

BOARD OF APPEALS
COUNTY OF HAWAI'I

HEARING TRANSCRIPT
NOVEMBER 14, 2008

A regularly advertised hearing on the appeal of **BRIDGE AINA LEA LLC (BOA 08-000068)** was called to order at 10:54 a.m. in the West Hawai'i Mayor's Office, Conference Room, 75-5706 Kuakini Highway, Suite 103, Kailua-Kona, Hawai'i with Chairman Joel Gimpel presiding.

PRESENT: Joel Gimpel
Charlene Hart
Peter Hendricks
Karen Maedo
Kim Tavares

ABSENT AND EXCUSED: David Drury

Renee Schoen, Counsel to the Board
Alice Kawaha, Staff to the Board

Eric Maehara, Esq. representing Appellant
Christopher Yuen, Planning Director
Amy Self representing Planning Director

And five people from the public in attendance.

PETITIONER: BRIDGE AINA LEA LLC (BOA 08-000068) - Appeal of the Planning Director's Decision of May 22, 2008 Denying the Request for Nonsignificant Zoning Change. The project area consists of approximately 444.399 acres and is located between Queen Ka'ahumanu Highway and Waikoloa Village, Waikoloa, South Kohala, Hawai'i, TMK: (3) 6-8-1:39.

GIMPEL: The next matter on our agenda is the Bridge Aina Lea LLC, Board of Appeals No. 08-000068; and this is an appeal of the Planning Director's Decision of May 22, 2008 Denying the Request for Nonsignificant Zoning Change. The project area consists of approximately 444.399 acres and is located between Queen Ka'ahumanu Highway and Waikoloa Village, Waikoloa, South Kohala, Hawai'i. The tax map number is (3) 6-8-1:39. Do we have a representative of the petitioner here?

MAEHARA: Yes, Mr. Chairman and Members of the Board. My name is Eric Maehara, the attorney for Bridge Aina Lea. And immediately to my right is Mr. Sidney Fuke who is the planning consultant for the petitioner.

GIMPEL: Thank you. And -?

SELF: Amy Self, Deputy Corporation Counsel on behalf of the Planning Director. And to my immediate left is the Planning Director, Christopher J. Yuen.

GIMPEL: Thank you. All right, I have read all of the materials that have been submitted on this matter. So, Eric, would you -. I'm sorry, I didn't get your last name well.

MAEHARA: Maehara, M-a-e-h-a-r-a.

GIMPEL: Maehara. Mr. Maehara, would you present an opening statement as to what you intend to prove?

MAEHARA: Yes.

GIMPEL: Thank you.

MAEHARA: Well, initially we had requested at the request of the Vice-President of Bridge Aina Lea LLC to continue this matter until the next meeting of this Board, either in Kona or in Hilo. Because of his travel schedule he was not available. He's not available today to participate in this appeal. But under the circumstances in the face of the vehement opposition from the Planning Director we're ready to proceed. And Mr. Fuke will first orient the Board with regard to a project description, location and purpose for the initial application.

GIMPEL: I think at this point we're not quite ready for testimony. Would you just give a brief summary of what you intend to prove as an opening statement?

MAEHARA: Yes.

GIMPEL: Thank you.

MAEHARA: Yes. We intend to prove that the petitioner in this matter has met all the requirements of the Maui, excuse me, the Hawaii County Code, particularly the nonsignificant zoning change provisions of the Code. We've met the General Plan, we've met the Land Use Pattern Allocation Guide Maps, we meet the zoning conditions and the land use provisions of the zoning conditions. And we submit that the denial of the nonsignificant zoning change application by the Planning Director was clearly erroneous, and arbitrary, and capricious.

GIMPEL: Thank you. Ms. Self, your opening statement.

