
15 process work where, okay, what conditions do you
16 need to change your mind I guess? Or has that
17 happened?

18 **MR. ORODENKER:** Well, it has happened.
19 And what happens is that a commissioner will make a
20 motion and then the other Commissioners will express
21 their concerns with that motion. And usually in the
22 course of that discussion one of the Commissioners
23 will, or the Commissioners who are in opposition
24 will, if it's possible, if they can come up with
25 something, suggest amendments to the motion to add

1 conditions to allow it to pass. Or they will say,
2 well, I'm just not going to vote for this motion.
3 And then the motion gets voted down and then
4 somebody calls for the question again, another
5 motion is made. And there have been times, not
6 recently but in the past, where we've gone through
7 three or four sets of motions before we finally came
8 up with something that everybody was okay with.

9 **CHAIRMAN GIOVANNI:** FYI, Waimanalo Gulch
10 went through --

11 **MR. ORODENKER:** Yeah.

12 **CHAIRMAN GIOVANNI:** -- went through I
13 think four different votes. It was denied three
14 times.

15 **MR. ORODENKER:** Exactly.

16 **CHAIRMAN GIOVANNI:** Within an hour.

17 **MR. ORODENKER:** Yeah. Yeah.

18 **CHAIRMAN GIOVANNI:** Yes, please.

19 **UNIDENTIFIABLE SPEAKER:** You know, along
20 those lines, in that final line for that timeframe,
21 okay, like a scenario, a commissioner comes up and
22 in order to maybe finalize one more vote amends a
23 condition. Does he go back to square one and
24 petitioner gets to input on the Commissioner, state,
25 county?

1 **MR. ORODENKER:** No. No. Once we enter
2 deliberations --

3 **CHAIRMAN GIOVANNI:** It's only among
4 Commissioners.

5 **MR. ORODENKER:** Yeah. I mean, we've had
6 situations where a petitioner has asked the chair to
7 comment and expressed their concerns. I mean, we've
8 had a couple of times where petitioners have said,
9 well, if you put that condition in we're not going
10 to do the project. You know. And then we have to
11 deal with it.

12 Under those circumstances, usually what
13 happens is that the Commissioner sends out the
14 parties, meaning OPSD, the county, and the
15 petitioner and any interveners to try and work it
16 out, you know, so that we can come up with a
17 reasonable solution.

18 **CHAIRMAN GIOVANNI:** So another way of
19 threading that needle that has worked, that I've
20 seen it work, is before we get to deliberations, at
21 the point where the petitioner is coming back for
22 its final testimony, a commissioner can ask
23 questions of them and it could ask a question like
24 would you be agreeable to a certain condition as
25 follows? And they may say yes, no, or can I have

1 five minutes in recess to talk, think about it? And
2 usually that comes back with a positive result. So
3 then the motion that would go forward likely after
4 that would be that condition would be included in
5 the motion. Does that make sense?

6 **MR. DERRICKSON:** I just want to point out,
7 too, that coming into the decision, it's not staff
8 coming up with conditions based on the record. The
9 majority of the conditions for an approval comes out
10 of the proposed decision and order that the
11 petitioner files with us. And most often, smart
12 petitioners that want to get their projects approved
13 have sat down with Office of Planning and
14 Sustainable Development, sat down with the county
15 guys, and hammered out the language.

16 **CHAIRMAN GIOVANNI:** Stipulated conditions.

17 **MR. DERRICKSON:** Yeah. Oftentimes, more
18 often than not, we're seeing stipulated conditions
19 and findings of fact and conclusions of law. So
20 they're basically, and many times what we're getting
21 is kind of a final that's gone through the parties
22 okay. And it's important enough for you guys to
23 know that just because the parties stipulate to a
24 decision and order that doesn't mean that you guys
25 have to accept it. You guys fully have all the

1 authority to take a stipulated agreement and make
2 changes to the language, to add, to subtract, to do
3 whatever you decide is in the best interest.

4 **CHAIRMAN GIOVANNI:** Commissioner Carr
5 Smith?

6 **COMMISSIONER CARR SMITH:** And there's a
7 timeframe on that; right? Both for say the
8 petitioner provides suggested DNO and maybe the
9 county doesn't agree, do they have to respond within
10 a certain period of time? And do we as well?

11 **MR. ORODENKER:** I usually set a timeframe
12 for that. Usually what happens is we will request
13 the proposed decision and order within about two
14 weeks unless they ask for more time. And then we
15 give the other parties a week to two weeks to
16 respond and file their petition statements with
17 regard to that decision and order. So I guess in
18 effect what happens is that unless it's a project
19 with a time limit on it or we're butting up against
20 365 days, there's usually plenty of time for the
21 parties to do that. And we won't hold -- and this is
22 where it becomes difficult for the Commissioners
23 because we don't meet every week. Sometimes it'll be
24 a month or a month and a half before we get back to
25 adopt, to the decision and order and making a final

1 decision because we have other stuff that goes on in
2 the --

3 **MR. DERRICKSON:** But you will have a staff
4 report prior to that adoption which will summarize
5 all the different positions if they are different,
6 or if there's a stipulation, and any issues that
7 staff has with the language or the thoroughness of
8 the decision and order. So we will suggest language
9 changes for you to consider when you make your
10 deliberations.

11 **CHAIRMAN GIOVANNI:** Well, there's two sets
12 of deliberations. One is where we deliberate and we
13 move to move forward or denial. Let's say we move
14 forward to approve. Right?

15 **MR. DERRICKSON:** Yes.

16 **CHAIRMAN GIOVANNI:** And then we get the
17 form of the order and we have to adopt the form of
18 the order and that's another opportunity to
19 wordsmith.

20 **MR. DERRICKSON:** It is, technically. But
21 generally, you don't tinker with it at that point
22 because usually at that point it has gone through
23 all the parties. The petitioner and the parties.
24 And you guys have made a decision. You've provided
25 the guidance to the staff on any changes to those

1 proposed DNO at issue. So what we're giving you
2 guys to adopt the form of the order is -- should be
3 pretty much tailored to what you guys --

4 **CHAIRMAN GIOVANNI:** Yeah. I'm worried
5 about the pretty much part because theoretically
6 it's not perfect. And I just want Commissioners to
7 know that they have another opportunity before adopt
8 to review the draft of the order. And if they see
9 something that is problematic or different than what
10 was in the record they can work with the staff to
11 get that corrected.

12 **MR. ORODENKER:** Yeah. That's correct.
13 It's not uncommon because it's happened in the past
14 a few times for us to draft a decision and order,
15 send it out to the Commissioners for review, and the
16 Commissioner who made the motion or the Commissioner
17 who suggested a condition said, no, no, no, that's
18 not what I said.

19 **CHAIRMAN GIOVANNI:** That's what I mean.

20 **MR. ORODENKER:** Yeah. So, and you can do
21 that before the hearing. Before we actually present
22 it and contact staff and say, look, I didn't say X,
23 Y, and Z. I said A, B, and C. And then we'll make
24 the change, assuming that it's consistent with the
25 record. Remember, we have to go back and look at

1 the record and see if that is what you actually
2 said.

3 **CHAIRMAN GIOVANNI:** Yeah. I mean, that's
4 a great way of describing of it. So if one of the
5 Commissioners during the deliberation period
6 articulated a condition and that became part of the
7 motion that was adopted, it's up to staff to rely on
8 that wording and then transform that into a
9 condition that will be part of the final order. You
10 draft it but the Commissioners will have an
11 opportunity to review your draft. And if they agree
12 with it, great. If they don't, they could call you
13 and work out what's different.

14 **MR. DERRICKSON:** Yeah. The only caveat I
15 have is we have to make sure that if there's a
16 change that we're making, it has to be based on
17 something in the record. So go back to the
18 transcript. Sometimes go back to evidentiary
19 filings just to make sure that we're pinning it to
20 that.

21 Yeah. I think, okay.

22 This is just so you know, the Commission
23 has kind of a set of standard conditions. There's
24 about six of them. They're based on statutory
25 requirements. Things like the decision and order

1 has got to be filed with the Bureau of (inaudible)
2 in X number of days. So those are kind of the six
3 primary basic conditions that are in just every
4 petition decision and order. Then we get case
5 specific conditions. You know, and that's dependent
6 on all kinds of things like the stormwater in one
7 area, the conditions are going to be different. The
8 transportation requirements are going to be
9 different.

10 Then there's atypical. And these are the
11 ones that are very case specific. And the one that
12 we have up here came from windward side of Oahu,
13 Hawaiian Memorial Park damsel flies. Endangered
14 species. Very specific stormwater condition. Well,
15 you can see. You're not going to see this in every
16 petition. You're not going to see it in any
17 petition except for this one, really.

18 Next slide.

19 Okay. Do you want to talk to this one?
20 Okay, go ahead.

21 **MR. ORODENKER:** This is the other way.
22 The reason this slide, it seems like it's out of
23 order but it's really not. This is the other way
24 that boundaries can be - - theoretically can be
25 moved. Under the original statutes there was

1 supposed to be a five-year boundary review with
2 recommendations. The LUC was originally tasked with
3 doing that and they did it in '64 and '69 and '74.
4 In 1988, that responsibility was transferred to the
5 Office of Planning and Sustainable Development. The
6 last time one was completed was in 1990. Scott was
7 actually working at OPSD and was involved in that.

8 The difficulty that OPSD has with doing
9 those boundary reviews is twofold. Number one is
10 the legislature won't appropriate any money for them
11 to do it. And it's a big undertaking because you
12 have to review the boundaries in the entire state
13 and then analyze whether or not they still make
14 sense.

15 The other problem they have is the town
16 decision which required that all parties need to be
17 noticed and given an opportunity to be heard if
18 there's going to be a boundary amendment change. So
19 unless it's state land we can't unilaterally change
20 boundaries. We can't just say, okay, we're going to
21 move this. We actually have to hold a hearing on it
22 and bring in the landowners and everybody else,
23 which becomes cumbersome. So the only real changes
24 that have been made on boundaries since 1990 have
25 been those that involve state lands.

1 I'll move on to the very special Special
2 Permits.

3 Okay. So Special Permits are a different
4 type of proceeding. And I mentioned this before for
5 activity that is not specifically allowed in a
6 district but is consistent with the designation.
7 It's usually on agricultural land, conservation
8 permits, permits for conservation land are governed
9 by the Board of Land and Natural Resources.

10 The difference, one of the big differences
11 is, and this is for special permits that are over 15
12 acres in size. Because if it's under 15 acres, the
13 county handles it 100 percent.

14 The proceeding is initiated and heard at
15 the county level. And that's where the, for all
16 intents and purposes, the contested case hearing
17 takes place. And then a hearing is held by the Land
18 Use Commission to either confirm, deny, or modify
19 the county decision based on the record that was
20 made at the county level.

21 If somebody comes in -- say the public
22 comes in and I think I mentioned this as an example
23 once before already and says, well, but there's a
24 trail through there that wasn't brought up at the
25 county level. We can't fix it at our level. We

1 have to send it back to the county for further
2 proceedings where they will hear the evidence on
3 whether or not that trail, for instance, is impacted
4 by the special permit request.

5 Recent changes -- the other area where we
6 have to do special permits is recent changes to
7 Chapter 205 require a special permit when solar
8 panels are to be placed on class B or C lands
9 regardless of the acreage involved. So that was a
10 recently enacted law.

11 The other thing about special permits is
12 they usually have a termination date. I think I
13 mentioned this before. They're not permanent.
14 That's one of the characteristics of a special
15 permit.

16 Okay. And then an overview of the process
17 --

18 **CHAIRMAN GIOVANNI:** Wait a minute. Go
19 back.

20 I want to share with the Commission a very
21 important thing that happened relevant to Waimanalo
22 Gulch since that's coming before us again in a few
23 months, or weeks.

24 So the key part of the decision and order
25 that was done by the Land Use Commission was that

1 Waimanalo Gulch had to be closed in 2028. And at
2 the time of our hearing the city and county of
3 Honolulu wanted to update the record to show that
4 no, it won't be filled up and exhausted or
5 terminated till 2035. But the record that had been
6 presented to the county, the city and county of
7 Honolulu presented to the Planning Department,
8 Planning Commission of the city and county of
9 Honolulu that it would be filled by 2028. And
10 that's the record we had to rule on. So that's
11 where that number came from.

12 **MR. ORODENKER:** I could -- there's another
13 story about Waimanalo Gulch that's kind of relevant
14 to this whole discussion. And this one actually
15 went up to the Supreme Court.

16 Back when Reuben Wong was on the
17 Commission, so that's going back to the early 2000s,
18 I think, Waimanalo Gulch came in front of us for an
19 extension for the landfill site. And there was --
20 they were saying at the time that it was going to
21 take seven years to move the site and so many years
22 to find a new place. And Ruben said, well, I want
23 to keep your feet to the fire so I'm going to make a
24 motion that we only give you two years. And the
25 rest of the Commissioners went along with it. But

1 there was no evidence on the record to support a
2 two-year extension and the Supreme Court overturned
3 it and sent it back down to us. So when I say the
4 evidence has to be on the record, that's got to be
5 there. Otherwise --

6 **MR. DERRICKSON:** And we had to send it
7 back down to the county.

