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PLANNING COMMISSION
COUNTY OF MAUI
STATE OF HAWAII

REGULAR MEETING

Held at the Planning Department Conference Room, Kalana
Pakui Building, 250 South High Street, Wailuku, Maui,
Hawaii, commencing at 9:00 a.m., June 8, 2010.

REPORTED BY: Rachelle Primeaux CSR No. 370

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A P P E A R A N C E S

CHAIRMAN:

JONATHAN STARR

COMMISSIONERS:

KENT HIRANAGA
WARD MARDFIN
WARREN SHIBUYA
ORLANDO TAGORDA
JACK FREITAS

CORPORATION COUNSEL:

JAMES GIROUX

AKAKU VIDEOGRAPHER:

KENNY HULTQUIST

1 MAUI COUNTY PLANNING COMMISSION

2 TRANSCRIPT OF PROCEEDINGS

3 * * *

4 CHAIRMAN STARR: Good morning, one and all.
5 Welcome. This is the June 8th, 2010 meeting of the Maui
6 Planning Commission. We have with us our Commissioners,
7 Kent Hiranaga, Commissioner Jack Freitas, Commissioner
8 Orlando Tagorda, Commissioner Ward Mardfin; James Giroux,
9 Corp Counsel extraordinary, our legal counsel. I'm Jonathan
10 Starr. I'm Chair of the Commission this year. Ann Cua is
11 our Deputy Director, who is here staffing the Commission for
12 the Department and does a great job.

13 Commissioner Warren Shibuya. We have Carolyn
14 Takayama-Corden, the Secretary for the Commission. Mike
15 Miyamoto, Deputy Director of Public Works, expert on roads
16 and all things that work in public. Joe Alueta is a senior
17 planner, who does ordinance drafting and other areas of
18 intense expertise. Planner Livit Callentine, Kenny
19 Hultquist filming for Akaku. And thank you everyone for
20 joining us. I turn it over to -- we turn it over to the
21 public for public testimony.

22 The public is welcome to testify on any agenda
23 item. As far as contested cases, we don't accept public
24 testimony. We do allow the public to give comments. Any
25 members of the public wishing to give testimony or comments,

1 please make yourself known. Okay. Mr. Reyes, welcome.
2 Please take the microphone. Introduce yourself, and good to
3 see you. Stand up at the podium.

4 MR. REYES: Thank you, Mr. Chairman. Members of
5 the Maui County Planning Commission, good morning. Aloha,
6 my name is Victor Reyes. I'm the Energy Commissioner, and
7 I'm with the Office of Economic Development. My testimony
8 or comments this morning is not elaborate, or quite simple,
9 because I just want to bring to the Commission's attention
10 some portions or some sections of the proposed ordinance
11 that I thought you should be aware of. But before I do
12 that, I have a prepared testimony, and each of you has a
13 copy of that testimony.

14 But before I read the testimony for the record, I
15 also would like to point out that in the purpose of section
16 of the proposed ordinance which is a general statement, I
17 would like to make a modification or suggestion this way.
18 In Number 2, it says, "Small wind energy systems enhance the
19 reliability and power quality of the power grid," and so
20 forth. I think by its nature, wind energy systems are not
21 stable, and so I would like to add a qualifier, which would
22 now read, "Small wind energy systems with appropriate
23 controls enhance the reliability and power quality of the
24 power grid." Now, that is more correct. Because by itself,
25 I said earlier, wind systems are not -- do not contribute to

1 the reliability of the grid.

2 Having said that, I would like to go to the main
3 portion of my testimony. And I would like to again say
4 aloha, Chair Jonathan Starr and Members of the Planning
5 Commission. The Office of Economic Development supports the
6 bill for an ordinance amending relating to small wind energy
7 systems. Its intent is to help end our addiction to foreign
8 oil and chart a plan to develop new energy by embracing
9 alternative and renewable energy for Maui County. Small
10 wind energy systems will facilitate our County's clean
11 energy goal.

12 While OED, or the Office of Economic Development,
13 agrees with the purpose of the bill, we would like to bring
14 to the Commissioners' attention a limitation that
15 inadvertently excludes certain types of small wind energy
16 systems. In the development standards, it says,
17 19.67.030(a)(b), it says, "No part of the small wind energy
18 system blade shall extend within 20 feet of the ground,
19 tree, public utility lines or any other structure." There
20 are small wind energy systems designed to be installed on
21 homes and buildings instead of traditional pole deployment.
22 Urban wind energy systems are specifically being developed
23 and engineered for installations in dense areas and where
24 wind turbulence can be predominant. Building-integrated
25 wind turbines are in the future of small wind.

1 Certain vertical wind turbines, by nature able to
2 spin faster than the speed of wind, are suitable for direct
3 building structure installations. As such, small wind
4 energy systems designed for building installation should be
5 exempted. So, I'm addressing the 20 foot within the
6 structure will preclude those type of systems. And I have
7 on the second page some examples of wind, small wind energy
8 systems that are appropriate for installation on buildings
9 and on structures. Number 2, 19.67.030.

10 CHAIRMAN STARR: Mr. Reyes, time is up, but
11 perhaps a Commissioner would have a question for you that
12 would give you some more time. Any members?

13 MR. REYES: I have only one very short -- and I am
14 done.

15 CHAIRMAN STARR: Okay. Finish up.

16 MR. REYES: On that second -- on (a)(c), it states
17 that, "No part of the small wind energy system shall be
18 located within or over drainage, utility or other
19 established easements." In the future, it is not
20 inconceivable that advanced small wind systems can be
21 installed or may be advisable on or near utility structures.
22 Hence, it is suggested that exemptions be allowed where the
23 utility company will allow.

24 OED respectfully requests that the Maui Planning
25 Commission modify the language of the bill to allow for

1 these applications. Mahalo for your consideration. Thank
2 you.

3 CHAIRMAN STARR: Mr. Reyes, will you be able to
4 stick around and help us as a resource person, since you're
5 Energy Commissioner for the County?

6 MR. REYES: Yes, Mr. Chairman.

7 CHAIRMAN STARR: Okay. Thank you. We may call on
8 you a little later when the item is up. Next testimony is
9 Mr. Tony Liserre. Please come up to the microphone.
10 Introduce yourself, and welcome.

11 MR. LISERRE: Thank you. My name is Tony Liserre,
12 Maui resident for 17 years. I have a company called Pelico,
13 Incorporated. I am developing small wind here in Maui to be
14 built here in Maui, assembled here in Maui, and hopefully,
15 installed here in Maui. I gave you a printout of a Power
16 Point presentation that I have done. Basically, these do
17 attach to homes. They're made for residential. That's
18 exactly what they're designed to do. I have had test units
19 not attached, not hooked to the grid, but just spinning
20 units for over 18 months, and they are vibration free and
21 noise free. They're completely acceptable as a residential
22 unit, barring visual impact. That's something that's a
23 matter of taste.

24 But these units here, as you can see in the
25 handout, are capable of taking care of up to half of the

1 average home's energy use. Each one of these units
2 currently put out approximately 1.5 kilowatt hours each per
3 day. An array of ten can put out 15. And I think you'll
4 find that that will pretty much take care of most homes,
5 depending on the wind resource.

6 Anyway, again, Victor touched upon A and B of 030,
7 and that would completely wipe out residential in my
8 opinion. It would be such a small avenue for allowing a
9 residence to have its own wind capabilities that I think it
10 would just turn it over to large wind. And again, I would
11 like to see residential have a chance at that. That's all I
12 have to say.

13 CHAIRMAN STARR: Okay. Thank you. Commissioner
14 Hiranaga first and Commissioner Mardfin.

15 COMMISSIONER HIRANAGA: Hi. You mentioned visual
16 impact.

17 MR. LISERRE: Yes.

18 COMMISSIONER HIRANAGA: And to me that's a major
19 concern for me.

20 MR. LISERRE: Sure.

21 COMMISSIONER HIRANAGA: In fact, in my
22 neighborhood, someone has erected a wind energy device. Of
23 course, he's not going to put it where it blocks his ocean
24 view, but he put it to the side of the building where it
25 blocks the ocean view of his back neighbor. So now, the

1 neighbor, instead of looking at the ocean, he's looking at
2 the silver device that spins around.

3 MR. LISERRE: Yeah, I understand that. If you
4 look at the photographs, they can be installed at the
5 beginning of the eave of the roof, and they are only 56
6 inches tall. So, they're actually less height than the roof
7 ridge itself. And I have neighbors that, unless you're
8 directly on the side, cannot see these. People who are on
9 the back side of me -- I'm right on the ocean. People who
10 are on the back side of me, where my house is between the
11 ocean and their house, don't even know they're there,
12 literally don't know they're there. So, that's one thing.

13 If you look at another picture there, they can
14 actually be put very close to the ground, within three feet
15 of the ground and be more like a fence. So, if you -- if
16 you look at it, it could be considered an electric fence, if
17 you would. And so, the impact visually can be mitigated.
18 Also, this type of unit, if developed further, could be
19 actually incorporated into a roof line where you wouldn't
20 see it at all. And you could actually use the roof as a
21 ducting device for the unit. But if B is upheld and passed,
22 then it will not be allowed to be attached to the structure,
23 and that will be a crime I believe. It won't allow us to go
24 further. I hope I've answered the question.

25 CHAIRMAN STARR: Yeah, a followup, Commissioner

1 Hiranaga.

2 COMMISSIONER HIRANAGA: So, what you're saying is
3 there are devices that can be implemented that would be
4 function at or below the existing building height
5 requirements for structures?

6 MR. LISERRE: Oh, absolutely. These work -- the
7 beauty of vertical axis, and you're talking to somebody who
8 builds these things, so I've had a lot of experience with
9 them, vertical axis accepts dirty wind, where the horizontal
10 axis, the basic propeller types, need to have a fairly
11 large, high, unobstructed resource to act properly. Without
12 getting into too much detail, propeller types, if they're
13 not directly into the wind, if they get any kind of side
14 wind or any variance, they vibrate. And that's where the
15 noise comes from. And that's where a lot of the
16 catastrophes and where you see them fail comes from.

17 Vertical axis, I've literally run these and tested
18 these at four different directions, wind directions at the
19 same time. And there's absolutely no vibration out of them,
20 so they are feasible. The downside is they don't put as
21 much power output as the propeller types. But the gains are
22 the reliability, the solid build, the lower rpm's, so you
23 don't have something that's spinning madly. These things
24 run generally around 250 rpm. But the visual impact can be
25 placed on a side of the house. They're not silver. They're

1 made out of -- the type I'm developing are made out of a
2 marine grade plastic. There's no reflection. There's no
3 corrosion.

4 CHAIRMAN STARR: Okay. Thank you. Commissioner
5 Mardfin, did you have a --

6 COMMISSIONER MARDFIN: In your photos, I wanted to
7 know, you said one unit turns out 1.5 kilowatt hours. And I
8 was wondering what consisted of one unit?

9 MR. LISERRE: One unit is one cage, one single
10 cage, one single turbine cage. The concept is called
11 vertical axis horizontal array. What you've done is you've
12 taken a 30-foot tower and you've chopped it into smaller
13 pieces and you put them in a horizontal array.

14 COMMISSIONER MARDFIN: When I look at this bottom
15 photo, is that one or is that ten?

16 MR. LISERRE: Each one of those green cages is
17 one. So, if you had ten of those, it would put out 15
18 kilowatt hours.

19 COMMISSIONER MARDFIN: And is this too high?

20 MR. LISERRE: Well, that's a double stack, but
21 that's only 56 inches tall.

22 COMMISSIONER MARDFIN: The whole thing?

23 MR. LISERRE: Yes. Two foot diameter, 56 inches
24 tall.

25 CHAIRMAN STARR: Okay. Thank you very much.

1 Commissioner Shibuya.

2 COMMISSIONER SHIBUYA: Thank you for coming and
3 letting us know and educating us on this.

4 MR. LISERRE: Thank you for having me.

5 COMMISSIONER SHIBUYA: I just wanted to know, the
6 placement can be on the ground and using the venturi effect
7 between the buildings?

8 MR. LISERRE: Yes, absolutely. It works well.

9 COMMISSIONER SHIBUYA: Also, on the roof having a
10 horizontal type of axis, vein type system, you could
11 possibly use the prevailing winds.

12 MR. LISERRE: Yes.

13 COMMISSIONER SHIBUYA: Accelerating this, the same
14 venturi effect, on top of your roof.

15 MR. LISERRE: Correct. The -- we've tested them
16 laying down in a horizontal, the same type of design, but in
17 a horizontal configuration. So, they're laying down like
18 this and spinning this way. The problem is you have to be
19 within 15 percent or degrees of the prevailing wind. And
20 generally here in Maui, that's not a problem. So, that's
21 why if you were to incorporate something like this into the
22 roof structure, because you normally have a roof that does
23 something like on a full hip, then you could do that.
24 Because you would have a larger bite of the wind to then
25 venturi into it.

1 Now, Maui is a venturi, as we know, in Maalaea.
2 So, yes, it can be done. In fact, it's been done.

3 COMMISSIONER SHIBUYA: Okay.

4 CHAIRMAN STARR: Thank you very much.

5 MR. LISERRE: Thank you. Okay.

6 CHAIRMAN STARR: Are there any other members of
7 the public wishing to testify on any agenda item? Not
8 seeing any, the initial public testimony portion of the
9 meeting is over. We'll return to Deputy Director Cua to
10 introduce our first agenda item. Mr. Chair, Members of the
11 Commission, our first public hearing is a request by
12 Planning Director Kathleen Aoki transmitting Council
13 Resolution No. 10-17 referring a Draft Bill Amending Chapter
14 19, Maui County Code relating to Small Wind Energy Systems
15 to the Lanai, Maui and Molokai Planning Commissions. Joe
16 Alueta is the staff planner on this matter. Mr. Alueta.

17 MR. ALUETA: Good morning, Commissioners. Again,
18 I'm Joe Alueta. I'm the administrative planning officer. I
19 think this is my first time before some of the new
20 Commissioners that have been on the board. Primarily, my
21 role is to draft legislation either for the administration
22 or to shuttle through legislation that is being proposed by
23 the legislative branch, which is the County Council. Today
24 you have what you call a resolution, which that means it's
25 coming out of the County Council. And that's what you have

1 before you.

2 And normally, what happens is we kind of go in a
3 damage control mode. My job is to come before you, get your
4 comments, at the same time, analyze what type of impacts the
5 proposed resolution will have on the administration side as
6 well as the functionality side. Often when someone drafts
7 something on the political level, it may or may not have
8 been thoroughly baked, as they say, and may have unknown
9 repercussions throughout Title 19. And a lot of these
10 piecemeal amendments can create a problem whenever you open
11 up the County Code.

12 I think it was well-pointed out by some of our
13 testifiers about some of the issues that were brought up and
14 the variety of scenarios that could be attributed to this.
15 And that's why, if you go through our -- in our memo report,
16 the key point that I try to hammer home, or two points, is
17 we support the concept of small wind energy. I think it's a
18 great idea. However, one, we think it's redundant, because
19 there is already a code in the Title 19, which calls for
20 energy systems small scale. And that definition covers not
21 only wind; photovoltaic, solar and biomass energy systems.

22 And we are currently going through Title 19 and
23 adding energy systems small scale to the variety of zoning
24 districts from -- we've already amended interim district.
25 We've also amended rural district. And we're also amending

1 several other codes as we -- and we're also amending several
2 different -- can you hear me? Okay. Thank you, Carolyn.

3 Okay. As I said, we have been amending several
4 different sections of the Code as we come along. We feel
5 that the development standards that are outlined in this
6 proposed resolution better fit within the building code
7 under 16 and was highlighted I mean by some of the
8 testifiers about the variety in different methodologies, and
9 we feel it would be easier to -- your standards of where you
10 want it and the safety precautions that are outlined within
11 the development standards should be located within Title 16.

12 In Title 19, which is the zoning category, each
13 one should be different, and you should look at it. The
14 only criteria, would you allow it within that zoning
15 category. And for the most part, we are, through our energy
16 systems small scale definition, we are adding it. And then
17 through height definition, we are again setting what kind of
18 height criteria, because every zoning category is going to
19 be slightly different, and you may want to allow for certain
20 allowances. We have in the draft bills that we brought
21 before you with regards to the residential district as well
22 as the business district or energy systems small scales,
23 which this proposed resolution will fall under, we've given
24 height bonuses of up to ten feet on top of it.

25 We've also made provisions for freestanding small

1 scale wind energy systems from monopole or for grid tie
2 systems, grid systems in which we've established, again,
3 setbacks very similar to what's in here. We don't go into
4 detail of do you need a licensed engineer or a licensed
5 architect to sign off on it. Those are all really building
6 code issues. And I think the Public Works, I guess as a
7 stopgap measure, as you know, times -- private sector and
8 times often move faster than government in the regulations.
9 And you're always trying to play catchup.

10 And I think Public Works is commended for their
11 efforts in introducing a stopgap measure with regards to
12 this ordinance or this proposal. And if you look at Exhibit
13 3 of the memo report that you all have, they have, you know,
14 they're specific. They've established already as a
15 department policy and procedure. This is not codified.
16 This is a policy and procedure of theirs. But something
17 like this, as well as combining some of the standards that
18 are proposed in Resolution 10-17 should be reformulated and
19 placed into what we consider Title, what I'm calling 16-26.

20 And so, again, we don't have any problem with the
21 overall concept and support of small wind energies. We
22 think the support should be extended to energy systems or
23 small scales, which is what we have been doing all along
24 through Title 19. Some of the things in standards that are
25 not covered -- and I'm going to be going on page 3 of the

1 memo report -- some of the highlights that we think should
2 be covered or in a different fashion, and this incorporates
3 some of the comments from different agencies, is that
4 licensing requirements, as noted by Public Works, there
5 should be a consistent requirement on -- for design and
6 clarification of these systems. Recommended licensed
7 architect or licensed engineer during the building permit.

8 Noise level. The proposed bill of small wind
9 energy systems should not exceed 60 decibels at the property
10 line. That's in the proposal. Again, that could be
11 incorporated again in the building code. And I just note
12 out and I attached as Exhibit 13 and 14 of the Code some
13 noise level decibel comparisons to give you an idea of how
14 noisy these things are. I've reviewed a variety of
15 ordinances from around the country as well as some legal
16 bulletins that corporation counsel was kind enough to give
17 me. And I looked at it, and many of the -- they use 50
18 decibels or 10 decibels above ambient noise level. Because
19 that way, you know, if you have a very noisy industrial
20 complex, right, you're not going to notice the noise from a
21 wind energy system, so that makes sense.

22 But if you're in a quiet residential area, a
23 little bit of increase may be noticeable. So, I think they
24 put that 10 decibels above ambient noise level. Electrical
25 interference. Not only are you talking about conflicts with

1 frequencies, you know, when you have a bad motor or a bad
2 connection on your electrical when you turn the radio on,
3 you get that whine, that's the influence from your
4 electrical motor in your car interfering; but also, there's
5 tower interference where you have a structure that spins or,
6 you know, a windmill that spins or a tall structure.
7 Certain frequencies or radios are in line of sight, so these
8 intrusions into the air and spinning can disrupt that line
9 of sight frequency as well as for a.m. radios. Security.
10 That's again something that needs to be addressed in the
11 building code. Many of the codes that I reviewed, ladders
12 don't come within ten feet of the ground, or it has to be
13 fully fenced or enclosed. Because of -- for security
14 reasons, tampering, and also for safety. You don't want a
15 kid running around. Might have a -- miss a few fingers or
16 digits, or head, you know, depending on what happens.

17 Again, electrical interconnection require that all
18 electrical interconnection of distribution lines be
19 underground. And that's clearly one way or another, you
20 know. Obviously, overhead -- overhead lines are cheaper for
21 the installation; however, some communities require that
22 underground -- and for the most part, in our new subdivision
23 codes, we require underground electrical connections now.
24 Insurance. Small energy code, a lot of these require proof
25 of homeowner's insurance that provide coverage in the event

1 of damage or injury that may result from a failure. Maybe
2 not so much with the horizontal, but when you're dealing
3 with your typical propeller, you can have catastrophic
4 failure.

5 Not only possibly if it's a freestanding tower, of
6 the tower falling, which given today's engineering
7 standards, it's very unlikely. However, many of these
8 blades are made of composite materials, and they're
9 spinning, as noted by one of the testifiers, are spinning at
10 a pretty high rpm. So, how far, if there is a catastrophic
11 failure such as something flying into it and cracking it and
12 the thing breaking off and flying into your neighbor's yard
13 or into their roof or whatever, you need to show that you
14 have some type of insurance.

15 And one of the things that from the main energy --
16 or sorry, excuse me, the agency comments that we had, if you
17 go through it, and this is on Page 2 and 3 of the memo
18 report the impact to potential wildlife. And based on their
19 studies, you know, most of these are going to be less
20 than -- they're recommending that nothing more than 50 feet
21 above the ground. For -- I don't know how it happened, but
22 we luckily, in many of the codes that we've brought before
23 you already regarding Small Wind Energy Systems for
24 freestanding towers set a limit of 50 feet. And so, it was
25 interesting we hit that number without actually talking with

1 Fish and Wildlife. They seem to agree anything above 50
2 feet there is a concern for.

3 And so again, we can incorporate that one within
4 our Title 19, but also within the building code that you can
5 say that if it's above this height, you need to get certain
6 permits from not only U.S. Fish and Wildlife, but also DLNR
7 for with regards to incidental take licenses. Let's see,
8 that's pretty much all I had as far as comments on the
9 ordinance or on the proposed resolution. Again, we're --
10 the Department is willing to assist either people from OED
11 in possibly redrafting 16, Chapter and Title 16. That would
12 incorporate Public Works' existing policies and procedures
13 and codifying it to move it along. But we do not believe it
14 should be in Title 19. I think it would create more
15 confusion.

16 Our goal with Title 19 in our revisions that we're
17 currently doing is to make it simple and easier to
18 understand. We don't want to have people running back and
19 forth between sections. We feel that if it's allowed within
20 that district, in that zoning class, we say yes, you can
21 have it. And then building permit, the technical aspect of
22 engineers, what you require as far as licensing should go --
23 should be in the building code. Just like we say you can
24 have a single-family home, we don't specify out whether or
25 not it has to be signed by a licensed engineer. It has to

1 have an architect's stamp. We don't put that in Title 19.
2 We just say you can have it, or you can't have it. And
3 that's all I have for now. Is there any questions?

4 CHAIRMAN STARR: Mr. Alueta, just to clarify my
5 understanding of what you're saying is a recommendation
6 against the specific wording that's in the resolution from
7 Council, but to accomplish it in a different fashion through
8 Title 16 and the building code; however, the wording to do
9 that is not before us?

10 MR. ALUETA: That's correct. Because, again, when
11 you have a resolution from Council, all you're being asked
12 is to comment on it. We don't normally redraft, because
13 it's not our bill. If it was an administrative draft or a
14 thing, we would -- basically, if the Commission didn't like
15 it and recommended we redraft it, most likely, we would go
16 back, redraft, and come back before you again the with the
17 changes to try to get your complete buy-in by the
18 Commission. But in this case, we don't have that luxury.
19 One, we have a time constraint; and two, our obligation for
20 this resolution is to just to get your comments.

21 But it's our duty at least, if this is going to
22 impact the Planning Department and Public Works and how they
23 run their area, it's our duty or my department's duty to
24 say, hey, we've got a problem with this bill. We like the
25 concept. However, we think it needs to be placed within,

1 instead of 19, 16-26-A, and we'll be fine with it. But we
2 think there should be a comprehensive look at it, and I've
3 kind of started drafting one for Title 16.

4 But again, my job is 19. Technically, I'm not
5 supposed to get into Public Works' kuleana.

6 CHAIRMAN STARR: Could we find out -- I know it's
7 not really your area of expertise, Mr. Miyamoto. But did
8 DSA have a hand in drafting it? And then I'm going to ask
9 Mr. Reyes the same. I'm trying to figure out if Planning
10 wasn't involved in this, who drafted this?

11 MR. ALUETA: Council Services did.

12 CHAIRMAN STARR: Okay. Mr. Miyamoto, did DSA look
13 at this? I can give you some time if you want to make a
14 call.

15 MR. MIYAMOTO: I'm assuming we took a look at
16 this, as we do have procedures and policies that were
17 formulated to try and accommodate these types of systems.
18 So, I think we've had a very limited input into this process
19 is my understanding. So, as he pointed out, we do have
20 policies and procedures that we've implemented.

21 CHAIRMAN STARR: Commissioner Mardfin.

22 COMMISSIONER MARDFIN: I would like to ask Mike
23 some more questions, but if he's going to testify, I could
24 wait until that time. If he's not planning to testify, I
25 would like to ask him.

1 CHAIRMAN STARR: Now is the time. Go ahead.

2 COMMISSIONER MARDFIN: Mike, two things. In
3 general, without going into the details, would Public Works
4 have a problem with it being in Title -- something similar
5 in Title 16? You seem to already have the policies anyway.

6 MR. MIYAMOTO: If it's in Title 16, as long as
7 it's something general that refers to the appropriate codes
8 that would apply to implementation of these types of
9 systems. I don't think you want to have a code where it's
10 -- where a lot of the procedures are implemented, because
11 then it becomes every time you need to make a change, you
12 have to go through that whole process, where it's easier to
13 make policy changes and procedure changes.

14 COMMISSIONER MARDFIN: Thank you. One more, if I
15 may. Public Works did come back with the comment,
16 "Recommend small energy system be designed with a cutoff
17 system to stop feeding power into the grid." I can
18 understand that one. "Have a consistent requirement for
19 design and certification by either a licensed architect or
20 licensed engineer."

21 How about a licensed installer? Can there be a
22 licensed installer or something like that? Or does that --
23 or it doesn't have any meaning to the building department?

24 MR. MIYAMOTO: Well, generally, to pull a permit,
25 you're going to have some kind of a license, whether it be a

1 building contractor's license or engineer's license,
2 architect license. So, to pull the permit, you're going to
3 have some kind of a license to begin with. Licensed
4 installer is a little bit general in that sense. I mean
5 right now what we've tried to do, for example, with the
6 solar water heating system, we have a lot of good
7 contractors out there. They're very consistent. And
8 they've demonstrated to us their ability to be consistent
9 and provide a safe and good product to the public, so we've
10 streamlined the process.

11 COMMISSIONER MARDFIN: I think I get the idea. I
12 understand. How about if it said licensed architect,
13 licensed engineer or licensed contractor? Would that --

14 MR. MIYAMOTO: I would have to take that one back
15 to the staff to see if our code allows us to accept that.

16 COMMISSIONER MARDFIN: Okay. Thank you.

17 CHAIRMAN STARR: Commissioner Freitas.

18 MR. FREITAS: Yes, clarification for the record.
19 On our agenda, it says Chapter 19, and we're dealing with
20 Title 19. Is it the same thing?

21 CHAIRMAN STARR: Mr. Giroux.

22 MR. GIROUX: Yeah, the way the Code is laid out,
23 it's not really interchangeable, but it's talking about the
24 same thing.

25 MR. ALUETA: It's Title 19, but it's a specific

1 chapter of Title 19.

2 CHAIRMAN STARR: Commissioner Shibuya.

3 COMMISSIONER SHIBUYA: Joe, the spirit and intent
4 is actually to protect the public and ensure the public gets
5 a quality type of installation. And so, do we actually have
6 a testing or certified product list, or do we depend on
7 California? California does test all of the photovoltaic
8 modules and inverters that are installed, and the state
9 allows for renewable credits. And I've been recommending
10 people on Maui to take a look at that web site. And if the
11 product that you're going to buy and install in your room --
12 I mean your home, if it does not -- is not listed on that
13 certified list, that California list, you're very
14 questionable, and you're taking it on your own. California
15 actually tests it, and they test for the outputs.

16 MR. ALUETA: Right. No, no, I understand. And
17 again, that just shows, once again, why it shouldn't be in
18 Title 19. It's more of a technical -- it should be in Title
19 16, which is the building code and standards. And, you
20 know, we don't have the luxury -- normally national codes,
21 and California being the -- I mean, again, as it's always
22 pointed out, if California were a country, it would be the
23 sixth largest country, sixth largest nation economically in
24 the world. That's how big it is. So, they have the luxury
25 of providing that type of home base and testing for their

1 uses. However, Maui does not have that.

2 We normally would rely on national building codes
3 and electrical building codes. And that's -- and the point
4 regarding the engineer or architect or installer, the point
5 that was being made by Public Works, if you go through it,
6 is that they were looking at it. The Code had referenced a
7 licensed architect, and they referenced an engineer. And
8 they want to know what do you want. And so, I think it's
9 just the building code, or whatever code, it should be
10 consistent. Do you require a structural engineer, an
11 electrical engineer all to sign off on this? And I think
12 you just want to -- or an architect. And you want to keep
13 it as generic as possible, because then they can have
14 policies and procedures in their own.

15 Because you may not want a, no offense Chris, a
16 licensed landscape architect signing off on a, you know,
17 100-foot windmill tower. I think that you want to leave it
18 an architect that has certain qualifications or has that
19 certain skill level or has been licensed to do that. And
20 that's why, you know, you don't want a licensed plumber or,
21 you know, whatever to -- for electrical. You know, you want
22 to specify it can be an engineer, and Public Works can
23 decide what engineers or architects can be the ones that
24 sign off on these systems. But again, I think it's --

25 COMMISSIONER SHIBUYA: Thank you, Joe. Because we

1 want to build in integrity into our policies. And I fully
2 agree that, yes, it should be in 16.

3 CHAIRMAN STARR: Commissioner Tagorda.

4 COMMISSIONER TAGORDA: Mr. Alueta, this resolution
5 in front of us, Number 10-17, which is about small wind
6 energy is you mentioned about the redundancy and duplication
7 of this resolution with Title 16. I don't know what is
8 Title 16. Does Title 16 include small wind energy
9 specifically in their code?

10 MR. ALUETA: Yes.

11 COMMISSIONER TAGORDA: I don't see this in Title
12 19, in our chapter. So, I think this resolution is really
13 to provide small wind energy on all districts. That's what
14 I hear about this. That's what I understand about this
15 resolution.