SELF: Yes. The issue that's before this Board is the matter of whether or not the section of the Code, we don't challenge that Section 25-2-45 of the Hawaii County Code was, we're not challenging that the way it's written now, the amendment that was made of this year, does not apply to this case. We're working off of what the section said prior to the most recent amendment to the Code. But that being said, this is a situation where the Director by the language in the Code has been given discretion as to whether to grant a nonsignificant zoning change or not. The County Council gave that discretion to the Director. They did provide criteria by which it has to meet in order for him to grant that. But the important thing to keep in mind is that when the County Council provides language that indicates that the Planning Director has discretion in making his decision which is indicated by the word "may" and not the word "shall," it is left up to that Director. And unless that decision is unreasonable, or is not, or if it conflicts or contradicts with the purpose of the ordinance that he's seeking to implement, then

it's up to his discretion. So as long as his decision does not conflict with what is written in this provision then the Board should give deference to his decision because that is in the expertise of the Planning Director, and that is why the Code reads as it does. So that is the issue that's before the Board today. And I would ask that you keep in mind the language that's actually in this section of the Code during today's hearing. Thank you.

GIMPEL: Thank you. All right, you may present your witness now.

MAEHARA: Thank you.

FUKE: Thank you. Good morning, Mr. Chairman. Do I need to respond -?

GIMPEL: Good morning. Would you give your name, and I'll swear you in. Thank you.

FUKE: Sure, okay. My name is Sidney Fuke. I'm the planning consultant that has been retained by Bridge Aina Lea for this project.

GIMPEL: Thank you, Mr. Fuke. Do you swear to tell the whole truth and nothing but the truth?

FUKE: Yes, I do, sir. For the purpose of my presentation, you know, I just kind of wanted to brief the Board Members as far as, you know, the project, its location, so on and so forth, so that we pretty much would be operating from the same page. The project is called Bridge Aina Lea. It's a 3,000-acre project that's situated on the mauka side of the Queen Kaahumanu Highway. It's generally directly across of the Mauna Lani Resort. This is the entrance to the Mauna Lani Resort. It's primarily vacant land, not primarily, it is vacant land. Surrounding properties also are vacant land. This here is Waikoloa Village. The entire property consists of 3,000 acres of land. The area that's kind of outlined by the dotted line is within the State Land Use Urban District. The property was reclassified into the State Land Use Urban District back in 1989, thereabouts, and subsequently had some zoning changes approved by the County with some amendments, and I'll go over that a little bit later.

This is kind of like a blow-up, you know, of the project, again, just to orient the Board Members. This is the entrance to the Mauna Lani Resort; and directly across off it would be the proposed project. The entire area, again, is 3,000 acres. Within the State Land Use Urban District is, you know, you have 1,060 acres of land. What happened was that when the properties are zoned, you know, by the County, the properties gets zoned by metes and bounds description. And I'd like to, if I may Mr. Chairman, pass out a zoning map of this particular area which pretty much like corresponds to this map over here. But I think that if you see the map you'll get a better sense as far as what I'm talking about in terms of zoning designations, zoning boundaries.

So if you can kind of like visualize, like, you know, the entire 3,000 acres are zoned by metes and bounds descriptions, these are legal descriptions; and so developers then would try to kind of like work within the confines of those kinds of boundaries. When you deal with a master planned community such as this, you know, whether it's Bridge Aina Lea, Mauna Lani, Kukio, Maniniowale, Kohanaiki, you know, you have master planned communities and they all get zoned by metes and bounds descriptions. And as you begin to proceed or do finer type of

planning for the project, looking at the topography, looking at drainageways, so on and so forth, then you find that there's a need for certain kind of adjustments; and it becomes very difficult to fall within the exact boundaries as kind of outlined in the map I had circulated. So what happened was that, you know, just to give you some historical perspective, Mauna Lani Resort, for example, across the street after they developed the golf course or as they were developing the golf course, they found it very difficult to kind of have the golf course or the commercial areas all situated within defined boundaries. So they came back to the County Council and then requested for boundary adjustments. Then it was discovered that, you know, it was really creating a lot of paperwork for all of the administrators as well as the legislative bodies to do what they consider like nonsignificant zone change where substantively the project didn't change and the impact to surrounding property owners were really negligible, you know, as in situations like this.