8 **MR. ORODENKER:** Yeah. And we had to send
9 it back down to the county. And so in actuality,
10 Waimanalo Gulch was working without a permit for
11 close to 10 years because of that whole process.

12 Okay. This is an overview of the process.
13 I think I've already talked through it. If it's
14 land area greater than 15 acres, of course it stays
15 with the county. Yep.

16 The thing about special permits that's
17 difficult for us is we have 45 days to make a
18 determination and to adopt an order which is very,
19 very short. So we have to work with the county on
20 when the record's been transcribed because the clock
21 starts to tick when we get the complete record.
22 Which we've taken the position that that includes
23 the adoption of the minutes for that meeting. And
24 that may sound like we're trying to drag our feet,
25 but in actuality, the parties cannot respond to the

1 Commission hearing or the filings for the Commission
2 hearing if there isn't at least 60 days in between
3 when the decision was rendered and when the 45-day
4 clock starts to click. It just -- it's not
5 possible. So just so you're aware of that.

6 Okay. Chapter 205 provides what
7 activities can be undertaken in the different
8 districts.

9 If a use is listed in Chapter 205 as an
10 allowed use on agricultural land, no LUC permits are
11 required to undertake the activity or build the
12 associated structure. So things like farm dwellings
13 are an allowed use. And so are things pertinent to
14 the farming activities such as barns and things like
15 that. But you'll note that the county building
16 permits may still be required.

17 There are 21 allowed uses set forth in
18 205-4.5 ranging from activities that are generally
19 associated with agricultural undertakings with
20 regard to infrastructure or utility needs for
21 processing facilities to plantation communities.

22 In certain cases, energy producing
23 facilities are also allowed. This was the Ocean
24 Vodka processing facility where they already had the
25 SP for the facility and they wanted to add the solar

1 panels. That was allowed. 205-4.5(b). Uses not
2 expressly permitted in 205- 4.5(a) are prohibited,
3 except those allowed under 205-6 and 205-8. And
4 construction of dwellings on single-property --
5 single-family lots existing before '76 -- 1976.

6 Subdivision -- and this is a little bit of
7 a caveat. Subdivision of agricultural land with a
8 productivity rating of A or B is not allowed unless
9 the land is restricted to agricultural use.

10 This is kind of a funky thing. The
11 legislature recognized that farmers who wanted to
12 pass on their lands to their children should be
13 allowed to do so even though that would be
14 subdividing it into smaller lots and theoretically
15 could have an impact on agricultural productivity.
16 So they carved out this exception provided that the
17 land is used for agricultural purposes. 205-6 allows
18 other uses. And this is where the special permit
19 process comes in. Land uses supporting ecotourism
20 and native species preservation are allowed under
21 205-6 without a special permit.

22 For land classified as C, D, E, or U, use
23 limitations are governed by 205-5, allowing the
24 county to define uses further, including
25 agricultural tourism and accessory uses on a farm,

1 provided there is a bona fide farming operation.

2 And this has caused a lot of pain for the
3 counties because what is a bona fide farming
4 operation? I mean, there's situations where people
5 have built homes and called them farm dwellings and
6 said, well, I'm growing Koa trees. I mean, it takes
7 100 years for a Koa tree to come to be big enough to
8 harvest so, you know, what are you really doing
9 there? Anyway.

10 Once again, the not contested case
11 hearings, the decision is based on the record. The
12 Commission can ask for clarification from the
13 counties, but the Commission can ask for additional
14 information from the parties. However, this may
15 trigger a remand to the county for further
16 proceedings if the topic was not covered in the
17 original county proceedings.

18 Not a formal evidentiary proceeding.
19 There is a misunderstanding on the part of some of
20 the practitioners before the Commission. I won't
21 name names but SPs can be done basically as an oral
22 argument. In other words, this is what we presented
23 at the county. This is what happened. This is what
24 we said. This is what the SP says. And that's the
25 end of it. They are not required to put on

1 witnesses. They're not required to give us exhibits
2 or anything. Some of the practitioners before the
3 Commission didn't want to do that anyway.

4 The way the statute is worded and the
5 leeway that is given to the counties has resulted in
6 a lot of inconsistency and abuse. As I mentioned
7 before, there was a period of time where a couple of
8 the counties took the position that, well, we don't
9 care if it's a prohibited use. If we do an SP, they
10 can do it anyway. And that's caused a lot of
11 problems. It's left the counties with a lot of
12 issues that they have to clean up as the Supreme
13 Court has issued decisions on these matters. And
14 it's left some property owners with significant
15 problems because they were granted a special permit
16 by the county and now they've found out that that
17 was not okay. And they have to go through a DBA
18 process after the fact.

19 Some of the problems that we've
20 encountered was what does land that is greater than
21 15 acres mean? Sometimes the counties -- in the past
22 the counties might have interpreted that provision
23 to mean just the footprint of the building.
24 However, the Supreme Court has indicated -- or the
25 courts have indicated because it's only been

1 district court decisions that no, that includes the
2 parking lot and the driveway and the picnic areas
3 and all the rest if there are those things
4 associated with the property.

5 What is an unusual and reasonable use
6 within an agricultural district? Some of the
7 counties in the past have seen this as a catch-all
8 allowing everything, even if prohibited -- I
9 mentioned this before -- by another statutory
10 section.

11 What are allowed uses? I mean, churches?
12 We have a bunch on special permits but that wasn't
13 our decision. The counties have interpreted the
14 statute to mean a church was okay. Repair shops? I
15 mean, if you're repairing farm equipment, clearly
16 that's okay. Automobile repair shops? Borderline.
17 B&B's? That's actually up at the Supreme Court
18 right now. They're trying to make a determination
19 on whether or not B&Bs are an allowed use under a
20 special permit. Yoga studios? Wellness Centers?
21 Energy production? These are all the types of
22 things that have come in front of us at one point in
23 time or another or have come in front of the
24 counties.

25 Some of these uses are urban or industrial

1 uses. And the question then becomes is an SP the
2 right mechanism?

3 There's also a parceling issue. We've had
4 situations with rock quarries where they've come in
5 for a special permit. One piece of property. Rock
6 quarry there and then on the same TMK or the same
7 land ownership they put another one in for 15 acres.
8 And then they come in for another one and another
9 one. And before you know it you've got 40-50 acres
10 of special permits. And most of the time that
11 doesn't work out well. So we discourage parceling
12 on special permits.

13 Declaratory rulings is another type of
14 proceeding that comes before us occasionally.
15 They're not common, although we do have one coming
16 up fairly soon. And declaratory rulings are a
17 slightly different animal. This is where the
18 Commission really sits as a court of appeals for
19 lack of a better word. And we can render a decision
20 or guide parties where there is uncertainty as to
21 how to interpret something, meaning a statute or an
22 order. The LUC can issue an opinion as to what it
23 believes the answer is to terminate controversy or
24 to remove uncertainty.

25 The other time we see these is when it

1 involves one of our district boundary amendments or
2 our decisions and orders and we have a provision in
3 there and there's a disagreement usually between the
4 counties and the petitioner as to what a condition
5 means. And they'll come to us and ask for
6 clarification.

7 This is, once again, not a contested case
8 hearing. Briefs are filed by the parties and
9 there's argument. This is one of the few times
10 where OPSD and the counties are not official
11 participants in the proceedings. They're no
12 different from any other member of the public.
13 They're not parties. That being said, we usually
14 give them a seat at the table and allow them to
15 present their arguments.

16 Can you back up for second?

17 Under the rules, the LUC can affirm what
18 the petitioner is requesting, deny it, or schedule
19 it for further hearings based on the pleadings and
20 the oral arguments. It's not usually an evidentiary
21 hearing but sometimes what's submitted and the
22 arguments that are made at the public hearing on the
23 declaratory ruling are kind of convoluted and we've
24 asked petitioners to submit additional briefs and
25 schedule for further hearing so that we can get

1 clarification as to what the exact issue is and what
2 we're asking -- what they're asking us to render a
3 decision on.

4 There's a timeframe. There's technically
5 a 90- day timeframe on these but there's no penalty
6 if we don't do it within the 90 days. I mean, it's
7 not like -- there's no automatic approval provision.

8 We've never had a problem with this in
9 terms of meeting the 90 days. There have been a
10 couple of times where we've asked the parties to
11 waive the 90-day deadline because we don't have time
12 to get to it within the 90 days. But we do try and
13 schedule them within 90 days.

14 **CHAIRMAN GIOVANNI:** Commissioner Carr
15 Smith?

16 **COMMISSIONER CARR SMITH:** Can I ask a
17 quick question?

18 **MR. ORODENKER:** Sure.

19 **COMMISSIONER CARR SMITH:** I know we have
20 one coming before us; right?

21 **MR. ORODENKER:** Mm-hmm.

22 **COMMISSIONER CARR SMITH:** So I don't know
23 whether Dan G, you've done one of these before or
24 no?

25 **CHAIRMAN GIOVANNI:** I have.

1 **COMMISSIONER CARR SMITH:** Okay. Okay. So
2 the petitioner brings the request for a declaratory
3 ruling.

4 **MR. ORODENKER:** Well, anybody can actually
5 bring it. It doesn't even have to be a member --
6 someone who is a party to the proceedings initially.
7 So it's a wide open process.

8 **COMMISSIONER CARR SMITH:** Can you give us
9 just a brief example?

10 **MR. ORODENKER:** Of?

11 **COMMISSIONER CARR SMITH:** Of a declaratory
12 ruling?

13 **MR. ORODENKER:** Oh, God. We had one a
14 while back where a landowner was trying to build a
15 tent facility, a camping facility on his property
16 for the homeless. The neighboring property owners
17 came to us and asked us to interpret Chapter 205 and
18 the allowed uses provision to make a determination
19 as to whether camping, permanent camping facilities
20 were an allowed use in the agricultural district.
21 They weren't even parties -- there were no prior
22 proceedings so there were no parties. They brought
23 it. The landowner came in and objected. That case
24 actually went up on appeal and the Commission had
25 determined that no camping was an allowed use on

1 agricultural land without a special permit. And the
2 Supreme Court agreed with us. So that's an example
3 of one.

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

5 **MR. ORODENKER:** You're welcome.

6 This is kind of a chart of how things go
7 with declaratory rulings. Like I said, you can deny
8 the petition, issue a declaratory order, set it for
9 hearing, refuse to issue a declaratory order. There
10 are various reasons why and this should really be
11 underneath the deny the petition section. We have
12 denied petitions that have been speculative or
13 purely hypothetical. Or the petitioner is not of
14 the type that would give the positioner standing to
15 maintain and action of the petitioner in order to
16 seek judicial relief. In other words, as I said
17 before, anybody can bring a DR. But if they were to
18 appeal to the courts, the courts have to do a
19 standing analysis and the courts may not find that
20 that party has standing.

21 We can deny it if the issuance of the
22 declaratory order or dismiss it actually, may affect
23 the interest of the Commission in a litigation that
24 is pending or may reasonably be expected to arise.

25 So an example of that would be the

1 situation that I was just mentioning where a
2 decision that was made by the Commission is up on
3 appeal. And then if somebody tried to bring another
4 declaratory ruling on the same subject matter during
5 that period the Commission would have to say, no,
6 look, you can't do that because it's up on appeal.

7 Or if the matter is not within the
8 jurisdiction of the Commission. Meaning somebody
9 asks us to interpret a portion of Chapter 343. I
10 mean, that's not us. That's what used to be called
11 OEQC. ENV now. ERB?

12 **UNIDENTIFIABLE SPEAKER:** ERB.

13 **MR. ORODENKER:** ERB now. I can't keep up
14 with all the acronym changes.

15 **UNIDENTIFIABLE SPEAKER:** Department of
16 Environmental Review Program.

17 **MR. ORODENKER:** Yeah. Yeah. Something
18 like that.

19 Subchapter 14, 15-15-98 to 104 is the
20 section of audibles that governs declaratory
21 rulings.

22 On a petition of any interested person,
23 like I said, it's wide open, and that's basically
24 what 15-15-98 says, the Commission can also issue an
25 order on its own motion to remove uncertainty. I've

1 never seen that done but I can see how it could be
2 done.

3 One example of that would be Kihei High
4 School and everything that went through with Kihei
5 High School. Theoretically at some point we could
6 have scheduled the hearing and said, look, you know,
7 we're going to tell you what this condition means
8 and have issued a declaratory ruling. It's not
9 something we want to do. It's not something we like
10 to do, and we've never done it. Because if
11 everybody else is happy, why should we get upset
12 about it? Yeah, so.