16 MR. ALUETA: Yes.

17 COMMISSIONER TAGORDA: So, is that provision in
18 this resolution is with Title 16?

19 MR. ALUETA: This resolution, right, is with Title
20 19.

21 COMMISSIONER TAGORDA: Yes, this is an amendment
22 to Title 19, which I don't see in Title 19.

23 MR. ALUETA: Right, they want to amend Title 19 to
24 allow it across all districts. And then they've also
25 established standards in which these need to meet for within

1 all the districts.

2 COMMISSIONER TAGORDA: Yes.

3 MR. ALUETA: However, we have a wide variety of
4 districts and different standards. We have already started
5 to amend Title 19 to allow a more broadly -- a definition
6 called energy systems small scale. Energy systems small
7 scale includes the wind energy systems that this resolution
8 is talking about. It also talks about solar water heaters.
9 It also talks about photovoltaic systems. It also talks
10 about biomass classification as well as, you know, anything
11 that meets the definition of a small energy system. This
12 one is only specific to wind.

13 And so we don't think that one size fits all as
14 far as height, okay. Because very different districts are
15 going to have a variety of height, and you may want to have
16 different standards with regards to that height situation.
17 And that's what we've done consistently with Title 19. As
18 each amendment that's come before this Commission, we've
19 allowed wind energy systems or small energy systems to have
20 a higher height standards in certain categories.

21 So, in the business district, you may allow higher
22 height. In the residential district, you may lower that
23 height standard. In the ag district, you may have a higher
24 height, or in the rural district, you may have a higher
25 height. And that is what we have consistently done in all

1 the amendments to Title 19. And we feel that each district
2 needs to be looked at and analyzed, is the small energy
3 system appropriate. In most cases, they are. And the
4 standards generally with regards to height are established
5 in the zoning.

6 But regarding the building codes, engineers and
7 some of the other language that's in the resolution that's
8 before you, that is more of a -- we feel that's more of a
9 building code issue. And, in fact, as I point out on
10 Exhibit 3 of the memo report, Public Works already has a
11 policy with regards to permits for photovoltaic systems and
12 wind turbines and windmills. So, Public Works is already
13 looking at this as a building codes issue with regards to
14 the general standards that should be in there. So, like I
15 say, I -- I know it's kind of confusing, because the bill
16 came down to amend Title 19. But what they're putting in
17 Title 19 and generally across it is building code standards.
18 And that's not where it should be.

19 Secondly, they're amending or adding a new chapter
20 in Title 19. They're not individually going into Title 19
21 and saying, in the residential district, you can do a small
22 wind scale energy. In business districts, they're not
23 amending each chapter of Title 19. They're just making a
24 brand-new chapter. And to me, that's more confusing to the
25 general public who needs to use the Code. Because they want

1 to just see I'm in the residential district, can I do it.
2 They're not going to see --

3 COMMISSIONER TAGORDA: But I believe this
4 resolution, if it will be adopted, it just totally allows
5 you, or it's not a voluntary. It's a mandate that you have
6 to have small wind energy when that's not the case.

7 MR. ALUETA: It's not a mandate.

8 COMMISSIONER TAGORDA: It's not a mandate?

9 MR. ALUETA: No, it's not like a solar water
10 heater. It's not mandating that you have to install one.
11 What it does is it allows you to install one, and sets up
12 the standards in which to install a small wind energy
13 system, but it doesn't mandate it. It's not like the solar
14 water heater bill where it mandates or requires that during
15 new building construction that you actually have to install
16 a water system. This doesn't do that with this amendment.

17 COMMISSIONER TAGORDA: Thank you.

18 CHAIRMAN STARR: I wanted to ask Energy
19 Commissioner Reyes about any -- if they have any comments
20 and whether they were consulted in drafting this. What
21 we're hearing is that the department supports the concept,
22 but that they feel that the change should be in 16 and in
23 the building codes. Mr. Reyes, do you have any comments on
24 that?

25 MR. REYES: Thank you, Mr. Chair. I'm not an

1 expert on the planning side, but what I do hear is the
2 proposed ordinance has a component, or has components that
3 belong to the building code area or Title 16. And there's
4 some area that belongs to Title 19. That's what I'm
5 hearing. With respect to whether or not we have had a
6 chance to see this, I wish we had more time to look at
7 the -- at the proposed, proposed bill. But I think overall,
8 in general, it is nice to see that we are addressing the
9 issues that we've heard wherein people are given the
10 impression that they can have a certain type of small energy
11 system in their -- in their -- on their property or in their
12 location.

13 And I think this brings up the awareness that we
14 are open to looking at avenues by which we can enhance and
15 facilitate, distribute. Another term for small renewable
16 energy, it would be distributed, which enhances overall our
17 long-term energy goal.

18 CHAIRMAN STARR: Thank you, Doctor. It also seems
19 like there should be comment from the energy working group,
20 which is relevant to this, since the County under the Mayor
21 and your office does have the citizens working group of
22 experts in the community. Commissioner Mardfin.

23 COMMISSIONER MARDFIN: Mr. Reyes, do you concur
24 with Mr. Alueta that this would be more logically come under
25 Title 16 rather than Title 19?

1 MR. REYES: Again, I'm not the expert, but I think
2 in the practicality of it, I think there are some sections
3 or provisions which should be addressed in the building code
4 area. And then what's appropriate in the language area
5 should be distinguished. I think what we're trying to do is
6 make it easier for the public to understand, you know, where
7 we're going and how we're proceeding.

8 And so, I guess to put those particular areas
9 where it's more appropriate in the building code section
10 permitting process would probably contribute to a better
11 system, because we have heard about a lot of these things
12 that facilitated permitting, and I think that is in the
13 right direction.

14 COMMISSIONER MARDFIN: When you gave your initial
15 testimony, it was -- a lot of it had to do with allowing
16 them closer to structures, so it makes more sense. After
17 you testified, there was another testifier that talked about
18 the vertical systems. And I -- would I take it from your
19 testimony that you would have been supportive of the kinds
20 of things he was suggesting?

21 MR. REYES: I agree. My intent was just to bring
22 to your attention that by having that language, whether it's
23 adopted in whichever title, I think you should be aware of,
24 because you essentially would be excluding some systems that
25 are designed and appropriate for -- to be close or at or on

1 the structures. I just want to bring that to your
2 attention.

3 COMMISSIONER MARDFIN: Thank you very much.

4 CHAIRMAN STARR: Commissioner Shibuya.

5 COMMISSIONER SHIBUYA: I think this is -- the
6 intent here by the Planning Department is outstanding,
7 because it allows for the public to become more sustaining,
8 self-sustaining, energy sustaining. And so, I would like to
9 make a motion.

10 CHAIRMAN STARR: Commissioner Shibuya, I want to
11 ask you to hold that motion until we're ready to receive it.
12 Because we do need to have a public hearing on this.

13 COMMISSIONER SHIBUYA: Okay, sounds good. I just
14 wanted to make a comment that it does support the energy
15 sustaining objectives of this County. And it is consistent
16 that when you start talking in terms of specific building
17 and placement on property, then it comes into the building
18 and construction area more so than it is in terms of
19 planning. It's more of the developmental implementation
20 phase that we allow for this and that we ensure that the
21 public is safe in which they can use and have these reliable
22 systems.

23 CHAIRMAN STARR: Okay. Members, are we ready to
24 hear if there are any public comments specifically on this?
25 We're opening the public hearing portion specifically on

1 this item. Anyone who has not testified and wants to
2 testify on this item is welcome to do so. Okay. Not seeing
3 any, the public hearing is closed.

4 Where now we could have further discussion,
5 questions or a motion would be -- would be in order. I
6 think Mr. Alueta had some additional comments to make. No?
7 So, Commissioner Shibuya, now is a good opportunity.

8 COMMISSIONER SHIBUYA: I would like to make a
9 motion that we support the Planning Department's efforts to
10 draft with the assistance of the Public Works as well as
11 Energy Commissioner -- the Energy Commissioner has a
12 resource, a public resource that he can tap to review the
13 proposals -- but to come up with regulatory standards that
14 should be drafted into Title 16 building and construction to
15 include some of the standards such as licensing
16 requirements, noise levels, electrical interference,
17 security, electrical interconnections and insurance.

18 I would also like to include, besides Public Works
19 and Economic Development Energy Commissioner, to have
20 someone from MECO involved.

21 COMMISSIONER MARDFIN: I'll second that very long
22 resolution.

23 COMMISSIONER SHIBUYA: Motion.

24 COMMISSIONER MARDFIN: Motion. But if you wanted
25 to simplify it, I wouldn't mind. I would second a more

1 simple one.

2 COMMISSIONER SHIBUYA: Okay. I'll try it again.

3 COMMISSIONER MARDFIN: May I make a suggestion?

4 COMMISSIONER SHIBUYA: Sure.

5 COMMISSIONER MARDFIN: Let me take a shot at this.

6 CHAIRMAN STARR: Before you do it, could I suggest

7 we thank the Council and say their concept --

8 COMMISSIONER MARDFIN: That's what I was going to
9 do. I move we support the concept developed by the Council
10 to support small wind and other small system energy
11 production. Let's do it in pieces. Let's keep it at that,
12 and then we'll have a series of them.

13 CHAIRMAN STARR: So, the rest will be as
14 amendments?

15 COMMISSIONER MARDFIN: No, we'll do a series of
16 separate motions.

17 CHAIRMAN STARR: So, is there a second?

18 COMMISSIONER SHIBUYA: I second.

19 CHAIRMAN STARR: So, could you read back the
20 motion?

21 MS. CUA: The motion is to support the concept of
22 the bill, which is establishes Small Wind Energy Systems in
23 Maui County.

24 CHAIRMAN STARR: Wind and --

25 COMMISSIONER MARDFIN: And other alternative --

1 small system other alternatives.

2 COMMISSIONER SHIBUYA: It could include PV, that's
3 why.

4 MS. CUA: And other alternatives.

5 CHAIRMAN STARR: So, we have a motion on the floor
6 that's been seconded. And I understand this is the first of
7 several motions that will be offered on this. Any
8 amendments or discussion? All in favor, please raise your
9 hand.

10 MS. CUA: Five aye's. Motion passes.

11 CHAIRMAN STARR: And any opposed? Okay.

12 MS. CUA: Five aye's.

13 CHAIRMAN STARR: So, the motion passes.

14 Commissioner Mardfin.

15 COMMISSIONER MARDFIN: I move we urge the Council,
16 however, to redraft this for a Title 16 change and only
17 refer to Title 19 where appropriate.

18 COMMISSIONER SHIBUYA: I'll second it.

19 CHAIRMAN STARR: So, the new motion reads?

20 MS. CUA: That the bill be redrafted.

21 MR. ALUETA: For Title 16.

22 MS. CUA: For a Title 16 change and only referring
23 to Title 19 where appropriate.

24 CHAIRMAN STARR: Okay. Any discussion,
25 amendments? All in favor, please raise your hand.

1 MS. CUA: Five aye's. Motion is carried.

2 CHAIRMAN STARR: Okay. Commissioner Mardfin.

3 COMMISSIONER MARDFIN: I move we urge the Council
4 to adjust the language to reflect the concept that small
5 energy systems should be able to be built near or -- near or
6 on existing structures as well as what they have.

7 COMMISSIONER SHIBUYA: I'll second it.

8 CHAIRMAN STARR: So, we have a third motion, and
9 that motion reads?

10 MS. CUA: That the Council adopt language to
11 reflect the concept that small energy systems, small wind
12 and other energy systems, should be able to be built near or
13 on existing structures in addition to what is included in
14 the bill.

15 CHAIRMAN STARR: Okay. All in favor, please raise
16 your hand.

17 COMMISSIONER HIRANAGA: Discussion?

18 CHAIRMAN STARR: Yeah, discussion. Commissioner
19 Hiranaga.

20 COMMISSIONER HIRANAGA: I'm just trying to
21 understand the need for the motion, if someone could explain
22 that to me. It's being prohibited that small energy systems
23 not be built near structures or on top of structures?

24 CHAIRMAN STARR: Commissioner Mardfin.

25 COMMISSIONER MARDFIN: That's what Mr. Reyes

1 testified to earlier. He was in particular referring to 19
2 dot -- in the proposed bill, 19.67.030-A(1) Setback, (b),
3 "No part of the small wind energy system blade shall extend
4 within 20 feet of the ground, tree, public utility, or any
5 other structure." And so, it's to urge them to rethink that
6 item.

7 MR. ALUETA: Yeah. And also, there was comments
8 regarding not only B. Anyway, it's supposed to be -- it's
9 supposed to be on Title B -- Section B and C, one dealing
10 with structures like trees, and then the other one dealing
11 with utility and drainage easements. So, but the first --
12 the motion that you have right now is dealing with having it
13 being built near other structures.

14 CHAIRMAN STARR: Commissioner Hiranaga.

15 COMMISSIONER HIRANAGA: Well, the motion as stated
16 and the explanation that Commissioner Mardfin provided is
17 not exactly the same. One is to allow. The other one he
18 said is to rethink. So, is the motion to clarify what's
19 allowed, or you just wanted to say allow?

20 CHAIRMAN STARR: Would you please read back that
21 motion?

22 MS. CUA: It says adjust the language, so
23 basically, do a modification of what the bill is saying
24 right now is the way I took the --

25 COMMISSIONER HIRANAGA: To allow these --

1 MS. CUA: To be on or near existing structures as
2 opposed to so much feet.

3 COMMISSIONER HIRANAGA: Twenty feet is not near,
4 so you want it nearer?

5 MS. CUA: Well, on is about as near as you can
6 get. And according to the testimony, like Joe has, you
7 know, Joe is nodding his head, we wouldn't be allowed the
8 way the bill is currently proposed.

9 MR. ALUETA: Correct. Because I guess the way the
10 language and the thought process behind this was that you're
11 dealing with a -- your normal windmill, I guess you could
12 say, your propeller type where it has a high vertical. And
13 then you have the wind -- the wind, the blades spinning
14 around. And they don't want it to be on, or the blade, the
15 tip of the blade to come down within 20 feet of a structure.

16 However, there are Small Wind Energy Systems that
17 are actually mounted to the roof, so they're actually like
18 within inches of the roof structure or actually mounted to
19 the roof structure, and there's not really a monopole,
20 separate monopole structure supported above the building.
21 And so, they feel that language, which I would concur with,
22 would prohibit those types of roof-mounted windmills from
23 occurring, which is the most predominant small wind or
24 consumer level windmills that are out there.

25 CHAIRMAN STARR: Okay. Members, are you ready?

1 All in favor, please raise your hand. All opposed.

2 MS. CUA: Five aye's. Motion carries.

3 CHAIRMAN STARR: Commissioner Mardfin.

4 COMMISSIONER MARDFIN: I don't think I want to
5 make another motion, but I do want to -- this would just be
6 a comment I would like to see passed on. One is in
7 19.67.010, Purpose. Number 2, it says, "Small Wind Energy
8 Systems enhance the reliability" -- and I concur with
9 Commissioner Reyes that with appropriate controls, because
10 wind is variable. And so, it might not help reliability.

11 I think that's just as a note to pass onto them.
12 And the second one I have is on Page 4 of the bill. It's
13 under 19.67.030, Development Standards. Item, it starts on
14 3, but continues on 4. And under 4, it says 7. And the
15 line is just, "Drawings to scale of the entire small wind
16 energy structure, including location and elevation of all
17 elements of the proposed small wind energy system, including
18 the tower base, wind turbine, blade, footing, guy wires, and
19 all other elements of the system." And then it has a
20 period, and I don't know what that means.

21 Are they supposed to provide these? Are they
22 supposed to be made? That's just an offhand comment. When
23 they come to rewrite this for Title 16, they can deal with
24 that.

25 CHAIRMAN STARR: I have a question for

1 Commissioner Shibuya. Part of your original motion, it
2 wasn't covered. I was wondering if you were interested in
3 having wording that, Department of Planning, DSA, the Energy
4 Commissioner's office and the appropriate working group be
5 brought into --

6 COMMISSIONER SHIBUYA: Yes, I would like to have
7 this type of activity where you have a group, think type of
8 operation.

9 COMMISSIONER MARDFIN: Second the motion.

10 CHAIRMAN STARR: So, we have a motion, and that
11 motion reads?

12 MS. CUA: Well, can I ask a quick question first?
13 I was just wondering if you wanted to go off of your second
14 motion.

15 CHAIRMAN STARR: Let's make an addition.

16 MS. CUA: Okay.

17 CHAIRMAN STARR: Just to get it done at this
18 point.

19 MS. CUA: So, should we say that relative to the
20 redrafting of the bill for Title 19, that it -- you suggest
21 coordinating with the Planning Department, Public Works and
22 the Energy --

23 COMMISSIONER SHIBUYA: As well as MECO.

24 MS. CUA: Energy Commissioner or energy office and
25 MECO.

1 CHAIRMAN STARR: Energy office and working groups.

2 COMMISSIONER SHIBUYA: Okay.

3 MS. CUA: That would be your fourth motion.

4 COMMISSIONER MARDFIN: That's acceptable.

5 CHAIRMAN STARR: All in favor, please raise your
6 hand. All opposed.

7 MS. CUA: Five aye's.

8 CHAIRMAN STARR: Thank you. And Ms. Cua.

9 MS. CUA: Another part of the -- Mr. Shibuya's
10 original motion that he was trying to make included
11 incorporating all of the additional standards that the
12 Planning Department had mentioned on Pages 3 and 4, license
13 requirements, noise level, electrical interference, so on
14 and so forth. Is that something this body --

15 COMMISSIONER MARDFIN: I'll move that those
16 standards be -- it be recommended to the Council to
17 incorporate those concepts.

18 COMMISSIONER SHIBUYA: Second.

19 CHAIRMAN STARR: So, we have an additional motion
20 that is?

21 MS. CUA: That the additional standards
22 recommended by the Planning Department to include license
23 requirements, noise level, electrical interference,
24 security, electrical connections and insurance be
25 incorporated into a revised bill.

1 CHAIRMAN STARR: Okay. All in favor, please raise
2 your hand. All opposed. Okay. Thank you very much. That
3 passes, correct?

4 MS. CUA: Yes, five aye's.

5 CHAIRMAN STARR: Commissioner Mardfin.

6 COMMISSIONER MARDFIN: I just would like to make a
7 quick statement. I really think these things are great.
8 It's compatible with the proposed Maui Island Plan that we
9 sent to the Council, and I think this is a wonderful
10 opportunity.

11 CHAIRMAN STARR: Yeah, I have a comment, too.
12 We've been living off the grid since 1972 in East Maui. We
13 were manufacturing small wind systems back in the '70s. We
14 always did it in a guerilla fashion, because it was almost
15 insurmountable to permit it. And it's great to see it being
16 made as part of our process in Title 16 and 19, et cetera.

17 MR. ALUETA: Thank you very much.

18 CHAIRMAN STARR: Thank you, Joe.

19 Ms. Callentine, are we ready for the next item?

20 MS. CALLENTINE: Mr. Chair, if we could just have
21 a short break.

22 CHAIRMAN STARR: We're going to take a short
23 break. We'll be back at 10:15.

24 (Recess taken.)

25 CHAIRMAN STARR: Okay. The Maui Planning

1 Commission is back in session. We're ready for Deputy
2 Director Cua to introduce the next item.

3 MS. CUA: Under Unfinished Business, the next item
4 is a request by Edward D. Thielk of Mana Foods requesting an
5 off-site parking approval in order to utilize eight parking
6 stalls at the Maui Dharma Center site in the R-1 Residential
7 District at 81 Baldwin Avenue, Tax Map Key: 2-6-006, Parcel
8 30 in Paia in order to help satisfy the parking requirement
9 for the Mana Foods Expansion project and related
10 improvements in the B-CT Country Town Business District at
11 49 Baldwin Avenue at TMK: 2-6-005, Parcel 2.

12 Livit Callentine is the planner, and this was last
13 reviewed at your April 28th, 2009 meeting.

14 CHAIRMAN STARR: Ms. Callentine.

15 MS. CALLENTINE: Thank you. Good morning, Chair
16 and Commissioners. As Director Cua just said, we are here
17 today to review an application for a Special Management
18 Area -- is that on -- Use Permit. Maybe Joe shut it off.
19 Can you hear me?

20 CHAIRMAN STARR: Yeah.

21 MS. CALLENTINE: Anyway, and we are -- so, we are
22 here today to review an application for a Special Management
23 Area Use Permit for after-the-fact and proposed revisions to
24 the Mana Foods retail establishment. We will also be
25 reviewing an off-site parking approval for use of eight

1 off-site parking stalls on a nearby lot owned by the Maui
2 Dharma Center.

3 And for your information, I did bring extra
4 reports from your meetings back in April 2009. If any of
5 you need an extra copy, please let me know. Now, you may
6 recall that these requests came before you during review of
7 the conditional permit application for off-site parking in
8 the R-1 Residential District, and that was on April 28th,
9 2009. The applications were filed by Chris Hart & Partners
10 on behalf of Edward Thielk, owner of the -- owner of the
11 Mana Foods parcel.

12 Upon your request, I will review the land use
13 designations and uses of surrounding properties for each of
14 the parcels. But if not requested, I'll dispense with that
15 portion to speed things up. Now, I'll just summarize the
16 project since it last came before you in April 2009. And
17 afterwards, Chris Hart's firm would like approximately ten
18 minutes to present project slides. Also with us today from
19 Mana Foods is Edward Thielk and also the engineering
20 consultant to the project, Linda Taylor.

21 As far as procedural matters go, the applications
22 were filed in August 2004 and 2005. On March 23rd, 2006,
23 the Board of Variances and Appeals approved a request to
24 provide eight off-site -- off-street parking stalls whereas
25 17 were required. On April 15th, 2008, the Urban Design

1 Review Board reviewed and recommended approval of the
2 project as proposed with one additional condition, which was
3 that the applicant construct a masonry wall along the rear
4 property line to further separate the commercial uses from
5 the residential area.

6 On April 28th of 2009, this body conducted a
7 public hearing on the SMA permit and conditional permit
8 applications. The Commission voted to defer on the SMA and
9 the off-site parking applications pending Council approval
10 of a conditional permit to allow for off-site parking on a
11 lot -- a nearby lot zoned R-1 Residential. The conditional
12 permit is required because parking lots are not a permitted
13 or a special use in the Residential District. At the public
14 hearing, seven members of the public testified in support of
15 the project. No one testified in opposition.

16 Two letters of support were received prior to
17 public hearing and were included in the staff report. No
18 letters were received in opposition to the project. And
19 during the public hearing, approximately 18 additional
20 letters in support of the project were submitted. And
21 finally, Ordinance Number 3739 approving the use of eight
22 parking stalls in the off-site parking lot became effective
23 April 7, 2010, and was subject to six conditions. Now, for
24 a brief project summary. The SMA use permit again is for
25 after-the-fact and proposed improvements to the existing

1 Mana Foods retail establishment. The after-the-fact
2 improvements include expansion of the existing retail space,
3 conversion of the second floor to an office, expansion of
4 the storage capacity, including refrigeration, freezer rooms
5 and warehouse.

6 The proposed improvements include expansion of the
7 vitamin room, construction of the masonry wall I previously
8 mentioned, repair and replacement of existing siding,
9 windows, trim and other design-related improvements in
10 compliance with the Paia-Haiku Country Town Design
11 Guidelines. In addition, drainage improvements include two
12 onsite drainage inlets with subsurface drainage systems that
13 will store runoff and allow it to percolate into the
14 substrata.

15 There's further details of that drainage report,
16 which I will not go into now for the sake of time unless you
17 request it. A drainage summary dated May 24th, 2001 was
18 provided in the SMA report. And it was Exhibit 15 in your
19 Department report dated April 28th, 2009. And a drainage
20 report was provided to you on March -- at the hearing, and
21 it was dated March 26th, 2009. And a copy of that was
22 provided in our addendum report to you.

23 Now, for the off-site parking approval, it is
24 necessary because the Mana Foods parcel is not large enough
25 to provide the required 17 off-street parking stalls, so

1 thus, the Applicant intends to provide off-street parking in
2 an off-site parking lot located at 81 Baldwin Avenue, site
3 of the Maui Dharma Center. This site is approximately 256
4 feet from the Mana Foods parcel and almost 1,500 feet from
5 the ocean. Mana Foods has a six-year lease agreement with
6 the Maui Dharma Center, and no one else has a lease on these
7 parking stalls. In order to provide the required off-street
8 parking stalls off site, an off-site parking approval is
9 required and as approved by this body, but not as a public
10 hearing body.

11 Because the Dharma Center was located in R-1
12 Residential, the conditional permit was required and was
13 approved by County Council. On March 26th of 2006, the
14 Board of Variances and Appeals granted a request by the
15 Applicant to reduce the number of off-street parking spaces
16 required from 17 to 8. And they will be providing one
17 loading zone on the Mana Foods property. The Dharma Center
18 is also located in the SMA. The Applicant has filed a
19 special management area assessment application that will be
20 processed administratively upon approval of the off-site
21 parking request.

22 The Applicant intends to request that five of the
23 eight required parking stalls be grass-block pavers as
24 allowed in Section 1936-A-110 of the Maui County Code. The
25 Applicant submitted a preliminary drainage report dated June

1 1st, 2010 for the parking lot, and this report was provided
2 for your information in your packets this morning. The
3 Department of Public Works commented that the Applicant
4 should provide details of the drywell in order to
5 substantiate the calculation that the capacity is actually
6 201 cubic feet.

7 Early this morning, I received a new preliminary
8 drainage report dated June 7th, 2010 and distributed as your
9 meeting began. A detail of the drywell was provided as well
10 as additional calculations. As of June 7th or as of June
11 8th, I should say, the Department has received 20 letters in
12 support of the project and no letters in opposition. The
13 Department finds that the proposal as planned is in
14 compliance with the Special Management Area Use Permit that
15 was -- sorry, with the rules and standards of the special
16 management area. I won't go into each one of those, because
17 I know you're familiar with them and with other codes and
18 land use and design guidelines.

19 The Planning Department, based on the facts
20 presented, finds that the proposed project will not have an
21 adverse environmental or ecological effect provided
22 mitigation measures are incorporated into the project's
23 conditions. The proposed action meets the objectives,
24 policies and guidelines of the Special Management Area Rules
25 of the Maui Planning Commission. And the proposed action is

1 consistent with the countywide policy plan and the
2 Paia-Haiku Community Plan. Now, the off-site parking is
3 regulated by Maui County Code, Chapter 1936-A.

4 And the -- this Section 30 states that every
5 off-site parking space or area or equivalent, et cetera,
6 shall be located on the same lot it serves or within a
7 distance of 400 feet. So, this property is 256 feet, so it
8 is in compliance with the applicable standards for off-site
9 parking. And that concludes my summary.

10 CHAIRMAN STARR: Okay. Thank you for an excellent
11 and very complete report, Ms. Callentine. Mr. Hart, you now
12 have ten minutes. We look forward to it, and good to see
13 you today.

14 MR. HART: Good to see you, too. Thank you very
15 much. Everyone has been introduced, except that Raymond
16 Cabebe of our office has been the planner in charge of this
17 project. As we indicated to you, this is a consolidated
18 application, Special Management Area Use Permit Country Town
19 Design Review, Urban Design, and off-site parking and
20 conditional permit. As Livit indicated, the application was
21 submitted in 2004. Our Maui County Planning Commission
22 hearing was on April 28th, 2009.

23 And at that hearing, we also considered the
24 application for the conditional permit, so it was a dual
25 hearing. And the Special Management Area Permit application

1 was held in abeyance until this date. The conditional
2 permit was approved by the County Council on April 7th,
3 2010. The applications, we've gone over that. The only one
4 that is kind of interesting is the fact that we're now doing
5 the SMA assessment application for the grass-block pavers
6 and the parking that were basically granted by conditional
7 permit in the County Council. That's an administrative
8 permit, and I think you should be aware of that.

9 The location is this is Hana Highway, Baldwin
10 Avenue. Most of you are familiar with this. Paia Town is a
11 plantation town. These buildings were built back in the
12 1930's. And the town has gone through actually a process
13 very much like what's going on in Wailuku. It's a
14 revitalization process. And I think this project is
15 probably the best example of the revitalization in Paia.
16 This is Baldwin Avenue and our parcel. It's within the
17 Country Town Business District. I might also add that right
18 next door, there's a County parking lot with 45 stalls.
19 You'll see that. There's also a proposal to do additional
20 parking across the street working with an attorney, David
21 Spee.

22 This is some of the history. These buildings
23 again were built in 1930, in the 1930's. This was Mana
24 Foods as it started in 1984. This basically is how it
25 became Mana Foods. And Hi-Tech purchased the property in

1 1987, the original Hi-Tech Windsurf shop. Mana Foods bought
2 out Hi-Tech. They moved across the street in 2000. So, as
3 the store grew, basically they added buildings that were
4 existing. And it's really a true example of revitalization.
5 This is pretty much as it is today in 2007.

6 This shows the proposed vitamin room extension.
7 This used to be the post office. This shows the location of
8 the 45 stalls that were built immediately on the mauka side
9 of Mana Foods. This shows basically the Bank of Hawaii and
10 the old post office. These are some photographs of existing
11 buildings around Paia. I think Paia is unique, because, you
12 know, essentially the businesses have taken the old
13 buildings and refurbished them. And I think that's really
14 in the spirit of the Country Town Business District. The
15 urban design review, basically our meeting was held in
16 October -- or I'm sorry, April 15th, 2008.

17 They basically thought that the project was a good
18 project. They asked for landscape planting plans or
19 landscape architectural plans, and they also asked a masonry
20 privacy wall be constructed along the rear property line.
21 Along the rear property line is a separation between the
22 Business District and the Residential District. This is our
23 landscape planting plan. It shows the exit and loading
24 zone. This is Residential District.