So subsequently the Council then adopted two major provisions to the Zoning Code. One was called the Nonsignificant Zone Change provision, which is the issue that we're talking about today which allows the Planning Director to make decisions on a nonsignificant zone change. There were primarily two criteria: You either, the resultant change does not exceed the density, you know, of whatever you were exchanging, and also there's a percentage requirement, and, you know, then you have to comply with the General Plan, so on and so forth. But that was one of the provisions that was adopted in the Zoning Code to make basically life easier in terms of processing wise. The other provision that was adopted was a process they called project district zoning. For a project district zoning, what would have happened like in situations like this is that the entire property would be zoned like a project district zone; and in that project district zoning ordinance you would have stipulations of your maximum density, height, the kinds of uses that would be allowed, so on and so forth. But you would not necessarily be confined to specific boundaries as outlined on this map here, or let alone on this map over here. So they had adopted, the County right now in the Zoning Code provides for those two kinds of provisions.

So in situations where like, and I'll just kind of pass this out, there were several other, I just wanted for illustrative purpose -. For illustrative purposes what I wanted to just pass out would be like examples of three nonsignificant zone change applications that were approved by the Planning Director. There were more but these were, I think, you know, kind of like illustrate the point I'm trying to make.

SELF: Are these exhibits that are already on the record or -?

GIMPEL: That I don't know. I'm going to -. Are these on the record?

MAEHARA: No, they're not.

GIMPEL: No. All right. We will receive them but they haven't been admitted into evidence yet. While we're at it let's do a couple of things. One we have been, or the appellant has, submitted earlier documents as well as the Planning Director has submitted documents. Can we agree to admit those documents previously submitted into evidence by the Planning Director and by the appellant before these, not these?

SELF: Yes.

GIMPEL: Okay. Would you agree that the documents that have been previously submitted to us with your application and with the index to the record on appeal submitted by the Planning Director are submitted into evidence so we can consider those?

MAEHARA: Yes.

GIMPEL: All right. Now we have before us three additional documents.

MAEHARA: Excuse me. There are four if we include the site plan, well, the zoning map, excuse me.

GIMPEL: Oh, this.

MAEHARA: Correct.

GIMPEL: Okay, we have the site plan plus letters and attachments from the Planning Department dated March 15, 2004, October 31, 2003 and November 2, 2007, that apparently are copies of materials that the Planning Department had sent to other applicants for nonsignificant zoning changes. Are there any objections to admitting those documents into evidence for our consideration?

SELF: No objection.

GIMPEL: All right. And -?

MAEHARA: Thank you.

GIMPEL: Okay, thank you. Then it will be admitted. And, oh, we also have the zoning map. Is that okay?

SELF: No objections.

GIMPEL: Thank you. They're all in.

KAWAHA: Excuse me, Mr. Chair?

GIMPEL: Yes.

KAWAHA: Can we consider what exhibit each of these would be?

GIMPEL: All right, let's do it by the date. Let's do the October 31, 2003 as Exhibit A; March 15, 2004, Exhibit B; November 2, 2007, Exhibit C; and the zoning map of the property that we're considering now as Exhibit D. Okay? Thank you.

SCHOEN: Mr. Chairman, if I may, I'd just like to ask counsel if he is going to rely upon documents and present documents for the Board to consider that you provide the documents in advance to the parties as well as to the Board so they have adequate time to review the documents.

MAEHARA: Yes, I'm sorry. I'm sorry we were inadvertent in not submitting it earlier.

GIMPEL: All right. You may continue now. Thank you.

FUKE: Okay, thank you, Mr. Chairman. Again, if I can direct you to the, again, these are just purely illustrative. But Exhibits A, B and C as you had outlined, these reflect like approval letters by the Planning Director for nonsignificant zone changes; and I just kind of wanted to direct Members of the Board to three particular areas.