13 I think I mentioned this before. Reject
14 the petition, issue a declaratory order on the
15 matter, or set the matter for hearing.

16 If we want to schedule a hearing, it can
17 be at the request of a party in addition to a motion
18 by the Commission. I can't read that so I've got to
19 go -- what does that green one say, Ariana?

20 **MS. KWAN:** If a hearing is ordered or
21 requested, the Commission must render a decision
22 within 120 days.

23 **MR. ORODENKER:** Oh, yeah. That's the
24 other deadline. Yeah. Yeah. If we hold a hearing
25 then we have to issue a decision in 120 days.

1 There's flexibility in this regard, and the
2 Commission may set different time constraints at
3 hearing. Like I said before, there's theoretically
4 a 90-day and 120-day whip on these things but
5 there's no penalty if we don't. And usually, the
6 parties are understanding. They will continue a
7 hearing.

8 I mentioned these before. Grounds for
9 rejection. The question is speculative. The
10 petitioner lacks standing. The issuance of the
11 order will adversely affect the state. The matter
12 is outside the Commissioners' jurisdiction.

13 This must be distinguished from actual
14 resolution of the issue. These are grounds for not
15 reaching the question. If the question is reached,
16 you can still find against the petitioner based on
17 your analysis of the issue.

18 A lot of confusion comes from how the
19 petitioner presents their request. So for instance,
20 let me give you an example of that and this is
21 purely hypothetical.

22 If a petitioner wants clarification on one
23 of our conditions, say with regard to a traffic
24 impact and analysis report, and we determine that
25 for some reason one of these four things is in play,

1 we don't even reach the question and whether or not
2 it's required. If we decide that these four things
3 are not in play, then we actually go to the question
4 and then we have to decide whether or not our
5 condition does require a traffic impact analysis
6 report or not. So there's a very -- it seems like
7 there's a fine line there and there actually is. So
8 the question is, are there procedural grounds for
9 rejecting it? If not, then you look at -- then we
10 have to look at the question.

11 **CHAIRMAN GIOVANNI:** Commissioner Yamane?

12 **COMMISSIONER YAMANE:** Thanks.

13 So on both special permits and dec
14 rulings, the open deliberations are similar to a DBA
15 where like the chair asks for a motion to make a
16 decision?

17 **MR. ORODENKER:** Yes, that is correct.

18 **COMMISSIONER YAMANE:** We vote. It's
19 seconded. We vote.

20 **MR. ORODENKER:** Yes.

21 **COMMISSIONER YAMANE:** We speak openly on
22 why we want to do that for both special permits and
23 dec rulings very similar.

24 **MR. ORODENKER:** So if the Commissioners,
25 one of the Commissioners feels, for instance, that

1 the petitioner lacks standing, the Commissioner
2 would make a motion to deny the petition or reject
3 the petition on that basis. And if the rest of the
4 Commission agrees, then it's out. You don't even
5 have to get into the argument of whether or not, for
6 instance, a TAIAR (phonetic) is required. If nobody
7 makes a motion on those four things then you hear
8 the parties' arguments and then the chair calls for
9 the question and then a decision is made.

10 **COMMISSIONER YAMANE:** (Off mic)

11 **MR. ORODENKER:** No. It's just -- well,
12 it's five. It's five. Yeah. It's five.

13 **CHAIRMAN GIOVANNI:** Do you want to take a
14 recess?

15 **MR. ORODENKER:** Yeah.

16 **CHAIRMAN GIOVANNI:** We'll come back in
17 seven minutes. Thank you.

18 **(Recess taken 2:04 p.m. to 2:11 p.m.)**

19 **CHAIRMAN GIOVANNI:** Back on the record at
20 2:11.

21 **MR. ORODENKER:** Okay. This next section
22 is Important Agriculture Land. I'm going to really
23 breeze through this for several reasons.

24 Number one is it's probably the worst
25 piece of legislation I have ever seen in my entire

1 life. It is an unholy mess. And when I started at
2 the Commission, my predecessor, when I worked in the
3 private sector at Molokai Ranch I was talking to him
4 about designating some IAL land. And he refused to
5 even draft rules around it because it was so messy.
6 So then when I got there I undertook the obligation
7 to draft rules around IAL. And I probably went
8 deeper than most people have ever done in that
9 section and everywhere you turned it just doesn't
10 make any sense. It contradicts itself. It's crazy.

11 But you should know about it because one
12 might pop up.

13 The original intent --

14 **CHAIRMAN GIOVANNI:** I suppose you have 50
15 slides on it.

16 **MR. ORODENKER:** Yeah. Well, that's why
17 I'm going to breeze through it; right? Because it
18 used to be important but it's not important anymore.

19 The other reason that it's not important
20 is that the county tried to -- landowners thought
21 they should -- one of the provisions of the IAL
22 statute is that if a private landowner designates 50
23 percent of their property IAL, then the county is
24 prohibited from designating any more of their land
25 IAL. So at the beginning, a lot of landowners like

1 A & B jumped on it and tried to get 50 percent of
2 their land designated IAL so that they could keep
3 control over what portions of the property could be
4 redesignated.

5 Then the county -- city and county of
6 Honolulu submitted their IAL designation and
7 everything just went south. I mean, there were so
8 many unanswered questions with regard to due
9 process, notification requirements, and all the rest
10 of that stuff that it ended up getting appealed to
11 the Supreme Court which is where it still is. So we
12 don't have any direction. As a result, private
13 landowners stopped trying to designate their own
14 land because they think it's dead. The other
15 counties are not designating, although Kauai did for
16 all intents and purposes do it already. But the
17 other counties just stopped their processes because
18 --

19 **CHAIRMAN GIOVANNI:** So since you mentioned
20 that, can you be a little more explicit? For
21 example, like the city and county of Honolulu
22 presented their recommendations for IAL designations
23 on Oahu. The Land Use Commission rejected it. Is
24 that correct? Denied it?

25 **MR. ORODENKER:** We sent it back for

1 further proceedings.

2 **CHAIRMAN GIOVANNI:** Oh, we sent it back?

3 **MR. ORODENKER:** Yeah.

4 **CHAIRMAN GIOVANNI:** But what got appealed?
5 Our decision to send it back or something else?

6 **MR. ORODENKER:** The issues associated with
7 the appeal, the way I understand it, revolve around
8 what kind of due process was required. There are so
9 many issues. I mean, when somebody appeals to the
10 Supreme Court they throw everything --

11 **CHAIRMAN GIOVANNI:** Start with who
12 appealed it?

13 **MR. ORODENKER:** The county recalled it as
14 I recall.

15 Their position was that the due process
16 that they had given to the landowners was
17 sufficient. The landowners were arguing that some
18 of them didn't even get notice of what was
19 happening. The argument then began to revolve
20 around what level of due process is required for
21 these proceedings. And I'll get into that a little
22 bit in a minute.

23 The other thing that was appealed I
24 believe was whether or not the criteria -- the
25 counties -- the way it was -- let's go through it

1 because I'm jumping way ahead of everything and I
2 can answer your question at the end.

3 But anyway, I just talked about this.
4 Private landowners can move the LUC to have their
5 lands designated IAL. And I have to tell you that
6 the legislature originally intended this to be a
7 declaratory ruling process. So even though every
8 time we've done one of these for a private landowner
9 it's boiled down into an evidentiary hearing. It's
10 not required.

11 The counties are also tasked with
12 proposing a designation of all land within their
13 jurisdiction, public and private, appropriate for
14 IAL designation.

15 There's also another provision that
16 provides that a landowner may request that a portion
17 of the proposed IAL land be designated rural or
18 urban or take a credit for later urbanization of a
19 percentage of that land.

20 That provision has never been utilized,
21 and one of the reasons is that everybody knows that
22 as soon as somebody tries to do it every
23 environmental organization and community
24 organization in the state is going to sue them
25 because it sidesteps around a whole bunch of due

1 process provisions and a whole bunch of other
2 provisions. For instance, how can you automatically
3 redesignate without an EIS if there's a trigger? I
4 mean, it just doesn't work. I mean, the intent was -
5 - I understand the intent but it just doesn't work.
6 The whole thing doesn't work from a legal
7 standpoint.

8 There are tax implications to IAL
9 designation which is why some of the landowners do
10 this because it lowers their taxes.

11 And this is the other place where
12 everything got messed up. The original intention of
13 the IAL and in my opinion, looking at the
14 legislative history was to create a planning tool.
15 Article IX or XI of the constitution, yeah, 11 of
16 the constitution puts a positive requirement on all
17 state agencies to protect the most important
18 agricultural lands in the state. But there was
19 never any mechanism to do that until this law was
20 passed under pressure from the courts. And as Rick
21 Kanoho, God bless him, was the one who pushed this
22 bill through, and he believed that what he was doing
23 was creating a tool for planning because the
24 constitution doesn't say you have to designate lands
25 that will never be taken out of agriculture. It

1 just says you have to protect the most important
2 ones. Well, how do you know what to protect if you
3 don't know what the most important ones are? So he
4 believed he was creating a planning tool.

5 The difficulty became, and this is what
6 this last paragraph may or may not be right because
7 this is part of what's up at the Supreme Court.
8 Instead of drafting the bill so it just says
9 everything you can do on ag land you can do on IAL
10 land, the bill passed with a bunch of specific
11 provisions that theoretically mirrored what was
12 contained in 205-4.5. But it really doesn't. It
13 has slightly different language.

14 So the attorneys who were representing
15 landowners when the city and county of Honolulu's
16 proposed designation came up in front of us were
17 saying, no, the way the way this reads, I can't
18 allow my daughter to live on the land because she's
19 not actively involved in farming. I mean, there's
20 all sorts of crazy stuff flying around. And so
21 that's why we're waiting for the Supreme Court to
22 tell us what to do. My suspicion is that the
23 Supreme Court is going to tell us it's got to go
24 back to the legislature to get fixed. But we won't
25 know until the decision comes out.

1 It's not a new district. And this is part
2 of the problem and why there was so much
3 controversy. The land remains in the general
4 agricultural district.

5 As I mentioned, they are not DBA
6 proceedings.

7 It doesn't change permitted activities.
8 All current agricultural district allowances remain.

9 Unless IAL designation is linked to a
10 request for urban redistricting, there is no problem
11 on later petitioning the LUC to change the land
12 designation from agriculture to rural or urban.

13 This was one of the things that was argued
14 about at the hearing on city and county of Honolulu
15 proceedings. The way we have always thought the IAL
16 designation worked and the way the Supreme Court up
17 until recently though it worked as that if there's
18 an IAL designation, or if your land is potentially
19 IAL because the Supreme Court doesn't distinguish
20 between that, then when you do a district boundary
21 amendment you just have to do a heightened analysis
22 on whether or not the land needs to stay in
23 agriculture. And almost every petitioner who has
24 attempted to convert IAL lands to -- or potential
25 IAL lands to urban has recognized that and done the

1 analysis. The interesting thing -- this is kind of
2 an aside, because I went to the oral arguments on
3 this stuff when they went to the Supreme Court, in
4 the Ho'opili case, even though the designation had
5 not occurred yet, Ho'opili said -- the developers,
6 D.R. Horton said, well, this could be important
7 agricultural land. So we're going to do an analysis
8 as if this was IAL land and they were fine. Koa
9 Ridge ignored the IAL section and the Supreme Court
10 said, no, you have to do an analysis on whether or
11 not this could be IAL land so you know what level of
12 scrutiny you have to give the petition.

13 So even if your land is not IAL, if it
14 could be IAL, we told the petitioners you should
15 really do a heightened analysis just so that the
16 Commission knows what it needs to do.

17 There are, as I mentioned, there are
18 several ways which IAL land can be designated. And
19 I mentioned all this already. It does not alter
20 districting, allowing portions of properties or TMKs
21 to be designated as IAL. It doesn't have to be the
22 whole TMK. It can just be a portion of the
23 property.

24 The Standards and Criteria for IAL
25 Designation.

1 There are eight criteria for IAL
2 designation. The Commission must evaluate the
3 petition based on the criteria. If the petition is
4 solely for IAL -- in other words, there's no
5 reservation or credit requested for designation of
6 urban, you know, later on, the land doesn't need to
7 meet all eight of the criteria. If the land meets
8 any of the significant criteria it must be given
9 consideration for designation.

10 However, we're tasked with weighing the
11 standards and criteria to determine whether the land
12 meets the mandated purpose of the Hawaii State
13 Constitution and the objectives and policies of
14 section 205.

15 So you could have land that -- the only
16 caveat to that is water. You could have land that's
17 -- you have to have water. Other than that, you
18 could have land that is not class A or B land but is
19 contiguous, meets one of the other criteria, is
20 contiguous with other class A and B land and is
21 needed to prevent fragmentation and then you can go
22 into the petition.