25 The plan for Mana Foods as it is today and will be

1 in terms of the construction of the vitamin room. This is
2 the new vitamin room. This shows the parking, which is
3 right next door. And it's probably one of the big reasons
4 why we were able to get the variance from the Board of
5 Variances and Appeals. Obviously, you can see there's no
6 room for parking on the site. And obviously, there is a
7 public parking lot with 45 stalls, so the number is reduced
8 from 17 to eight. The elevations, this would be the
9 elevation along Baldwin Avenue, which we feel is a
10 significant improvement.

11 And actually, working with the Planning
12 Department, we're articulating essentially the facade in
13 terms of the existing buildings that were there. So,
14 there's a variety of colors. So, you won't have the sense
15 that one large building -- they'll maintain the character,
16 the urban design character of Paia. The side elevations.

17 Raymond, you want to do the parking part?

18 MR. CABEBE: Good morning, Members of the
19 Commission. I'm Raymond Cabebe of Chris Hart & Partners.
20 There was a variance requested in 2005 actually and granted
21 by the Board of Variances in 2006, as Livit talked about.
22 There's 17 stalls required and was reduced to eight. These
23 eight stalls are provided at the Dharma Center, which is
24 approximately 250 feet from Mana Foods. Mana Foods has a
25 six-year lease from 2006, which means that it will expire in

1 2012, but the Dharma Center has agreed to extend that lease
2 if necessary.

3 As a conditional permit, it's actually for five
4 years. As Chris mentioned, the Applicant has applied for an
5 SMA assessment for the parking. And the Mana Foods is
6 participating with other property owners along Baldwin
7 Avenue to try to get more public parking. Ed Thielk
8 indicated that David Spee, who has a building across the
9 street, is about to take possession of the property next to
10 the Spee building. I'll show you here. This is the Mana
11 Foods here. Dharma parking here. The David Spee building
12 is right here, and this area here is in the sugar cane
13 production right now. They are in negotiations with A&B.

14 The post office is up here to the south a little
15 bit more. So, this area here is where they're proposing to
16 have parking or public parking. This is the Dharma Center
17 parcel. You see the peace stupa here that was blessed by
18 the Dalai Lama in 2007. You can see the -- right now, it's
19 paved, gravel paved. It's going to be asphalt paved. Some
20 more pictures of the parking lot as it is now. The site
21 plan shows the eight stalls. These three stalls will be
22 paved here, pavement. And these five, three here and these
23 two up here, are going to be Grasscrete. And it shows the
24 drainage plan as we talked about for the parking. It has a
25 drywell right in the center of the pavement here.

1 The existing use conforms with State and County
2 land use plans and policies. Mana Foods has not caused any
3 significant area, excuse me, caused any significant
4 environmental impacts to the surrounding area. Public
5 infrastructure is adequate to serve the project. The
6 project meets the criteria for off-site parking, and the
7 conditional permit has been obtained. UDRB recommended for
8 a privacy wall, and that's going to be constructed. And
9 Mana Foods has not caused any cumulative or significant
10 environmental or ecological effects on the special
11 management area. This concludes our presentation. Thank
12 you.

13 CHAIRMAN STARR: Okay. Thank you, Mr. Cabebe.
14 Before questions, is the Applicant here, and do they wish to
15 make any short comments?

16 MR. HART: David Thielk is here. David.

17 CHAIRMAN STARR: Welcome.

18 MR. HART: Actually, Edward, Edward. Sorry,
19 Edward.

20 CHAIRMAN STARR: Introduce yourself and welcome.

21 MR. THIELK: Edward Thielk, and good morning to
22 everybody. I don't have really have any comments. Other
23 than the parking, I would just like to say we're working
24 with David Spee, and if we do manage to get the parking
25 there, the short-term effect of that will be to have the

1 parking for employees on Baldwin Avenue. We will not have
2 public parking there initially, because he won't have his
3 permits. It will take some time. But he's offered to let
4 us use the property temporarily for employee parking. So,
5 that's about all the comments I have to make other than
6 what's been said.

7 CHAIRMAN STARR: Thank you very much. Members,
8 questions for Ms. Callentine, Mr. Hart, Mr. Cabebe or
9 Mr. Thielk? Commissioner Mardfin.

10 COMMISSIONER MARDFIN: I'm not sure who wants to
11 answer this. Maybe Chris. How will it be controlled that
12 these will be for Mana Foods and Mana Foods only? The
13 parking, I'm talking about.

14 MR. HART: Well, it's -- it's not a high traffic
15 area, the Dharma Center. And, you know, there's --
16 basically, the -- I'm sorry, David, or Ed.

17 MR. THIELK: At this point, we have a scheduled
18 parking use of that area right now. So, it's mostly our
19 employees parking there. And they're scheduled to park
20 there at certain times of the day. There are certain
21 shifts. We have two shifts, a morning shift and afternoon
22 shift. Generally speaking, it's always full. And it's
23 filled by our employees, and they are scheduled to be there
24 at certain times.

25 COMMISSIONER MARDFIN: And what if I were to pull

1 in there and try to park there?

2 MR. THIELK: If it were full, you wouldn't be able
3 to. And if it wasn't, you would be able to.

4 COMMISSIONER MARDFIN: Even if I wasn't going to
5 Mana Foods?

6 MR. THIELK: It wouldn't really matter. Like I
7 say, the parking is -- we fill it up in the morning with our
8 employees. We feel like it's the best use because it leaves
9 the County parking lot empty, which is actually more
10 appropriate use for public parking for our customers.

11 COMMISSIONER MARDFIN: I use the public one when I
12 come into your store. I love your store.

13 MR. THIELK: Thank you very much.

14 CHAIRMAN STARR: Members. Commissioner Hiranaga.

15 COMMISSIONER HIRANAGA: Did we want to address
16 parking first and then the SMA, or can we -- do you have a
17 preference?

18 CHAIRMAN STARR: However you wish.

19 COMMISSIONER HIRANAGA: Well, first of all, do you
20 know where the storm water flows once it I guess flows onto
21 Baldwin Avenue? Where does that water end up?

22 MR. THIELK: What I've always watched is it runs
23 down into a dirty mess toward the ocean when it rains really
24 hard. Not from my property, I mean from the whole of
25 Baldwin Avenue.

1 COMMISSIONER HIRANAGA: Right, yeah. Paia Town
2 basically empties into Paia Bay.

3 MR. THIELK: Yeah, yeah.

4 COMMISSIONER HIRANAGA: I'm just wondering how
5 much additional storage capacity would you need in order to
6 increase your drywell to capture all post development
7 surface runoff that comes off of your parking lot?

8 MR. THIELK: I wouldn't be competent to answer
9 that question. But Linda Taylor is here, and she's our
10 engineer if you would like.

11 MS. TAYLOR: Good morning. I'm Linda Taylor with
12 Linda Taylor Engineering. I did do a quick calculation to
13 see what would be required if we were to retain 100 percent
14 of the post development runoff. And right now, just to hold
15 the difference between the existing development and the post
16 development, we need one four-foot, eight-foot diameter
17 concrete ring. In order to hold 100 percent, we would need
18 this pit to be 20 feet deep. So, from four feet to 20 feet
19 deep, five times more capacity.

20 COMMISSIONER HIRANAGA: Just to get clarification,
21 because it appears various civil engineers use different
22 terms, and it's kind of confusing. So, when you say post
23 development, you're assuming that the entire lot was not
24 improved, meaning there is no stupa, and there is no -- it
25 would just be grass or dirt, is that what you're saying is

1 post development? Or you're considering the stupa runoff as
2 part of predevelopment?

3 MS. TAYLOR: Correct, I'm assuming that the stupa
4 is part of the existing predevelopment along with the gravel
5 parking lot that is also existing. The post development
6 would be the stupa as it exists, plus the parking lot is
7 being paved and also with the Grasscrete on some of the
8 parking lot.

9 COMMISSIONER HIRANAGA: Isn't that more existing
10 condition than improved condition or proposed condition?
11 Because isn't -- I mean predevelopment, from my
12 understanding, is that lot was vacant and covered with grass
13 or dirt. So now, you're saying the stupa is part of
14 predevelopment?

15 MS. TAYLOR: That's what I based my preliminary
16 drainage report on is that, what you see is the stupa being
17 existing with the gravel parking lot.

18 COMMISSIONER HIRANAGA: Okay. So, looking at your
19 drainage report, you say the increase should be 104 cf, and
20 your drywell capacity is 201 cf?

21 MS. TAYLOR: Correct.

22 COMMISSIONER HIRANAGA: So, why would you have to
23 make a bigger pit? It seems like you're capturing more than
24 what is being created.

25 MS. TAYLOR: That is correct. We are capturing

1 double what is required. Just because the way these
2 drainage pits are designed, they come in four-foot sections.
3 They're easily installed. We could make it smaller, but we
4 are providing almost twice the capacity.

5 COMMISSIONER HIRANAGA: I'm sorry, I'm confused.
6 What's the 20-foot pit for?

7 MS. TAYLOR: You asked me how much bigger the pit
8 would have to be if you held 100 percent of the post
9 development runoff, I thought.

10 COMMISSIONER HIRANAGA: What is increase in
11 runoff? Isn't that post development?

12 MS. TAYLOR: I'm sorry, could you repeat the
13 question?

14 COMMISSIONER HIRANAGA: The 104 cf, isn't that
15 post development? You're saying increase runoff of 104 cfs?

16 MS. TAYLOR: That's correct. That's the
17 difference between the predevelopment and the post
18 development.

19 COMMISSIONER HIRANAGA: But you're saying you need
20 to dig a pit five time deeper to capture 100 -- when you say
21 100 percent post development, you're meaning the entire
22 parcel after it's been improved?

23 MS. TAYLOR: Yes.

24 COMMISSIONER HIRANAGA: The entire parcel?

25 MS. TAYLOR: Correct.

1 COMMISSIONER HIRANAGA: Including the grassed
2 areas, the stupa. So, whatever water is coming off of that
3 surface, you're capturing?

4 MS. TAYLOR: Yes.

5 COMMISSIONER HIRANAGA: I'm not really proposing
6 that. I'm allowing the predevelopment, which if it was
7 grass, to continue to flow. But anything that was basically
8 manmade improvements what it would take to capture that, so
9 I'm not really asking for 100 percent post development.
10 What I'm saying, predevelopment meaning totally unimproved
11 and post development capturing the delta.

12 MS. TAYLOR: I would have to calculate that. I
13 did not do it that way.

14 COMMISSIONER HIRANAGA: Can we give you some time
15 to do that?

16 MS. TAYLOR: Sure.

17 COMMISSIONER HIRANAGA: We can move on.

18 CHAIRMAN STARR: Members, any other questions?
19 Commissioner Mardfin.

20 COMMISSIONER MARDFIN: Again, I don't know whether
21 this is for Chris or the owner. One of the things you said
22 for the building for Mana Foods itself was some of this is
23 after the fact. Would you explain what part of it is after
24 the fact and maybe why it was after the fact?

25 MR. HART: Actually --

1 CHAIRMAN STARR: Introduce yourself.

2 MR. HART: I'm sorry, my name is Chris Hart. And
3 Edward Thielk is here. And actually, it is a reality that,
4 again, the Mana Foods is a consolidation of essentially
5 three buildings over time. And as the consolidation and,
6 you know, of the -- in the development of the business moved
7 forward, there were repairs that were made, you know, to the
8 building. And that would be -- you know, that would
9 constitute the requirement for after-the-fact permits.

10 Like at one point, there was, in the process of,
11 you know, dealing with the issue, the toilet, for instance,
12 in the public restroom fell through the floor, okay. So, it
13 had to be repaired. You know, so the work was done. And,
14 of course, they didn't have an SMA permanent, so we wouldn't
15 get a building permit. So, the work was done. That's the
16 kinds of things that were done. You might look at it and
17 you might say, well, that's very skeptical that you should
18 be doing that, but in reality, that's life, okay. And we
19 have to move on.

20 COMMISSIONER MARDFIN: And now that you've
21 refreshed my memory, I recall the discussion we did have a
22 year or so ago when this first came to us and I think asked
23 the same thing at that point. And I just had forgotten the
24 answer. Thank you.

25 CHAIRMAN STARR: Commissioner Tagorda.

1 COMMISSIONER TAGORDA: Good morning, Mr. Thielk,
2 Mr. Hart. On that site plan you have against the wall, it
3 looks like the whole property is already occupied. There's
4 a building and structures all over. How would you address
5 or comment in case of fire way down on your -- behind the
6 rear of that property?

7 MR. THIELK: We're currently dealing with that
8 with Public Works. There are some issues that we're trying
9 to deal with. They recommended a sprinkler system. But
10 then the Water Department said they didn't have the water
11 pressure for us. Now we're working with engineers to see if
12 we can use noncombustible construction to avoid the
13 possibility of a fire and possibly with or without
14 sprinklers depending on what they recommend what can be
15 done. There was an improvement, some sort of a reduced -- a
16 flow reducer they suggested we could maybe put in. But then
17 after that, they still weren't sure, so there's some
18 difficulty.

19 We may end up having to take out part of the rear
20 section of the building to comply with the Code.

21 COMMISSIONER TAGORDA: So, in those structures
22 there, which one of those structures are not in compliance
23 with the County Codes?

24 MR. THIELK: Well, it's not -- the general -- I
25 don't think it's a question of compliance. I think it's a

1 question of what the fire flow that they have for the water,
2 what they have available and what we need to do to make sure
3 that our building in case of fire will meet all of their
4 current ordinances.

5 COMMISSIONER TAGORDA: I don't know if this
6 question, you can comment on it, but looking at that site
7 plan, I don't see no parking stalls.

8 MR. HART: Commissioner, you see to the right,
9 there's a parking lot right here.

10 COMMISSIONER TAGORDA: But that's off site of the
11 property.

12 MR. HART: Well, it is, but it's a public parking
13 lot, provides access. This is the area that's undeveloped
14 on the site. The buildings were built in 1930. And this
15 has been a gradual process of refurbishing, repair,
16 revitalization, you know, in Paia. And in order for us to
17 go forward and get building permits, you know, for all of
18 the work that has been done, we have first had to go through
19 an SMA permit process. And that's why we're here today, to
20 get the SMA. Then we're going to apply for the building
21 permits, okay.

22 Then issues like using noncombustible materials
23 for fire protection and sprinkler systems are going to come
24 into the process, okay. But there is access for fire trucks
25 and fire protection. I think that's important. You said --

1 initially in your first comment, you said that the site is
2 all built, right?

3 COMMISSIONER TAGORDA: Uh-huh.

4 MR. HART: I'm just telling you that this is a
5 public parking lot with access available for fire fighting
6 equipment.

7 COMMISSIONER TAGORDA: So, those area where
8 there's an access to the property is not obstructed?

9 MR. HART: Not obstructed. They would be able to
10 get in.

11 COMMISSIONER TAGORDA: But before you took this
12 property in 1984, were there some open spaces there before?

13 MR. THIELK: Yes, there were. You can see by
14 looking at the -- looking at the after-the-fact areas. The
15 warehouse -- okay, where the warehouse is now used to be an
16 old -- where the warehouse is now, there used to be an old
17 Quonset hut, and that was allocated for storage. The
18 warehouse, as it shows, is 1,757 square feet. But it's
19 actually only 1,200 square feet. It's the mezzanine that
20 brings the size out. And then it's just a roof over our
21 equipment, our refrigeration equipment.

22 The area where you see where the yard is was
23 always open. And there was a small area in the back that
24 was open also before. But not -- there wasn't a whole lot
25 actually. And you see where on the side, the very, very

1 side there where the Matson container, you see, yeah, that.
2 We put that in in I think something like 1986 for storage.

3 If there was any parking on site, it would have
4 had to have been where the warehouse is now. That was
5 really the only open space. Going up to the warehouse now,
6 there is a loading zone, and that would have also been
7 parking. When we came here before, the -- we came before
8 the variance committee. They had said that the most
9 important thing in their opinion was to have off-the-street
10 loading and unloading for our business. They thought that
11 was very important.

12 And they said that they would prefer us to keep
13 the loading zone rather than to allocate it to parking and
14 give us the variance. That was their opinion at that time.
15 If I knew what I knew today when I was actually renovating,
16 I probably would have foregone the warehouse. Because the
17 warehouse, even though it's very, very essential to
18 operation, it's something that could have probably been
19 moved off site, say in the Ikeda building up the street.
20 But it's too late for us to do that now because we have our
21 electrical service in there. And it's such a critical part
22 of our operation right now. If it was all parking, where
23 would we unload? Where would our forklift be driving? It
24 would be dangerous to the public if there was parking there.
25 It's a very difficult situation. The property is small.

1 The original -- the existing County parking lot was part of
2 my property before I purchased it. The owner before me sold
3 it to the County for parking. Our position is that we need
4 more parking in Paia desperately.

5 We're willing to take our part in that. We're
6 willing to help pay for it and participate any way, shape or
7 form we can. But it's going to take some initiative outside
8 of our operation, because I don't have the influence and the
9 clout to force a parking lot in what is now just vacant
10 land. But if I could, I would.

11 COMMISSIONER TAGORDA: I think that's the reason
12 why these are my concern is your parking. And I think there
13 is a requirement, minimum requirement of parking stalls
14 inside your property.

15 MR. THIELK: That's why we got the off-site
16 variance and the off-site parking and the variance that went
17 with it. We were required to have 17 stalls total, and that
18 got reduced to eight. But in reality, in the Dharma Center,
19 we're parking more than eight cars there. We're parking ten
20 cars there every day.

21 COMMISSIONER TAGORDA: And on that -- bringing out
22 the Dharma Center, which is a residential property, did that
23 Dharma Center have a SMA permit, too, to build a lot of
24 parking stalls?

25 MR. THIELK: We had to get a variance because of

1 that. We had to get a conditional permit, conditional use
2 permit. That's why we had to go before the Council.

3 COMMISSIONER TAGORDA: Thank you.

4 CHAIRMAN STARR: Commissioner Freitas.

5 COMMISSIONER FREITAS: Yes. I most definitely --
6 most definitely you need parking in Paia. I was in your
7 store last week Friday. I like your store. My concern is
8 do you have any fire access in the rear of the store?
9 Because your aisles are narrow. And, you know, it's -- it's
10 a good store. My concern is how many fire exists you got?
11 Because you got three doors in the front. And in the rear,
12 if you have a fire up front, my concern is --

13 MR. THIELK: When you say three doors, are you
14 speaking about --

15 COMMISSIONER FREITAS: The front of your store.

16 MR. THIELK: The in and the out. Are you speaking
17 about the side door that goes out to the driveway?

18 COMMISSIONER FREITAS: Yes.

19 MR. THIELK: And in the back down below, it exits
20 on both sides towards the old bank parking lot and out
21 towards the County parking lot.

22 COMMISSIONER FREITAS: Thank you.

23 CHAIRMAN STARR: Okay. Yeah, Commissioner
24 Shibuya, and I'm going to ask, if we can, to try to move it
25 along because we've got a lot of stuff today. Commissioner

1 Shibuya.

2 COMMISSIONER SHIBUYA: Yeah, I just want to help
3 Commissioner Tagorda with this issue on parking. I was on
4 the Board of Variance and Appeals when we did pass this.
5 And I just wanted to let you know that all of our historical
6 or town and country cities such as the Lahaina, Paia,
7 Makawao, have this parking problem. Because parking was not
8 really developed at that time. So, now we have a larger
9 volume of people.

10 And so, we need to come up with some compromise
11 other than having phantom parking. Phantom parking is a
12 parking lot in the back of Lahaina Town where the parking
13 lots are credited to various businesses over various times.
14 So, the problem is is that the space does not increase, but
15 everybody is taking credit for it. And the only person
16 that's making money is the owner of the parking lot. And
17 so, this is not a real workable type of situation. Here we
18 just are allowing for this parking. As we have parking
19 become available, then we'll have parking available.

20 COMMISSIONER TAGORDA: Thank you.

21 CHAIRMAN STARR: Commissioner Mardfin.

22 COMMISSIONER MARDFIN: Real quickly, what sort of
23 energy conservation measures are you going to use?

24 MR. THIELK: Everything we can possibly do. At
25 this point, we're trying to look at a new refrigeration

1 system. The problem is the technology -- you know, I've
2 talked to a couple of consultants -- it's just not quite
3 there yet. I think that when we do our new construction,
4 we're going to incorporate better insulation, and that
5 should conserve energy. But what we're also going to try to
6 do at that point is take a really hard look at what we can
7 do to improve the lighting and these kinds of things. I've
8 also looked at putting solar on the top of the roof.

9 But the problem is that even if we covered our
10 whole roof, it would be less than ten percent. And I would
11 also prefer to do an off-site wind farm somewhere in Haiku
12 than do something so small. I feel the need to do more than
13 ten percent. If we're going to do something, it needs to be
14 bigger than that. It's going to be a large undertaking in
15 any case. So, I'm hoping when we do the construction, that
16 will offer some opportunities.

17 COMMISSIONER MARDFIN: My last one, I think. For
18 your parking, how are you planning to separate petroleum
19 products and other potential contaminates in the drainage
20 plan? That might be for Linda Taylor.

21 CHAIRMAN STARR: Ms. Taylor, the question is how
22 are you going to separate out petroleum and other stuff from
23 the drainage?

24 MS. TAYLOR: To separate out the petroleum
25 products, we could do a series of filtration devices

1 underground before it went into our subsurface irrigation
2 system. Unfortunately, I don't have the details of that,
3 because I'm --

4 CHAIRMAN STARR: Are you willing to condition
5 that, is that what you're saying?

6 COMMISSIONER HIRANAGA: That's a question for the
7 owner.

8 MR. THIELK: Yes.

9 MS. TAYLOR: Yes.

10 CHAIRMAN STARR: Commissioner Hiranaga had a
11 question that was unanswered about increasing the retainage
12 to the point where you're retaining from all the developed
13 portion. Did I get that correct, Commissioner?

14 COMMISSIONER HIRANAGA: Yeah, pretty much. You
15 know, we all understand that the storm water runoff flows
16 directly into Paia Bay untreated. And that's just the way
17 Paia Town is constructed. And, you know, we have
18 challenges, like Commissioner Shibuya said, with parking
19 because it is an old town. But I'm hoping that you would be
20 able to increase your retention and also treatment to do
21 your part in trying to clean up the water and reduce the
22 water that flows into Paia Bay. So, I'm not sure if you've
23 completed your calculations regarding both properties.

24 MS. TAYLOR: Almost. Can I -- I have them back
25 there.

1 COMMISSIONER HIRANAGA: She's not quite ready.

2 CHAIRMAN STARR: Yeah, we would love to finish
3 this up. But maybe we should come back another day if she
4 doesn't have the numbers.

5 MR. THIELK: She says she has it.

6 CHAIRMAN STARR: Then let's have it.

7 MS. TAYLOR: Okay. I believe your question was
8 what was the runoff if the site was undeveloped.

9 COMMISSIONER HIRANAGA: Totally undeveloped.

10 MS. TAYLOR: Totally undeveloped. I did a quick
11 calculation assuming that it was grass, the existing
12 condition. This is for the Dharma Center parking lot. So,
13 the original runoff for the Dharma Center parking lot was
14 224 cubic feet. The developed site was 945 feet. So, the
15 difference is 721 cubic feet, which would be a seepage pit
16 drywell at eight-foot diameter about 14 feet deep.

17 COMMISSIONER HIRANAGA: So, I guess the question
18 is is the Applicant willing to install that drainage system?

19 MR. HART: You know, I disagree. We went to the
20 Council. And we got approval of off-site parking on a site
21 that was already developed. We're willing -- we committed
22 to do Grasscrete and asphalt and to basically put a drainage
23 structure in. The drainage structure, as it is, is larger
24 than is required. And now you're asking us, you know, in
25 the context of this conditional use permit, we don't even

1 own the property, we only have a six-year lease on the
2 property, to basically develop a drainage system for the
3 whole --

4 CHAIRMAN STARR: Mr. Hart, no will suffice.

5 MR. HART: No is the answer.

6 CHAIRMAN STARR: Thank you.

7 MR. THIELK: Can I add something?

8 CHAIRMAN STARR: Commissioner Hiranaga.

9 COMMISSIONER HIRANAGA: The owner wants to add
10 something.

11 MR. THIELK: If I could add something. I would
12 like to say in terms of drainage, my observation in 30 years
13 of Paia is the from the Dharma Center lot, there's actually
14 very little water that runs off. I would say the properties
15 down below it have a much larger runoff, much more volume.
16 Even our store has less, for example, than the bank. And as
17 you go on further down, you see much, much more runoff. I'm
18 not an engineer, but I can say from observation, I've never
19 seen runoff from the Dharma Center parking lot.

20 COMMISSIONER HIRANAGA: Just a question. So, if
21 you were to increase the capacity of this retention system,
22 what increase in costs would you estimate it to be?

23 MS. TAYLOR: From what was proposed in the
24 preliminary drainage report?

25 COMMISSIONER HIRANAGA: Yeah, what you're

1 proposing and what you just calculated.

2 MS. TAYLOR: What we were proposing with the
3 four-foot deep, eight-foot diameter drywell would probably
4 be just for that structure itself in place about \$8,000. So
5 if we had to increase that to hold this, probably four times
6 that amount, so over \$30,000.

7 COMMISSIONER HIRANAGA: And that is because you're
8 lining it with concrete, or because if you're just digging a
9 deeper hole --

10 MS. TAYLOR: We're digging the hole deeper. We're
11 lining it with concrete blocks, and there's gravel behind
12 that with filter fabric.

13 COMMISSIONER HIRANAGA: So, four times deeper, it
14 goes four times more in cost? I don't think so.

15 MS. TAYLOR: No, now that you say it that way.
16 Probably 12 times four. Maybe twice the cost. \$16,000.

17 COMMISSIONER HIRANAGA: Thank you. I would like
18 to ask the same question for the store property.

19 MS. TAYLOR: Okay.

20 CHAIRMAN STARR: Yeah, go ahead.

21 MS. TAYLOR: So, these are just quick calculations
22 that I just did here. I haven't checked them. The change
23 in runoff volume for the Mana Foods site, if it were
24 considered in the undeveloped phase, meaning the grassy
25 area, to almost 100 percent impervious today, we're looking

1 at a change in volume of about 1,200 cubic feet, which would
2 be about 24 feet deep of eight-foot diameter storage volume.

3 COMMISSIONER HIRANAGA: So, your estimated cost
4 might be?

5 MS. TAYLOR: That would probably be over \$30,000.

6 CHAIRMAN STARR: Okay. Is that it, Commissioner
7 Hiranaga?

8 COMMISSIONER HIRANAGA: On the store property,
9 you're not proposing any retention because you're saying
10 it's an existing condition?

11 MS. TAYLOR: No, we are. We are proposing
12 retention in two areas. In the northeast area there, we
13 have underground absorption trenches, and then also in the
14 parking load and unloading zone area, there's also
15 underground retention.

16 COMMISSIONER HIRANAGA: And that would capture --
17 what is that capturing as far as the increase over existing
18 condition or is it the increase over the permitted area, or
19 what are you trying to -- what standard are you trying to
20 meet?

21 MS. TAYLOR: There we were assuming the existing
22 condition being as the property is developed today, and the
23 increase would be the addition of the vitamin room, and I
24 believe there was a little area towards the end, the
25 northeast property line, the increase in runoff between

1 those two developed sites.

2 COMMISSIONER HIRANAGA: Okay. So, according to
3 the report, there is no increase in runoff, because
4 basically, it's all developed, except for the vitamin room?

5 MS. TAYLOR: Right.

6 COMMISSIONER HIRANAGA: But you're saying you're
7 going to capture 1,292 cubic feet, which is approximately 30
8 percent, so if --

9 MS. TAYLOR: We said that we were going to retain
10 1,100 cubic feet. Because the vitamin room right now is a
11 paved area, so if we build it out, it's still going to be
12 impervious. We're not increasing the impervious area.
13 We're putting a roof over it.

14 COMMISSIONER HIRANAGA: I understand. Because,
15 you know, most of the are is buildings, so you're not going
16 to have petrochemicals on it. But is there a way you could
17 at least filter the runoff that's not being captured?

18 MS. TAYLOR: The only area that where there could
19 be a petroleum product contamination would be in the loading
20 dock area, and we could put a filtration device inside that
21 inlet there to capture any greases and oils before it goes
22 into the subsurface drainage.

23 COMMISSIONER HIRANAGA: Okay. Thank you.

24 CHAIRMAN STARR: Okay. Members. Commissioner
25 Tagorda.

1 COMMISSIONER TAGORDA: Thank you, Mr. Chair. I
2 don't want to take so much time with the Commission and the
3 Applicant. But I have a lot of questions and concerns about
4 the mitigating measures that we are trying to incorporate
5 with this project is not really permanent, but temporary.
6 Like parking stalls, like waiting for your friend David Spee
7 to have property from A&B so you can get 20 or more stalls
8 for your Mana Foods store.

9 MR. THIELK: Yeah, I have no control over that.

10 COMMISSIONER TAGORDA: I know. And there is an
11 adverse affect of this property if there's no mitigation
12 measures provided, especially a parking problem in Paia
13 Town. And I don't want to worsen that because of your
14 expansion. There's supposed to be a small scale store.
15 Now, it's an expansion. It's a supermarket. I like Mana
16 Foods. I've been there before. But I don't want you to
17 take County parking stalls provided for, you know,
18 pedestrians like me.

19 CHAIRMAN STARR: Yeah, Ms. Cua has a comment. Let
20 me turn it over to her. Hold on, Mr. Thielk.

21 MS. CUA: Commissioner Tagorda, maybe I can
22 explain the process a little bit. I think Chris tried to
23 earlier. For many of our old towns, you know, buildings
24 were built to take up pretty much the whole property. And
25 so, many businesses within our old towns, historic district,

1 Paia, Haiku, Makawao, they don't have the luxury of having
2 parking on site. So, through the County Code, there is a
3 process for that. You still have to meet your parking
4 requirement, but you can do it by getting your parking off
5 site within a distance of 400 feet. And that is an
6 application that is before you today.