First, in the Exhibit A, October 31st letter, 2003, that relates to the Kohanaiki project. The total area involved was 440 acres, as kind of highlighted for you. And if you would turn to page 2, then there are basically two reasons why the approval was given. One was compliance with the General Plan Map and the other one was not resulting in any net increase or decrease in the density. The other Exhibit, Exhibit B, is the letter dated March 15, 2004 to Mr. James Leonard. This related to the Kukio development in the South Kohala Coast area, near the South Kohala/North Kona boundary. On the third page, the total area that was affected by the proposed zoning area, I had to just kind of total it up but it's approximately 185 acres. And, again, I direct your attention to the bottom of that same page. The two reasons given for the approval was the, you know, the not resulting in any increase in the zoning densities and compliance with the General Plan Land Use Map. The last, Exhibit C, is a letter dated November 2, 2007, but this is really like an amendment to an earlier letter. And if you flip through that page, to the third page of that clipped portion, you will find another letter; and that letter is dated May 22, 2007 also to Mr. Suwa. This is in regards to Stanford Carr's development, and that project is actually within the Mauna Lani area; and the total area involved in this nonsignificant zone change was 100.797 acres. And, again, if you look on the second page of that May 22nd letter you will find the two reasons given for the approval were that being in compliance with the General Plan Map and, secondly, will not result in any increase or net decrease in the density. Relative to -.

SELF: Excuse me.

FUKE: I'm sorry.

SELF: Objection. Are there going to be questions asked by the attorney, or is this just a presentation, or what are we doing here?

MAEHARA: I'm not planning any direct examination, no.

GIMPEL: I don't mind the recitation. I think that's acceptable at this point. I mean, he can obviously ask a leading question, so I'll let him go on. So -.

FUKE: So with that as a background, again, this is the overall site plan for the Bridge Aina Lea project. And back in the year 2005 the Land Use Commission had required as a condition of the land use boundary amendment of Bridge that they must construct 385 for sale affordable housing by the year 2010. And Bridge, you know, like looking at that requirement and looking at your Exhibit D, you know, like the zoning map, kind of found that it really didn't have enough land area to provide for 385 units in one consolidated area, you know, short of like hopscotching the project. And because there was a heavy infrastructure cost associated with the

development, with the planned development of this project, bringing in the waterline, the roads, and so on and so forth, to have a hopped type of affordable housing project, some being situated here and maybe another project being situated, you know, at a distance away would have added to the infrastructure cost. In addition to that Bridge had an understanding with the ILWU to provide up to 100 workforce housing on that same site and also provide for additional areas to be set aside for the union to be able to properly train and educate their members so that they can eventually move up from the rental to eventual homeownership. So that was the overall plan. And in so doing, Bridge realized that the areas that they had to kind of work within was totally unworkable. And so what they then did was to submit a petition to the Planning Director requesting that, as I had indicated in your Exhibit D the shaded areas reflect like those that we had requested to be, you know, changed. Changing basically properties that were zoned Ag-5, the Ag-5 zoning designation was really for that area that was going to be set aside for the golf course, but shifting the proposed golf course location to other areas and then increasing the area for the affordable housing area so that we ultimately arrived at a site that came up to about a total of 31 acres, which would then provide for like 10 to 12 units, per unit, 10 to 12 units rather per acre. So that was the plan.

We then submitted the, actually the application was submitted by SSFM for this nonsignificant zone change; and in that nonsignificant zone change the argument was made that, like in all of the other petitions that, No. 1, it was totally in compliance with the General Plan Map. The General Plan Map was Alternate Urban Expansion in this area; and, secondly, there was no net result in both acreage as well as any increase in density. So that was the reason why, you know, we had applied; and the rest is history, which is to this point. Thank you.

GIMPEL: Thank you. Any other questions of Mr. Fuke? No, no questions of Mr. Fuke. Okay. Cross-examination.

SELF: Yes. Hi, Mr. Fuke.

FUKE: Hi.

SELF: Section 25-2-45 as it existed when your application went in, you mentioned it allows the Planning Director to make changes to the zoning, nonsignificant changes to the zoning. Is that correct?

FUKE: I was just trying to summarize what my understanding of the law is, was at that time, correct.

SELF: Right. And so the Code doesn't say that the Director shall or must provide -?

FUKE: Oh, that's correct. I agree with you -.

SELF: Okay.