23 I mentioned this before and this is pretty
24 much what the constitution sends, Article XI,
25 Section 3. The state must conserve and protect

1 agricultural lands, promote diversified agriculture,
2 increase agricultural self- sufficiency, blah, blah,
3 blah, blah. If there has been a - - okay, if
4 there's been a reservation of 10 percent for urban
5 uses then the only way the land can be reclassified
6 is if the legislature allows it. It has to go to
7 the legislature. If there's no reservation for
8 urban uses, then a two-thirds vote on the
9 responsible body, meaning us, needs to agree to
10 redesignate or reclassify the land, which in our
11 case means six votes.

12 **CHAIRMAN GIOVANNI:** When was Article XI,
13 Section 3 adopted?

14 **MR. ORODENKER:** At the last Constitutional
15 Convention.

16 **CHAIRMAN GIOVANNI:** What year was that?

17 **MR. ORODENKER:** '78.

18 **CHAIRMAN GIOVANNI:** What?

19 **UNIDENTIFIABLE SPEAKER:** 1978.

20 **CHAIRMAN GIOVANNI:** '78. Plantation era.

21 **MR. ORODENKER:** The plantations were still
22 there. They were on their way out but they were
23 still there.

24 **CHAIRMAN GIOVANNI:** This was in part to
25 preserve the plantation land?

1 **MR. ORODENKER:** Well --

2 **CHAIRMAN GIOVANNI:** Put me back in the
3 mindset of the people that did this.

4 **MR. ORODENKER:** Well, I can call John
5 Waihee. Maybe he can --

6 **CHAIRMAN GIOVANNI:** All of them. I mean,
7 we're living with it today.

8 **MR. ORODENKER:** Yeah.

9 **CHAIRMAN GIOVANNI:** And we have to make
10 decisions based on it. But it's like it seems
11 outdated to me.

12 **MR. ORODENKER:** Well, you have to go back
13 all the way to the 1960s.

14 **CHAIRMAN GIOVANNI:** Yeah.

15 **MR. ORODENKER:** And there is -- there was
16 a concern and there remains a concern that
17 agricultural land is precious and that for the sake
18 of future generations it should not be frivolously,
19 for lack of a better word, I wouldn't use that word
20 but --

21 **CHAIRMAN GIOVANNI:** Or urbanized for
22 housing.

23 **MR. ORODENKER:** Yeah.

24 **CHAIRMAN GIOVANNI:** My words.

25 **MR. ORODENKER:** Yeah. Yeah.

1 That has come around again. Believe it or
2 not there's been a resurgence of that concern with
3 regard to food sustainability. My understanding is
4 that that's one of the governor's initiatives going
5 into this next legislative session as food
6 sustainability. And there's a real concern that the
7 livelihood of the farmers will be significantly
8 deteriorated if we don't preserve agricultural land.

9 So I mean, the original intent may have
10 been to preserve the plantation economy back in the
11 1960s when the original mandate was considered. In
12 the '70s, it became -- or late '70s it became
13 evident that with sugar going out and pineapple
14 going out that there was still a need to protect
15 agricultural land.

16 I have to tell you, even in the '90s, I
17 was working for the state at the time and Hamakua
18 Sugar went out. And myself, along with a bunch of
19 other people were tasked with going over to discuss
20 alternatives to sugar cane with the Hamakua
21 community and they did not want to hear it. All
22 they wanted to hear about was what kind of
23 agriculture were we going to replace it with.

24 **CHAIRMAN GIOVANNI:** I lived there 10 years
25 later and it was still the same.

1 **MR. ORODENKER:** Yeah.

2 **CHAIRMAN GIOVANNI:** But we're now in 2025
3 and all I hear is about housing and it just seems in
4 contrast to all this stuff.

5 **MR. ORODENKER:** You'll see later on when
6 we discuss the public trust doctrine. The
7 preservation of agricultural land has been rolled
8 into the public trust doctrine. And the thought
9 process there is that if we urbanize it now then if
10 we need it in the future it won't be there.

11 **CHAIRMAN GIOVANNI:** But it's not all or
12 nothing. It's like -- it seems like to take, I mean,
13 if you look at the percentage of total land that is
14 agriculture it's like, you know, it's going fallow.
15 It's building grasses. We're having fires because
16 they're not taking care of it. All that stuff going
17 on. Meanwhile, we struggle to convert small
18 portions of that ag land to urban for housing.

19 **MR. ORODENKER:** I don't disagree with you.
20 I'm just -- this is kind of the constitutional
21 mandate and that's the way the courts are viewing
22 it.

23 **CHAIRMAN GIOVANNI:** Yep. I agree. Okay.
24 Onward, Dan.

25 **MR. ORODENKER:** Definitions and

1 Objectives. I think I talked about this already.

2 Important agricultural lands are those
3 that produce high agricultural yields, contribute to
4 the state's economy, promote future agricultural
5 activities and income.

6 The objectives are -- and this is what I
7 talked about before. We originally perceived -- and
8 when I say "we" I'm talking about the legislators at
9 the time because I was peripherally involved with
10 the process. To identify and plan for a strategic
11 agricultural land resources to support diversified
12 ag.

13 I don't know what to say about this
14 because if I can be crass, most of this is shipai
15 (phonetic). You know, because the county -- state
16 and county policies like tax policy, land use
17 ordinance, all that stuff, it never took this into
18 account. Even there was a requirement for
19 incentives that was never passed. You know, the
20 counties, they passed some tax incentives and for a
21 short period of time, DOA had some incentives for
22 low-interest loans. But that's all passed. I mean,
23 that's why I say this is almost irrelevant because a
24 lot of the things that were supposed to happen never
25 happened.

1 These are the eight standards and
2 criteria. And I won't go through them in detail
3 because I don't think we're going to see one of
4 these for a long time but it is contained in our
5 rules and in the statute.

6 This is where the counties come in, 205-
7 47.

8 The maps were supposed to be developed --
9 it's a county designation. If there's a county
10 designation. The maps must be developed in
11 consultation with landowners, the State Department
12 of Agriculture, agricultural interest groups, US
13 DOA, OPSD, and other groups as necessary.

14 Once again, this is what the county
15 thought -- the city and county of Honolulu though it
16 was doing when it went through its process.

17 These are simple IAL petitions. And like
18 I said, we haven't seen one of these in going on 12
19 years.

20 **CHAIRMAN GIOVANNI:** They tried to have one
21 where the lessee tried to put forth an IAL petition
22 to land that they didn't have jurisdiction over.

23 **MR. ORODENKER:** Yeah. They didn't have
24 ownership of. Yeah.

25 **CHAIRMAN GIOVANNI:** An understanding;

1 right?

2 **MR. ORODENKER:** Yeah. Yeah. Yep.

3 Once again, got to be -- can only be
4 granted with two-thirds affirmative vote, six
5 Commissioners. Otherwise, it's denied.

6 Because of this credit situation, and the
7 fact that we don't want to get any legal backlash
8 later on, when we have had IAL petitions, we request
9 that the petition specifically waive the 15 percent
10 reclassification credit if it's not included in the
11 petition. If the petition doesn't request a credit
12 for reclassification, the credits are waived.

13 No, no, no. No, no, no. We'll be here
14 for another hour.

15 **UNIDENTIFIABLE SPEAKER:** I've only got two
16 hours to look.

17 **MR. ORODENKER:** Okay.

18 **CHAIRMAN GIOVANNI:** Everybody should be
19 adjourned.

20 **MR. ORODENKER:** I'm not even going to go
21 into this because it's just a waste of everybody's
22 time because this is really not something that's
23 likely to happen.

24 **CHAIRMAN GIOVANNI:** I thought we had one
25 coming?

1 **MR. ORODENKER:** No. Not with a 15 percent
2 reclassification.

3 **CHAIRMAN GIOVANNI:** Oh. Okay.

4 **MR. ORODENKER:** Yeah.

5 Once again, we'll just roll through this.
6 I mean, if you're interested in this, it's in the
7 PowerPoint handout.

8 When I drafted the rules on this, I didn't
9 know what to do. Because as I mentioned before, you
10 know, a petition with a 15 percent request has all
11 sorts of other problems. It doesn't meet Chapter
12 343. Are they required to go through Chapter 343?
13 Nobody answered that question. Do we need to get the
14 counties to weigh in on infrastructure? What about
15 Commission of Water Resource Management? I mean,
16 none of that was addressed in the statute. So I did
17 the best I could but I'm not sure it would stand
18 court review.

19 Keep going.

20 Well, that is one of the things, if the
21 Commission finds either -- back up one slide. If it
22 does come up, if the IAL designation is
23 inappropriate or the reclassification of the
24 remaining land is not appropriate, the Commission
25 has to deny.

1 Next slide.

2 Self-explanatory. Once again, if you're
3 interested in this, look at the PowerPoint handout.

4 Once again, this is with regard to the 15
5 percent.

6 Once again, as I mentioned, once land --
7 and this is actually going to be coming up in front
8 of us in the near future. We have a situation with
9 the County of Maui where they're going to expand a
10 waste dump. And they want to take some land,
11 surrounding land out of IAL and put into IAL. So
12 we'll probably see one of these petitions. They're
13 not real difficult though if it's just a straight
14 IAL designation.

15 If -- this is not really relevant to what
16 the County of Maui is going to be doing but as I
17 mentioned before, you can classify it to IAL. And
18 SPs can also be granted on IAL land after referral
19 to the Department of Agriculture.

20 Moving the IAL designation. The way the
21 statute is written, and this is going to be the
22 problem for us with what the County of Maui is
23 trying to do. There's not really a lot of
24 explanation on how you take land out of IAL because
25 it was intended, in my opinion, to be a planning

1 right. So if there's not enough water that's clear.
2 You can take it out of IAL. If there's been a 15
3 percent reservation that the legislature has to
4 authorize it and the county designated maps, if, for
5 instance, if Maui County had done its designation,
6 can be readjusted through periodic review. But
7 there is nothing in the rules that talks about
8 somebody who just wants to take it out without water
9 going away. So that's something we're going to have
10 to wrestle with when that petition comes up in front
11 of us.

12 **CHAIRMAN GIOVANNI:** So I notice that
13 rather than a swap of 22 acres for 22 acres, they
14 want two separate petitions?

15 **MR. ORODENKER:** Yes.

16 **CHAIRMAN GIOVANNI:** One to take it out and
17 a totally separate decision, to add separate land
18 back in to IAL?

19 **MR. ORODENKER:** Yes.

20 **CHAIRMAN GIOVANNI:** Is that correct?

21 **MR. ORODENKER:** And I have to tell you --

22 **CHAIRMAN GIOVANNI:** You don't have to but
23 you may.

24 **MR. ORODENKER:** Yeah. Well, no, I do have
25 to. They're not listening to us.

1 **CHAIRMAN GIOVANNI:** Okay.

2 **MR. ORODENKER:** I mean --

3 **CHAIRMAN GIOVANNI:** What are you saying to
4 them?

5 **MR. ORODENKER:** Well, there are two things
6 that I'm saying to them. One is, don't bother to
7 take the land out of IAL because you can do what you
8 want to do without doing that. Just redesignate or
9 designate a replacement. Or if you're going to
10 insist on taking land out of IAL, roll it up into
11 one petition so we don't have to hold two hearings.
12 Right? And then it becomes a swap, like you said.
13 And that would be easier for the Commission to deal
14 with.

15 **CHAIRMAN GIOVANNI:** Yeah.

16 **MR. ORODENKER:** But they're going to do
17 what they're going to do, so.

18 **COMMISSIONER CARR SMITH:** Is that --

19 **MR. ORODENKER:** Yes, it was. And I talked
20 to them about that. If they could roll it all up
21 together into one motion or -- because remember,
22 it's a motion. It's not really a petition; right?
23 To remove that condition and designate additional
24 lands. I mean, they could do it all at one time.
25 Yeah.

1 I talked about this already. The issues
2 involved with implementing the IAL statute are
3 numerous. We're trying to interpret a set of rules
4 that legislature intended and reconciled the IAL
5 statutes to other Supreme Court decisions, laws, and
6 statutes. All of our rules are, up until now until
7 the city and county of Honolulu appealed, are
8 untested. And I have to tell you, I've had some
9 arguments with our AGs who have said, well, we can
10 get this dismissed on procedural grounds. And I'm
11 like, no, no, no. Don't do that. We want to know
12 what the Supreme Court has to say about this because
13 we need direction because this has become
14 unworkable. So hopefully we'll get some direction
15 in the next year or two.

16 And this is a whole set of slides on the
17 county designation process. And the counties were
18 supposed to develop maps in consultation with
19 landowners, agricultural groups, USDA, all that
20 stuff. It was supposed to be an inclusive public
21 involvement process through meetings and possible
22 citizen advisory committees. And they're supposed
23 to notify landowners of potential IAL designation by
24 mail or posted notice.