7 So, by your action, as they have proposed, you
8 will be granting off-site parking approval for this business
9 to have their parking on another site. They have an
10 agreement to do so. It's a process that is in place for
11 businesses just like this all over the County. The
12 Commission has done it before. They will continue to do it
13 in the future. But again, that is going to assure that
14 there is parking for this business. Does that -- so, there
15 is not all this uncertainty.

16 They're trying to get additional parking just for
17 their employees. But the required parking is going to be
18 met off site. And they -- instead of being required 17
19 stalls, they went to the Board of Variances and Appeals, and
20 they got -- they got a variance to get down to eight stalls.
21 And they are asking this Commission to grant an off-site
22 parking approval to be able to have those stalls be on an
23 adjacent lot. And so, your action today is in possibly
24 granting the SMA permit is also going to be to approve the
25 off-site parking approval. If they don't have required

1 parking stalls met, they're not going to be able to get a
2 building permit. That's why they need the off-site parking
3 approval for this Commission. Right now, it's a Commission
4 approval. Hopefully, in the future, it's something the
5 Department will be able to do. But right now, it needs your
6 approval.

7 CHAIRMAN STARR: Ms. Cua, I have a question. I
8 understand there were two things before us. One is the SMA
9 for the store, for the onsite. The second is the ability to
10 put some of the parking off site. Now, when the -- before
11 the construction starts on developing that parking, will
12 they have to get a separate SMA for -- to deal with that
13 off-site parking?

14 MS. CUA: Yes, and I believe they have already
15 filed an assessment application for that. We're just
16 waiting to see if you're going to approve the off-site
17 parking location. That has to be done first. There's no
18 sense in us reviewing and approving an SMA assessment
19 application if you're not going to approve the off-site
20 parking.

21 CHAIRMAN STARR: So, then the impacts of the
22 off-site parking will come back to us as a major SMA?

23 MS. CUA: No, no, no.

24 CHAIRMAN STARR: No?

25 MS. CUA: Again, they're filing an assessment.

1 And based on the cost or the impacts, the department may
2 either be able to grant an exemption or a minor permit. We
3 don't anticipate that the scale of those improvements will
4 be enough to trigger another major SMA permit. It's an
5 existing site already.

6 CHAIRMAN STARR: First of all, Commissioner
7 Freitas, did you have something?

8 COMMISSIONER FREITAS: Yes, I would like to move
9 that we accept --

10 CHAIRMAN STARR: Hold on. We can't yet. We need
11 to have testimony first. Let's move it along though.
12 Commissioner Freitas is right. We need to get to the
13 decision-making. Commissioner Mardfin.

14 COMMISSIONER MARDFIN: So, when you say it will
15 come back to us; it will come to the Planning Department, it
16 won't come back to the Commission?

17 MS. CUA: Yeah, I didn't say it would come back to
18 the -- it will come to the Planning -- it is with the
19 Planning Department right now. They have filed an SMA
20 assessment for the improvements of the parking lot
21 improvements at the Dharma Center. And if this body
22 approves the off-site parking to be located at the Dharma
23 Center, we can then process the SMA assessment.

24 COMMISSIONER MARDFIN: The Planning Department?

25 MS. CUA: The Planning Department.

1 CHAIRMAN STARR: So, it will come back to the
2 yellow sheet, in other words?

3 MS. CUA: In some way, shape or form, either as an
4 exemption or a minor.

5 CHAIRMAN STARR: Commissioner Hiranaga.

6 COMMISSIONER HIRANAGA: Could you put that slide
7 back up that had the drainage retention for the store? Just
8 my question is how did you determine the capacity of 1,353
9 cfs -- cf? What determined that amount?

10 MS. TAYLOR: It was by adding the two volumes of
11 each retention area together.

12 COMMISSIONER HIRANAGA: I mean what -- why that
13 capacity? Is that the minimum to meet code, or is that what
14 the system you're proposing captures without going to the
15 next level? What determines those?

16 MS. TAYLOR: It was the maximum that we could fit,
17 the maximum volume we could actually have in the
18 northeastern area. We couldn't fit anything any bigger
19 there, because it's already got trees and a very small area
20 on the northeast corner there. So, we maximized that area.
21 This area here under the loading zone, we also made that
22 fairly large. It's large enough to meet what was going on
23 in the other area. And that's equivalent to the
24 two-year/one-hour storm.

25 COMMISSIONER HIRANAGA: So, the capacity for the

1 limitation is the size of the pipe?

2 MS. TAYLOR: No, it's the physical area available
3 for an underground retention facility to be put on the
4 property.

5 COMMISSIONER HIRANAGA: That's different from a
6 drywell? What you're proposing for this site is different?

7 MS. TAYLOR: It's similar. It's a different
8 configuration. Instead of it being a vertical seepage pit,
9 it's a horizontal one.

10 COMMISSIONER HIRANAGA: And why was the decision
11 to do horizontal versus vertical?

12 MS. TAYLOR: Because of the proximity to the
13 building. We didn't want to affect any of the structural
14 integrity. Plus we've got fire lanes running through the
15 loading zone. There is a lot of utilities running through
16 there. We were very limited with the space.

17 COMMISSIONER HIRANAGA: Okay. Thank you.

18 CHAIRMAN STARR: Okay. Members, are we ready for
19 public testimony? Okay. Any members of the public wishing
20 to offer testimony on this item, please make yourself known.
21 Not seeing any, public testimony is closed.

22 COMMISSIONER FREITAS: I move that we accept.

23 CHAIRMAN STARR: Hold on. Let's get our
24 recommendation really quick. Callentine, you don't need to
25 read any of it. You just need to give us a very brief

1 synopsis.

2 MS. CALLENTINE: Are we using this one now?

3 CHAIRMAN STARR: No, the other one.

4 MS. CALLENTINE: We're using this one, okay. Yes,
5 very briefly. The Maui Planning Department recommends that
6 the Planning Commission approve the Special Management Area
7 Use Permit subject to 14 standard and 14 project-specific
8 condition and that you also approve the off-site parking
9 approval subject to seven conditions; however, those seven
10 conditions --

11 CHAIRMAN STARR: We're going to take the SMA
12 first, so stick to the SMA.

13 MS. CALLENTINE: Okay. Very good.

14 MS. CUA: If I could make a correction, I believe
15 we have 14 standard conditions and four project specific,
16 not 14.

17 MS. CALLENTINE: I'm sorry, I meant to say four.
18 So, for the SMA, in consideration of the foregoing, the Maui
19 Planning Department recommends that the Maui Planning
20 Commission adopts the Maui Planning Department's report and
21 recommendation memorandums prepared for the June 8, 2010
22 meeting as its findings of fact, conclusion of law and
23 decision and order, and further, to authorize the Planning
24 Director to transmit said decision and order on behalf of
25 the Maui Planning Commission.

1 CHAIRMAN STARR: Commissioner Freitas.

2 COMMISSIONER FREITAS: So move.

3 COMMISSIONER MARDFIN: Second.

4 CHAIRMAN STARR: We have a motion by Commissioner
5 Freitas, seconded by Commissioner Mardfin. That motion is?

6 MS. CUA: To approve the Special Management Area
7 Permit subject to 18 conditions.

8 CHAIRMAN STARR: Any amendments, anything else?
9 Okay. All in favor, please raise your hand. All opposed.

10 MS. CUA: Five aye's. Motion carries.

11 CHAIRMAN STARR: Okay. Thank you. Callentine,
12 really brief on the off site.

13 MS. CALLENTINE: Okay. Thank you, Mr. Chair. The
14 Maui Planning Department recommends that the Maui Planning
15 Commission grant the off-site parking approval subject to
16 eight conditions. And I want to point out that your report
17 only listed seven conditions. The eighth condition would
18 read -- I apologize, Mr. Chair, I'm trying to find it.

19 COMMISSIONER HIRANAGA: Are you talking about
20 filtration of petroleum products?

21 MS. CALLENTINE: Yes, it's similar to that. It's
22 exactly the same wording of the condition that you put on
23 the Kihei Maui Dive Shop, which was that pre and post
24 development runoff will be captured on site, and filtration
25 measures.

1 CHAIRMAN STARR: Yeah, I think that's good enough.

2 COMMISSIONER MARDFIN: Livit.

3 MS. CALLENTINE: Yes.

4 COMMISSIONER MARDFIN: I thought -- if you say pre
5 and post, I think you may be in trouble, because they didn't
6 commit to pre and post runoff. They committed to
7 filtration.

8 MS. CALLENTINE: Post development.

9 COMMISSIONER HIRANAGA: Don't look at me. I'm not
10 a staff.

11 MS. CALLENTINE: So, it would read that post
12 development runoff for the proposed improvement shall be
13 retained on site and treated via a filtration system to
14 capture and remove hydrocarbons and other hazardous
15 materials.

16 CHAIRMAN STARR: Commissioner Mardfin, quickly.

17 COMMISSIONER MARDFIN: Would check with Chris that
18 that wording is what you folks were agreeing to?

19 CHAIRMAN STARR: Kent, is that what we were
20 talking about before? I forget.

21 COMMISSIONER HIRANAGA: I think the rental car was
22 because it was by a wetland. I don't think we need to be
23 that -- I think what they're proposing is -- we're out of
24 order. We're not supposed to be -- I think the addition of
25 14 is adequate.

1 MS. CALLENTINE: Mr. Chair, what we're having a
2 discussion about is whether the Commission is -- yes, I'll
3 yield the floor to Chris Hart.

4 CHAIRMAN STARR: We really don't have too much
5 time to deal with this, Mr. Hart.

6 MR. HART: I'm not going to take any time. What I
7 would like to do, given the fact that this is a property
8 that's leased and we're already putting in improvements that
9 were agreed to by the Council, I would agree to whatever is
10 required of the Maui County Drainage or Flood Hazard
11 District Ordinance.

12 CHAIRMAN STARR: Commissioner Mardfin.

13 COMMISSIONER MARDFIN: Are we ready for a motion?

14 MS. CALLENTINE: We have not clarified what your
15 wording --

16 COMMISSIONER MARDFIN: What I was going to suggest
17 was that it be -- it certainly can't be less than what the
18 building permit is going to require, but I would suggest
19 that it be what was -- has been proposed. Because I believe
20 that was acceptable, I hope it was acceptable to the
21 Commission. So, what the Applicant proposed should be a
22 minimum. And if Building requires more, then they meet
23 that. But it should be at least -- if the building
24 department's is met, it should be at least what they
25 committed to today in terms of what the proposal was. And

1 we do want the filtration.

2 MS. CALLENTINE: Could I just ask the Deputy
3 Director of Public Works to clarify, so we get that clear?

4 MR. MIYAMOTO: Based on what the most recent
5 information provided by the Applicant's consultant regarding
6 the drywell for the parking lot, the incremental amount,
7 which is the post development total minus the predevelopment
8 total, is the incremental amount which our Code says they're
9 required to mitigate. That amount is 104 cf, cubic feet.
10 The drywell based on their calculations, which we're in the
11 process of trying to review, is to estimated to carry about
12 201 cubic feet, so they're more than meeting their
13 requirement. They're actually almost doubling the amount,
14 the incremental amount.

15 COMMISSIONER MARDFIN: And so, the condition
16 should be the 200-and-some-odd that they proposed, not the
17 bare minimum that the Building Department requires, plus
18 your other wording on filtration.

19 CHAIRMAN STARR: Okay. Do you have that? Have
20 you got that, Callentine?

21 MS. CALLENTINE: Well, let me try this. That 201
22 cubic feet of the runoff from the proposed improvements
23 shall be retained on site and treated via a filtration
24 system to capture and remove hydrocarbons and other
25 hazardous materials.

1 MS. CUA: Should we use approximate? I just get
2 nervous when we use specific numbers like that.

3 MS. CALLENTINE: Yeah, right. Is that all right
4 with the Commission?

5 CHAIRMAN STARR: Yeah. Commissioner Hiranaga?

6 COMMISSIONER HIRANAGA: Uh-huh.

7 CHAIRMAN STARR: Someone make a motion. Anyone,
8 please.

9 COMMISSIONER SHIBUYA: So move.

10 COMMISSIONER MARDFIN: Second.

11 CHAIRMAN STARR: Moved by Commissioner Shibuya,
12 seconded by Commissioner Mardfin.

13 MS. CUA: Could you read that back?

14 MS. CALLENTINE: The condition?

15 MS. CUA: Yes.

16 MS. CALLENTINE: That approximately 201 cubic feet
17 of the runoff from the proposed improvements shall be
18 retained on site and treated via a filtration system to
19 capture and remove hydrocarbons and other hazardous
20 materials.

21 CHAIRMAN STARR: Okay. So, read the whole motion.

22 MS. CUA: To approval of the -- for off-site
23 parking approval subject to eight conditions, and Condition
24 Number 8 as was read into the record by Livit.

25 CHAIRMAN STARR: Commissioner Hiranaga.

1 COMMISSIONER HIRANAGA: Yeah. I would prefer that
2 Condition 14 from the SMA permit be incorporated into that
3 Condition 8 because it is a lot more detailed.

4 CHAIRMAN STARR: As an amendment. Is there a
5 second?

6 COMMISSIONER MARDFIN: Second.

7 CHAIRMAN STARR: Okay. So, we have an amendment
8 that has been seconded. The amendment is?

9 MS. CUA: To incorporate Condition Number 14 of
10 the permit that you just approved, the SMA permit to the
11 off-site parking approval.

12 COMMISSIONER HIRANAGA: Condition Number 8 that
13 you did for off-site?

14 MS. CUA: Right.

15 COMMISSIONER HIRANAGA: Because this language is a
16 lot more detailed than what's being proposed.

17 MS. CUA: So, you're just saying to basically use
18 Condition Number 14 as -- add that as Condition Number 8?

19 COMMISSIONER HIRANAGA: With regards to
20 filtration.

21 MS. CUA: Condition Number 8 would now read as 14
22 has read, not as Livit read it.

23 COMMISSIONER HIRANAGA: Plus the 201 cf capture.

24 MS. CUA: Okay. All right.

25 COMMISSIONER MARDFIN: I was going to have a

1 problem with that. I was going to incorporate 14 as
2 Condition Number 9.

3 COMMISSIONER HIRANAGA: Yeah, you could do that.

4 CHAIRMAN STARR: So, the amendment is Condition 14
5 be included as Condition 9. Ms. Cua, you have that?

6 MS. CUA: So, yes, that you're recommending
7 off-site parking approval subject to nine conditions.
8 Condition Number 8 dealing with approximately 201 cfs of the
9 runoff as Livit read into that condition. Condition Number
10 9 would be the wording of Condition Number 14 from the SMA
11 permit.

12 CHAIRMAN STARR: Okay. All in favor of the
13 amendment and the amendment only, please raise your hand.
14 The vote, five.

15 MS. CUA: Five. Motion passes.

16 CHAIRMAN STARR: Amendment passes. Now to the
17 main motion. All in favor of the main motion as amended,
18 please raise your hand. All opposed.

19 MS. CUA: Motion carried. Five votes.

20 CHAIRMAN STARR: Congratulations, and we ask you
21 to do whatever you can to try to keep the storm water off of
22 the streets of Paia. And build a great store.

23 MR. THIELK: We will. Thank you very much.

24 CHAIRMAN STARR: Thank you. Are we ready to move
25 right along, Mr. Fasi? We're going to try to get through it

1 all today. And I thank the Commissioners for bearing with a
2 overabundant agenda.

3 I ask the public to please be quiet. Take your
4 conversations outside. Ms. Cua, please introduce the next
5 item.

6 MS. CUA: The next item is a request by Maui
7 Memorial Park, LLC requesting a County Special Use Permit
8 and Accessory Use Permit in order to expand the existing
9 Maui Memorial Park on 10.936 acres of the land in the County
10 Agricultural District and the M-1 Light Industrial District
11 at Waiinu Road, TMK: 3-8-046, Parcel 43, Wailuku.

12 The public hearing on this matter was held on May
13 11th, 2010 where you deferred action for a number of
14 reasons. The County Special Use Permit is for lands on the
15 property zoned County Agricultural District and the
16 Accessory Use Permit is for the lands on the property zoned
17 M-1 Light Industrial District. And the planner in this
18 matter is Paul Fasi.

19 MR. FASI: Good morning, Commissioners. Thank
20 you, Deputy Director. We have representatives from the
21 owner, Rightstar Memorial, as well as their consultant in
22 the audience. And I won't get too specific. I'll have to
23 rely on them to bring them up for answers. But basically,
24 what we want to do today is let you know that the item came
25 before the Maui-Lanai Island Burial Council on May 27, 2010.

1 And at this meeting, the subject matter was
2 discussed. The Burial Council had concerns regarding
3 potential for burials in the area. And so, it was suggested
4 that they do a site visit and the date for that site visit
5 was June 24th, 2010. And the Department concurred with that
6 request, and so therefore, the Department is going to
7 request that this matter be deferred until the Burial
8 Council has a chance to do their site visit and include
9 their comments into the next public hearing deliberation.
10 There are -- there is a representative here as well today
11 from the Burial Council in the audience. So if you have any
12 questions.

13 CHAIRMAN STARR: Yeah. Mr. Kapu, could you come
14 and share your mana'o on this?

15 MR. KAPU: Aloha. I'm Keeaumoku Kapu. Yeah, it
16 was placed on our agenda. And I guess one of the serious
17 issues of the matter was the recommendations from State
18 Historic Preservation Division that the management and
19 overseeing of any subsurface burials triggered a monitor.
20 Once it triggers a monitor, what happens from there is if
21 there is any precontact or burials or affiliated things that
22 are found, then it sort of triggers another process. It has
23 to go through the State Historic Preservations Division. It
24 goes through a public notice. Let's say burials that are
25 found, goes through a public notice, which is like a 30-day

1 process. So, my concerns I talked about is if they -- there
2 was an applicant or a guest that was waiting to be interned
3 in this area, that what would be the ramifications if all of
4 the sudden they was to find something, that they would have
5 to extend this process to make the -- that internment time
6 limit even longer knowing what's going to happen.

7 Because once the Burial Council voices the opinion
8 to that, we make recommendations for reinternment, or I
9 guess the key part is to -- it's a horrendous process, and
10 that's the reason why we requested for a site visit to see
11 whether or not there would be other alternatives to
12 mitigating the possibility of using this area for an
13 internment.

14 CHAIRMAN STARR: Members, questions. Why don't we
15 start with questions for Mr. Kapu. Commissioner Mardfin.

16 COMMISSIONER MARDFIN: Actually, I wanted to ask
17 the Chairman a question.

18 CHAIRMAN STARR: Sure.

19 COMMISSIONER MARDFIN: Since the Department is
20 recommending that we essentially defer this until after the
21 site visit, it seems to me there are a couple of options.
22 One is to discuss some of the other issues, use the time now
23 to discuss some of the other issues. The alternative would
24 be to defer at this point and discuss the other issues later
25 and use this time to do stuff, other stuff on our agenda.

1 But the next two items on the agenda are scheduled for 1:00
2 and 1:30. But we could have a change in the agenda to bring
3 up anything that would come after those. And I would like
4 the Chair's recommendation as to which route to follow.

5 CHAIRMAN STARR: I think my preference would be to
6 try to get through some of the other issues with this, even
7 if we do have a large possibility of deferral. But Ms. Cua
8 had a comment.

9 MS. CUA: I also appreciate that direction, Chair.
10 Inasmuch as you do have agenda items listed for 1:00, I
11 don't see those people here. We definitely, when we
12 attended the Burial Council, appreciate that they are going
13 to do a site visit, because we share -- when Keeaumoku
14 brought those concerns up, we were just overwhelmed at what
15 could happen, you know, when -- if they are digging a grave
16 and a funeral is all set, and what if they find something.
17 There's got to be another way that we could proactively go
18 forward.

19 And we did not want this process to go forward
20 independently of the Burial Council, because we feel that
21 they could really help in this matter. And, you know, we've
22 talked to the Applicant about it. However, there are other
23 issues that you raised. And although Paul didn't go through
24 them, they're listed on Page 2 of the report. And that
25 discussion, being that we have some time, should happen.

1 Because they're still going to be topics that you brought
2 up. We have to address it. So, while this process is
3 happening with the Burial Council, you can in whatever time
4 you have discuss the issues you raised. And we can see if
5 we can make progress on that.

6 CHAIRMAN STARR: Okay, so Mr. Kapu.

7 MR. KAPU: Yeah, I just would like to mahalo Ann
8 Cua, Deputy Planner, for showing up at the meeting, and also
9 the Planning Staff Fasi. Because it sort of opened a window
10 of opportunity where it's important. I'm kind of really
11 upset that there isn't any representation from the State to
12 give their recommendations of what had happened at that
13 time. I'm glad I came today, and I'm glad there is some
14 kind of cohesiveness that we can actually work together on
15 that. Thank you.

16 CHAIRMAN STARR: And I would just like to comment
17 that I want to thank the Burial Council and encourage them
18 to take the lead. Because we are not really in the right
19 position to create the right framework for issues related to
20 old burials. And the State is often absent. So, I think
21 the kupuna who have the experience are on the Council. And
22 the more they can take the lead, at least as far as I'm
23 concerned, the better.

24 MR. KAPU: Thank you.

25 CHAIR STARR: Commissioner Tagorda.

1 COMMISSIONER TAGORDA: Can I just ask you a
2 question?

3 CHAIRMAN STARR: Yes.

4 COMMISSIONER TAGORDA: What time is this site
5 visit going to be on June 24th?

6 MR. KAPU: It's on the 28th, and it's first thing
7 in the morning.

8 COMMISSIONER TAGORDA: 28th or 24th?

9 MR. KAPU: Oh, 24th.

10 MS. CUA: I don't know if it's 9 or 10. 9:00.

11 MR. KAPU: 9:00, and it's going to be at the site.

12 CHAIRMAN STARR: Can I ask the Commissioners be
13 informed of that? But if more than two Commissioners do
14 attend, you know, they observe the niceties of not breaking
15 the Sunshine Law.

16 MR. KAPU: Yeah, yeah. I was going to mention
17 that.

18 COMMISSIONER TAGORDA: That was one of the
19 requirements, Mr. Chair. Can any one of the Commissioners
20 attend the site visit?

21 CHAIRMAN STARR: I may get hit over the head by
22 Corp Counsel, but my belief is they can. But since it's a
23 chance encounter, they certainly should not discuss
24 Commission business if there's more than two of them. Do I
25 have that right, Mr. Giroux?

1 MR. KAPU: Our site visit is going to be all the
2 Commissioners, so it's actually open to the public. And I
3 think we're going to be, you know, open for discussion,
4 yeah. It's an actual meeting we're conducting at site.

5 MR. GIROUX: I think the question, as far as the
6 Sunshine Law for this body, you have -- if two or more
7 people show up at that meeting incidentally, you wouldn't
8 want any discussion between those two members or three
9 members. The other caution is that it is on this agenda
10 item. So, it is -- it is board business. And that could
11 raise other issues of, you know, independent investigation
12 and such.

13 Because the issues discussed should be matters
14 that are introduced on the record.

15 COMMISSIONER TAGORDA: So, what are you saying?
16 Is --

17 CHAIRMAN STARR: So, you can attend, but stay out
18 of the discussion I think is --

19 COMMISSIONER TAGORDA: Thank you.

20 CHAIRMAN STARR: And don't make plans with other
21 Commissioners to meet there. Because you're meeting -- you
22 can go there and meet by chance, but not by plan. Okay.
23 Anyway, on the larger topic at hand, there was some spirited
24 discussion previously. Who would like to -- Commissioner
25 Hiranaga.

1 COMMISSIONER HIRANAGA: Actually, just continuing
2 on the subject. From a procedural matter, my understanding
3 is Maui Burial Council does not become involved unless there
4 is, what do you call it, an un --

5 MS. CUA: Inadvertent.

6 COMMISSIONER HIRANAGA: Inadvertent find. So, by
7 doing this, are you setting a precedence, or what is your
8 basis for recommending this deferral based upon the request
9 from the Burial Council?

10 MS. CUA: Okay. And it's actually because of a
11 comment that we have in a letter from State Historic
12 Preservation Division -- Paul, you want to point that out --
13 which is calling for monitoring of ground-disturbing
14 activities. In a normal situation, if we just put that --
15 if you put that condition on a permit, it's not a much of a
16 possible problem as in this particular application.

17 Because if you think about it, digging a grave
18 site is a ground-altering activity. And so, that -- that
19 general comment that you include on many permits takes a
20 different kind of a meaning with this permit. And again, a
21 grave site is not normally dug until the services are all
22 set. And so what happens, I mean if you think this through,
23 you know, what can happen if there is a process of digging
24 that site, and maybe the burial is scheduled for tomorrow,
25 you know, what happens if they find something? Then there's

1 this process that Keeaumoku that talked about that has to
2 take place.

3 What does that do to the whole funeral service? I
4 mean that's a huge, huge problem, challenge. The Burial
5 Council saw it right away, and we see it as well. And why
6 it affects you is because that is a somewhat standard
7 condition that we put on a typical project that would be
8 okay. For this one, we might want to have some proactive
9 situation occur that maybe could happen as part of this site
10 visit, discussions with the Applicant, maybe something they
11 can do so that maybe they wouldn't need a monitor at that
12 point.

13 Maybe they could do something ahead of time so
14 that we wouldn't have that situation occur when they're
15 ready to dig that grave for that guest, as Keeaumoku said.

16 CHAIRMAN STARR: Okay. Members, other questions?
17 It doesn't have to relate to this. We had some other
18 discussions previously about water and chemicals and
19 parking. Commissioner Shibuya.

20 COMMISSIONER SHIBUYA: Yes. First of all, I want
21 to thank Planner Fasi, Paul Fasi, for doing an outstanding
22 research and getting us background information and sharing
23 with all of the Commissioners. I know it was a short
24 suspense, but you did pull in even the State water people
25 and their comments. Thank you very much.

1 Now, this issue that we want to bring up and
2 discuss would be the presence of the way we process bodies
3 and prepare them for burial, it can be done without
4 embalming fluids, or it could be done with the fluids. And
5 the issue is the fluids, according to the EPA, are Class B
6 pesticides and/or carcinogenic type of chemicals. The
7 problem here is that do we want to put these chemicals
8 within our ground.

9 CHAIRMAN STARR: I believe the Applicant is
10 standing behind you, Mr. Fasi. Please introduce yourself,
11 and give us some comments.

12 MR. FASI: Paul Fasi, Planner.

13 CHAIRMAN STARR: No, not you, Mr. Fasi.

14 MR. FASI: I have the Applicant.

15 MR. HAWLEY: Hi, I'm Steve Hawley. I'm the
16 Director of Operations for Maui Memorial Park. We -- I
17 think we included this time some information in the
18 materials that we gave you. As far as the formaldehyde and
19 how it works and how it breaks down and that sort of thing,
20 I think that's included in an exhibit there for you.

21 One of the things that we do when we do burials is
22 we do not take bodies and embalm them and then put them in
23 direct contact with the soil. When someone is embalmed,
24 they're placed into a container, a casket. Oftentimes,
25 those caskets are sealed caskets. They're then placed into

1 a grave liner, which is either a concrete or a Poly-Vault,
2 and that in itself. So, you have multiple layers there
3 separating the body of the deceased and the chemicals and
4 whatever is in them from the soil.

5 One of the things I think it says there in our
6 exhibit is it comments about how the formaldehyde breaks
7 down very quickly. And so, it doesn't keep its form. It
8 breaks down very quickly, and again, the exhibit was I think
9 stated that it is not a hazard because of it breaking down.
10 So, our feeling and I think what we're proposing is we
11 require in our cemetery, we do not -- we've never buried a
12 body without a concrete grave liner or Poly liner. We never
13 do that, and we will continue that policy.

14 CHAIRMAN STARR: Commissioner Shibuya, any
15 followup?

16 COMMISSIONER SHIBUYA: Yes, I agree. And those
17 are good mitigation efforts. And I applaud that. It's just
18 that I did talk with Oceanit, who did some testing of Hawaii
19 Memorial Park type grave sites. And they don't have any
20 soil sampling testing procedures or equipment, but they do
21 have testing of the gas, the formaldehyde gas and vapors.
22 And this issue did come up in Honolulu, by the way. And
23 they tested it, and it became negligible. There was some
24 vapors, but it was negligible amounts. So therefore, they
25 proceeded with the development.

1 CHAIRMAN STARR: Okay. Commissioner Mardfin.

2 COMMISSIONER MARDFIN: I would just like to say I
3 read this morning I guess the statement you distributed by
4 Mark De Benedetto, Senior Chemist with the Dodge Company.
5 And he says what are the -- on the second page I think, what
6 are the alternatives to traditional burial methods. And he
7 says the only alternative currently is cremation,
8 above-ground burial in a mausoleum or burial at sea. He
9 left out the one that I favor, which is donation of organs
10 for transplants and body for research, and that would avoid
11 the whole problem. But I support people that do organ
12 donations.

13 CHAIRMAN STARR: I have a question, which is when
14 we first had the discussion, I was not aware that concrete
15 vaults were being employed universally. I know I've
16 certainly attended a number of burials where the coffin was
17 just being lowered into a hole in the dirt and then, you
18 know, shovel-fulls of dirt were being added on. Could you
19 talk to that?

20 MR. HAWLEY: Yes. That would not be at Maui
21 Memorial Park. Maui Memorial Park, as most perpetual care
22 parks, require a minimum outside burial container.
23 Virtually every memorial, every perpetual care park I've
24 ever been associated with has done that, mainly because two
25 reasons. One, what we talked about. The other reason is

1 because maintenance-wise if you simply put caskets into the
2 ground or bodies, then the ground is going to settle and you
3 have to keep adding dirt. And you can't mow it.

4 Now, that's not to say that some private
5 cemeteries or even church cemeteries, I can't comment on
6 what they might do, but as for us, and again, all perpetual
7 care cemeteries that I'm aware of require an outside burial
8 container.

9 CHAIRMAN STARR: And do all religions allow that?

10 MR. HAWLEY: All religions that we have dealt with
11 here, we have not buried anyone without an outside burial
12 container. Some -- for instance, we have even, at other
13 places with, for instance, people who are, as far as Judaism
14 is concerned, they require some ground contact. And what
15 they have done in some situations is you have a vault
16 without a base in it, so the body would be in contact with
17 the ground; however, that is not our policy to do that. To
18 my knowledge, we've never done that here.