FUKE: That it's not mandatory. It's like, it's discretionary.

SELF: Correct. All right, thank you. And so the nonsignificant zoning change that you've requested from the Planning Director, that will now change the plans that were presented to the County Council when the County Council passed the rezoning on this property, correct?

FUKE: No different in the sense like conceptually, you know, the project remains the same.

SELF: But it's still different from what was presented to the Council when they gave you the rezoning, isn't that correct?

FUKE: Would be the same difference as like other projects that the three other examples I had cited.

SELF: I'm not asking about the other projects. I'm asking about this one, is that correct?

FUKE: That's correct, yes.

SELF: And so this was originally rezoned by the County Council?

FUKE: That's correct.

SELF: Okay. The LUC decision that you spoke about, the result of that decision also reduced Bridge's affordable housing from 60 percent to 20 percent. Isn't that correct?

FUKE: That's correct.

SELF: Okay. So you were saying that because of the affordable housing requirement that it gave you less area. But, in fact, if it reduced your affordable housing from 60 percent to 20 percent, you had more area within which to work. Isn't that correct?

FUKE: That is correct, except that the 60 percent affordable housing requirement would have been staged in conjunction with the actual development of the project. So as you generate the need for the affordable housing through the specific development of different components of the project, then the affordable housing requirement would be kicked in. In this situation, however, when the Land Use Commission reduced it from 60 percent to 20 percent, they had mandated that whether you do anything on the property, commercial, golf course, residential or other wise, Bridge was nevertheless mandated to provide 385 units for sale by the year 2010. That's the major difference.

SELF: Okay, thank you.

MAEHARA: Mr. Chair, if we may proceed?

GIMPEL: No more questions? Ms. Self, no more questions?

SELF: No more questions.

MAEHARA: Thank you. As Mr. Fuke pointed out, the main thrust of this initial application from nonsignificant zoning change was affordable housing. Condition 1 of the Land Use Commission's Decision and Order -.

GIMPEL: Excuse me. Are you making final argument here?

MAEHARA: Basically, but it won't be abbreviated -.

GIMPEL: Well, because I think Ms. Self may have witnesses to call. Unless you have a recross of Mr. Fuke -.

MAEHARA: No, I have no further recross of Mr. Fuke.

GIMPEL: All right. So then do you have any other witnesses or any other evidence to present?

MAEHARA: One question on redirect.

GIMPEL: Okay, go ahead.

MAEHARA: Mr. Fuke, would you, you have anything to clarify with regard to these exhibits that we just submitted today, Exhibits A, B and C?

FUKE: That is correct. What I'd like to just kind of comment on was just that the properties as I had presented earlier have all been zoned by metes and bounds; and all of these when they get zoned by metes and bounds described, they're approved by the County Council, and the County Council has an understanding generally of what the project would look like. It's no different than the three other projects I was referring to. As reflected in your Exhibits A, B, and C, you know, there are certain expectations that certain land uses would occur in a certain area. And then where there's some adjustments to that then the County Council is not informed directly or a participant in the decision-making, except that they were provided copies of the ultimate decision. But the thrust being from a nonsignificant zone change that the project concept has not changed.

GIMPEL: Thank you. Any recross of Mr. Fuke?

SELF: No. Sorry, no.

GIMPEL: Okay, do you have any more evidence or witnesses to present?

MAEHARA: No further witnesses.

GIMPEL: Okay, thank you. Ms. Self, your case.

SELF: Yes. I'd like to call the Planning Director, Mr. Chris Yuen.

GIMPEL: Mr. Yuen, do you swear to tell the truth, the whole truth and nothing but the truth?

YUEN: Yes, I do.

GIMPEL: All right, give your name and address please.

YUEN: My name is Chris Yuen. My working address is 101 Pauahi Street, Suite 3, Hilo.

SELF: Mr. Yuen, Mr. Fuke has agreed that the Director may grant a nonsignificant zoning change. So you have been allowed discretion in that area, isn't that correct?

YUEN: Right, yes.

SELF: Now there are reasons why you decided that this would need to go back to the Council since they did the original zoning on this. So could you please describe for the Board what the public policy implications were for not granting this particular nonsignificant zoning change?