25 Skip ahead.

1 And I think the best way to handle this is
2 to talk about where it went wrong rather than what
3 they were supposed to because the county's position
4 is that they followed all of these requirements.
5 They're supposed to submit those maps to the county
6 councilmen for adoption and resolution and then
7 those county councilmen transmit those maps to the
8 LUC for further designation. If it turns out that
9 the Supreme Court says that the city and county of
10 Honolulu did it right, one of the things that this
11 commission needs to know is that it can adjust those
12 boundaries if they're not set in stone by what came
13 up from the planning commission or the city council.
14 We have the ability to adjust those boundaries based
15 on evidence that's presented to us at a hearing.

16 Where things went south. No, you can just
17 keep going.

18 I just talked about this amendment of the
19 designation.

20 Where things went wrong with what happened
21 with the city and county of Honolulu's submission
22 was that when it came to us we discovered a whole
23 bunch of things. Number one was that they were using
24 antiquated tax maps to determine who owned what
25 piece of property. They were like 10 years out of

1 date. Because they had started the process 10 years
2 ago but then when they went to complete it they
3 didn't look at those maps, or those tax maps again
4 to figure out if ownership had changed.

5 They also, they sent out letters to owners
6 of record, and sometimes those owners were addressed
7 or something like that, that was held by a bank on
8 the mainland someplace. So they got this letter
9 that there was going to be an IAL designation. They
10 didn't know what to do with it. They didn't call
11 the trustees. Nothing. So when we finally got to
12 hearing there were all these objections from people
13 who said we didn't know what was happening. You
14 know, we didn't get notice until somebody, so and so
15 called us and told us it was happening. One of our
16 neighbors or something like that. So that was the
17 first place that the county ran into trouble.

18 The second place that they ran into
19 trouble was they swept up a lot of land. They just
20 drew big maps and they swept out a lot of land
21 according to what we heard at the hearings for
22 pieces of property that had been subdivided and were
23 now single-family homes. Whether their zoning was
24 legal or not is a separate issue. Or land that had
25 not been farmed for two generations. And so all

1 those landowners came in and objected.

2 And that was part of the whole thing.

3 There was a claim that they were not granted due
4 process, and there was also a claim that the
5 county's criteria was flawed.

6 I'm just going to breeze through this,
7 Ariana. You can just keep moving along.

8 The only thing important about this slide
9 is the state designation process. The state is also
10 supposed to designate its land. It's not intended
11 to be piecemeal but DLNR, in collaboration with DOA
12 are supposed to designate all the state-owned lands
13 that are important agricultural lands. And they
14 haven't.

15 Go ahead.

16 Other Proceedings. Did we make the
17 halfway mark?

18 **MS. KWAN:** We did.

19 **MR. ORODENKER:** There we go. Okay.

20 So Other Proceedings. I'm going to turn
21 that over to Martina. No, it says Martina on my
22 sheet.

23 **MS. KWAN:** The Commission is good on the
24 IAL section or was there any questions before we
25 move forward?

1 **MR. ORODENKER:** Okay.

2 **MS. KWAN:** All right. Seeing none.

3 **MR. ORODENKER:** Okay. Go onto the next
4 slide then since -- and we can keep going.

5 **MR. DERRICKSON:** Okay. So I'm back on for
6 a short period before I give it to Martina.

7 So the first other types of proceedings.
8 First, I'm going to talk about intervention and what
9 it is.

10 So intervention is when a party -- or
11 actually not a -- I won't say a party. When an
12 individual or a group wants to become a party to the
13 proceedings. So there's a big difference between
14 someone who comes representing themselves or an
15 organization and presents public testimony and
16 someone who has become an intervener and actually a
17 party to the proceedings.

18 As a member of the public, you can come in
19 and you can say your piece. You can even present
20 evidence, pictures, testimony, but you don't have
21 the ability to cross-examine any of the parties that
22 are witnesses and whatnot. Becoming a party to
23 intervention is a method for you to take part as a
24 member or as a party to the petition process.

25 And the two processes that intervention is

1 allowed is, one, at the district boundary amendment
2 process or of a declaratory ruling process.

3 Well, okay. Intervention. You've got to
4 request it before the hearing start. You can't jump
5 up during the hearing and say I want to become an
6 intervener. There's a formal process for the
7 district boundary amendments and the Commission
8 itself holds a hearing to hear the intervener --
9 potential intervener presenting their case. Do you
10 guys have standing? And the Commission has been
11 very liberal and free with granting intervention in
12 the past.

13 **COMMISSIONER CARR SMITH:** Are there
14 standing requirements that are clear?

15 **MR. DERRICKSON:** Yes. Yeah, the law does
16 lay out some specifics. But it also gives a lot of
17 latitude to the Commission.

18 **MR. ORODENKER:** Well, Scott. Yeah.

19 The standard that's set forth in the
20 statutes and the rules are that you can intervene if
21 your interests are different from any of the other
22 parties already allowed into the proceedings. That
23 has been extremely liberally construed. I have
24 actually never seen -- I've got to tell you, when I
25 first joined the Commission, my first proceeding was

1 an IAL. I mean, an intervention proceeding. And I'm
2 sitting there listening to the intervener make their
3 case and I'm going like, no, you're not allowed to,
4 no, no, no, no, no, no. This is all BS. But they
5 let him in anyway. And that became a nightmare but
6 that's a whole different story.

7 But I've never seen this Commission deny
8 intervention, although it could. I've never seen it
9 done. Most times, parties come in front of us. We
10 had a case on Kauai where a woman wanted to
11 intervene and we granted it just because she lived
12 in the area and the traffic was going to impact her
13 home. There would be an increase in traffic.

14 I mean, in my mind there are grounds to
15 deny intervention. As a matter of fact, in that
16 particular case on Kauai, we were going to deny. We
17 called a recess and Mike Dahilig went out of the
18 room. He was -- at the time he was the planning
19 director and he came back in and he said, we've
20 reached an agreement. We're going to let him in.
21 And we were like, we weren't going to deny. But
22 anyway, it's very liberally construed. You have the
23 ability in intervention. I think Scott was going to
24 talk about this. To limit what that intervention
25 can be about. For instance, traffic or, you know,

1 endangered species or whatever. But I've never seen
2 it denied.

3 **CHAIRMAN GIOVANNI:** So the word
4 "intervention" has a negative connotation but my
5 experience from this Commission is that interveners
6 have provided great value in the couple of dockets
7 that we've been active in.

8 **MR. ORODENKER:** Yeah.

9 **CHAIRMAN GIOVANNI:** So I think, you know,
10 it's almost a common sense decision. If the
11 prospective intervener is frivolous and just wants
12 to make a very narrow point, that usually could be
13 dealt with in a different way. But to grant them
14 full intervener status through all aspects of the
15 hearing, I think you've got to put some careful
16 thought into that. But in general, I think they
17 bring value if they're so inclined to make an
18 effort.

19 **MR. ORODENKER:** Well, it's not just that
20 they bring value. I mean, if you're talking about a
21 controversial project --

22 **CHAIRMAN GIOVANNI:** Yeah.

23 **MR. ORODENKER:** -- that might get
24 appealed, it's better to err on the side of allowing
25 them in than having the whole proceedings thrown out

1 because you should have allowed them in. I mean,
2 yeah --

3 **CHAIRMAN GIOVANNI:** Yeah. I mean, that's
4 a reason but I would look to make a reason why we
5 should include them from a what can they -- what
6 perspective can they bring that is of value?

7 **MR. ORODENKER:** Yeah.

8 **CHAIRMAN GIOVANNI:** As opposed to trying
9 just to avoid an appeal, although I'd like to avoid
10 an appeal.

11 **MR. ORODENKER:** Before your time we had a
12 couple of interventions that didn't bring any value.

13 **CHAIRMAN GIOVANNI:** Okay. Let's go on.

14 **MR. DERRICKSON:** Okay. So who can
15 intervene? And this right from our statute, Chapter
16 205-4. One, all departments or agencies of state or
17 county governments where the land is situated shall
18 be admitted as parties upon timely application for
19 intervention.

20 We've had that before where we've had a
21 state or a county agency with what they believe is a
22 compelling interest ask to be interveners. Also,
23 all persons who have a property interest in the
24 land. On the Big Island, we had a neighboring large
25 property owner, Queen Lili'uokalani Trust asked to

1 be an intervener when there was a large housing
2 development being planned adjacent to their
3 property. They felt that because there's going to
4 be some shared infrastructure issues that could
5 facilitate their development or slow it down, they
6 wanted to become an intervener and be a party.

7 Then, as Dan was talking, all other
8 persons can apply and it shall be freely granted it
9 says. And the Commission may deny an application to
10 intervene when the Commission or hearing officer's
11 sound discretion appears that the position of the
12 applicant for intervention is substantially the same
13 as another party's or the admission of additional
14 parties are going to render the proceedings
15 inefficient or unmanageable.

16 So, I mean, you guys have the opportunity
17 because you're going to have a hearing on whether or
18 not to allow intervention. And if you say yes,
19 these folks can be interveners, you also have the
20 ability to narrow the scope of their intervention.
21 Because some parties, their purpose and scope is
22 going to be narrow. It may be just to address
23 protection of threatened and endangered species.
24 They're not going to be, you know, bringing in
25 expertise to deal with transportation issues. So

1 you're going to narrow -- you may narrow their
2 intervention scope.

3 Yeah. Go ahead. Yeah. You can go to the
4 next slide.

5 So the way it works generally is when a
6 petition is filed, that initial petition is filed,
7 that starts 30- day clock for any interested parties
8 to say, look, we think we might want to intervene.
9 Here's our notice of intent to intervene. Once the
10 proceedings actually are going to happen, that's
11 when we're going to formally put in a petition to
12 intervene. Later on, they put in a petition to
13 intervene, the LUC hears that and makes a decision
14 upon it. Again, you decide whether or not to allow
15 intervention and also the scope of the intervention.

16 **MR. ORODENKER:** Scott, let me -- I want to
17 talk about reality for a second. When it comes to
18 reality for a second when it comes to intervention
19 because if you look back at what Scott talked about
20 with the timing on declaratory rulings -- I mean, on
21 DBAs, what happens is that after the petition is
22 deemed complete, which is usually right after the
23 EIS is accepted, we immediately hold a scheduling
24 conference which tells the parties when they're
25 supposed to submit whatever.

1 So we're chugging along thinking we're
2 okay and then somebody decides they want to
3 intervene and it blows that whole process out of the
4 water. Because then what happens is that we have to
5 hear the petition to -- everything gets stopped.
6 Okay? We hear the petition to intervene. And then
7 if the petition to intervene is granted, then we
8 have to reset the whole clock on submission of
9 witness and exhibit lists and physician statements
10 and all the rest of that stuff. And so there's a
11 disconnect there between, you know, where we're
12 moving to under normal circumstances and when the
13 petition for intervention is filed. It causes us to
14 have to reset the clock on almost everything.

15 The other thing that I want to mention
16 with regard to reality is that it is not uncommon
17 for a petitioner -- for a proposed intervener to
18 file a petition for intervention like either the day
19 of the hearing or a week before the hearing. You
20 know, and then we've got to deal with it.

21 So, it's not -- I mean, our rules say what
22 they say but the petitioner -- the interveners don't
23 pay attention to it. And then it's up to this
24 Commission to decide whether or not a late petition
25 to intervene, that they're going to hear it or deny

1 it outright because it's late. So it just screws up
2 the whole timing schedule.

3 **MR. DERRICKSON:** Yeah. So a late filing
4 or petition to intervene is technically grounds for
5 just outright denying. You guys will then have to
6 determine whether or not you want to use that as a
7 reason to deny intervention or hear them out and
8 decide whether or not they've got value in being
9 added to the process.

10 The last side, I call it Not Quite
11 Intervention. Sometimes there's a citizen or a
12 community group that's given allowance to testify as
13 a public witness and express the views of a grip.
14 They're not given party status and basically, all
15 you're doing is you're asking -- if someone comes up
16 and says I'm speaking for the Sierra Club, you want
17 to know that they've presented some bona fide saying
18 that these guys actually do have authorization to
19 speak on behalf of that group.

20 **CHAIRMAN GIOVANNI:** So that would be
21 separate, give them more than two minutes. Give
22 them, what --

23 **MR. DERRICKSON:** You might -- you might --
24 you have the discretion. You can give them maybe a
25 few more minutes.

1 **CHAIRMAN GIOVANNI:** And they can provide a
2 slide deck or whatever.

3 **MR. DERRICKSON:** Exactly. And hopefully,
4 those folks have identified themselves to staff and
5 maybe we've identified that to the chair that, hey,
6 this group wants to share a PowerPoint presentation,
7 10 slides or --

8 **MR. ORODENKER:** While we're on the subject
9 of time for public testimony, I want to -- I forgot
10 to mention this earlier. There are some shenanigans
11 that have gone on with public testimony. And most
12 of it revolves around the fact that the Commission -
13 - the chair will say, okay, we're going to give
14 everybody two minutes or three minutes and then
15 people try to say, oh, well, they're going to give
16 me their three minutes and they talk for six.