19 CHAIRMAN STARR: So, yeah. Because I know I've
20 attended quite a few Jewish funerals, and they were always
21 in the dirt. So, if a member of the Jewish community wanted
22 to be buried in Maui Memorial Park, but they required ground
23 contact, then explain what would happen and what would
24 prevent leaching, eventual leaching of chemicals.

25 MR. HAWLEY: I would say, especially under these

1 circumstances, we would not be able to accommodate them.
2 There are perhaps other choices for them.

3 CHAIRMAN STARR: So, in other words, you won't
4 accommodate Jews in your cemetery?

5 MR. HAWLEY: No, no, we would not accommodate
6 burials without a vault. That would be the issue.

7 CHAIRMAN STARR: Very interesting. Commissioner
8 Hiranaga.

9 COMMISSIONER HIRANAGA: Actually, moving onto
10 another subject. There's a comment here regarding the
11 curbing, concrete curbing to -- along the roadway regarding
12 no parking. I'm just curious how that concrete curbing is
13 going to work on Waiinu Road.

14 MR. FASI: Passed out to you earlier was the
15 cutaway of the road section. If you can refer to this
16 particular drawing here, Wayne Arakaki will help explain it.

17 MR. ARAKAKI: Wayne Arakaki, the engineer for the
18 project. What we found out through the survey is that the
19 existing right-of-way is 60 feet wide. And then the
20 existing pavement is 24 feet for traffic going in both
21 directions. And then there's a white stripe, and then
22 there's an existing paved shoulder. It's about six feet.
23 And what we are proposing to do since so there's no parking
24 along the street side was to put a concrete curb and then
25 finish that off with a grass area, grass shoulder.

1 COMMISSIONER HIRANAGA: That wouldn't prevent
2 parallel parking though. You could park on the 6-foot
3 shoulder, paved shoulder.

4 MR. ARAKAKI: Well, I did -- I mean the only thing
5 that I could do was put a concrete curb. If I -- unless
6 Public Works have some other solutions so there's no
7 parking.

8 COMMISSIONER HIRANAGA: Would Public Works have
9 the authority to erect or have the Applicant erect a no
10 parking sign?

11 MR. MIYAMOTO: The no parking would have to go
12 through Council's approval and to change the County Code to
13 allow that area to be designated as no parking at this
14 point.

15 CHAIRMAN STARR: Members, any other questions?

16 COMMISSIONER MARDFIN: If there are none, would
17 you like a motion to defer?

18 CHAIRMAN STARR: Yes -- no, before we do that, I
19 would like to ask if there are any other areas that anyone
20 would like to see additional information provided before it
21 comes backs to us. Commissioner Shibuya.

22 COMMISSIONER SHIBUYA: Just a comment and
23 clarification here. The EPA is -- still the jury is out.
24 They started in 1989, and they have currently a backlog of
25 chemicals that at that time was 60,000 chemicals. Today

1 it's 80,000, and they've only investigated 200 of them.
2 This is just one of the 200, and the jury is still out. I
3 just want to lay the -- I went through several of the
4 research documents, and there are pros and cons.

5 People are saying, yeah, no problem. One that has
6 been very problematic for me was that on one research, 109
7 employees working in this composite material factory all
8 suffered, 100 percent all suffered irritations and/or
9 growths, but they were noncancerous, from breathing, so the
10 respiratory and other factors. I remind you that the FEMA
11 also on a separate study identified that, yes, formaldehyde
12 was part of this composite material, and it was put into
13 these campers that Louisiana victims were added into. And
14 they suffered irritations, and they quickly stopped that.

15 CHAIRMAN STARR: Is there a question?

16 COMMISSIONER SHIBUYA: No, I'm just saying that
17 the jury is out. Even though that we have current experts
18 saying it's okay, there are some problems. I can't tell you
19 exactly what's going to happen. Even in the State Water
20 Department, there is no testing for the dirt; however, it
21 says formaldehyde is currently not regulated by EPA as a
22 drinking water contaminate, although its presence in the
23 nearby drinking water wells would be of serious concern
24 since it would indicate contamination, transport through
25 ground water.

1 CHAIRMAN STARR: Thank you, Commissioner Shibuya.
2 That doesn't require a response. There's no question there.

3 MR. HAWLEY: Could I clarify something? I
4 misspoke a little bit. When I was referring to burials, you
5 were asking about specifically Jewish burials, and when I
6 was saying we would not accommodate, I was referring to if
7 those bodies were embalmed. After further thought, most
8 Jewish burials, especially since they're not embalmed, and
9 that would be a whole different -- and we would not have a
10 problem accommodating them. It's simply -- but if it's an
11 embalmed body, that would be a different story.

12 CHAIRMAN STARR: Could we have a letter expressing
13 that? And also, I would like to know what other religions
14 have religious rules that would preclude them from being
15 able to be buried at this facility.

16 Okay. Commissioner Mardfin.

17 COMMISSIONER MARDFIN: Let me understand this. If
18 they're embalmed, they have to be in concrete, but you do
19 accommodate people that are aren't embalmed without burying
20 them in concrete?

21 MR. HAWLEY: I would that say if it was a special
22 request, which we haven't had any at Maui Memorial Park in
23 all the years, we would if they are -- especially because of
24 the conditions we're talking about, we already require
25 everyone to have a concrete grave liner minimum.

1 If it was a situation where we had a burial of
2 someone who needed contact with the ground, our policy, we
3 are perfectly willing to say that we would work with them on
4 that; however, if the body is embalmed, that's going to be a
5 problem. And we would just continue with our current
6 policy.

7 COMMISSIONER MARDFIN: But wouldn't you still have
8 the settling problem?

9 MR. HAWLEY: Well, we could do a three-sided
10 vault. In other words, we could make a three-sided vault,
11 leave the base off.

12 CHAIRMAN STARR: Members, any other -- okay.
13 Commissioner Mardfin, you had a motion to make?

14 COMMISSIONER MARDFIN: I move we defer this to
15 some date after the Maui-Lanai Island Burial Council has had
16 a chance to have their site visit, make a determination and
17 make their report to us.

18 COMMISSIONER SHIBUYA: Second.

19 CHAIRMAN STARR: Mr. Yoshida isn't here. I'm sure
20 he'll schedule it. Do we need a fixed date for it? I
21 forget if there's a public hearing.

22 MS. CUA: I believe the -- what is the first
23 meeting in July?

24 COMMISSIONER SHIBUYA: We have a meeting on the
25 13th on another issue.

1 CHAIRMAN STARR: Those -- both July meetings are
2 pretty full right now.

3 COMMISSIONER MARDFIN: I would suggest we ask
4 Keeaumoku if he hasn't left, because we don't know how long
5 it's going to take them to respond. We don't want to set it
6 before we get feedback from them.

7 MS. CUA: We can do the first meeting in August.
8 What date is that? August 10th.

9 COMMISSIONER MARDFIN: I move we defer to August
10 10th.

11 COMMISSIONER SHIBUYA: Second.

12 CHAIRMAN STARR: All in favor, please raise your
13 hand. All opposed.

14 MS. CUA: Five in favor.

15 CHAIRMAN STARR: We'll see you August 10th. And
16 we are now in recess until 1 p.m.

17 (Lunch recess.)

18 CHAIRMAN STARR: Okay. Welcome back, everyone.
19 Welcome back. It's June 8th. The Maui Planning Commission
20 meeting is to going to reconvene, and our next item will be
21 introduced by Deputy Director Ann Cua. I would like to
22 welcome the Director Kathleen Aoki, who has joined us.

23 MS. CUA: Mr. Chair and Members of the Commission,
24 the next item on your agenda is the Director's Report. The
25 Planning Director notifying the Planning Commission pursuant

1 to Section 12-202-17(e) of the Maui Planning Commission's
2 SMA Rules of her intent to process the time extension
3 request administratively on the following matter: A request
4 by Ms. Yarrow Flower of Maui Land & Pineapple Company, Inc.
5 requesting a two-year time extension on the Special
6 Management Area Use Permit condition to initiate
7 construction of the Kapalua Central Resort Project at Tax
8 Map Key 4-2-004: Portion of 024 in Kapalua. The planner on
9 this matter is Kurt Wollenhaupt.

10 CHAIRMAN STARR: Mr. Wollenhaupt. And before we
11 proceed, please correct me if I'm wrong, but it's my
12 understanding that this is brought before us, and if we wish
13 to hear and act on the time extension request, we can vote
14 to do so; otherwise, we can allow it to remain under the
15 purview of the director.

16 MS. CUA: Correct.

17 CHAIRMAN STARR: And that's why it's brought
18 before us. Mr. Wollenhaupt, please.

19 MR. WOLLENHAUPT: Good afternoon, Members of the
20 Maui Planning Commission. A memorandum was sent to you that
21 included the old conditions of approval for this SMA. As
22 Assistant Director Cua indicated, the Applicant is
23 requesting a two-year extension for the project to start.
24 That would be until June 30th, 2012. There was a request by
25 a member of the Planning Commission for some questions to be

1 answered. I believe that's within the purview today if it
2 can be relatively quickly answered.

3 And we are here, pleased to have Leilani Pulmano
4 from Munekiyo & Hiraga, who is the consultant with the
5 project. Also Yarrow Flower, the Development Coordinator
6 for Maui Land Company, and also Ryan Churchill, the
7 President, who will be able to answer any questions you
8 have. I can give a brief explanation if you have any other
9 questions. However, I was not the original planner on the
10 project, so probably the representatives with the
11 consultants and the company could probably answer specific
12 questions.

13 CHAIRMAN STARR: So, if we have questions related
14 to the time extension or allowing that or not allowing that,
15 we can ask those specifically now. If we have deeper
16 questions regarding the project itself and any changes, then
17 the way to deal with that would be to have an actual hearing
18 on the matter. Anyway, Members. Yeah, Commissioner
19 Mardfin.

20 COMMISSIONER MARDFIN: Mr. Chairman, I was looking
21 and I couldn't find anything that I had on this. So, I
22 haven't seen it, but I'll ask my questions, and I may not
23 need to see it. What were the reasons for the time
24 extension?

25 MR. WOLLENHAUPT: I believe -- well, probably

1 Mr. Churchill could answer that to the best ability. But it
2 would be the indication that as the economy has taken a turn
3 southward, they need to have more time to --

4 CHAIRMAN STARR: Why don't we hear from the
5 Applicant.

6 MR. WOLLENHAUPT: I think that's the best thing.

7 CHAIRMAN STARR: Mr. Churchill, please introduce
8 yourself.

9 MR. CHURCHILL: Good afternoon. Ryan Churchill
10 with Maui Land & Pineapple Company. Commissioner Mardfin,
11 to answer your question, yes, it's primarily economic driven
12 due to the downturn in the real estate economy and the
13 capital markets. We're unable to secure financing to go
14 forward with the project at this time.

15 COMMISSIONER MARDFIN: And are you convinced that
16 within two years, you'll be able to, or are you going to
17 come back to see us in another couple of years?

18 MR. CHURCHILL: Hopefully we don't have to. We
19 all hope the market is going to get better and improve.
20 We've proceeded with a lot of other aspects of the project.
21 We subdivided out the large lot that will be the eventual
22 condominium lot for the project. We've completed
23 construction drawings for the majority of the project and
24 have submitted those. Going through the building permit
25 process and processing those permits. We're still

1 continuing on that front, but really, it's hard to say if in
2 two years the economy is going to be back and we're going to
3 be able to get financing for the project or not.

4 That's what we're asking for today. And hopefully
5 it will be better by then.

6 CHAIRMAN STARR: Commissioner Hiranaga.

7 COMMISSIONER HIRANAGA: Regarding your drainage
8 retention system, if you could refresh my memory on your
9 capacity? Is it capable of retaining 100 percent of the
10 post development surface runoff?

11 MR. CHURCHILL: Yes, the project is designed for
12 105 percent of retainage.

13 COMMISSIONER HIRANAGA: Okay. Thank you.

14 CHAIRMAN STARR: Any other questions?
15 Commissioner Freitas.

16 COMMISSIONER FREITAS: I would like to move we
17 accept the time extension under board review.

18 CHAIRMAN STARR: I would like to offer the public
19 an opportunity to testify first as a courtesy if anyone is
20 here wishing to testify. And now would be the time. Please
21 make yourself known. Okay. Not seeing any, Commissioner
22 Freitas, I apologize for interrupting you.

23 COMMISSIONER FREITAS: I would like to move that
24 we accept this time extension.

25 CHAIRMAN STARR: Waive our review?

1 COMMISSIONER FREITAS: Yes, a review of the time
2 extension.

3 CHAIRMAN STARR: Is there a second?

4 COMMISSIONER HIRANAGA: Second.

5 CHAIRMAN STARR: Moved by Commissioner Freitas,
6 seconded by Commissioner Hiranaga. The motion is?

7 MS. CUA: To waive the Commission's review of the
8 time extension to the Planning Department.

9 CHAIRMAN STARR: Okay. So, ready to vote? All in
10 favor, please raise your hand. All opposed.

11 MS. CUA: Five aye's.

12 CHAIRMAN STARR: Okay. Thank you.

13 MR. CHURCHILL: Thank you.

14 CHAIRMAN STARR: Ms. Kapuaala, do we need a break,
15 or are we ready to move on?

16 MS. KAPUAALA: We're ready.

17 COMMISSIONER HIRANAGA: Mr. Chair.

18 CHAIRMAN STARR: Commissioner Hiranaga.

19 COMMISSIONER HIRANAGA: According to the agenda,
20 it says to begin at 1:30 or soon thereafter. Do you want to
21 do something else? We could do minutes.

22 CHAIRMAN STARR: Yeah. Why don't --

23 COMMISSIONER MARDFIN: Mr. Chairman.

24 CHAIRMAN STARR: Yes.

25 COMMISSIONER MARDFIN: May I move that we defer

1 this until 1:30 and deal with the agenda that directly
2 follows this.

3 CHAIRMAN STARR: Is there a second?

4 COMMISSIONER FREITAS: Second.

5 CHAIRMAN STARR: All in favor. All opposed.

6 Okay. We're deferring until 1:30. And Ms. Cua.

7 MS. CUA: So, Item F, acceptance of the action
8 minutes of the May 11th, 2010, and May 25th, 2010, and the
9 regular minutes of the March 17th, March 30th, and April 27,
10 2010 meetings.

11 CHAIRMAN STARR: Okay. We have a motion related
12 to this, or comments, corrections? Commissioner Hiranaga.

13 COMMISSIONER HIRANAGA: You want me to make a
14 motion for all of them? May 11, May 25th, March 17, March
15 30, April 27, 2010. I make to motion to accept the minutes.

16 COMMISSIONER SHIBUYA: Second.

17 CHAIRMAN STARR: Moved by Commissioner Hiranaga.
18 Seconded by Commissioner Shibuya.

19 MS. CUA: To accept the minutes.

20 CHAIRMAN STARR: Okay. No corrections. Not
21 seeing any, all in favor, please raise your hand. All
22 opposed. Okay. Ms. Cua.

23 That was five aye's, yeah.

24 MS. CUA: Oh, yeah. Sorry.

25 CHAIRMAN STARR: Yeah. Go ahead. Director's

1 Report.

2 MS. CUA: So, we have a letter dated May 4th, 2010
3 from Daniel Grantham of the Waipio Bay Benevolent
4 Association requesting a rescheduling of the contested case
5 hearing on the SMA appeal of the SMA exemption for the
6 Jeffree Trudeau three-lot subdivision at TMK 2-9-007, Parcel
7 52 in Haiku.

8 CHAIRMAN STARR: Okay. I believe the item was --
9 the item was pushed back on our schedule.

10 MS. CUA: To the July 13th, 2010 meeting.

11 CHAIRMAN STARR: Okay. Anyone have any questions,
12 comments on that? Commissioner.

13 COMMISSIONER MARDFIN: Date of request is June 22.
14 Is it that we were full on that date? The bottom of the
15 next to the last paragraph says, "The Commission considered
16 moving the date of the hearing from the June 8th meeting to
17 the next immediate meeting on June 22 or any meeting date
18 thereafter."

19 MS. CUA: The meeting might have been full, and
20 that's why we moved it to July 13th.

21 COMMISSIONER MARDFIN: That's fine.

22 CHAIRMAN STARR: I think in discussions
23 Mr. Yoshida had with them, they moved it up.

24 COMMISSIONER MARDFIN: That's fine. I move we
25 defer to July 13th.

1 CHAIRMAN STARR: I don't think we really need it.
2 Just the scheduling. Next item.

3 MS. CUA: The next item we just wanted to notify
4 you on the Honuaula Draft Environmental Impact Statement.
5 The public comment deadline was scheduled for June 7th,
6 2010. The Applicant has agreed to extend that public
7 comment deadline to June 30th, 2010. As you may be aware
8 from the training that we gave you, for an environmental
9 assessment document, the public review comment is 30 days,
10 but for an environmental impact statement, it's 45.

11 So, the 45 days would have taken us to June 7th.
12 However, the time period has been extended to June 30th. I
13 distributed a letter today dated June 4th from PVR Hawaii,
14 and it's to all the participants who received a copy of the
15 draft EIS indicating or informing them of the extension of
16 the deadline. And this, just for more information, this
17 matter, the draft EIS will be coming before the Commission
18 on June 22nd.

19 CHAIRMAN STARR: We are the accepting agency, I
20 believe.

21 MS. CUA: That's correct, and you've all received
22 copies of the documents already.

23 CHAIRMAN STARR: Commissioner Mardfin.

24 COMMISSIONER MARDFIN: How is it that we're
25 supposed to make a decision on accepting this on June

1 whatever it is?

2 CHAIRMAN STARR: No, we're not. We're offering
3 our comments.

4 COMMISSIONER MARDFIN: Comments. We're not
5 accepting it?

6 CHAIRMAN STARR: We are ultimately. I'm sorry.

7 COMMISSIONER MARDFIN: But it will be after the
8 public comment period is finished?

9 MS. CUA: You are the accepting authority, and
10 we're going to begin the process with the Commission
11 reviewing the draft EIS first and then your comments as well
12 as all the other agencies and public comments will need to
13 be addressed and incorporated into the final EIS document,
14 which will come before you at another time. And then after
15 that, the Applicant has a Phase II project district
16 application that will be -- will need your review and
17 approval.

18 COMMISSIONER MARDFIN: Thank you very much.

19 CHAIRMAN STARR: And it's my understanding that
20 legally this is -- it's actually preferable that we add our
21 comments while the comment period is still open, which this
22 will allow, though it didn't -- the request did not come
23 from us. And I do request that, you know, we look at it and
24 have our comments and concerns ready at the next meeting
25 when we'll review it. So, we can have those comments and

1 questions put into -- put onto the record. Anything else,
2 Members, on that? Okay. Ms. Cua.

3 MS. CUA: The next matter is Planning Commission
4 projects issues.

5 CHAIRMAN STARR: I was -- two members had asked
6 about the refreshment sign-up list. And I know it's a
7 somewhat trivial matter. But we have -- you know, we have
8 had a process where one of the members brings in -- brings
9 in stuff each meeting. And first I just wanted to ask if
10 everyone is happy with that system or if anyone has a
11 problem with it, because we never asked that. It doesn't
12 seem like anyone has a problem with it. There was some open
13 slots here. I'm not listed. I'll fill in a bunch of them
14 myself. And maybe someone else, if they want to, they could
15 put one in. Okay.

16 COMMISSIONER MARDFIN: What would be the
17 appropriate number if it were allocated evenly?

18 CHAIRMAN STARR: What?

19 COMMISSIONER MARDFIN: What would be the
20 appropriate number if we were signing up to have it fairly
21 allocated?

22 CHAIRMAN STARR: Two each according to their need,
23 one each according to their means.

24 COMMISSIONER TAGORDA: Can you exclude yourself
25 from that system that we have now? I have no problem with

1 it. But I just want to exclude myself.

2 CHAIRMAN STARR: Oh yeah, sure. Commissioner
3 Hiranaga.

4 COMMISSIONER HIRANAGA: I would like to suggest
5 you create a calendar until March for the term of the --

6 CHAIRMAN STARR: Right now, it's until December.
7 How about we see Carolyn and fill in where we want to fill
8 in?

9 COMMISSIONER HIRANAGA: If you do it until March,
10 because that's when the term ends.

11 CHAIRMAN STARR: We'll do it until March. And
12 even if we have a date without anyone filling in, it's not
13 tragic. Okay. Commissioner Mardfin.

14 COMMISSIONER MARDFIN: I don't know if this is
15 appropriate or not, but in the packet I was sent, I had a
16 letter from McCorriston, Miller, Mukai, MacKinnon, Attorneys
17 at Law, dated 25 May 2010, talked to the Corp Counsel Brian
18 Moto regarding Olowalu Subdivision. And this person or law
19 firm is, I guess a law firm, is claiming that there were
20 permit violations. How are we supposed to deal with this?
21 Is this something we deal with, or it gets referred to
22 somebody by us or gets referred to somebody by the Planning
23 Department, or what happens?

24 CHAIRMAN STARR: Okay. I'll ask the director to
25 respond.

1 DIRECTOR AOKI: Sure. Thank you, Commissioners.
2 The Department is aware of issues concerning Olowalu Mauka.
3 And we have proceeded to do enforcement, so I think this was
4 just an FYI from these people to let you know of the
5 situation. We are working with the developers'
6 representatives right now. They have been issued a Notice
7 of Warning, and we are in the process of further review of
8 that enforcement. So, at this juncture, I would say that
9 the Commission, it's more for an FYI until we review it
10 further and see what actions have to be taken whether or not
11 it would come back before the Commission, et cetera.

12 CHAIRMAN STARR: Commissioner Mardfin.

13 COMMISSIONER MARDFIN: I would just like to say
14 when I read it, it occurred to me that if the allegations
15 are correct, maybe it should be reported -- it should be
16 referred to some prosecutor, because it sounds like there
17 might be some fraud involved. But I'm not a lawyer, so I
18 don't really know.

19 DIRECTOR AOKI: I would say that would be up for
20 Corp Counsel to make that determination, and Corp Counsel is
21 working on this as we speak.

22 COMMISSIONER MARDFIN: Thank you.

23 CHAIRMAN STARR: I would like to bring up another
24 matter, which I believe is related. And this was at some
25 meetings previously, there had been some concerns raised

1 about an outlet for runoff at Olowalu through a culvert that
2 ran -- that was placed underneath the highway, a new large
3 culvert, and now empties that drainage channel for the
4 runoff from that subdivision right onto the beach. And, you
5 know, on snorkeling there, the reef is suffering very badly
6 from it. I had seen that and snapped pictures of it,
7 submitted them to the Department quite a while back.

8 I -- after asking questions, we -- I received, we
9 all received comments. Mr. Yoshida had gotten comments
10 about how it went to enforcement. And enforcement had gone
11 to State DOT, who had actually put the culvert under the
12 highway and did the excavation without doing an SMA. And
13 they had made several requests, and they had not been
14 answered. Now, it's my understanding that this connection
15 allowing the runoff to go right onto the beach there was for
16 that same subdivision. It's probably connected to that
17 project, and somehow State DOT was gotten to put it under
18 the highway.

19 But I would -- since State DOT is not asking
20 questions from enforcement on that, perhaps that should -- I
21 would like to make sure that that's part of the equation as
22 well.

23 DIRECTOR AOKI: We can look into it, Commissioner.

24 CHAIRMAN STARR: Thank you.

25 DIRECTOR AOKI: Excuse me, Chair. Can you just

1 describe where the culvert is?

2 CHAIRMAN STARR: I have photos, and I have the
3 package here.

4 DIRECTOR AOKI: Okay.

5 CHAIRMAN STARR: Your compliance folks were
6 already on it. They tried -- I'll present that to you. If
7 any members want additional copies, we can get it. Ms. Cua.

8 MS. CUA: The next matter is discussion of future
9 Maui Planning Commission agenda, and you were given a memo
10 dated June 7th, 2010 indicating based on the information
11 available at this time, we have two items on your June 22nd
12 agenda. One is the Draft Environmental Impact Statement, as
13 I mentioned, on Honuaula, and also a workshop from the Puma
14 Group on Small Town Revitalization, I believe the Chair had
15 requested.

16 CHAIRMAN STARR: Yeah, that will be at 1:00, and
17 we probably could have fit the Waipio Bay on it, but for
18 some reason, Clayton felt it wasn't -- someone wasn't ready.
19 I don't know. So, it may be a short agenda. I don't know
20 how long the testimony will be. Also, the first meeting in
21 July, I know that's a busy meeting with a number of public
22 hearings and the Waipio Bay. The second meeting in July,
23 there's several hearing items, and I'm sorry, I don't have
24 the list, and also a presentation by Sea Grant and by
25 Richardson School of Law and by our own shoreline planners

1 and maybe DAR also about shoreline health and recession.
2 And Sea Grant will be providing us with the new revised
3 shoreline recession maps, which they've been doing as a
4 project for, I believe the Department, for the last year or
5 so. So, that should be an interesting meeting.

6 Any other questions on that? Anyone with any
7 other programs that they want to schedule, you know,
8 between, you know, now and the end of the year or so, think
9 about them.

10 MR. GIROUX: I think Kent wants me to finish up my
11 treatise on the case law review. I think that was one part
12 we didn't get to. I got through everything else but the
13 case law review.

14 CHAIRMAN STARR: Okay. Case law review, and I
15 would like to see one on the, what do they call it, the
16 Rosetta Stone, or the update of the zoning maps?

17 MS. CUA: Dead sea scrolls?

18 CHAIRMAN STARR: Yeah, the dead sea scrolls they
19 call that. Okay. Let's move along. I know at 1:30, we
20 have another item.

21 MS. CUA: I think we can wrap up by 1:30. The
22 last group of items, if there's nothing on the EA/EIS's to
23 report, the last group of items, 6, 7 and 8, is your minor
24 permit report, SMA minor permit and SMA exemptions report.
25 And also, from your May 11th meeting, you did have some

1 questions on some of the I guess blank spaces that were not
2 filled in. And so, Clayton provided a memo dated May 21st
3 outlining the missing blanks in your previous report.

4 CHAIRMAN STARR: Okay. Anyone with questions,
5 this is -- we'll start with the one that was from two
6 meetings ago up until 5/12/2010, and then we'll get to the
7 newest one, because we deferred that one. I know I had a
8 number of items on it. These were exemptions issued. And
9 mainly because it's blank spaces, they're probably trivial
10 items, but I don't know. The first one is here, SM5
11 Exemption, Palms at Wailea. Next is SM5, Anthony
12 Riecke-Gonzales, and it just says Anthony Riecke, Anthony
13 Riecke-Gonzales. There's no description of what the project
14 is. Again, Baker Residence, Sugar Beach AOA0, and Francis
15 Kihara.

16 So, I have questions about those. And I would
17 like to have just a little -- to figure out a way to have
18 just a little more description so that we don't have to take
19 time to looking into items, which are mostly trivial in
20 nature but just because we don't have info.

21 MS. CUA: Yeah, we are always trying to be better
22 with inputting information into our KIVA system. Hopefully
23 you all have the memo that Clayton distributed dated May
24 21st, which kind of fills in the holes. We'll try not to
25 have so many holes, but sometimes we do. So, we'll do the

1 best we can to get you the information that you need.

2 CHAIRMAN STARR: Okay. And you have these marked,
3 or should I give you this one? That's for the previous one.

4 MS. CUA: So, this is another one?

5 CHAIRMAN STARR: Yeah.

6 MS. CUA: Yeah, maybe I'll get your copy.

7 CHAIRMAN STARR: And does anyone have any
8 questions regarding the latest one?

9 COMMISSIONER MARDFIN: Yeah, Ann, I would just
10 like a little bit more information on the -- I'm looking at
11 the SMA minor. And we've got one for Maui Electric about
12 fill of eroding banks. It says some stuff, but I just don't
13 know quite where it goes.

14 MS. CUA: Well, actually, the planner is here. I
15 don't know if she can -- Anna, are you prepared to answer
16 real quick on the -- there's a Maui Electric application
17 that looks like it's assigned to you. It was done. It's
18 done already.

19 MS. BENESOVSKA: Yes, that's correct.

20 MS. CUA: Take the mic. Our planner, Anna, should
21 be able to answer any questions you have, Commissioner.

22 COMMISSIONER MARDFIN: I just need to know what it
23 was about.

24 MS. BENESOVSKA: It was the Maui Electric Company.
25 I believe they were actually trying to fix a road that, or

1 kind of a driveway that led to their facility that was
2 falling apart due to erosion, I believe.

3 COMMISSIONER MARDFIN: Is it on the beach?

4 MS. BENESOVSKA: No, no, this was not in the
5 shoreline area.

6 COMMISSIONER MARDFIN: My second one on that same
7 page is Spreckelsville Beach Restoration Foundation.

8 MS. CUA: That looks like the planner is
9 Mr. Buika. I don't know if he's able to comment today. It
10 was approved with conditions.

11 COMMISSIONER MARDFIN: I can get the -- if you
12 provide the information later, that would be fine.

13 MS. CUA: Jim, are you prepared to just give a
14 quick comment today, or do we have to get back?

15 MR. BUIKA: Sure. This was a -- this was a -- is
16 the mic on? This is a followup to, or yeah, it's a followup
17 to a 2008 beach renourishment project that they had in
18 Spreckelsville in Laulea. And we had determined that what
19 has happened is there were two areas where the Applicant had
20 privately put in sand totally permitted in 2008.

21 Some of the -- on the north shore, again, there is
22 high rate of erosion. There were two areas that were on
23 private property that had eroded back. So, all that was,
24 all this permit is is to allow them just to replenish some
25 sand on the beachfront in two small eroded areas, so it's a

1 very, very small --

2 COMMISSIONER MARDFIN: And it should improve the
3 beach?

4 MR. BUIKA: Pardon?

5 COMMISSIONER MARDFIN: It should improve the
6 beach?

7 MR. BUIKA: Oh, yes.

8 COMMISSIONER MARDFIN: On the SMA exempt ones, you
9 have the fifth one down, it says Maui Ocean Center,
10 miscellaneous structure. I don't need answers today. And
11 then the eighth one down, it says Heintzman Marty,
12 Spa/Kahului. And further down, it says Na Kamehameha,
13 Banyan Tree Park, and those are the three that kind of made
14 me wonder what is going on.