YUEN: Right. Well, the whole question of how to do nonsignificant zoning changes is a matter that I started to become more concerned about over the years in being the Planning Director. Because the way the ordinance was written really permitted the Planning Director to make very significant, really not nonsignificant but very significant zoning changes unilaterally without any public input, without any input from other public agencies, that normally comes through the zoning process. And it really was something that as time went on I saw it could be very significantly abused given the wording of the ordinance that existed. It essentially allowed large scale movements of zoning from one area to another as long as the General Plan Map was consistent. And if you know the General Plan Map, you have big areas that are called Urban Expansion; and so it could be consistent from one area to, it could be consistent with the General Plan Map. And there was no limit of the acreages. So essentially you could swap zoning from one part of a project to another part. And the worst example which I found out about it in 2007 is where a zoning designation of about 15 acres of hotel zoning was moved 2 ½ miles from one location and actually jumped over intervening properties, essentially swapped from one area to another. That, to me, is not a nonsignificant zoning change. It's actually a much larger and more significant kind of change than many of the things that go to the Council. So as a matter of policy I do think that these should be limited.

And I introduced a change in the way the Zoning Code was written, to be changed back to the way it was before 1997, because there was a nonsignificant zoning change provision in the County Code before December 1996. But it was limited to .5 acre or 5 percent of the parcel, whichever is less. And that was changed in 1996 to say that as long as you didn't increase the density it really had no limit as to size. So by the end of 2007 I had actually drafted a bill that was at the Planning Commission and going to the County Council to limit nonsignificant zoning changes to something that really is nonsignificant to a relatively small area; and this had gone through the Planning Commission. It was being considered by the Council at the time when this zoning change came in, when this request came in for a nonsignificant zoning change. So that's

the, and the change, because this application came in before that bill was enacted by Council we did not, certainly, apply that law. But that's an expression of the policy; and the Council agreed with that expression of policy and passed that bill. The Planning Commission agreed with that expression of policy and recommended approval of that bill. So as a matter of policy it's not a good idea to make this kind of large-scale change. And I could get into the specifics of this one.

SELF: Hold on. Let me ask you one other thing. But the fact that the County Council provided this discretion to the Director, that has never changed? Isn't that correct?

YUEN: It was always the discretion. It always said the Director may grant a nonsignificant zoning change, provided the criteria are met. So you have to meet the criteria to qualify, but then the Director still gets to make a decision as to whether to grant it or not.

SELF: And based on the public, let's get into a little bit on the public policy decision you made. Are there problems with this particular project that you feel the Council should be aware of since they're the ones that gave the zoning to the property to begin with?

YUEN: Well, yes. And this is a, I can tell you that, first, that this is a project that was pretty controversial when it went to the Council in 1993 and for modification in 1996. They asked for a project district zoning in 2000 which would have enabled them to move the zoning designations around more freely within the project. They had a lot of opposition at the Council in that, and from the public at Council for that, in 2000; and they actually withdrew that application. And going back all the way, this is a project that there was a lot of debate at the Council. It was presented to both the Council and Land Use Commission with a set master plan, which is encompassed in the way the zoning was granted for the property. This is what the public looked at. And my feeling is that when you have that kind of a project that you really ought to, that the Council ought to be the one that changes the boundaries for an area of, I think, the total changes here are something like 15 or 20 acres that are being changed, which is a significant change in a zoning for the area.

SELF: Okay. Is there any sort of problem with the floodway?

YUEN: Yes.

SELF: And could you show us the floodway on the maps that Mr. Fuke presented?

YUEN: And it turns out that there is a significant problem with what they're proposing in this nonsignificant zoning change; and I think there are a couple of things that will show this. If we could pass this out as an exhibit. And I think I can also show this pretty well on Mr. Fuke's poster boards that he brought. Could we add the topo map into this?

SELF: Yes. Could we have this admitted as evidence, the map that was just passed out?

GIMPEL: Any objections?

MAEHARA: No objections.