17 **CHAIRMAN GIOVANNI:** Well, that's when I
18 break my gavel.

19 **MR. ORODENKER:** Yeah. Yeah. We actually
20 had -- the worst example of that is that we were
21 holding a hearing. I wasn't actually working for
22 the Commission at the time. I was working for the
23 petitioner on Molokai for Molokai Ranch. And one of
24 the mistakes that the Commission made was selecting
25 a venue that was immediately adjacent to the high

1 school. So Walter Ritte, who was in opposition to
2 the petition, went next door to the high school at a
3 break and got all the high school students to come
4 over and sign up to testify, like 20 of them, and
5 said, oh, well, I'm going to take all of their time.
6 You know. So he argued that he had like an hour or
7 something to talk and, you know, but so you have to
8 be careful of that.

9 **MR. DERRICKSON:** At the discretion of the
10 chair.

11 **CHAIRMAN GIOVANNI:** There you go.

12 So I want to -- I mean, you breezed over
13 this point but I think it's very significant -- is
14 that intervention is not allowed on a special permit
15 consideration. And the reason for that, if I read
16 your words correctly, because we're really reviewing
17 a case that's been made before the county and then
18 put up to us for concurrence or action. Is that
19 right?

20 **MR. ORODENKER:** Yes. That's correct. And
21 if they intervene at the county level --

22 **CHAIRMAN GIOVANNI:** That's their business.

23 **MR. ORODENKER:** Then they can come up and
24 they are a party in our proceedings.

25 **CHAIRMAN GIOVANNI:** Oh, really?

1 **MR. ORODENKER:** Yeah.

2 **CHAIRMAN GIOVANNI:** That's not clear.

3 **MR. ORODENKER:** Yeah.

4 **CHAIRMAN GIOVANNI:** So if the county
5 grants them intervention status, that carries up to
6 us?

7 **MR. ORODENKER:** Yes, it does. And that
8 should be pertinent to Waimanalo Gulch. That's why
9 you have all of those interveners.

10 **CHAIRMAN GIOVANNI:** That's where I was
11 going. How did we get these interveners?

12 **MR. ORODENKER:** Yeah. Yeah. Because they
13 intervened at the county level.

14 **CHAIRMAN GIOVANNI:** Okay. Got it.
15 Okay. It looks like it's break time to
16 me.

17 So before we break, how far in the slide
18 deck did you hope to go today?

19 **MR. DERRICKSON:** As far as we can go.

20 **CHAIRMAN GIOVANNI:** I know that. Be real.
21 I mean, is this for --

22 **MR. DERRICKSON:** Well, it's like when you
23 ask me --

24 **CHAIRMAN GIOVANNI:** Originally you wanted
25 to do this whole deck today and then a different

1 deck tomorrow?

2 **MR. DERRICKSON:** -- how long this public
3 hearing --

4 **MR. ORODENKER:** No. Yeah. So we're good.
5 I mean, it's up to the Commissioners on how burned
6 out they are with regard to everything. Although I
7 will point out that Martina's section -- and the
8 reason that I thought you were getting the last one
9 is that it got reversed -- is relatively short.

10 **CHAIRMAN GIOVANNI:** No, we're going to
11 keep going at least another 45 minutes.

12 **MR. ORODENKER:** Yeah.

13 **CHAIRMAN GIOVANNI:** But let's take --
14 let's take five minutes for recess.

15 **(Recess taken from 3:00 p.m. to 3:10 p.m.)**

16 **CHAIRMAN GIOVANNI:** Okay. It's 3:10.
17 We're back on the record.

18 **MS. SEGURA:** All right. It's my turn.
19 Okay.

20 I'm going to be talking about the EA and
21 EIS Acceptance Process and the Environmental Review.
22 Yeah.

23 So there are two parts to EAs and EISs,
24 one where the LUC is the accepting authority and one
25 where it isn't. And we still have to consider the EA

1 and EIS in district boundary amendments.

2 So when we are the accepting authority, we
3 have to hear the EAs and EISs at the different
4 stages of the compilation. And when that comes
5 before the Commission that is not accepting and
6 approving the project in its entirety. It's just
7 accepting the environmental document.

8 So EAs and EISs have to follow the Hawaii
9 Environmental Policy Act (HEPA). And they are laid
10 out in HRS Chapter 343 and in numerous Hawaii
11 amendment -- wait, admin rules. Sorry.

12 Yeah. So the processes and lists of what
13 needs to be included in those documents are listed
14 out in those chapters on the slide.

15 And in those documents, we also have to
16 consider implications like Ka Pa'akai, parceling,
17 and sustainability. Yeah.

18 So the Staff Involvement in this process
19 is pretty crucial because staff holds the knowledge
20 and the basis of these documents. And as I
21 mentioned, there are different processes. So
22 there's the draft, there's the second draft, and the
23 final. And staff will review those documents to
24 point out any inconsistencies or any points of
25 concerns. And we usually limit our comments to

1 procedure and LUC roles, and other issues like water
2 availability. And we will issue those comments in
3 forms of letters that aren't always posted on the
4 website but we have to revisit that. We get a lot
5 of comment requests for projects over 15 acres and
6 under 15 acres just so we can put out our Land Use
7 Commission staff concerns on those documents.

8 Okay. Any questions?

9 **COMMISSIONER YAMANE:** So but we don't
10 determine whether it should be an EA or EIS, do we?

11 **MS. SEGURA:** No.

12 **MR. ORODENKER:** Actually, we do.

13 **MS. SEGURA:** Dan can take it.

14 **MR. ORODENKER:** Yeah. Okay.

15 If a -- the law has changed in this area a
16 couple of times. Petitioners can do one of two
17 things. They can either file an EA and request a
18 decision from the Commission that there's a
19 likelihood of no significant impact and then they've
20 completed their process. Or they can go directly to
21 an EIS where they know there's going to be a
22 significant impact. If they file an EA and the
23 Commission finds that regardless of what's contained
24 in the EA or because of what's contained in the EA
25 there is a likelihood of significant -- there is a

1 likelihood of significant impact, then it can force
2 the Commissioner to do a full-blown -- the
3 petitioner to do a full-blown EIS.

4 **CHAIRMAN GIOVANNI:** That's indirect.

5 **MR. ORODENKER:** Huh?

6 **CHAIRMAN GIOVANNI:** That's indirect.

7 We're not telling them -- I think Commissioner
8 Yamane's question is do we tell them to do an EA or
9 an EIS up front? And we don't.

10 **MR. ORODENKER:** No, no, not up front.

11 **CHAIRMAN GIOVANNI:** Up front they decide
12 what they do. Now, if they do an EA and we find
13 it's inadequate because there may be significant
14 findings -- our findings of significant impact --

15 **MR. ORODENKER:** Yeah.

16 **CHAIRMAN GIOVANNI:** -- we're going to tell
17 them they probably should have done an EIS and they
18 need to do one now; right?

19 **MR. ORODENKER:** Well, where I was going
20 with this is that -- you're absolutely right.
21 You're absolutely right. Where I was going with
22 this though was I think the Commission -- this is
23 one of the areas where staff does a lot of work that
24 the Commission doesn't see. Okay? When a
25 petitioner comes to us and says we're going to do a

1 project, we know we're going to do an EIS, we work
2 with them from the very first day on what they need
3 to put in that EIS to make sure all of the concerns
4 are being met and that they're following the correct
5 process. And if we think, for instance, they tell
6 us they're going to do an EA and we look at it,
7 staff will say, you know, you can do what you want
8 but we kind of think you're supposed to be doing an
9 EIS on this, they'll usually listen to us but they
10 don't have to. And they can still try for an EA.

11 **CHAIRMAN GIOVANNI:** So there's another
12 dynamic in place in the state and that dynamic is
13 that virtually any EA can be challenged by a third
14 party for being inadequate and that they should have
15 done an EIS. And the chances are pretty close to
16 100 percent there will be a two to three year delay
17 while it works its way through appeals.

18 **MR. ORODENKER:** Yeah. Supposedly, the way
19 to handle that is that you go to the environmental
20 court and they render a decision, which they don't
21 meet very often so that's a long process. But you
22 can appeal from the environmental court's decision
23 as well. So yeah. Yeah. And that's why a lot of
24 times when we have a petitioner come in and we're
25 talking about environmental work, if we think that

1 there's reason to believe that an EIS might be
2 adequate, usually our advice to them is usually just
3 do it because if you're wrong, you're going to end
4 up on appeal and your project is going to be set
5 back five years.

6 **CHAIRMAN GIOVANNI:** And you end up
7 spending more money anyway.

8 **MR. ORODENKER:** Right. Right. Exactly.

9 A couple of other things about the EIS
10 process. I want to emphasize -- it was in the slide
11 but I want to emphasize that approval of an EIS or
12 an EA, is not approval of the project. You can hate
13 the project but technically, if they've revealed
14 everything -- and I always like to say, you know,
15 you could propose to put a nuclear waste dump in the
16 middle of Downtown Honolulu. And if you revealed
17 everything, the EIS should be accepted. And then
18 you deny the project later, of course. But you
19 know. So there's a distinction there. The
20 community doesn't generally understand that. So at
21 EIS hearings they will come in and bring in 200
22 people to testify against a project.

23 If you're going to deny an EIS based on
24 public testimony, it has to be because there's
25 something in the public testimony that says that the

1 study was inadequate. Olowalu is a good example of
2 that. We denied that EIS because it became clear
3 that the petitioner had not actually reached out to
4 the cultural practitioners in the area to get their
5 input.

6 One of the things that we caution
7 petitioners about is that the way we understand the
8 circuit court rulings, you can't just send letters
9 out to everybody and then wait for them to answer.
10 A lot of cultural practitioners in particular don't
11 like to respond to letters because they don't want
12 people to know what they're doing because it's
13 sacred. It's their family business. And all the
14 rest. So you actually have to go and knock on doors
15 and take that extra effort to find out. If there
16 are any cultural practitioners in the area, you have
17 to have a qualified person do your archaeological
18 study. You have to have a qualified person to do
19 your environmental study. EISs can fail if the
20 credentials of the people who did the study is not
21 adequate.

22 **COMMISSIONER YAMANE:** Mr. Chair?

23 **CHAIRMAN GIOVANNI:** Commissioner Yamane?

24 **COMMISSIONER YAMANE:** So a couple of
25 questions.

1 What or who determines when the Land Use
2 is accepting authority? And who actually approves
3 the EA/EIS? Is that staff or is that the Commission
4 decision?

5 **MR. ORODENKER:** We hold a hearing for
6 approval of the EIS when they've completed the
7 final. Staff works with them closely during
8 (inaudible) stage. We work with them up through the
9 draft and everything else.

10 **CHAIRMAN GIOVANNI:** I think the question
11 was, upfront, the duration of the accepting agency.

12 **MR. ORODENKER:** I was going to get to
13 that. I was going to get to that.

14 The accepting agency -- there is such a
15 thing as forum shopping. I mean, technically, the
16 accepting agency is supposed to be the first agency
17 that is going to take action on the proposed use. A
18 petitioner, if it doesn't want to go to the Land Use
19 Commission can structure their entitlement process
20 so that the first action is taken by the county. So
21 there are times when we are not the accepting
22 authority for an EIS.

23 **CHAIRMAN GIOVANNI:** What if they bring it
24 -- I mean, what if the Commission doesn't want to be
25 the accepting agency and the Commission votes

1 against it? What are the alternatives for the
2 petitioner?

3 **MR. ORODENKER:** Well, I mean, I don't
4 think you can actually deny their request to be the
5 accepting authority.

6 **CHAIRMAN GIOVANNI:** That's my question.
7 Can we --

8 **MR. ORODENKER:** Yeah. I mean, unless you
9 have legal grounds. For instance, EA or EIS
10 (inaudible) notice says that the first place they're
11 going to go is to the county. You don't have any
12 grounds to deny it or to reject being the accepting
13 authority. I mean, there has to be -- it's like
14 anything else. You can't deny the request if you
15 don't have any basis for it.

16 So a good example is if someone comes in
17 front of us and says, well, before I come to the
18 Land Use Commission I'm going to get, you know, the
19 rules from the county to build the sewage treatment
20 plant that's part of the project. Then you can say,
21 well, then you should go to the county first if you
22 don't want to take it. But if there's nothing in
23 the record to show that they are going to go to the
24 county for anything prior to coming to us then I
25 don't think you have the discretion to reject it.

1 Or to reject the request to be the accepting
2 authority.

3 **CHAIRMAN GIOVANNI:** Okay. Commissioner?

4 **COMMISSIONER YAMANE:** Yeah. So just
5 looking at the flowchart from before, the EA/EIS
6 required. So that doesn't start the clock then
7 because that's before a petition is filed; correct?

8 **MR. DERRICKSON:** That's correct because
9 that is one of the content requirements for a
10 petition to be deemed complete.