15 CHAIRMAN STARR: Okay. So, we'll get further
16 information on those. And with the exception -- with the
17 exception of those, would anyone like to make a motion to
18 accept everything else in these reports with the exception
19 of those we generated questions on? Commissioner Shibuya.

20 COMMISSIONER SHIBUYA: No, just a question more in
21 terms of the status of Honoapiilani Highway Shoreline
22 Improvement. It's the State DOT project. Also, the
23 20090005 SM1, Jeffrey Dack. And the other one is Lahaina
24 Hongwanji, Collumbarium Demolition over 50 years old, SMX
25 137. Erin Wade.

1 And the other one is Shaw Street Sidewalk. DWP --
2 I mean DPW-Engineering Division. And that's all.

3 CHAIRMAN STARR: What page number, Commissioner
4 Shibuya?

5 COMMISSIONER SHIBUYA: It might be Page 7, way in
6 the back. Maybe I have an old one.

7 MS. CUA: What's the number?

8 COMMISSIONER SHIBUYA: Shaw Street. You can have
9 the whole thing.

10 MS. CUA: You just want more information on it as
11 well?

12 COMMISSIONER SHIBUYA: Yeah, I just want to know
13 the status. Not a dissertation.

14 CHAIRMAN STARR: I'll give you this list. So,
15 with the exception of those that we're looking for more
16 information on, do we have a motion to accept those reports?

17 COMMISSIONER SHIBUYA: Move to accept.

18 CHAIRMAN STARR: Is there a second?

19 COMMISSIONER MARDFIN: Second.

20 CHAIRMAN STARR: Okay. We have a motion and a
21 second by Commissioner Shibuya, Commissioner Mardfin. The
22 motion is to accept all the items excluding the ones just
23 mentioned. All in favor, please raise your hand. All
24 opposed. And thank you. That passes with five.

25 MS. CUA: Five aye's.

1 CHAIRMAN STARR: I have a question on this
2 process. Is there a space where especially the SMA
3 exemptions is available for perusal by us or by the public
4 after they've disappeared off this list? Because the only
5 way to know when something has been exempted is it appears
6 on our list once. After we've seen it, it goes off. How
7 can we tell, you know, what projects were exempted six
8 months ago or three months ago?

9 MS. CUA: I mean we can -- we can print up a list
10 of any time duration. You know, if you wanted to see a
11 year, a year list of all the exemptions, all our documents
12 are public information. If anybody wanted to come in,
13 they're all filed. All the exemptions are filed together.
14 We usually can send people electronic copies.

15 CHAIRMAN STARR: I would like to ask that at a
16 later meeting, you get back to us a way that anyone can
17 access those. Because the active ones stay on these sheets.
18 That's why these sheets are so long. But the exempt ones
19 just go away after that, so let's discuss it at a future
20 meeting.

21 MS. CUA: All right.

22 CHAIRMAN STARR: And just for Commissioners again,
23 when an exemption is issued, the only way that we or the
24 public knows about it is by looking at this sheet we get.
25 And once we've looked at it and accepted it, it's, you know,

1 it's done, and there's no further process. So, it's just
2 good for us to understand since we are responsible for all
3 of the things in the shoreline area. Once it goes past us,
4 we've accepted it.

5 Okay. Thank you very much. And I thank the
6 Applicant for -- we're a few minutes late in starting. I'll
7 have a short recess until the Applicant is ready. Once
8 again, I'm going to ask Ms. Cua to step down since we're,
9 once again, going into our contested case when we come back
10 in a few short minutes.

11 (Recess taken.)

12 CHAIRMAN STARR: Okay. Maui Planning Commission
13 meeting of June 8th is back in session. We're about to
14 proceed with the contested case related to Mr. Gary Stice
15 and of Hana Beachfront Associates, who is appealing the
16 Planning Department's decision requiring an SMA Major Use
17 Permit for property in Hana. We had began this hearing
18 several weeks ago. The Maui Planning Commission is serving
19 as the hearings officer as such the semi-judicial
20 proceeding. And we're operating under the rules of the Maui
21 Planning Commission in holding this contested case hearing.

22 We've proceeded through opening arguments as well
23 as several witnesses. I would like Ms. Trisha Kapuaala to
24 give us a brief history of how -- of where we're at and all
25 of the -- just note the different remarks and testimonies

1 and cross-examination and so on that we've heard up until
2 this point. And then we'll proceed from there. So,
3 Ms. Kapuaala, please proceed.

4 MS. KAPUAALA: Thank you, Mr. Chair. At the last
5 meeting, the contested case hearing was conducted where
6 there were witnesses or a witness and direct examination and
7 cross-examination as well as the Commission's examination of
8 the witness. Exhibits were entered into the record, and
9 that's basically it. We did not have time to deliberate.
10 There were opening arguments, and there were no closing
11 arguments. So, to continue the contested case hearing
12 procedurally, we would do closing arguments. The
13 transcripts have been prepared for you by Rachelle, and they
14 are before you. I also have a digital copy where I can pull
15 up the minutes if you need to read it. And I'll let the
16 attorneys take it from here.

17 CHAIRMAN STARR: No. Before that, I believe we've
18 had two witnesses so far. Am I correct?

19 MS. KAPUAALA: Was it Mr. Jeff Hunt as well as
20 Mr. Stice? Yes, I stand corrected. Thank you.

21 CHAIRMAN STARR: So, Mr. Jeff Hunt was examined,
22 and was there cross-examination as well?

23 MS. KAPUAALA: Yes.

24 CHAIRMAN STARR: And then was there any recross on
25 that? I'm just trying to make sure we understand the

1 record.

2 MS. JOHNSTON: If I may, Commissioner.

3 CHAIRMAN STARR: Yeah, please go ahead.

4 MS. JOHNSTON: Deputy Corporation Counsel Mary
5 Blaine Johnston. Is this on? Just to remind you, when we
6 left off, Mr. Tanaka had examined Mr. Stice. At that time,
7 I indicated that I didn't have any cross-examination. The
8 Commission asked questions. Then we ran out of time, and
9 Mr. Tanaka was about to do redirect. I have indicated to
10 him that, in looking back at the notes in the transcript,
11 that I have about ten minutes worth of cross-examination I
12 would like to do of Mr. Stice. And he said he doesn't have
13 any problem with my doing that, so if we could do that.

14 CHAIRMAN STARR: Okay. Mr. Tanaka, please, I have
15 a question for you. Do you have a problem with Ms. Johnston
16 doing cross on this?

17 MR. TANAKA: No, Mr. Chairman.

18 CHAIRMAN STARR: And would it be acceptable for
19 her to do that now, and then following that, you can do
20 redirect?

21 MR. TANAKA: Yes.

22 CHAIRMAN STARR: Okay. So, I would like to call
23 the witness back to the microphone, and please remain
24 standing for a moment. And if you could just stand right
25 there for a second. Mr. Stice.

1 MR. STICE: Yes.

2 CHAIRMAN STARR: Please state your name for the
3 record.

4 MR. STICE: Gary Stice.

5 CHAIRMAN STARR: Mr. Stice, do you affirm that you
6 will tell us the truth and nothing but the truth?

7 MR. STICE: Yes.

8 CHAIRMAN STARR: Thank you very much. Please be
9 seated. Ms. Johnston, your witness.

10 CROSS-EXAMINATION

11 BY MS. JOHNSTON:

12 Q. Good afternoon, Mr. Stice.

13 A. Hi.

14 Q. I realize that one of the areas that wasn't
15 covered, and there are no exhibits in the record at this
16 point that should be in, the first is, and I brought the
17 exhibits because, you know, I was going to help you with
18 your exhibits, so I'm helping you a little bit more. When
19 -- the property was purchased in 1996; is that correct, the
20 subject property?

21 A. Yes.

22 Q. By Hana Beachfront Associates, correct?

23 A. Yes.

24 Q. I have -- and I've provided copies of these three
25 exhibits I'm going to be referring to to Mr. Tanaka. I have

1 marked as Exhibit 19 going after the ones that already have
2 been marked and put in evidence a copy of the Warranty Deed:
3 Thomas M., I'm not sure how you pronounce his last name,
4 Mailhiot, and others to Hana Beachfront Associates. I would
5 like at this time to move that deed into evidence.

6 MR. TANAKA: No objections.

7 CHAIRMAN STARR: Okay. The deed will be entered
8 into evidence. Proceed, Ms. Johnston.

9 Q. (By Ms. Johnston) Okay. Mr. Stice, Hana
10 Beachfront Associates is a domestic limited partnership,
11 correct?

12 A. Yes.

13 Q. And it was formed shortly of before this property
14 was purchased?

15 A. Yes.

16 Q. And was it formed specifically to take ownership?

17 A. Yes.

18 Q. And as a partnership, who are the partners in the
19 partnership?

20 A. Well, the original partners, the partners now?
21 You want to know the partners now?

22 Q. Yes, let's deal with the partners now.

23 A. Okay. There's myself and a couple of members of
24 my family and Dr. Rick Coughlin, who is very close with my
25 son-in-law and daughter, and Shavonn Eason, who is very

1 close with us, and Tom Tanaka and John Papazian.

2 Q. Are those the limited partners in the partnership?

3 A. Yes.

4 Q. Who is the general partner in the partnership?

5 A. I believe I am.

6 Q. The documents that I want to put in evidence that
7 I have just printed out disclose that an entity, domestic
8 private corporation called Atlantic Development, Inc. is
9 actually the general partner. Does that ring a bell to you?

10 A. Oh yes, I'm sorry, that's correct.

11 Q. Who are the principals, the officers and directors
12 of Atlantic Development, Inc.?

13 A. The same.

14 Q. The printout I'm going to put into evidence says
15 that you're the president, treasurer and director, correct?

16 A. Yes.

17 Q. And Mr. Tanaka is the vice-president and a
18 director, correct?

19 A. Yes.

20 Q. And that Mr. Papazian is the secretary and
21 director?

22 A. Yes.

23 Q. And I will represent, I'm not going to put it in
24 evidence, but both the corporation and the partnership, Hana
25 Beachfront Associates, are in good standing with the State,

1 they've paid all their monies that they're supposed to pay.

2 So, at this time, I would like to move Exhibits
3 20, which is the business registration of Hana Beachfront
4 Associates, and Exhibit 21, the business registration of its
5 general partner Atlantic Development, Inc. into evidence.

6 CHAIRMAN STARR: Mr. Tanaka, please.

7 MR. TANAKA: Yeah, could I just ask counsel to
8 make a representation relative to the authenticity of these
9 documents?

10 MS. JOHNSTON: Okay. These are -- you'll see when
11 you get them, these were printed on June 2nd, 2010 from the
12 State of Hawaii's Business Registration web site where you
13 can go and have this information. At the bottom, it has the
14 e-mail address or the web site address and the date on them.

15 CHAIRMAN STARR: Okay. Mr. Tanaka, do you accept
16 the --

17 MR. TANAKA: Yes, accept as to its representation.

18 CHAIRMAN STARR: So, in that case, these two shall
19 be entered into evidence.

20 MS. JOHNSTON: Okay. And the reason I wanted to
21 put this in, it had not been established by what credentials
22 Mr. Stice was the appropriate person to be giving testimony
23 on behalf of the Hana Beachfront Associates. But as the
24 president of the general partner, that establishes the
25 connections.

1 Q. (By Ms. Johnston) At the beginning of the last
2 hearing we were at, Mr. Tanaka indicated that he was going
3 to be representing -- helping you today or helping Hana
4 Beachfront Associates, which he can do in a contested case
5 hearing, that he's a retired attorney and also that he had a
6 financial interest in either the project or the property.

7 What is Mr. Tanaka's financial interest in the --

8 A. He's an original partner.

9 Q. Okay. All right. And so, is that a monetary
10 interest?

11 A. Yes.

12 Q. So, in the event the partnership is sold, he would
13 get some money, correct?

14 A. Yes.

15 Q. In the event the partnership is not sold, what
16 does he get, what financial interest does he have then?

17 A. He has his percentage interest in the property
18 that he presently has.

19 Q. Okay. So, you're talking about a percentage
20 interest in the Hana Beachfront Associates property?

21 A. Yes, yes.

22 Q. Also, briefly you were asked questions about your
23 efforts to subdivide the property. Can you just say briefly
24 what steps you took to subdivide the property and when they
25 started, when you started subdividing the property?

1 A. Well, the original intention was to subdivide the
2 property in half and have two lots.

3 Q. Okay. I have -- I have looked at the subdivision
4 file. Actually, the subdivision began before you even --
5 the process began before you purchased that property,
6 correct?

7 A. Possibly.

8 Q. Mr. Papazian actually started it; is that correct?

9 A. Yes, that's possible.

10 Q. And from my review of the file, it looked like
11 that you worked, or Hana Beachfront Associates actively
12 pursued the subdivision until about the year 2004, is that
13 --

14 A. That sounds about right.

15 Q. And why did you discontinue the effort?

16 A. Well, over the evolution of those many years, the
17 purposes and mix of the partnership changed, and the goals
18 changed. So, we were no longer a majority of the partners
19 interested in selling the property.

20 Q. So, with subdividing, you would sell off the two
21 lots basically, was that the concept?

22 A. Yeah, or possibly some people would keep one,
23 yeah.

24 Q. I would like to point out that there is a copy of
25 the subdivision map that's in the files that's part of the

1 exhibits you already have. Exhibit 9, Page 6, it's entitled
2 Electrical Site Plan. But if you want to see what the
3 proposal was, Lot A and Lot B, there's a diagram there
4 showing what the proposal was.

5 Now, you and your wife have a corporation entitled
6 Hawaii Beachfront Vacation Homes, Inc.; is that correct?

7 A. Correct.

8 Q. And when was that entity formed, that corporation
9 formed?

10 A. Early '90s maybe, around there.

11 Q. The printout I have says July 10th, 1996. Does
12 that sound about right?

13 A. Yeah.

14 Q. So, this was formed also shortly before you
15 purchased the Hana property, correct?

16 A. Yes, but it was not related to that.

17 Q. What is the purpose of this corporation?

18 A. The purpose of the corporation is to do --

19 MR. TANAKA: Mr. Chairman, I'm just wondering the
20 connection between this corporation and --

21 CHAIRMAN STARR: If you have an objection, please
22 stand up.

23 MR. TANAKA: I'm sorry.

24 CHAIRMAN STARR: Please, Mr. Tanaka, state your
25 objection.

1 MR. TANAKA: Yeah, I'm just -- I would like to
2 object. I just don't see the connection between his
3 ownership of another corporation that's not involved in the
4 ownership of the property for which this proposed action is
5 concerned.

6 CHAIRMAN STARR: Okay. So noted. I'll allow the
7 questioning to proceed.

8 MS. JOHNSTON: Let me -- maybe I can get really
9 quickly to the connection.

10 Q. (By Ms. Johnston) As part of your -- the
11 processing of your SMA assessment application, you've
12 indicated that the property, the house and ohana you're
13 proposing to be built will not be used for transient
14 vacation rental purposes; is that correct?

15 A. Yes.

16 Q. As long as Hana Beachfront Associates owns the
17 property, correct?

18 A. Yes.

19 Q. Was there a letter to that effect, or was that an
20 oral representation?

21 A. No, I believe there's a letter somewhere.

22 Q. Okay. All right. I'll get to that later. The
23 purpose stated in the printout from the State of Hawaii
24 Beachfront Associates Vacation Homes, Inc. says vacation
25 rentals throughout the islands of Hawaii. Is that what the

1 purpose of this corporation is?

2 A. Yes.

3 Q. And this corporation is still in existence, right?

4 A. Yes.

5 Q. And are you operating vacation rentals throughout
6 the islands of Hawaii?

7 A. Yes.

8 Q. Approximately how many properties are you renting?

9 A. About a dozen, I think.

10 Q. Okay. And are these all ones owned by you and
11 your wife?

12 A. Not entirely, no. Some are partnerships, and some
13 are -- a few we don't even own at all.

14 Q. The printout I have shows as of June 1st, 2010
15 shows 14 properties. Does that sound about right?

16 A. Yeah.

17 Q. One of them, the only one listed on Maui is Hale
18 Kilohana. Do you still own that?

19 A. Yes.

20 Q. And that's in Hana, correct?

21 A. Yes.

22 Q. And are you to date operating that as a transient
23 vacation rental property?

24 A. Well, that's in flux. I probably am not going to
25 be able to operate it as of today.

1 Q. And it's correct that that is -- that particular
2 property does not have a transient vacation permit from the
3 County; is that correct?

4 A. I tried to pursue one, but no, there's none
5 available.

6 Q. And this property is located pretty close to the
7 project site you're building, correct?

8 A. Yes.

9 Q. Are the properties you own -- well, it looks like
10 you own or at least rent out properties on all -- each
11 island; is that correct?

12 A. Yes.

13 Q. Are any of those permitted transient vacation
14 rentals or in zones that allow rentals?

15 A. Where they're required, we have a permit, yeah.

16 Q. And it's correct that as of today, your Hana one
17 is not permitted by the County of Maui?

18 A. Right, there's no permit available for it.

19 MS. JOHNSTON: I don't have any further questions.

20 CHAIRMAN STARR: Okay. Thank you. Next we will
21 allow Mr. Tanaka to redirect.

22 REDIRECT EXAMINATION

23 BY MR. TANAKA:

24 Q. Mr. Chairman. Gary, Commissioner Mardfin asked
25 the question relative to a -- the monitoring plan had a

1 sketch attached to it, which was exhibit, and it's Exhibit 9
2 to the County's exhibit. It's figure 9 on Page 17. And I
3 think Mr. Mardfin asked a question relative to what I call
4 an oblong-shaped area, which stated that it's a pile of
5 graded/grubbed material (excavation not possible within this
6 area).

7 And this is part of the monitoring plan. The
8 earlier map -- I'm sorry, the map that Commissioner Mardfin
9 referred to is part of the inventory survey of archeological
10 sites that had been prepared prior to the monitoring plan.
11 Can you explain the distinction between the inventory survey
12 and the monitoring plan?

13 A. Could you rephrase the last part of that question,
14 the very last part?

15 Q. Can you explain the distinction between the
16 inventory survey and the monitoring plan?

17 A. I don't -- I don't know. I know that --

18 Q. Well, let me go back a step. The monitoring plan
19 is prepared as an initial recognizance and survey of the
20 area; is that correct?

21 A. Yes.

22 Q. For potential historical and cultural items on the
23 property, correct?

24 A. Yes, yes.

25 Q. And during that process, they dig trenches

1 throughout the property?

2 A. Uh-huh.

3 Q. To determine --

4 CHAIRMAN STARR: Mr. Tanaka, I believe you're
5 leading the witness. I would prefer it if you would stick
6 to the question.

7 MR. STICE: I didn't understand the question.

8 Q. (By Mr. Tanaka) All right. So, can you explain
9 then the purpose for the inventory survey?

10 A. The inventory survey done by Cultural Surveys
11 Hawaii was to determine if there were any cultural or
12 historical artifacts or important sites in the area.

13 Q. Okay. And as a result of that -- and a report is
14 generated, an inventory survey report?

15 A. Yes.

16 Q. And that's sent to the Historical Preservation
17 Division of the State of Hawaii?

18 A. Yes, yes.

19 Q. And as a result of that, do they make any
20 recommendations relative to going further and developing the
21 monitoring plan?

22 A. Well, they approved the archeological report and
23 study, and then we were requested to do the construction
24 monitoring plan, which was a separate item.

25 Q. And what is the purpose for the monitoring plan?

1 A. That is to assure that during construction, there
2 will not be any adverse impact on the environment and that
3 there will have -- it reduces the potential of any kind of a
4 disturbance of anything of historical or cultural
5 importance, because it requires that archeologist be present
6 on site during the breaking of the ground for columns and
7 the utility lines.

8 Q. So that, in the -- that oblong-shaped area on the
9 map, which is part of the inventory survey which indicates
10 that this pile of graded and grubbed material, which was not
11 excavated would ultimately be removed from the property and
12 then prepared for construction; is that correct?

13 A. Yes, if -- if it is going to be -- especially if
14 it's going to be where the location of the house is, but I
15 don't believe it is.

16 Q. Okay. But it's anticipated that that pile of
17 graded material --

18 A. I don't think we would want to leave it there.

19 Q. It would be removed?

20 A. Yes.

21 Q. Mr. Stice, you made mention that the fact that
22 there was no permit available right now in order to conduct
23 vacation rentals on your property?

24 A. Yes.

25 Q. Would you want to have a permit?

1 A. Of course, I would. I want to comply with the
2 law. We built that house 20 years ago.

3 Q. And you mentioned in terms of the two-lot
4 subdivision that essentially you did not push the
5 subdivision process after 2004?

6 A. Yes.

7 Q. And that I think you mentioned that due to the
8 change in purposes of the partnership?

9 A. Yes.

10 Q. Okay. And could you explain what the changes in
11 purposes were?

12 A. Well, the original purposes stated were as an
13 investment property, but as the -- especially, it was not my
14 intention when I entered the partnership, to subdivide and
15 sell and not be a part, a continuing part of the lot. I've
16 never sold a beachfront lot in my life. But I did find that
17 other people in my family and close friends that were
18 interested in this project and wanted to create sort of an
19 ohana that would occupy this and share this property. And
20 that is why the objectives of the partnership changed
21 dramatically.

22 Q. Sir, have you investigated the costs to do a major
23 SMA permit?

24 A. Yes, I've gotten some estimates.

25 Q. And what do the estimates range from?

1 A. Well, the lowest is \$60,000 maybe, but it goes up
2 to 80, \$100,000.

3 Q. Now, there was mention made about your
4 representation relative to the no use of the property for
5 short-term rental?

6 A. For what kind of uses?

7 Q. For short-term rental.

8 A. Yes.

9 Q. And, in fact, in the director's decision, he
10 states that -- and you made that representation to the
11 Department in the form of a letter; is that correct?

12 A. Yes.

13 Q. All right. And that the director in his decision
14 letter on Page 3, and this is County Exhibit Number 1,
15 stated that, "Should the applicant fail to comply with this
16 representation, the Department may at its sole discretion
17 rescind its determination, require a new determination,
18 determine the project to be a 'development' and subject to
19 public review, comment and decision-making and/or issue
20 fines and penalties until permits or appropriate approvals
21 for short-term rental and/or commercial use of the
22 structures and/or property have been obtained."

23 And I believe you've testified that you agree to
24 this representation?

25 A. I agree totally with it, and I have no problem

1 with any of the conditions stated in it.

2 Q. And I believe you stated that you would be willing
3 to sign a declaration containing this same language and then
4 provide it to the County?

5 A. Yes, yes, yes.

6 MR. TANAKA: All right. I have no further
7 questions, sir.

8 CHAIRMAN STARR: Okay. Thank you, Mr. Tanaka.
9 Okay. Mr. Stice, you can step down now.

10 MR. STICE: Oh, okay.

11 CHAIRMAN STARR: Thank you very much. Mr. Tanaka,
12 I believe you have opportunity to call additional witnesses
13 if you would like.

14 MR. TANAKA: We rest, Mr. Chairman. We don't
15 intend to call any further witnesses.

16 CHAIRMAN STARR: Okay. Thank you. Yeah,
17 Ms. Johnston, before closings, do you have anything?

18 MS. JOHNSTON: No, I'm not going to call any
19 rebuttal witnesses, but maybe, Trisha, could you pass out
20 the copies of the exhibits that are in evidence?

21 MS. KAPUAALA: Yes ma'am, the Commissioners do
22 have that.

23 MS. JOHNSTON: Oh, they do already, okay.

24 Mr. Tanaka and I talked outside, and we changed
25 the order of presentation of the case because it seemed to

1 make more sense to have Mr. Hunt go first. But we agreed
2 that the Appellant normally has the first closing argument
3 with the Appellee doing a response. And I guess if he
4 chooses do a rebuttal and the Commission allows it, he can
5 do a rebuttal of my closing argument.

6 CHAIRMAN STARR: So, we will be moving onto
7 closing. And before we do that, I would like to have
8 clarity as to the length of time that the Appellant and the
9 Appellee will have for closing and rebuttal. I don't think
10 that we had agreed to a specific length of time, did we?
11 Ms. Kapuaala, could you refresh my memory?

12 MS. KAPUAALA: There was no agreement as to time.

13 CHAIRMAN STARR: So, you know, we should find a
14 period of time that would be satisfactory to Ms. Johnston
15 and Mr. Tanaka. And if you wish to reserve some of it for
16 rebuttal, that would be fine. But I would like to ask
17 Mr. Tanaka, do you have a period of time that you feel would
18 be good?

19 MR. TANAKA: Well, frankly, because we had not
20 discussed any time limit for the closing arguments, you
21 know, I haven't thought in those terms, yeah. On the other
22 hand, I don't think my closing arguments would be, you know,
23 lengthy. But at the same time, I haven't timed myself, so I
24 really don't have a feel for it. Yeah.

25 CHAIRMAN STARR: I'm happy to, you know, give you

1 as much as you want. Just in fairness, I would like it to
2 be what, half an hour, 45 minutes, 20 minutes, whatever you
3 feel, which one?

4 MR. TANAKA: I would say 45 minutes.

5 CHAIRMAN STARR: Okay. So, each side will have a
6 maximum of 45 minutes both for closing and/or rebuttal, so
7 in other words, if you take half an hour for closing, you
8 would have 15 minutes for rebuttal if you wish to use it
9 that way. Is that your understanding, Mr. Tanaka, is that
10 acceptable?

11 MR. TANAKA: Well, I would say that my experience
12 would indicate that we would have 45 minutes for closing.

13 CHAIRMAN STARR: Yeah.

14 MR. TANAKA: And that for rebuttal, it will be
15 another an additional 15 minutes.

16 CHAIRMAN STARR: So, a maximum of 45 minutes for
17 closing and 15 minutes for rebuttal. Ms. Johnston, is that
18 acceptable? That's quite a bit of time.

19 MS. JOHNSTON: When you appear in front of the
20 Hawaii Supreme Court, you get half an hour to argue.

21 CHAIRMAN STARR: Yeah, it does seem excessive.
22 But, Mr. Tanaka, if you wish it, I would prefer to err on
23 the side of that.

24 MR. TANAKA: So would I.

25 CHAIRMAN STARR: So, I will allow you at this

1 point up to 45 minutes for closing. Do we need a break
2 before we begin? We'll have a break after Mr. Tanaka gives
3 his closing.

4 MR. TANAKA: I'm sorry, Mr. Chairman. Can I have
5 five minutes before I start? You can hold me to it. Five
6 minutes. I just want to get a little organized.

7 CHAIRMAN STARR: Okay. We will recess until --
8 for five minutes, and then we'll have the closing.

9 (Recess taken.)

10 CHAIRMAN STARR: Maui Planning Commission meeting
11 contested case, June 8th, 2010, we're back in session.
12 We're ready for closing arguments by the Appellant.
13 Mr. Tanaka, you have up to 45 minutes. Shorter would not be
14 remiss. Please proceed.

15 MR. TANAKA: Thank you. Commissioner Shibuya
16 asked the Appellant, Mr. Stice, what can we do to improve
17 the process. And my suggestion to you is that you can
18 improve the process by requiring the Planning Director to do
19 his job. Don't let any personal agenda, fear of any
20 criticism or any political pressure cause the director not
21 to administer the law fairly, consistently and in full
22 compliance with the law. He cannot act arbitrarily or
23 capriciously. He cannot act with an abuse of his
24 discretion. He cannot commit an act which is clearly
25 erroneous in the application of the law.

1 So, make him do his job, follow the law, apply it
2 uniformly, fairly and consistently. Now, in the appeal
3 situation, the requirements were presented to you at the
4 very beginning, and let me review them with you. You can
5 affirm the decision of the director, or you can reverse the
6 decision if the substantial rights of the Appellant may have
7 been prejudiced because of the decision. Because the
8 decision, I'm sorry, is based on clearly erroneous findings
9 of material fact or erroneous application of law. Now, this
10 is in your County rules of practice. Or, and I emphasize
11 the word or, arbitrary or capricious in its application, or,
12 and again I emphasize the word or, a clearly unwarranted
13 abuse of discretion. These are the requirements. Now,
14 notice that it says "or" at the end of each separate
15 element, right. And this means that of the three -- if you
16 find one of the three elements to have been violated, then
17 you can find that the director did not do his job. One of
18 the three elements, all right, based on a clearly erroneous
19 finding of material fact or erroneous application of law or
20 arbitrary or capricious in its application or a clearly
21 unwarranted abuse of discretion.

22 Now, I'm going to refer to the director's letter,
23 his decision letter of December 12th. This is, if you're
24 following along, in County Exhibit Number 1, okay. I'm
25 going to refer to this as the director's decision. Now, you

1 will remember that when the director was on the stand and
2 cross-examined about his description, he indicated that the
3 project description and itemized analysis, starting on Page
4 1 and continuing on Page 2 and ending on Page 3 with
5 subdivision, were elements that he considered in making his
6 decision that there was a potential for adverse impacts.

7 Each of these items, each of these seven items in
8 the project description and itemized analysis were used by
9 the director in making his finding. All right. Then if you
10 review the director's decision on Page 3, it has the SMA
11 assessment, and it continues on Page 4. And if you review
12 the nine or ten items listed there, you would find that
13 Items 1 through 4 are statements of fact and contain no
14 adverse impact. Items 5 and 6, I would admit, contained
15 adverse impacts. Item Number 7 doesn't contain any adverse
16 impacts. Item 8 is a conclusion based upon the previous
17 things.