GIMPEL: All right, it's admitted. This will be, let's make it -.

SELF: PD-A

GIMPEL: All right PD-A. Fine, thank you.

YUEN: In a nutshell the problem is that there is a floodway that crosses what they want to change from the Ag-5 zoning to the Multi-Family zoning where they want to, where they're proposing to put apartment buildings. In the original zoning this was left in 5-acre agricultural zoning as an open space for the floodway waters to pass through; and they want to change this to now be zoned for apartment construction. So to understand this, if you first look at the topo map here, and you see a little blue line with dashes and dots.

MAEHARA: Excuse me, excuse me, Mr. Chairman. I'm going to object this line of testimony because we have a petition on the record that refers to Section 25-2-45, Nonsignificant zoning changes. There's no condition that relates to engineering, there's no condition that relates to any kind of detailed land use planning. It talks about the General Plan, it talks about densities, it talks about zoning. Detailed engineering considerations are not a part of this section and should not determine whether or not this petition should have been approved or not by the Planning Director in the exercise of his discretion.

GIMPEL: Well, I think I'm going to disagree with you. I think that his discretion could rightfully take into account the proposed use if the rezoning, insignificant rezoning was granted; and if that poses a problem then he could exercise his discretion. Whether it's a reasonable exercise of discretion is up to us. But I'm going to let him testify as to what he based his decision on.

MAEHARA: If you look at his denial letter which was an exhibit in our memorandum in support of our petition, he cites several reasons for his denial, and he does not raise this engineering at all.

GIMPEL: That is an issue for you to cross-examine on. Thank you.

YUEN: Okay. To continue with this, if you look at the Exhibit A, Planning Director's Exhibit A, the topo map shows a blue line with dashes and dots on the lower, there are several of them. But the one that's sort of in the middle, and let me point to it, it'd be here, unnamed. You'll notice that goes through, there's a rectangle there, and see it goes very near the corner of that rectangle. That rectangle is the same as looking at this exhibit, the zoning map. The part that's colored, that corner where the intermittent stream crosses is the same as this corner that I'm pointing to on this map that's near the No. 39. And you see how that is, that corner is A-5a zoning under the existing zoning, the zoning that was passed by metes and bounds. This is also -.

SCHOEN: Chris, I'm sorry. Chris, just to, so that the record is clear I just wanted to refer to on the record as to what you're referring to. When Mr. Yuen was referring to the topographical map he was referring to PD-A, Exhibit PD-A, and he was pointing to a blue line

depicted in that exhibit, right in the middle of the page. When he was referencing the other document, he was referring to Petitioner's Exhibit D. Thank you. Sorry.

YUEN: Okay, thank you very much. So, again, looking at Petitioner's Exhibit D, I have to turn it upside down so that we, it's a little clearer to understand if it's upside down, because on Exhibit D when you turn it upside down then the Queen Kaahumanu Highway is on the bottom of the page. And this corner of the rectangle that the intermittent stream passes through is the same corner as is labeled A-5a up near the No. 39. And what happens there is that in the original zoning of the property this floodway was set aside to remain in A-5a zoning. It does pass through a portion of the RM zoning right at the boundary between what you see as RM-4 and RM-14.5 on 39, and then it passes through again on Ag-5a zoning. So this was set aside and not zoned to be in Residential use. It was kept in Agricultural use. And this is the kind of things, and when you go through zoning and you have the studies that are done in connection with zoning, this was recognized. This is shown in the studies as there's a floodway here. The floodways, it's a little more complicated. There's actually another branch of it that doesn't show up on the topographic map. But we have another map here, that we don't have copies of, it's a copy of the zoning ordinance itself. And it has these floodways shown actually on the zoning map and has dash lines on the zoning map, and it shows how the zoning was done in a way that these two, that these floodways would pass through the Ag-5 acre area, zoned areas on the property. And so what they wanted to do here is, in this nonsignificant zone change, is to take this corner of the property going back up here to Exhibit D, and change that corner from being Ag-5 zoning to being this Multi-Family Residential RM-4 zoning, which is a zoning that permits about 11 residential units per acre to be put in there. So when you actually go through the normal zoning process you have a lot of review of things like this versus, and this was looked at and part of the considerations in the zoning of the property. Then the nonsignificant zoning change is strictly administrative. The Planning Director is supposed to make a decision in 30 days. There's no provision for sending this around to the Department of Public Works, Department of land and Natural Resources, anybody else, to look and see is there a problem created by this proposal to change this area from being an Open space area in the plan to being a Residential area in the development.