11 **COMMISSIONER YAMANE:** Then so prior to the
12 petition filed there's potentially a land use
13 decision to approve the EA or EIS?

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

15 **MR. DERRICKSON:** Right.

16 **COMMISSIONER YAMANE:** That's even before
17 the petition is filed?

18 **MR. DERRICKSON:** That's outside of the
19 petition process.

20 **COMMISSIONER YAMANE:** Okay.

21 **MR. DERRICKSON:** Yeah.

22 **MS. KWAN:** And on that we do have -- I
23 believe we have two pending EAs and EISs out
24 waiting. We have one for U of N Bencorp's motion to
25 amend. So I believe they're in their draft EIS

1 phase and we did two comment letters on that so they
2 should be finalizing soon. And that should be
3 coming before the Commission for approval hopefully
4 in the near future. And then we have another one
5 for a quarry.

6 **MR. DERRICKSON:** And we actually also have
7 one from a project on the Big Island. It used to be
8 called Oceanside 1250. I think now it's Hokulia.
9 And that's 25 years old maybe. And the last we
10 heard from them they were at the draft EIS stage.

11 **CHAIRMAN GIOVANNI:** So Martina, I didn't
12 look ahead in your slides but are you going to speak
13 at all about stale EISs and whether they need to be
14 updated?

15 **MS. SEGURA:** I don't think we included a
16 portion on the stale EISs.

17 **MR. ORODENKER:** Yeah. No, I can talk to
18 that.

19 The Supreme Court in the Turtle Bay case
20 rendered a decision that EISs do go stale. I mean,
21 before that there was no definitive law on whether
22 or not an EIS could be good for perpetuity or not.
23 Since the Turtle Bay case, a number of projects have
24 been told they have to renew their EISs. The
25 Supreme Court didn't give us a lot of guidance on

1 what a stale EIS is. Anything over 20 years is
2 probably stale. Just because of the changes in
3 infrastructure and all the rest. When you get under
4 20 years then I think it becomes the discretion of
5 the accepting authority as to whether or not an EIS
6 is stale. Or the acting authority I should say, the
7 accepting authority. Because we may not have been
8 an approving authority and we get the project that
9 comes in front of us and the EIS hasn't been updated
10 in 15 years. Depending on the area, there may have
11 been a lot of changes to the roadways, the
12 infrastructure. What we know about the water. For
13 instance, Maui is a good example of that. Any EIS
14 that was done on Maui before they designated the
15 Lahaina area as a -- what do you call an aquifer --
16 a special --

17 **COMMISSIONER CARR SMITH:** Designated area.

18 **MR. ORODENKER:** Yeah. It's probably stale
19 even though it may be only five years old. So it's
20 a discretionary thing.

21 Nancy?

22 **COMMISSIONER CARR SMITH:** So where does a
23 cultural impact assessment fall into this?

24 **MR. ORODENKER:** Well, the cultural impact
25 assessment should be part of the EIS or the EA. I

1 mean, if you've got an EA on -- they have to at
2 least do a cultural assessment to determine if
3 there's potential impacts. Of course, an EIS will
4 go into greater depth on that. So that has EAs and
5 EISs and cultural impact assessments. We'll get to
6 this tomorrow. They become, based on the latest
7 Supreme Court case that came down about three weeks
8 ago, all of a sudden they're a lot more complicated.

9 **COMMISSIONER CARR SMITH:** And then are we
10 going to get to the issue of Ka Pa'akai? We've had
11 some different opinions about it from you today.

12 **MR. ORODENKER:** Yeah. The Supreme Court
13 case that came down a few weeks ago makes it very
14 clear. I mean, one of the things about the latest
15 case is that not only did it make some new law but
16 it clarified a lot of the old law. So, and I'll be
17 going through that in detail tomorrow.

18 **MS. SEGURA:** On slide 110 tomorrow.

19 **MR. DERRICKSON:** So if I may just real
20 quickly. Regarding the staleness issue. So there's
21 a question of whether or not the entire EIS is stale
22 or certain portions of the background studies are
23 stale. And that leads to whether or not they have
24 to do an entirely new EIS or whether they only need
25 to do a supplemental EIS with updated studies.

1 **MR. ORODENKER:** Yeah. There's a whole
2 spectrum of issues associated with staleness. It
3 gets complicated but that is -- Scott is right.
4 That's the potential of having an EIS that only
5 needs to be supplemented. But once again, that's
6 the discretion of the Commission and staff will, of
7 course, brief the Commissioners and our staff
8 reports on what issues we see are presented.

9 Any other questions on EISs? Okay.

10 **MR. DERRICKSON:** I'm back on then.

11 Post Decision Action Items. And those
12 include motions to reconsider, which are filed by a
13 petitioner when they don't agree with a decision
14 that we just made. There are certain criteria that
15 they need to meet which is spelled out in our rules
16 in 15-15-84.

17 One is that they've got to be filed within
18 seven calendar days after the issuance of our
19 written decision and order. So they've got to do it
20 -- they have to do it in a timely fashion. It's not
21 like they can wait a month, two months, a year or
22 later.

23 They have to clearly specify that the
24 motion is for reconsideration.

25 They have to state specifically the

1 grounds that (inaudible) considers the decision in
2 order to be unreasonable, unlawful, and erroneous.
3 They've got to specifically call out where we made
4 errors in law and reference those. Where we made
5 errors and why we might have made an unreasonable
6 decision. In no event will the Commission consider
7 a motion for reconsideration after the period within
8 which the Commission is required to action on the
9 petition.

10 And I know that recently, a motion to
11 reconsider that we heard, it may have been confusing
12 to some of the newer Commissioners about what
13 exactly was going on. You know, I know that there
14 may have been thoughts that the motion to reconsider
15 was about whether or not the project was approved or
16 not but that wasn't the case. It wasn't about
17 whether the project was approved. It had already
18 been approved. They were asking for a time
19 extension and we denied the time extension for
20 cause. They asked for a motion to reconsider, and
21 the motion to reconsider was narrowly focused on
22 those issues. The petitioner for the motion to
23 reconsider needed to explain to the Commission why
24 we made errors in law or judgment. And the
25 Commission denied the motion to reconsider because

1 the Commission felt they had not done that.

2 **CHAIRMAN GIOVANNI:** Commissioner Lee?

3 **COMMISSIONER LEE:** Scott, can
4 theoretically that person then or that petitioner
5 ask for another reconsideration? And if so, is
6 there a time they have to wait?

7 **MR. DERRICKSON:** Yeah. It's the same.
8 Seven days after the issuance of the decision and
9 order. So in that case, that time period has
10 passed. Any legal remedy they might have would be
11 appealable to court.

12 **MR. ORODENKER:** Yeah. Motions for
13 reconsideration, I mean, we've only had the one
14 since I've been here.

15 **MR. DERRICKSON:** And church.

16 **MR. ORODENKER:** Oh, yeah. Well, two. But
17 I don't consider that anything legitimate. They're
18 supposed to be very narrowly focused on the criteria
19 that Scott laid out.

20 In the courts, motions for reconsideration
21 are usually only granted where there's a showing
22 that there was an error in law or that there is new
23 evidence that was not available at the time that the
24 hearing was held that should have been brought
25 forward.

1 When we hear motions for reconsideration,
2 we're a little more open in terms of what the
3 motions can be brought for but the ultimate decision
4 is based on the same criteria. You know, have they
5 met that legal standard? And it may not have
6 anything to do with the project. It's just did we
7 make a mistake?

8 Go ahead, Scott.

9 **MR. DERRICKSON:** Yeah. So some of the
10 other post-decision actions are primarily they're
11 motions. And normally, what we entertain are
12 motions to extend the time to either build the
13 infrastructure or to meet certain conditions that
14 are in the decision and order. We had a motion to
15 approve job credits, and in fact, I think we're
16 going to have a new motion to approve job credits
17 for the Haseko project out in the Kapolei area
18 coming up in the future, probably not for about a
19 year.

20 **CHAIRMAN GIOVANNI:** Same Haseko?

21 **MR. DERRICKSON:** Same Haseko. They've
22 gotten some new -- they're apply for some new job
23 credits. Motion to amend the project description,
24 motion to amend or remove conditions.

25 This is, like I said, the amount of new

1 district boundary amendment petitions that we've
2 been seeing over the years has declined
3 considerably. What's increased is these motions to
4 amend. And I think Dan spoke to that issue that
5 we've got a lot of projects that we've approved
6 historically that have not moved anywhere. And with
7 new ownership, new developers, they want to come in
8 and amend the conditions of the project. So that's
9 the kind of things that we're going to be seeing.

10 **MR. ORODENKER:** Okay. If I can speak to
11 that for a minute.

12 This has become our bread and butter,
13 motions to amend. I mean, this is what we're seeing
14 a lot of outside of the special permits which all of
15 a sudden popped up. But there's a couple of things
16 about motions to amend that I think the
17 Commissioners need to be cognizant of.

18 One of them is that because a lot of these
19 projects are so old that are coming in, we've begun
20 to treat motions to amend, significant motions to
21 amend, and what I mean by that is it's not just an
22 extension of time. But on a motion to amend the
23 project itself as contested case hearings. Okay?
24 Because usually there has to be good cause for us to
25 grant that type of a motion.

1 For instance, if you have a project that
2 was originally supposed to be an industrial project
3 and now a petitioner comes in and says, you know, we
4 want to change this to a housing project, we have to
5 go through the same analysis as we would as if it
6 was a brand new petition.

7 So those motions, even though they don't
8 have to be contested case hearings, we've been
9 treating as contested case hearings and that's the
10 way the parties have been treating them. So they
11 become much more involved.

12 Now, motions to amend like everything else
13 require good cause. You have to show that there's
14 good cause to grant it. And so a lot of times that
15 means the petitioner going through a lot of analyses
16 on, you know, why this is better than agricultural
17 land, what the needs are. One of the things that we
18 require in motions to amend if it's a major -- if
19 it's a new owner, is that they provide us with
20 information with regard to financial capability.
21 Because there's no sense amending a project so that
22 somebody can spin it. You know?

23 So if somebody is coming before us with a
24 motion to amend to convert industrial to housing
25 let's say, they've got to show us that they're going

1 to do the project. So we require that information.

2 That has flowed over into some of our
3 hearings status conferences where we've had
4 petitioners come in and say, you know, we're going
5 to amend this. We're going to make a motion to
6 amend. And if they're a Ukrainian brotherhood, some
7 bank -- backed by their own bank that may not get
8 granted. But if RM Towill comes in and says we just
9 bought this project and this is the status but we're
10 going to file a motion to amend, they show us that
11 they're legitimate, we know they have the resources
12 and something substantive like that, then we might
13 well probably grant it.

14 The sticky wicket with motions to amend is
15 that sometimes they're really old projects, and it
16 goes back to the EIS thing. Okay? If the project
17 is 30 or 40 years old and they haven't done any
18 updated environmental work then the granting of the
19 motion is probably dependent on them doing that.
20 And if they don't, we have the ability to say, look,
21 you know, go and do this EIS work or go and do
22 whatever studies. And we can be specific as to what
23 we want them to do. And then come back to us and
24 then we'll re-entertain the motion. There are no
25 time limits on motions. There's no 365 days.

1 There's no nothing. We don't have that concern.

2 **COMMISSIONER MIYASATO:** So Dan, you know
3 when you reference "we," are you meaning the staff
4 or Commission on making that decision on a motion to
5 allow it?

6 **MR. ORODENKER:** It's the Commission.

7 **COMMISSIONER MIYASATO:** Okay.

8 **MR. ORODENKER:** It's the Commission.

9 If somebody files a motion, and this has
10 happened several times in my tenure, if somebody
11 files a motion, even if staff has significant
12 reservations about what's being filed, we have to
13 hear it. I mean, we will never take a decision away
14 from the Commissioners. If we think there's
15 significant laws with a motion, we'll let the
16 petitioner know and then they can decide whether or
17 not they're going to withdraw the motion or not.

18 We will always defer to the Commission if
19 the petitioner does not voluntarily withdraw a
20 motion based on staff concerns. And those concerns
21 are usually concerns that are raised either by
22 Chapter 205, our rules, or Chapter 343. I mean,
23 they're not arbitrary decisions about whether we
24 like the project or not. It's just you didn't meet
25 the requirements of Chapter 205 when you filed this

1 motion.

2 While we're on the subject -- go ahead.

3 **COMMISSIONER LEE:** Sorry. This is kind of
4 related to Commissioner Miyasato's question.

5 So going back to the EIS, would the
6 determination of a finding of no significant impact
7 be that from coming from the staff or from the
8 Commission?

9 **MR. ORODENKER:** The Commission.

10 **COMMISSIONER LEE:** Okay. Thank you.

11 **MR. ORODENKER:** It's always the
12 Commission.

13 **COMMISSIONER LEE:** Okay. Thank you.