18 And item 8, by the way, says, "Based on the
19 project description and itemized analysis above, the
20 proposed action has potential to have adverse effects on
21 ecological, environmental, cultural and/or archeological
22 resources." So, that's one conclusion that he made. Item
23 Number 9 talks about the community input, et cetera, right.
24 And that I admit is a potential for adverse impact. Item
25 Number 10 is a conclusion on his part that the project has

1 the potential to be inconsistent with the objective policies
2 and SMA guidelines. So, in the SMA assessment, paragraphs
3 5, 6 and 9 need to be addressed by me to show whether or not
4 there were any adverse impacts, okay.

5 So, to summarize then, we will review the project
6 description and itemized analysis, and also Items 5, 6 and 9
7 in the director's letter. Now, I remind you that the SMA
8 law regulates a development. That's in Chapter 205-A-2,
9 okay. And in the definition for what is a development,
10 there are 16, a list of 16 activities that are excluded, are
11 not included in the definition of development. And one of
12 that, the every first one is construction of a single-family
13 residence. All right. Now, on the other hand, the section
14 goes on further to say that provided that whenever the
15 authority, and in this case, the planning director, finds
16 that any excluded use may have a cumulative impact or a
17 significant environmental or ecological effect on the
18 special management area, that use shall be defined as a
19 development.

20 So, we start off by saying a single-family
21 residence is not a development, but if it has a cumulative
22 impact or a significant impact, then it can be included in
23 as a development. All right. Now, notice the word
24 cumulative impact, okay, and significant impact. The
25 positioning of the words indicate that when you're looking

1 at a situation of cumulative impact, the decisionmaker in
2 this case must equate all of those cumulative impacts and
3 come up with, hey, I think collectively these amount of
4 cumulative impacts amount to a significant effect. Because
5 if you just have one significant effect, that's it. It's
6 no -- it's not an exempt property. It goes into a
7 category -- it's a development and subject to the SMA rules.

8 But if you have a lot of smaller impacts that
9 don't rise to a significant impact, then the cumulative
10 effect by adding it all up rises to a significant impact.
11 Then you can find that it's not a -- it's a development.
12 Okay. So, it's critical for us then to look at how the
13 director went about it. Because he never found that there
14 is a cumulative impact. What he said was there is a
15 potential for adverse impacts. There's no word of
16 cumulative impacts. So, there's a question in my mind as to
17 whether or not he complied with the law right off the bat,
18 okay.

19 Now, as I said, there is an important distinction
20 between the cumulative impacts and the potential for adverse
21 impacts. I don't know whether or not they're the same or
22 not in the director's mind or not, because he never made a
23 finding of a cumulative impact. So, we don't really know
24 what he had in his mind what he said a potential or adverse
25 impacts. Did he equate all of that and come up with a

1 conclusion that, oh, yeah, this is a significant impact, and
2 so therefore, we require a major SMA permit? So, to
3 conclude this area, we contend that the director never made
4 a finding that's required by the law, so he violated the law
5 right there.

6 But let's go forward and look at Exhibit 1, the
7 itemized description, and for the first item of which is
8 flood hazards. Now, we all know that this area is in a
9 tsunami zone, and that the -- there is federal regulations
10 relative to how do you construct a structure in a tsunami
11 zone. And the director in his statements indicate the
12 process that the Applicant went through in order to get a
13 FEMA permit on the main residence. Now, he also states that
14 the residence, the plans for the residence include breakaway
15 walls and elevated structures, which the director found to
16 be prudent mitigation measures, yet the director found that
17 because of the site is on a peninsula, because its history
18 of inundation by coastal hazards and its relatively low,
19 flat, topography, there is a potential for adverse impacts
20 to structures and life at the property.

21 Now, let's examine structures -- I'm sorry,
22 adverse impacts to life. Earlier in the paragraph, the
23 director wrote, "The parcel is currently out of range of the
24 warning siren located at Hamoa Beach. Mr. Stice testified
25 that he has heard the sirens during its monthly testing

1 while he was at the site or at the property that he owns
2 close-by. The tsunami warning system has been in place, has
3 been improved over the years, as Mr. Stice testified, and
4 has done frankly a fairly good job about warning residents
5 about an impending tsunami or wave, and frankly, even its
6 expected time of arrival.

7 Furthermore, television, radio, the Internet has
8 all provided us with additional avenues of communication and
9 warning, so that in terms of warning today that a tsunami
10 is -- has been generated and it may be coming is excellent.
11 So, the threat to a loss of life I think is very minimal,
12 okay. But the fact is the director made a statement that
13 the property is out of range of the warning system. All
14 right. Now, how that -- and clearly, that statement is
15 incorrect. But how that statement affected his analysis, we
16 don't know, okay. We only know he included a false
17 statement in there and then made his analysis. All right.

18 Now, regarding the potential for adverse impacts
19 to structures, the director pointed to the location of the
20 site on a peninsula, its prior history of inundation and
21 relatively low, flat topography or the reason for his
22 findings. But if you analyze his reason, you realize that
23 there were reasons -- that they were the same reasons why
24 the flood hazard zones were established; the topography, the
25 location, the prior history of inundation, et cetera. That

1 criteria or that facts were used in order to make a
2 determination that you should go up X amount of feet high in
3 your living structure. And that's throughout all of the
4 islands, that's what was happening.

5 Now, he finds that there were a potential for
6 adverse impacts. The point is that what he's seeking is to
7 prevent any hazards from occurring, any damage to property
8 from occurring. He says that the breakaway walls are a
9 prudent measure of mitigation. But yet, he still finds that
10 there were adverse impacts. Now, in terms of the law, the
11 objectives for the SMA law in coastal hazards is to reduce
12 the hazards, not eliminate the hazards, okay. Now, that is
13 in County Exhibit Number 15, which is a statement of the
14 objectives of the SMA law. In Item Number 6 is coastal
15 hazards, and the objective is to reduce hazard to life and
16 property from tsunami, storm waves, stream flooding,
17 erosion, subsidence and pollution. It's reduce, not
18 eliminate, okay.

19 By using the reduce language in the objective, the
20 intent of the law is clear. The law says here are the
21 standards we set and to make an attempt to reduce the
22 hazards. In setting these standards, the law is saying that
23 -- it's not saying that it eliminates all hazards. And if
24 you comply with the law, then you're going to reduce your
25 hazard. And we complied with the SMA law. We designed a

1 structure to be within the elevation that they require. We
2 provided for breakaway walls. What further are we required
3 to do in order to live up to the director's standards? And
4 we're saying how can we be asked to do more things than what
5 the law already requires?

6 We don't know what it is to begin with. But on
7 the other hand, if you look at it, then he's asking us to
8 eliminate all the hazards, and we can't do that. And the
9 law doesn't require us to do that. So, here we're
10 suggesting the director is imposing his own agenda in
11 finding adverse impacts, even if the proposed action
12 complies with all existing laws. This is a clear
13 misapplication of the law. It's arbitrary or capricious
14 action and a clearly unwarranted abuse of discretion.

15 Public views and view plane analysis. There are
16 nine sentences in this paragraph. The first eight are
17 either statement of facts about the location of the property
18 next to Koki Beach and the height of the property. The last
19 three sentences of the first eight sentences, I hope I'm not
20 confusing you, says, "There is a window of view underneath
21 the house and through the columns in areas which are
22 unscreened and unobstructed." This is certainly a positive
23 statement. The next sentence states that, "The proposed
24 structure obstructs 30 percent of the view when viewed from
25 the frontage road." Thirty percent. We suggest to you that

1 that's a very low percentage and a very good statement of
2 preserving the public view from the frontage road, so that
3 statement is a positive statement.

4 Now, the eighth statement says that the building
5 materials and proposed colors fit nicely with the
6 surrounding areas. So, this again is a positive statement.
7 And the first five are not adverse statements at all, but
8 just statements of fact. But in the last statement, the
9 ninth sentence, the director says, "However, the massing of
10 the structure may substantially contrast with the
11 neighboring structures in the community, most, if not all of
12 which, are located mauka of the road." Now, because the
13 director made a finding of potential adverse impacts based
14 upon in part this paragraph, and because he used the word
15 "however" as the first word in the sentence, we assume the
16 sentence describes an adverse impact.

17 But when you really read it, does it really
18 describe an adverse impact? Does the massing of the
19 structure substantially contrast? I read it to say that,
20 hey, because the massing of the structure is only 30
21 percent, blocks only 30 percent of the view, is going to
22 contrast from these other structures in the neighborhood
23 which obstruct more than 30 percent of the view. It's a
24 positive statement, not a negative one. So, from my
25 perspective, there's no adverse impacts in the public view

1 section.

2 So, to find that there are negative impacts is
3 clearly erroneous in its application of the law. Let's go
4 forward to Historic Considerations. There are seven
5 sentences in the paragraph. The first six recite facts
6 about the burial sites and the approval received during the
7 process, the sixth sentence, which describes the process
8 identifying and protect the burial sites with no adverse
9 impacts to the environment, okay. The last sentence says,
10 "It may be prudent to list to names of living individuals
11 who may exercise these visitation rights and have letters
12 affirming their acceptance of the agreement in order to
13 facilitate the agreement's implementation in the future."

14 The director finds adverse impacts because the
15 In Situ agreement, which is Exhibit 6 in the County's
16 exhibit, Exhibit 6, okay, does not provide for, one, a list
17 of names of living individuals who may exercise visitation
18 rights, and two, an agreement by separate letters affirming
19 their acceptance of the In Situ agreement. The director is
20 wrong, wrong, wrong. First, the director is wrong because
21 paragraph 6 of the In Situ agreement expressly provides as
22 follows: "The land owner agrees to provide living cultural
23 and lineal descendants as determined by the MLIDC," which is
24 the state agency, "in conjunction with the State Historic
25 Preservation Division burial sites program access rights to

1 visit the burial sites for cultural purposes. The access
2 rights shall be the most direct route across the land
3 owner's real property. A list of names and contact
4 information of the cultural and lineal descendants shall be
5 provided to the land owner by the SHPD-Burial Sites Program.
6 Such right of access shall be subject to the rules and
7 policies of the land owner. Cultural and lineal descendants
8 are to contact the land owner and their representatives
9 thereof to confirm dates and times of visitation. The
10 request for visitation must be made at least 48 hours in
11 advance to confirm date and time."

12 Clearly, the In Situ agreement provides for the
13 same thing that the director is suggesting, which he's
14 suggesting is a negative impact, which I don't agree with at
15 all. But the critical thing is he didn't read the In Situ
16 agreement before he made this -- included that last sentence
17 in this paragraph. And he's also proposing that we have a
18 letter agreement between the cultural descendants and the
19 land owner saying that the cultural descendants approved the
20 In Situ agreement. That frankly is contrary to the law.
21 It's not required. The law provides for the In Situ
22 agreement. The law provides for Burial Council to hold
23 hearings with the lineal descendants invited to attend to
24 discuss the burial plan, to discuss this In Situ agreement,
25 so the process already involves the living descendants.

1 And the process results in this In Situ agreement,
2 which provides that the names and addresses of the living
3 and cultural descendants be given to the land owner by the
4 State. The State is in charge of the entire program. So,
5 for the director to suggest otherwise than what the law
6 already provides is clearly arbitrary. For the director to
7 suggest that a letter be in addition to the In Situ
8 agreement be signed by the living descendants is clearly
9 outside the law and unnecessary. And it also provides a
10 trap for the Appellant. What if, one, there's a dispute as
11 to who living descendants are; and two, what if the living
12 descendants refuse to sign the agreement? Where does this
13 put the Appellant? It's a trap, so by providing for this
14 language, which is totally unnecessary, obviously, it's
15 contrary to the law, clearly arbitrary, no reason for it --
16 for this requirement.

17 Now, Webster's Dictionary defines arbitrary as
18 fixed or arrived at through will or caprice. Decisive, but
19 unreasonable. Webster's Dictionary also defines caprice or
20 caprice, if I'm pronouncing it incorrectly, as an abrupt
21 change of feeling, opinion or action. Proceeding from some
22 whim or fancy. That's the only way I can describe the
23 director's statement here, based upon some whim or fancy.

24 You know, if the director had asked if the burial
25 sites were being maintained, which would indicate that the

1 living descendants were coming to the property, maintaining
2 the property, he would have found out that, yes, that had
3 been happening. And he would have found out that,
4 therefore, his language is unnecessary. Further, the
5 director should know about the Burial Council process, and
6 he should know about the -- that the living -- I'm sorry,
7 the living descendants are invited participants in
8 developing the burial plan and leading up to the In Situ
9 agreement. Somehow this sentence got into the -- his, the
10 director's decision.

11 Water Quality and Pollution Control. First -- the
12 first paragraph sets forth facts about the aerobic septic
13 system, in which the responsible agency, the Department of
14 Health, had previously approved. The second paragraph deals
15 with the effects of the rising sea levels, potential that
16 the septic tank and absorption fields may not fully function
17 if inundated by ground water. The director did not review
18 the plans for the septic tank system. The director did not
19 know that the septic tank is water tight. The director did
20 not know that the system is an aerobic system, which means
21 that it's a secondary treatment process, which removes the
22 organic material, and so, the remaining effluent contains
23 nutrients, which can be helpful to the environment.

24 Secondly, the director assumed that the system
25 would not be repaired by the owner if it failed. Now, we're

1 all owners. And if our septic or sewer system or our
2 toilets need to be repaired, we would have to attend to it,
3 right, in order to function as somebody living on the
4 premises. So, to make that assumption that no repairs would
5 occur, and so therefore, you have an adverse impact is just
6 not reality. And finally, if the ground water would
7 inundate the septic system or the septic, including the
8 leach field, frankly, who would be living on that property?

9 If the ground water came up over and inundated the
10 leach field, which is six inches below the level of the
11 ground elevation, the water would be all over that property.
12 The water would have gone on the adjacent pond over the
13 seawall and come up high.

14 Thirdly, the director recognized that the rise in
15 the sea levels would be very, very slow and incremental.
16 Mr. Stice stated that it would take decades, if at all,
17 before the sea levels inundates the property. Decades,
18 right. Doesn't it seem reasonable to say that during that
19 period of time, if there was going to be any problems, the
20 Department of Health would come out and have said, hey, we
21 have to do something because of this forthcoming, forecasted
22 problem. All right. Wouldn't the land owner do something
23 in order to maintain how he can continue living on that
24 property?

25 So, there is mitigation that can be done, but was

1 not considered at all by the director in making his
2 decision, that finding that this problem had a potential for
3 adverse impacts. Now, as I said, it's an aerobic system.
4 It removes the organic materials in the process, so that the
5 resulting effluent coming out into the leach field, it can
6 be helpful to the environment. All right. So, raising the
7 scepter of the effect on the fish pond is a false
8 impression; one, because the -- if there is rising sea
9 level, then you're going to have the seawall around the fish
10 pond overtopped by the water creating a free-circulating
11 water system in that area.

12 Now, remember, now there are existing homes along
13 Haneo'o Road have that cesspools, not septic systems.
14 They're causing more pollution to the fish pond than this
15 septic system ever would, even if it were inundated as
16 presupposed by the director. So, the director here again
17 clearly arbitrary or capricious in making this finding and
18 including it in his total for potential for adverse impacts.

19 Shoreline Setback. There are five sentences in
20 this paragraph. The first four sentences recite the fact
21 relating to the shoreline setback and Appellant's compliance
22 with the law. The fifth sentence says, "For purposes of
23 this SMA application, the shoreline setback determination
24 was considered valid (60 feet) for site plans and submission
25 of this SMA assessment application." Is this a negative

1 statement? And if you recall, the director in his testimony
2 admitted that there is no adverse impact in this paragraph.
3 There is no adverse impact in this paragraph the director
4 admitted.

5 Now, that admission proves how arbitrary and
6 capricious the director has acted. First, he writes in
7 paragraph -- I'm sorry, Page 4, paragraph 8, "Based on the
8 project description and itemized analysis above" -- as I've
9 mentioned before, the project description and itemized
10 analysis above includes the paragraph on shoreline setback,
11 yet he includes it in his finding that there was a potential
12 for adverse effects on ecological environmental, cultural
13 and/or archeological sites. Yet in his testimony, he says
14 there's no adverse impacts.

15 So why the contrast? Why include it and say that
16 there is a potential for adverse impacts; on the other hand,
17 take it away and admit that it has no adverse impacts?
18 Clearly arbitrary. There's no reason for that. There's no
19 rational explanation. Clearly arbitrary, capricious and
20 unwarranted abuse of discretion. Single-family residence.
21 This paragraph reads as follows: "The Applicant has
22 represented to staff and the Department that neither the
23 main residence or ohana shall be used for short-term rental
24 income such as transient vacation rental during the
25 Applicant's or Hana Beachfront Associates' land tenure.

1 Should the Applicant fail to comply with this
2 representation, the Department may at its sole discretion
3 rescind its determination, require a new determination,
4 determine the project to be a development and subject to
5 public review, comment and decision-making and/or issue
6 fines or penalties until permits or appropriate approvals
7 for short-term rental and/or commercial use of the
8 structures and/or property have been obtained."

9 All right. Is this a negative statement? It
10 reads like a condition to granting the exemption, right.
11 And the Appellant again today affirmed that he would be
12 willing to sign a document stating this language at the time
13 that the grant of an exemption is given. All right. Now
14 so, really this single-family use paragraph contains no
15 adverse impacts. Why it's included in the description in
16 this particular section and relied upon by the director to
17 make a finding is unknown. All right. There's no reason or
18 rationale attached to it. Definitely, again, arbitrary or
19 capricious.

20 Now, there -- I think Commissioner Mardfin raised
21 the issue as to whether or not by putting this condition on
22 the record and then having received the exemption, building
23 the building and then there's a violation, what is the
24 impact of the declaration. Now, remember the declaration
25 says that they may rescind its determination. That says

1 they may rescind the exemption. If an exemption was granted
2 and rescinded, there's a violation of the SMA law. If there
3 is a violation of the SMA law, then the SMA law in Section
4 205-A-32 provides for a civil fine not to exceed \$100,000 or
5 the cost of returning the affected environment or ecology to
6 the condition existing before the violation; in addition, a
7 civil fine not to exceed \$10,000 a day for each day in which
8 such violation persists, okay.

9 Section 205-33 provides for an injunction or a
10 temporary restraining order in case of a violation also.
11 There are also substantial fines and penalties provided in
12 your County SMA rules. Section 12-202-25 provides for a
13 civil fine not to exceed \$10,000 per violation and maximum
14 daily fine of \$1,000 in addition to any other penalty. So,
15 the filing of a declaration such as contained in paragraph
16 6, Single-family Use, provides for extensive protection on
17 the County that there would be no violation, because in case
18 of a violation, the penalties are huge.

19 And frankly, I mean when you think about it, if
20 you have conditions to the SMA, frankly the building is
21 built, and then there are violations. What happens in that
22 instance? It's the same situation. You look at the
23 penalties in the -- what the State law provides or you look
24 at the penalties what the County law provides, and that's
25 the enforcement. Again, by stating that he relied on this

1 as a potential negative adverse impact, okay, when it really
2 isn't an adverse impact, the director again is acting
3 arbitrarily, capriciously and abusing his discretion and
4 misapplying the law.

5 Subdivision. There are four sentences in the
6 paragraph. We contend that the fact that there is a request
7 to subdivide the property has no potential for adverse
8 impacts. When you think about it, all right, he has a
9 request for subdivision pending. Hasn't been granted, but
10 it's pending, but he wants to build a house. If you build a
11 house on it, what happens to the subdivision? The line goes
12 right under the property. Would he pursue it then? Is it a
13 negative impact?

14 Now, Gary Stice has testified that if the appeal
15 is granted and an exemption is granted, that he will
16 withdraw the subdivision application. I think we -- in
17 fact, he will go further than that and agree with you that
18 prior to your issuance of a written order granting the
19 exemption that he will present to the County a letter
20 withdrawing the subdivision application. I'll say more
21 about this at the very end.

22 CHAIRMAN STARR: Mr. Tanaka, time is about done.
23 I'll give you another two minutes to wrap up.

24 MR. TANAKA: Okay. In terms of the ohana unit, we
25 agree to obtain the FEMA permit. In terms of the drainage

1 plan, we agree to get the issuance of the drainage plan,
2 sorry, filed -- get approval for a drainage plan. So, let
3 me summarize. We think that the director acted contrary to
4 the law. We think he acted arbitrarily, capriciously. We
5 think he abused his discretion. In all of these things, any
6 one of them which you find will result in a reversal of his
7 decision.

8 Now, assuming that there is a reversal of his
9 decision, right, then what I would suggest is this, because
10 we've discussed a lot of things relative to -- we're
11 agreeing to a declaration, et cetera. So, let me say this.
12 That the Building Department will require that the Planning
13 Department sign off on the building permit before they issue
14 the building permit. So, if you grant an exemption and a
15 building permit is filed, it will require the Planning
16 Department to sign off. The Planning Department will
17 require a FEMA permit before they sign off, right. So, I'm
18 suggesting that the -- the building permit process can
19 handle this. The FEMA permit for the ohana unit can be
20 handled in this fashion.

21 Same thing with the drainage plan. The
22 engineering division has to sign off on a building permit
23 application. Engineering division will not sign off unless
24 there is a drainage plan. So, the building permit process
25 again would handle this particular problem. With respect to

1 the single-family use and also the vacation rentals, as I've
2 stated, we can handle it like an escrow. Prior to
3 delivering us the written decision granting the exemption,
4 we will present to you the declaration setting forth no
5 vacation rentals. We will also provide you a letter
6 withdrawing the application for subdivision, so it's a
7 simultaneous exchange. It's like an escrow, right.

8 That's what I would suggest, and I'm open to
9 discussions with the County attorneys on working out all of
10 those details, so that concludes my presentation,
11 Mr. Chairman.

12 Before I close, however, I would like to say I
13 thank you all very much for your attention and your
14 contribution to the community.

15 CHAIRMAN STARR: Thank you very much, Mr. Tanaka.
16 We appreciate your eloquent summation. Now, Ms. Johnston,
17 it is your turn now to give your closing. We're going to
18 take a break. We'll be back at 20 minutes after 3 for the
19 closing by the Appellee.

20 (Recess taken.)

21 CHAIRMAN STARR: Maui Planning Commission meeting
22 June 8th, 2010 is back in order. We're continuing our
23 contested case. We're going to have the summation by the
24 Appellee Mary Blaine Johnston representing Planning Director
25 and the County of Maui.

1 MS. JOHNSTON: Thank you. Okay. Former Director
2 Jeff Hunt's December 2nd, 2008 letter is titled Project
3 Description and Itemized Analysis. It includes many factors
4 that are okay. And then it identifies those factors that
5 are not okay, and in his belief, needed to be given a closer
6 scrutiny by the Planning Commission. His conclusion is, and
7 let me quote from it, "The proposed action has the potential
8 for adverse impacts to resources and/or processes that are
9 provided protection within the Hawaii Coastal Zone
10 Management Act HRS 205-A, and therefore, the proposed
11 action, the project, cannot be granted an SMA exemption."

12 The impact specifically identified by the Director
13 in his letter were the flood hazard potential might have
14 adverse impacts on structures and life at the project site,
15 that public views and view planes would be affected by the
16 structures to be built, that that were historic and cultural
17 considerations to be taken into account, that water quality
18 might be affected and pollution in the neighboring fish pond
19 could occur should the wastewater system fail, that there
20 were no specific site specific drainage plans, and that
21 flood hazard mitigation measures for the ohana unit had not
22 been provided.

23 In addition, the Director observed that there was
24 no evidence of community input, meetings or comments having
25 been provided by the Appellant as set out by Section

1 12-202-12(c)2(k) of the Commission's SMA rules, noting that
2 the Department had received several inquiries requesting
3 public participation or review of the project. The letter
4 identifies the potential areas which may be impacted
5 adversely by the proposed project, pointing out that these
6 areas need further scrutiny by the Planning Commission.
7 Pursuant to Rule 12-202-12 of the Maui Planning Commission's
8 rules, the Planning Director is charged with the initial
9 task of reviewing an assessment application and identifying
10 and evaluating potential environmental impacts the proposed
11 project may have.

12 The determination of whether protective conditions
13 should be imposed is the responsibility of the Maui Planning
14 Commission to be exercised during its review of an SM1
15 permit application. Director Hunt determined that further
16 review by the Commission of the Hana Beachfront Associates'
17 proposed construction is needed due to the environmental and
18 cultural sensitivity of the property and due to the lack of
19 public input to ensure that all steps are taken to serve,
20 preserve and safeguard this unique shoreline land.

21 The denial of an SMA exemption and requirement
22 that the property owner follow the permit process set out in
23 the SMA rules is not a denial of the owner's ability to use
24 his property, but is a method by which the Commission can
25 gather additional information to determine what the

1 physical, ecological and social impacts may be, which
2 process needs to include public participation and input that
3 may help the Commission in determining whether the condition
4 should be imposed on the project. And I think it's
5 significant that this is just one of the identified negative
6 impacts that was not addressed at all by Mr. Tanaka, other
7 than his opening remarks to agree that that was a
8 significant area that needed to be looked at.

9 To date, the public has had no opportunity to
10 provide information about the impacts the project may have,
11 although Rule 202-12(c)2(k) of the assessment procedures
12 specifically identifies input from the public as an integral
13 part of the assessment process. And I'm going to quote what
14 that rule says. "Any oral or written comments received by
15 the Applicants from governmental or nongovernmental
16 agencies, community organizations or individuals with regard
17 to the proposed action and a summary of the dates and
18 attendance of public meetings held on the proposed project."
19 In addition, the Coastal Zone Management Act HRS 205-A at
20 Section 205-A-2, B.7 and 8 says, Number 7, "Managing
21 development. Improve the development review process,
22 communication and public participation in the management of
23 coastal resources and hazards."

24 And subparagraph 8 says, "Public participation
25 stimulates public awareness, education and participation in

1 coastal management." Appellant's argument is that because
2 the Director's decision does not conclude that the
3 identified potential adverse impacts are cumulative or
4 significant, it's a denial -- his denial of the exemption is
5 an error. This argument is factually inaccurate. It's a
6 misinterpretation of the purpose of the assessment process.
7 Appellant itself, Hawaii -- Hana Beachfront Associates,
8 during the testimony by Mr. Stice, has recognized and agreed
9 that there are conditions that appropriately may be imposed
10 upon the project. We've heard more today. We've had ways
11 around having to go through the process when all of these
12 things could be taken care of and conditions imposed upon
13 the granting of a permit. Go to the building department and
14 do this. Declaration here, declaration there.

15 Some of the things that the Appellant has agreed
16 to as far as the drainage plan, and I'm quoting from the
17 transcript, "A drainage plan is not required" -- this is
18 what Mr. Stice said. "A drainage plan is not required with
19 an exemption from the SMA, but we would be willing to accept
20 it as a condition if there was some valid reason this would
21 be desirable. It's not a difficult thing to do." And he
22 also said, "However, I still say that if drainage is a
23 concern of the Commission or the Planning Department, I have
24 no problem with going ahead and getting the drainage permit
25 subject to my getting an exemption."

1 Okay. As far as the conflict between his
2 subdivision application and permit for the project,
3 Mr. Stice said, "Well, I would be willing to, as a condition
4 of the permit again, first withdraw the subdivision plans if
5 I were going to be able to obtain a building permit. I just
6 don't want to give up that option if I'm going to. I would
7 have to consider that if I'm going to get my building permit
8 for the proposed project."

9 Now, today in questioning when I asked Mr. Stice
10 about the original intention of this acquiring this
11 property, of Hana Beachfront Associates acquiring this
12 property, he said, well, the original intent was to -- to
13 subdivide it into two lots and sell them. I will call
14 attention to Exhibit 20, which you have been presented,
15 which is the registration for Hana Beachfront Associates.
16 And it states as its purpose house rentals, which seems to
17 be that the property, contrary to being divided and being
18 sold, was contemplated to be house rentals, or perhaps to be
19 divided in two and have two houses and two ohanas for
20 rentals.

21 That would be consistent with the corporation he
22 and his wife has that has the 14 beachfront rentals
23 throughout the islands. As far as the issue of public --
24 also, let me just make a comment on that. The subdivision
25 was for two empty parcels. It's excluded from the

1 definition of development if there's no construction
2 involved. I don't know whether there would be any
3 restriction once an exemption was given for the line then --
4 go back to subdivision, and the line to be moved to
5 accommodate a house and ohana and another house and ohana
6 and completely get two exemptions, but would have double the
7 project that is presently being proposed. It's a
8 possibility.

9 About public views and view planes, Mr. Stice
10 testified, "And, of course, we're not going to expose the
11 house for people to view. We're going to increase and
12 camouflage the impact even more. So that seems
13 contradictory where he testified that, look, the design, the
14 rendering that's one of the exhibits, you can see right
15 through; if you plant to cover up that, then you are going
16 to impact the views. And how does the Director know if
17 public views have been respected when there's been no input
18 from the public about these views?

19 As far as the single-family use for the property,
20 Appellant has repeatedly presented to the Planning
21 Department staff and again on testimony to the Commission,
22 "Neither the main residence or ohana shall be used for
23 short-term rental income such as transient vacation rental
24 during the Applicant's or Hana Beachfront Associates'
25 tenure." During the hearing, Mr. Stice confirmed this

1 statement contained in the determination letter and affirmed
2 twice he had no objection and no problem with this
3 limitation of use. He made a condition to the exemption.
4 Again, he repeated that today, but again, should we weighed
5 in context of his Hawaiian Vacation beachfront rentals.

6 And finally, lack of community input. Mr. Stice
7 testified, "We are not trying to get this exemption to avoid
8 a meeting with the community, Hana community or the Hana
9 Community Council. In fact, I'm in favor of that, but this
10 is not a condition for exemption. And with scheduling and
11 such, we did not propose the meeting before turning in our
12 application, but we are willing to make that a condition of
13 our exemption. We have other conditions in here."

14 I believe Commissioner Mardfin pointed out in his
15 questioning last time we were here that what is the purpose
16 of community input after the project is finalized. And
17 again today, Mr. Tanaka admitted that this was a significant
18 impact that is missing from this work Mr. Stice has done as
19 far as trying to get an exemption. Once the proposed
20 project to be built in the SMA is determined to be exempt
21 from SMA conditions on the basis that it poses no
22 significant or cumulative impacts on the environment or the
23 ecology of the property, the County will lose the ability to
24 further analyze the potential impacts to the environment
25 beyond the representations as presented in the current SMA

1 assessment application.

2 In fact, the Maui Planning Commission will never
3 see this application or have the ability to analyze it.
4 Those conditions described above that Mr. Stice agreed to
5 that were appropriate to be imposed on the project cannot be
6 imposed if the project is found to be exempt from the
7 requirements. While exemptions for construction of
8 single-family residences are frequently given at the
9 assessment stage, most properties are not located in such
10 environmentally sensitive locations as the subject parcel.
11 Because of the parcel's environmental sensitivity, the
12 Director has the obligation to determine that the project
13 requires closer scrutiny due to potential and environmental
14 impacts. And this is the decision he's made. A special
15 piece of property, it needs a closer look by the Commission.

16 There's no dispute that the property owned by Hana
17 Beachfront Associates is an environmentally and ecologically
18 sensitive site. Local families from Hana and other parts of
19 Maui have used the beach and ocean fronting the property for
20 generations and will continue to do so in the years to come.
21 The project proposed has social impacts as well as
22 environmental impacts. It is understandable that local Hana
23 residents want to be fully informed about the project and
24 have an opportunity to comment on and make suggestions about
25 the final design of the project to be sure the coastal area

1 and adjacent beach are protected for future generations.

2 Hana Beachfront Associates was advised by the
3 Planning Department that it should take steps to have input
4 from the public prior to pursuing an application for
5 exemption from SMA requirements. It chose not to do so.
6 One of the benefits that will arise from the SMA -- SM1
7 permit process before the Commission is that the local
8 community will finally have an opportunity to provide its
9 input, which Mr. Stice and his attorney himself acknowledges
10 is a desirable thing. A further benefit of having the
11 Commission review the proposed project and receive input
12 from persons who have expertise in areas that may be
13 adversely impacted by the project is that the permit can
14 incorporate terms that provide a method for addressing
15 actual adverse results arising from the project in the
16 future.

17 It should be pointed out that the Commission,
18 there's a lot of talk about the Applicant has complied with
19 FEMA requirements and complied with this requirement and
20 that requirement. These are not SMA requirements. This
21 Commission can go beyond what FEMA requires, beyond what may
22 be required for drainage and impose further conditions to
23 further reduce the impact of the project on some of these
24 vital areas that are covered by the Coastal Zone Management
25 Act. For example, granting the SMA use permit for property

1 located on beachfront property in Kihei about a year and a
2 half ago, and this will be familiar to some of you, this was
3 Keawakapu beachfront lots for the Clapp residence, the
4 Commission went through and imposed a number of conditions
5 before the permit was granted, including the Applicant was
6 required to comply with infrastructure requirements required
7 by Maui County and other codes, rules, and regulations
8 related to water source and system improvements, drainage
9 improvements, wastewater system improvements, that the State
10 approved archeological monitoring program be implemented,
11 that if human burials were identified, work would stop and
12 the appropriate state authorities as well as the County's
13 Burial Council would be notified.

14 Certain conditions shall run with the land and be
15 set forth in a unilateral agreement recorded with the Bureau
16 of Conveyances. This, of course, included the restriction
17 on short-term rentals, which would mean anybody after Hana
18 Beachfront Associates who might purchase the property. And
19 that could happen the day after the exemption is given and
20 according to what has been offered up. The agreement not to
21 run TVR's is only during the Hana Beachfront Associates'
22 ownership of the land. So, these are the kind of things
23 that the Commission can do to ensure that the requirements
24 that they believe are significant or need to be imposed
25 because of this property being in the SMA. It's through

1 imposing these conditions that they can do so.

2 Now, Mr. Tanaka discussed the elements, the burden
3 of proof on appeal. And the burden of proof on appeal is
4 the Appellant's. In order to overturn the Director's
5 December 2008 assessment determination, Appellant's proposed
6 project poses potential adverse impacts to resources and
7 processes protected by the Hawaii Coastal Zone Management
8 Act. The Appellant has the burden of showing that the
9 Director's determination is one based on a clearly erroneous
10 findings of material fact or erroneous application of law;
11 or two, arbitrary and capricious in its application; or
12 three, a clearly unwarranted abuse of discretion. It seems
13 to be that what they're suggesting or what the Applicant is
14 suggesting is that there has to be proof beyond a reasonable
15 doubt that there are not adverse impacts. That's not the
16 role of the Director. His is just to call it and say I see
17 a potential red flag here and one over here and one over
18 here, and there are a bunch of these, so I think because
19 there are a number of these, that the Commission should take
20 a look at this and have the opportunity of the process
21 afforded by the Commission to evaluate the proposed project.

22 There's no dispute that a 4,000 square-foot house
23 and 800 square-foot ohana unit proposed to be built on the
24 property will impact drainage, public views, view planes and
25 the persons on the property could be faced with dangers for

1 flooding. That proper disposal of wastewater is necessary
2 to protect the shoreline and fish pond, and the use of the
3 property for a mini hotel would have social and other
4 impacts. This Commission can impose stricter standards that
5 are imposed by FEMA. We've had a lot of testimony by
6 Mr. Stice and Mr. Tanaka -- you must disregard Mr. Tanaka's
7 testimony, he was not a witness, he was not sworn in --
8 about how great the wastewater system is.

9 But there's been no showing that either he or
10 Mr. Stice have any particular expertise in this area.
11 Again, this is something during the review process by the
12 Commission that can be further pursued. And finally,
13 there's no dispute that the public hasn't had a chance to
14 say anything. All of these factors identified by the
15 Director as potentially having adverse impacts are specified
16 by HRS 205-A to be considered in the SMA exemption
17 permitting process.

18 Appellant has not demonstrated any erroneous facts
19 or any erroneous application in the requirements of 205-A or
20 the SMA Rules for the Planning Commission, nor has Appellant
21 demonstrated that the Director's determination was arbitrary
22 and capricious or that he has abused his discretion granted
23 to him by statute and by the rules of the Maui Planning
24 Commission. There is no basis for overturning the
25 Director's decision. Appellant has addressed a number of

1 the concerns relevant to the policies and objectives of the
2 Coastal Zone Management Act as part of this assessment
3 application.

4 For example, the In Situ agreement, which was just
5 discussed at length by Mr. Tanaka, has been entered into.
6 It exists, and it respectfully preserves and honors the
7 burial sites and the dead buried therein. And it's in
8 accord with guidelines and protections in the historic
9 resources. It's one of the categories. Appellant, however,
10 has not yet similarly respected the living by giving Hana
11 residents and others a chance to express their concerns
12 about the project and afford them an opportunity to provide
13 information and input relevant to the potential negative
14 impacts to the proposed project, which may be helpful in the
15 Commission's determination of what conditions might
16 ameliorate negative impacts, not just borderline, but even
17 go beyond the borderline and really make a difference.

18 Requiring Appellant to obtain a permit will
19 provide an opportunity for all of the potential impacts
20 identified to be reviewed by this Planning Commission. This
21 Commission should uphold the determination contained in the
22 Director's December 2nd, 2008 decision that an exemption is
23 not appropriate for this property and that Hana Beachfront
24 Associates must apply for an SM1 permit for this project.
25 Thank you.

1 CHAIRMAN STARR: Thank you, Ms. Johnston. We now
2 will allow the Appellant to -- yeah, your opportunity for
3 rebuttal, Mr. Tanaka.

4 MR. TANAKA: Thank you. Let me show you a couple
5 of things. All right. I think we've provided a detailed
6 analysis of each of the items for which the Director based
7 his decision of potential adverse impacts. And frankly, I
8 haven't heard a detailed analysis back to say why the
9 Director was correct. For example, why is the Director
10 correct in saying that there is adverse impacts in the
11 shoreline setback? When you read it, there really isn't
12 any, and he admitted it. Okay. That is an example of our
13 presentation of the Director basing his fact is arbitrary,
14 is capricious. He's abusing his discretion. All right.
15 Now, there isn't any argument on the part of the County that
16 there is a finding of cumulative impact. There is no
17 finding of cumulative impact. There is a finding of
18 potential adverse impacts. All right.

19 The law requires a finding of cumulative impacts.
20 Now, at the same time, we've looked at the analysis that he
21 went through in the project description and itemized
22 analysis section, at each of those seven pertinent sections
23 that he cited as being reasons why he made his finding. If
24 you look at them carefully, four of the seven, Historic
25 Considerations, Shoreline Setback, Single-family Use,

1 Subdivision, are really not adverse impacts at all. Flood
2 hazards, public views, and from my perspective, fall in the
3 same category. Okay.

4 But I'm willing to say there is some mitigation
5 efforts our part. To say that he's making his decision
6 based upon the fact that the Commission in a SMA major
7 application can impose further conditions, I mean it doesn't
8 follow the law. He's got to make a decision as to whether
9 or not there's cumulative impacts or a significant impact on
10 the environment or ecological systems, none of which he's
11 done. All right. And then in evaluating what is a
12 cumulative impact, he hasn't explained the process as to
13 what is the sum of these so-called adverse impacts total up
14 to a significant effect. That analysis is totally absent.

15 And frankly, if we go down and look at, as I said,
16 there is no, definitely no adverse impacts on at least four
17 of them. All right. So, when you look at -- even if you
18 credit some adverse impact to the remaining three, does that
19 sum total up to an adverse impact -- I'm sorry, a
20 significant effect? We have -- you know, you've heard a lot
21 about the Commission having the authority to go beyond FEMA.
22 Frankly, I don't -- I doubt that. But nonetheless, we can
23 accept it, accept that argument.

24 Again, it's not an argument to say the Commission
25 can do more. It's still the Director, according to the law,

1 must follow the law in making his analysis, right, and
2 that's what we're talking about. Did he make the correct
3 analysis? Not to -- and pass the buck to you guys and say,
4 hey, there's a problem here, you guys decide. He has to
5 make a decision. He has to make a reasoned, logical,
6 coherent analysis and say this is why I'm denying an
7 exemption. You know, Mr. Stice has indicated the estimated
8 cost of doing an SMA major runs between, from his analysis,
9 60 to \$100,000. It's not cheap. It's not cheap at all.
10 You know, so it's going to cause him substantial headaches,
11 substantial hit in the pocketbook, all right.

12 Now, I think in terms of public input, I
13 acknowledge we didn't do the public input. On the other
14 hand, to the graciousness of the Commission, there was a
15 public meeting in Hana attended by the Commission for which
16 comments, opportunity was given to all who participated to
17 provide comments to the project. Now, the Commissioners
18 heard it. I can't ask you to wipe it out of your minds, but
19 I do say that this was a mitigative effect on our failure
20 not to have community input. All right.

21 In terms of the suggestion that I made, the
22 vacation rentals condition, that's a condition. Now, and
23 then they are trying to pooh-pooh the idea of the condition.
24 The Director brought it up in his letter, the condition that
25 we agree to a no vacation rental provision, which we have

1 said that we will. We do agree.

2 But now he brings it up in his letter and says,
3 well, maybe you guys should take another look at it, right.
4 He made the decision. He put it in his letter. Let him
5 live up to his commitment, right. I started by asking
6 Commissioner Shibuya what can you do to improve the process.
7 What you can do, as I stated then, make the Director live up
8 to the law. All right. He has his requirements. Make sure
9 he follows them. No personal agenda involved. No fear of
10 criticism from the public. No political pressure. Let's do
11 his job. All right. And we're here to say he didn't do his
12 job, and we proved it by showing the decision was based on
13 clearly erroneous findings of material fact, erroneous
14 application of the law, arbitrary or capricious in its
15 application or a clearly unwarranted abuse of discretion.
16 Thank you very much.

17 CHAIRMAN STARR: Okay. Thank you, Mr. Tanaka.
18 Before we move on to decision-making, I just want to ask
19 both counsels a question. First, Mr. Tanaka, do you feel
20 you've had a fair opportunity to present all of your case
21 and all of your arguments and all of your witnesses?

22 MR. TANAKA: Yes, I have, and I thank the
23 Commission again for their courtesies.

24 CHAIRMAN STARR: Okay, thank you. Ms. Johnston, I
25 ask you the same question.

1 MS. JOHNSTON: Yes, I agree. Thank you.

2 CHAIRMAN STARR: Thank you, and I compliment both
3 of you on your job.

4 Okay. Members, it's time for deliberation and
5 decision-making, and I will ask Mr. Giroux to clarify what
6 your options are at this point.

7 MR. GIROUX: I think both attorneys went over that
8 pretty thoroughly, but I think, you know, in your
9 deliberations, I think you need to discuss facts that are
10 swaying you either way about whether the decision was --
11 either it was or it was not clearly erroneous, whether it
12 was or was not arbitrary and capricious, whether it was or
13 was not a clearly unwarranted abuse of discretion. So, your
14 role in debating is to bring the facts together with the
15 law. So, if you can -- if you want to, you know, discuss
16 that, I think that's a critical part of the discussion is
17 weaving the facts along with the law so that you can have a
18 supportable decision.

19 CHAIRMAN STARR: My understanding is our position
20 now is different in that up to now, we were bound to receive
21 all of the information based on the record and solely that
22 information from the record. Now we've received it. We can
23 express opinions and thoughts, and we're no longer -- we're
24 able to do our decision-making. So, Members, who would like
25 to begin and offer any comments that they may have?

1 Commissioner Hiranaga.

2 COMMISSIONER HIRANAGA: This is more of a
3 question. I think it's appropriate. There were some
4 arguments about impacting open public views. But looking at
5 the CZM, or I think there was -- I'm sorry, let me step
6 back. Public views and view plane analysis. So, I'm
7 wondering, I thought in the CZM, public views, my
8 interpretation was from State highways, but this is not a
9 State highway. So, does that public view argument apply?

10 CHAIRMAN STARR: Could we ask the Department,
11 Trisha, for that?

12 MR. GIROUX: Well, I think if you look at 205-A
13 and then you look at your own rules, they both comment on
14 the idea of the public has a -- an interest, a vested
15 interest in views. I think there's a lot of debate in the
16 planning community and in the courts about exactly what
17 views are protected. So, I think it's within your purview
18 to interpret your own rules as far as what views are
19 protected. I think the argument is that your rules say that
20 it's along the shoreline also, so there's open debate in
21 that area.

22 COMMISSIONER HIRANAGA: So, it's not necessarily
23 has to be from the State highway, it could be from a County
24 roadway?

25 MR. GIROUX: Well, I think depending on what

1 planners you're asking, whether they're public planners or
2 private planners, I think that debate is ongoing.

3 COMMISSIONER HIRANAGA: Okay. Thank you.

4 CHAIRMAN STARR: Commissioner Hiranaga.

5 COMMISSIONER HIRANAGA: So, there is no argument
6 as to whether this is a development, because he did not deny
7 the exemption because he determined it to be a development.
8 He denied the exemption because of the cumulative adverse
9 effects; is that correct? Because you can deny an exemption
10 if you determine it to be a development.

11 CHAIRMAN STARR: I think that as far as that
12 conclusion, we're here to make that conclusion. But if you
13 want an opinion from the two opposing counsels, we can -- we
14 can get that. Is that your wish, Commissioner Hiranaga? We
15 are the authority. We make that decision.

16 COMMISSIONER HIRANAGA: Well, it appears from the
17 letter dated December 2nd, 2008 on Page 4, at the bottom,
18 the Director finds that the proposed action has the
19 potential for adverse impacts to resources and/or processes
20 that are provided protection within the Hawaii Coastal Zone
21 Management Act, blah, blah, blah. So, he did not say the
22 exemption is denied because it is deemed a development. He
23 did not use that as an argument. I just want clarification
24 from somebody.

25 CHAIRMAN STARR: You're it, but -- we're it, but

1 my own reading is it's in agreement with that. I mean do
2 you want to hear what the two opposing counsels have to say
3 on it? I don't think there's -- you know, other than us,
4 there's no one who is definitive.

5 COMMISSIONER HIRANAGA: Trisha, could you put up
6 the criteria for the exemption?

7 MS. KAPUAALA: You mean from the 205-A, the
8 definition of the development? Okay. One moment, please.

9 CHAIRMAN STARR: While she's getting that up,
10 another way of doing this is to put a motion on the floor
11 and then to develop comments on that motion once the motion
12 has reached the floor. You were kind of trying to do it the
13 other way. The other way may be easier.

14 COMMISSIONER HIRANAGA: Actually, clarification.
15 I guess it's the 202-11 or 202, Page 11. It has the three
16 criteria. The assessment application shall be reviewed as
17 follows: Evaluation whether the proposed action is or is
18 not a development. This is Exhibit 13.

19 CHAIRMAN STARR: Exhibit 13 from the book of
20 exhibits.

21 COMMISSIONER HIRANAGA: 202-11.

22 CHAIRMAN STARR: 202-11.

23 COMMISSIONER HIRANAGA: And then C is the
24 potential adverse environmental and ecological effects. So,
25 my question is if the director had determined that this was

1 a development, he didn't really have to comply with C, or is
2 that incorrect? All three items have to be agreed to in
3 order to deny the exemption.

4 CHAIRMAN STARR: You're talking about 12-202-11.
5 205-A-26. Where is that in this book?

6 MS. KAPUAALA: Commissioners, I was able to find
7 it on the Internet. This is an excerpt of, excuse me,
8 Section 205-A-22 of Hawaii Revised Statutes, the definitions
9 of the CZM chapter. And the definition of development and
10 what development does not include.

11 COMMISSIONER MARDFIN: Trisha, that says
12 construction -- that says construction of a single-family
13 residence that is not part of a larger development. But
14 then I think later on, there's an exemption -- exception,
15 not exemption, an exception to that. And it would be
16 farther down I would guess. I don't know where.

17 CHAIRMAN STARR: Down below that. There it is,
18 right below 16. I'll read that off the screen. "Provided
19 that whenever the authority finds that any excluded use,
20 activity or operation may have a cumulative impact or a
21 significant environmental or ecological effect on a special
22 management area, that use, activity, or operation shall be
23 defined as development for the purpose of this part." And
24 then special management area means the land extending inland
25 from the shoreline as defined in the maps filed with the

1 authority as of June 8th or as amended, et cetera.

2 COMMISSIONER MARDFIN: And leaving that up --
3 may I?

4 CHAIRMAN STARR: Yes, Commissioner Mardfin.

5 COMMISSIONER MARDFIN: Leaving that up, it says,
6 "For the statutory authority," that would be our director,
7 "finds that any excluded use, activity or operation may have
8 a cumulative impact or significant environmental impact."
9 It's not that it does have. It's that it may have, so it's
10 really referring to potential.

11 CHAIRMAN STARR: Members, yeah, if we don't have
12 much more discussion, we can look for a motion as well.
13 Commissioner Hiranaga.

14 COMMISSIONER HIRANAGA: Yeah, I just have one more
15 question to clarify. So, on the single-family residence
16 exemption, when you propose a secondary dwelling, is that
17 still considered a single-family residence when you have
18 basically two dwellings?

19 CHAIRMAN STARR: Mr. Giroux.

20 MR. GIROUX: Mr. Chair, is it appropriate that I
21 respond because I work for the Zoning Enforcement Agency?

22 CHAIRMAN STARR: Yeah. And you're not on the side
23 of the Appellee. You're here to -- as a resource.

24 MS. KAPUAALA: Just a staff of the Zoning
25 Administration and Enforcement Division. The Department

1 does interpret that a single-family dwelling along with an
2 ohana dwelling, an accessory dwelling, can be exempt. It's
3 not considered a development, but that is only if they apply
4 together in one assessment application. In other words, you
5 cannot apply once your first assessment be a single-family
6 dwelling, and then apply a second time and exempt your
7 ohana.

8 CHAIRMAN STARR: Okay. Anyway, would anyone like
9 to put a motion up?

10 COMMISSIONER FREITAS: Yeah, I move that we upheld
11 the Director's decision.

12 CHAIRMAN STARR: Is there a second to uphold the
13 Director's decision?

14 COMMISSIONER MARDFIN: I'll second the motion.

15 CHAIRMAN STARR: So, we have a motion by
16 Commission Freitas, seconded by Commissioner Mardfin to
17 uphold the decision of the Director. Would someone like to
18 add in a little bit of the reasoning why we feel that that's
19 the right action?

20 COMMISSIONER FREITAS: Well, several issues. One,
21 there was no public hearing held, and then I heard them
22 speak of the monetary costs if they have to go into a major
23 SMA. And I feel if they were really concerned about the
24 coastal and the area, that money wouldn't come into play to
25 put this project forward.

1 CHAIRMAN STARR: Okay. Any additional?

2 Commissioner Mardfin.

3 COMMISSIONER MARDFIN: Yeah, we have three
4 possible categories for overturning the Director. We're
5 voting to -- the motion is to uphold the Director, but there
6 are three criteria that we should reverse him on. And I'm
7 waiting for Trisha to get that up there. The first one says
8 based on clearly erroneous findings of material fact. I'm
9 actually going to break one into two pieces, because there
10 are two parts to it. Clearly erroneous findings of material
11 fact. I don't -- there was a couple of minor, little things
12 like whether or not you could hear the siren from the lot,
13 but that's a minor thing. That's not a clearly erroneous
14 finding of material fact. It's not terribly material.

15 And I don't believe there was any finding of
16 material fact that was especially wrong. It could be
17 erroneous application of the law. And we just saw that it's
18 not -- it's a development if it has the potential for
19 significant or cumulative impact. The word "may" implies
20 that it's -- that it's the potential that's there. And I
21 think several of the Director's positions show potential for
22 adverse impact.

23 Whether it's arbitrary or capricious,
24 Mr. Tanaka made several points about only four out of the
25 seven didn't. And he wants us to see that the ones that --

1 I may have it wrong. It may be three out of four have
2 potential, but four were not. And he made us think that
3 because they were in there and they didn't show any adverse
4 effect, that the Director was being arbitrary or capricious.
5 My reading of it is a little different.

6 My reading of it is that the Director was being
7 balanced and looking at lots of different things, some of
8 which were not adverse and some of which were. And so, he
9 was putting all the analyses in there, not just the analyses
10 that would show adverse impact. So, Mr. Tanaka's argument
11 that several of them didn't show an adverse impact doesn't,
12 to me, make it arbitrary and capricious. It makes it look
13 balanced. Whether -- the third one is whether there's an
14 unwarranted abuse of discretion. And again, I think the
15 Director, former director, excuse me, was not unwarranted in
16 his discretion.

17 I think it's within his discretion to look at a
18 project, look at it carefully, see that if it's -- if there
19 really is no significant impact, there's no potential for
20 significant impact, then I think he would have granted an
21 SMA exempt. I think he used his appropriate discretion as a
22 planner of experience and in his position to view that it
23 did need additional scrutiny. So, I don't think any of the
24 three have been shown to be an error on the part of the
25 Director.

1 Let me add one more thing here. A great deal was
2 being said about the conditions and whether there are
3 conditions. And while Mr. Stice can agree to any condition
4 he wants, they're his conditions. And the day after he
5 sells the property, the conditions can disappear. One of
6 the things indicated in the Director's letter was that by
7 having it be -- by denying the SMA exempt and going down the
8 road of SMA major, then conditions can be put on that will
9 run with the land and not just run with the ownership.

10 So, I think we have not had sufficient evidence.
11 The burden of proof is on the Appellant, and I don't think
12 they've supplied sufficient evidence that the Director
13 exceeded his authority, was arbitrary and capricious or was
14 terribly erroneous. The -- I had one other thing I was
15 going to say. Give me a second. Sorry, I lost it.

16 CHAIRMAN STARR: I thank you, Commissioner
17 Mardfin. Any additional? Commissioner Hiranaga.

18 COMMISSIONER HIRANAGA: I have to agree that this
19 letter dated December 2nd, 2008 was a very poorly written
20 letter. And I understand that TEA wrote the letter and not
21 JSH, but I feel if you look at the overall arguments, you
22 need to look at the bold print up above. Substantial rights
23 of the Appellant -- no, no, no. Right, that one.

24 The substantial rights of the Appellant, in my
25 opinion, have not been prejudiced. So, therefore, you can

1 argue and argue and argue again as the SMA major permit does
2 not deny someone from building their house and ohana. It is
3 a review process. With that in mind, I will be making my
4 vote.

5 CHAIRMAN STARR: Okay. Commissioner Tagorda.

6 COMMISSIONER TAGORDA: Mr. Chair.

7 CHAIRMAN STARR: Yes, sir.

8 COMMISSIONER TAGORDA: I would like to just
9 comment. I really listened intently to those two opposing
10 sides. And when I was listening to the Appellant, I was
11 waiting for him to touch on the subject of public
12 participation. But I realize that he did not and he
13 apologized not going into that public participation thing,
14 which is very important to me. Because all of us went to
15 Hana and talked to a lot of those people there and how they
16 feel about this.

17 Now, going back to those three elements of finding
18 whether the Director is capricious in his application of the
19 law or erroneous in finding material facts and really abused
20 his discretion, I don't think he did a bit. The only thing
21 is he admitted that there was a level of trust to his
22 subordinate at that time, knowing that the subordinate, what
23 was his name, Thorne Abbott, knows that he was doing. So a
24 lot of those things happen. You just put your name and sign
25 it, and I think that's what happened. And he was honest to

1 admit that.

2 But and you went, Mr. Tanaka, in your eloquent and
3 intelligent presentations of your facts about those seven
4 itemized analyses made by the Director, I still disagree and
5 agree in some points. Like flood hazard, view planes and
6 all that, there are some of those cumulative adverse effect
7 because of that property where it is. And I think -- I
8 agree with my colleagues here that it needs to be -- the
9 Commissioners needs to be involved in putting some
10 conditions in here. Because the conditions that I saw and I
11 read was partly conditions made by Mr. Stice.

12 His conditions is I will remove my application for
13 the subdivision if I will get SMA exempt. And all these
14 things are just his conditions. And I will not sell this.
15 And I kind of -- my mind was kind of clouded when this was a
16 partnership ownership. So, once this partnership is
17 dissolved, I think you guys can -- whoever, the next owner,
18 can do anything about the property. And that's my take on
19 this.

20 CHAIRMAN STARR: Thank you, Commissioner Tagorda.
21 And Commissioner Shibuya, your turn.

22 COMMISSIONER SHIBUYA: Thank you. I just look at
23 this in terms of organizational management viewpoint. The
24 Planning Director is organizationally a staff agent, not an
25 operations officer. The Planning Director is advising the

1 Appellant in his note and he cites various citations as well
2 as conditions that actually helps or at least was -- should
3 help the Appellant develop or provide for adequate feedback.

4 But to personalize this I think goes way beyond
5 what the actual intent of the staff agent, and I think this
6 Commission has the authority and never relinquished it and
7 continues to review this. I feel that many of the facts
8 that were provided by Mr. Tanaka were well done. They were
9 very thought provoking. However, the views in terms of
10 specific items such as the drain plan, the public views and
11 the, to me, cumulative effect, I saw early on the key term
12 of cumulative effect, and that's why I asked the Appellant
13 if they would consider not doing the subdivision, because
14 they were just building the house, but yet, you're going to
15 subdivide.

16 Well, if you're going to subdivide, then you
17 probably have that right to put in other units. And so,
18 that would be a cumulative effect in my mind. And that is
19 in an area that has already had deaths, and unfortunately,
20 that's what our responsibility is to mitigate or avoid if
21 possible. And so, we have to strike a balance here with the
22 community and with the laws and the authorities given to us
23 to ensure that the public safety, security and also your
24 rights as an owner to express yourselves as well as provide
25 for your own shelter and your way of living in -- on your

1 property that you purchased. Thank you.

2 CHAIRMAN STARR: Okay. Well, thank you, Members,
3 for some very insightful comments. I will withhold my own,
4 which I think is the right thing to do. And are we ready to
5 vote on the motion that's on floor, which is to uphold the
6 Director?

7 All in favor, please raise your hand. All
8 opposed. The motion passes.

9 I have a comment to make, not about the specifics,
10 but, you know, being not a --

11 COMMISSIONER MARDFIN: What was the vote,
12 Mr. Chairman?

13 CHAIRMAN STARR: Five in favor of upholding the
14 Director. The Chair did not vote.

15 You know, we are not professional judge and
16 jurists, but I do want to compliment the members for their
17 understanding, patience and excellent job in proceeding with
18 this. And I want to also thank our counsel, Mr. Giroux, and
19 the counsel for Appellant and Appellee as well as
20 Ms. Kapuaala for handling this very well.

21 MR. GIROUX: Chair, the final thing is that we
22 need to produce a findings of facts, conclusions of law,
23 decision and order. And if we could ask the County, being
24 the prevailing party, to draft that, serve it upon the other
25 parties, and then the other parties can do exceptions. And

1 it will be back on our agenda just to adopt those findings
2 of facts, conclusions of law, and decision and order.

3 Once we do that, it will then be served upon the
4 nonprevailing party, and they can decide what to do with it
5 from there.

6 CHAIRMAN STARR: Thank you, Mr. Giroux. Are you
7 prepared to do that?

8 MS. JOHNSTON: Probably I'll wait until I get the
9 transcript of the hearing, so I'm very precise. That would
10 probably take about two to three weeks, so I can do that as
11 soon thereafter as I get the transcript.

12 CHAIRMAN STARR: Mr. Tanaka, is that doable?

13 MR. TANAKA: Yes, sir.

14 CHAIRMAN STARR: Thank you, everyone, for
15 participating. The meeting is adjourned.

16 (The meeting adjourned at 4:21 p.m.)

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C E R T I F I C A T I O N

I, RACHELLE PRIMEAUX, Notary Public for the State of Hawaii, certify:

That the proceedings contained herein were taken by me in machine shorthand and were thereafter reduced to print under my supervision by means of computer-aided transcription; that the foregoing represents, to the best of my ability, a true and accurate transcript of the proceedings had in the foregoing matter.

I further certify that I am neither attorney for any of the parties hereto nor in any way concerned with the cause.

Dated this _____ day of _____, 2010.

NOTARY PUBLIC, State of Hawaii
My commission expires 6/14/2012