14 **MR. ORODENKER:** The most staff ever does
15 is make recommendations to a petitioner. We never
16 make the decision, ever. And they're free to do
17 whatever they want. They can disagree with us and
18 still come before the Commission. We will not hold
19 them back.

20 **COMMISSIONER LEE:** But if it was kind of
21 erroneous, it would expose the decision to a lawsuit
22 then; right? I mean, if it was flagrantly wrong?

23 **MR. ORODENKER:** Well, we will tell the
24 Commission. If that's the circumstances, we will
25 let the Commission know that there's significant

1 legal peril in granting the motion or whatever.

2 But while we're on the subject there's a
3 couple of things. Because we really didn't discuss
4 it.

5 There's a funny thing that goes on. This
6 is from personal experience when I was on the other
7 side of the table. Motions and petitions can be
8 withdrawn up until the moment that the gavel bangs.
9 After that it can't be withdrawn. It has to be
10 heard. So the day before a hearing --

11 **CHAIRMAN GIOVANNI:** What do you mean by a
12 gavel bang?

13 **MR. ORODENKER:** In other words, we start
14 the hearing.

15 **CHAIRMAN GIOVANNI:** Stop the hearing?

16 **MR. ORODENKER:** Start the hearing.

17 **CHAIRMAN GIOVANNI:** Start.

18 **MR. ORODENKER:** Once we've started the
19 hearing on an action item you have to hear it
20 through. I mean, the petitioner can say that in the
21 course of the hearing that we recognize that there
22 are flaws and we ask the Commission to dismiss this
23 and give us, you know, an opportunity to fix it,
24 which the Commission can do. But they can't just
25 unilaterally stand up and say to the Commission, you

1 know, we're done with this. We're going to withdraw
2 it.

3 **CHAIRMAN GIOVANNI:** What about Hakua
4 Place? That's what they did.

5 **MR. ORODENKER:** Hakua Place.

6 **CHAIRMAN GIOVANNI:** Kauai. That was a
7 development in Ka Pa. Halfway through the hearing
8 --

9 **MR. DERRICKSON:** That's Three Stooges
10 turned into Hakua Place, turned in to Kapa'a
11 Highlands. Same project.

12 **MR. ORODENKER:** Yeah.

13 **MR. DERRICKSON:** Yeah. That was with
14 respect to the EIS.

15 **MR. ORODENKER:** Yeah.

16 **MR. DERRICKSON:** We never formally heard
17 the petition. They did not get beyond the EIS.

18 **CHAIRMAN GIOVANNI:** I'll take what you say
19 it is.

20 **MR. ORODENKER:** Yeah. Because we've never
21 heard the petition in that case. It's only been the
22 EIS.

23 And that's a different set of
24 circumstances because that falls under Chapter 343.
25 And the petitioner in that case had the ability to

1 recognize that their EIS was inadequate and asked
2 the Commission to give them an opportunity to fix
3 it.

4 **UNIDENTIFIABLE SPEAKER:** So you know in
5 the motions, the case, the example you had mentioned
6 about 30 years old and significant like industrial
7 to housing. But in most cases we've already changed
8 the boundary to urban already; right? It's already
9 urban for 30 years and nothing's been done.

10 **MR. ORODENKER:** Yeah.

11 **UNIDENTIFIABLE SPEAKER:** So now you've got
12 a turnover of developers. Now they want to do
13 something else. Who tells them to do that? And
14 what's the -- who tells them, hey, you've got to go
15 to Land Use and get --

16 **MR. ORODENKER:** Okay. We haven't gotten
17 to motions for order to show cause yet but that's
18 the risk that they run. Okay? If there hasn't been
19 substantial commencement of the project, and if a
20 petitioner decides or a landowner decides I'm not
21 going to do, you know, commercial. I'm going to do
22 housing. And they don't come back to the
23 Commission, anybody can come to us and say we want
24 you to revert this property back to agriculture.
25 And that's the risk that they run.

1 **UNIDENTIFIABLE SPEAKER:** So it's kind of
2 like a watchdog saying, hey, these guys originally
3 had a boundary amendment to this.

4 **MR. ORODENKER:** Yeah.

5 **UNIDENTIFIABLE SPEAKER:** Now, 30 years has
6 gone by and it's still urban and somebody has to
7 watch that?

8 **MR. ORODENKER:** Yeah.

9 **UNIDENTIFIABLE SPEAKER:** Because the
10 Commission isn't watching.

11 **MR. ORODENKER:** Well, what happens is that
12 -- the first thing that happens in that situation
13 where they're trying to avoid coming back or they're
14 going to not even avoid but they're going to ignore
15 the Commission, is that when they go to get their
16 county permits, the county planning departments will
17 deny them because they're not consistent with the
18 Land Use Commission decision and order.

19 Okay?

20 **MR. DERRICKSON:** Okay. I guess this is
21 just about Decision and Orders and who does them.
22 With district boundary amendments, I indicated
23 previously, okay, the petitioner provides a draft
24 proposed decision and order. And oftentimes, they
25 will work with the state, OPSD, and the county to

1 come to a stipulated agreement that they provide to,
2 you know, the staff and circulate to the parties.
3 So staff's role then is really, you know, making
4 edits to that based on issues that you guys bring up
5 and any specific changes you identify to either
6 findings of fact, conclusions of law, or to
7 conditions.

8 Special Permits. Those are ones that we
9 prepare the decision and order after the
10 proceedings. Sometimes, we will get a proposed
11 draft decision and order from the party seeking a
12 special permit.

13 Motions and status reports. Generally,
14 those decisions and orders are prepared by the
15 staff, reviewed by our attorney generals, and then
16 approved to go out to the Commission.

17 The information contained in the decision
18 and orders comes from the record. All the evidence
19 provided, all the testimony, the transcripts, the
20 video recordings, and the decisions are cited to the
21 specific, where did this finding of fact come from?
22 It came from, you know, the petitioner's draft or
23 the petitioner's EIS page X, paragraph whatever.
24 Sometimes it's a specific citation to a transcript
25 on a certain day, certain witness.

1 The DNOs. Those of you who have been here
2 and you've read through them, you know that they're
3 pretty complex. The staff does this by pouring back
4 through the record. So does the petitioner when
5 they provide the draft proposed DNO. By citing the
6 record, we make sure, or hopefully we reduce the
7 ability for an appeal. That your decision was not
8 based on evidence in the record. It was not
9 reasonable and it was not based on correct citations
10 of legal authority to make the decision. It adds
11 time to the process so it's not like some of the
12 ministerial approvals that the county often is able
13 to render.

14 **MR. ORODENKER:** I want to put in a little
15 plug for staff right here. If you'll notice going
16 through this, Commission hearing days are staff easy
17 days. Because the rest of the time we're working
18 hard to collect all the information so we can put
19 out the staff reports and make sure you guys are all
20 up to speed. And then as soon as the hearings are
21 over and a decision is rendered we're cranking to
22 get out the DNOs. And in the midst of all of that,
23 Ariana is trying to make sure everybody's traveling
24 to the right place and doing all the rest of the
25 staff stuff coming into the hearing and then going

1 home to the right place afterwards. So if we look
2 relaxed on hearing days, it's because compared to
3 our day-to-day work it's relatively easy for us.

4 **MS. KWAN:** Staff begs to differ because we
5 have to lug luggage on meeting days.

6 **MR. ORODENKER:** Well, you know, there's
7 that.

8 **CHAIRMAN GIOVANNI:** Yeah. For some
9 people.

10 **MS. KWAN:** Do I look relaxed?

11 **MR. ORODENKER:** Well, Ariana never looks
12 relaxed so, you know, what am I going to say about
13 that?

14 **CHAIRMAN GIOVANNI:** Somebody is speaking
15 for themselves.

16 **MR. ORODENKER:** No, I'm not speaking for
17 myself. I'm speaking for --

18 **MS. KWAN:** Dan is relaxed.

19 **MR. ORODENKER:** Once we get set up though
20 you're fine; right?

21 **MS. KWAN:** Yes.

22 **CHAIRMAN GIOVANNI:** Just call the
23 (inaudible) comment.

24 **MS. KWAN:** Once I'm set up I'm fine. But
25 during set up I am stressed.

1 **MR. ORODENKER:** Well, that's before the
2 hearing and after the hearing.

3 **MS. KWAN:** Well, sometimes there's tech
4 glitches, too.

5 **MR. ORODENKER:** Yeah, well, you know.
6 That's why, you know, I don't handle the computer.

7 **MS. KWAN:** I don't see you running to the
8 computer. You're right next to it.

9 **MR. ORODENKER:** Well, I'd make a bigger
10 mess out of it than you would.

11 Anyway, moving on.

12 **MR. DERRICKSON:** So again, about the
13 decisions and orders, those take a lot of work no
14 matter who is doing them.

15 The staff is doing a lot more work on
16 collating and editing, as well as outright drafting
17 from scratch than they ever used to have to do. So
18 it's more work today than it used to be.

19 When I was at Office of Planning, we used
20 to provide our own draft proposed decision and
21 orders that largely would track the interests of the
22 Land Use Commission.

23 Now, the Office of Planning no longer
24 provides draft proposed DNOs. They basically wait
25 and just react to the petitioner's draft. The

1 counties historically are hit and miss. Sometimes
2 they would provide proposed DNOs but most of the
3 time it's just comments, certain comments.

4 And in many cases they just say, you know
5 what? We'll deal with this. If you approve it,
6 we'll deal with it when it comes to us for zoning or
7 general plan or community plan amendments.

8 So yeah, decision and orders are big time
9 legal documents that we know we've got to get right
10 so that we don't get appealed, which is always one
11 of our goals.

12 **CHAIRMAN GIOVANNI:** Good.

13 Nancy?

14 **COMMISSIONER CARR SMITH:** So then after
15 that's drafted it goes to the parties for review and
16 input; is that correct?

17 **MR. ORODENKER:** After we draft the
18 decision and order, it's circulated to the
19 Commissioners and it's posted for the parties'
20 review. That's so that the parties have the
21 opportunity on the day that we adopt the order to
22 bring up any issues that they may have.

23 That rarely happens that the parties have
24 issues with the decisions and orders because the
25 first draft is usually theirs. But there is an

1 opportunity to make amendments at the adoption
2 hearing.

3 **CHAIRMAN GIOVANNI:** So a short while ago,
4 a couple weeks, only a few weeks ago you actually
5 put out an email on this topic about the different
6 decision and orders for different types of matters
7 before us and how they would be and who would they
8 be reviewed by.

9 **MR. ORODENKER:** Mm-hmm.

10 **CHAIRMAN GIOVANNI:** I thought that was an
11 excellent explanation. I don't know if you've
12 shared that with all Commissioners, all the new
13 Commissioners.

14 **MR. ORODENKER:** I believe -- I may not
15 have shared it with the new Commissioners.

16 **CHAIRMAN GIOVANNI:** Yeah --

17 **MR. ORODENKER:** That was before we had --

18 **CHAIRMAN GIOVANNI:** -- I encourage you to
19 do that. It answers that question.

20 **MR. ORODENKER:** Yeah. I can -- I can look
21 for that email and resend it.

22 **COMMISSIONER CARR SMITH:** Because it
23 doesn't actually come back before us for approval.

24 **MR. ORODENKER:** Motions, no. Motions, no.
25 And that is somewhat of an exception. I mean, with

1 SPs and with DBAs, yes. But with motions, very
2 often they're just signed by the chair. We, as
3 Scott pointed out, when we do those types of
4 decisions and orders, we're very careful to track
5 the record.

6 And there are citations to the record as
7 to where we got that information from. It would be
8 very difficult for a petitioner to take issue with a
9 provision and a decision and order on a motion if
10 it's contained in the record.

11 Because all of our decisions and orders
12 are cited to the record, we usually don't have
13 petitioners complaining about our decisions and
14 orders. Our primary goal with those is to make sure
15 that the -- it says what the Commissioners want it
16 to say.

17 **MR. DERRICKSON:** I think the next section
18 is probably a good segue break.

19 **CHAIRMAN GIOVANNI:** Actually, the chair is
20 going to entertain a motion to recess for the day.

21 **UNIDENTIFIABLE SPEAKER:** So moved.

22 **CHAIRMAN GIOVANNI:** So moved.

23 **UNIDENTIFIABLE SPEAKER:** Second.

24 **CHAIRMAN GIOVANNI:** Second.

25 All in favor, aye.

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(All say "aye.")

We're recessed until what time tomorrow,

Martina?

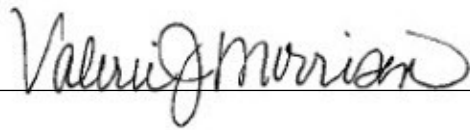
Nine o'clock tomorrow.

(The meeting adjourned at 3:52 p.m.)

CERTIFICATE

I, Valerie J. Morrison, 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 9th day of August, 2024.

A handwritten signature in cursive script, reading "Valerie J. Morrison", is written over a horizontal line.

Valerie J. Morrison