SELF: Do you think that the issue of flooding which will be affected by this nonsignificant zone change that was requested would be an issue that Council would be interested in?

YUEN: Well, definitely; and I think anybody would be interested and concerned about how the floodways are handled in the development.

SELF: Okay. Now they presented other decisions that you had made. All right, before I get to that, let me ask you this, could you describe some of the problems with conforming with LUC conditions? Because that was also considered by you, was it not?

YUEN: Yes. The Land Use Commission, originally this project went through the Land Use Commission in the early 1990's; and the Land Use Commission does have a condition that the project be developed in conformance with the representations made before the Land Use Commission. It was largely, the master plan that was presented to the Land Use, largely the zoning does conform. The zoning was passed by the Council, conforms to the master plan that was approved by the Land Use Commission. This request does not.

SELF: Okay. And could you briefly, they described as their main reason for needing the nonsignificant zoning change was to meet the affordable housing requirement that was a condition of the LUC decision. Could you please describe why that really is not a good reason for the nonsignificant zoning change.

YUEN: Well, this goes, you have to go way back to the very beginning. When they went to the Land Use Commission, this was presented as an affordable housing project; and they had a condition at that time that they would do, 60 percent of the project would be affordable housing. They changed the concept, and they asked to change to 20 percent. And by that time the County's standard condition for affordable housing had changed to 20 percent. And we supported them in making that change to 20 percent, the Planning Department. We did think that the 60 percent tended to be impractical and that they should have the same requirement as other projects. But, as I said, you know, all along they had this 60 percent affordable housing requirement that they had to meet, and they should have been planning how they would have to deal with that. The Land Use Commission was very skeptical about this project actually delivering, actually producing units. They told the Land Use Commission that if they had this approval they were ready to go and that they could issue a construction contract for their affordable housing.

SELF: So that also goes to the fact that they, this hearing was supposed to have been in September, but then they wanted to delay it yet again. So the timing issue doesn't seem that credible, is that correct?

YUEN: Well, it doesn't seem like they're in a hurry to get a decision on this nonsignificant zone change.

SELF: Okay, so switching gears here, let's go through the decisions that they've passed out. Let's go to Exhibit A first, Appellant's Exhibit A. And could you please describe your decision on that and how that is different from this particular decision.

YUEN: Well, before I get into this, and I'll discuss the specifics of each one of these. But let me say that my own thinking about these nonsignificant zone changes has evolved over time; and I did get more and more concerned about the scope of what's possible under them as I saw what had been done in situations in the past. And, especially, I think it was some time in 2007 that I learned about this moving zoning 2 ½ miles using nonsignificant zone change, which I cannot see as being nonsignificant. But it was possible under the terms of the ordinance as written. But the first one here has to do with Kohanaiki. And this is a project which was zoned to have hotel development along the shoreline in 1987. It still needed a Special Management Area Permit to be developed. And there was a lot of opposition to the development of Kohanaiki as it was allowed by zoning. When we came in, the administration came in in December of 2000, Harry Kim administration, we tried to work with both the community people who wanted to see a public park and open space near the shoreline at Kohanaiki, and with the landowner, on what would be an acceptable development. And we did eventually arrived at a compromise between the landowner and the community people over a development that would move the project back from the shoreline basically and eventually create a public park along the shoreline. Now this meant that in order to implement that we had to move some of the zoning off of the shoreline into the mauka part of the property, so that they could build on portions of

the property that was zoned Open in the mauka area rather than building up against the shoreline. So to implement, that's the reason for doing this, was to move them, create Open space along the shoreline so they now have Open zoning from the shoreline going back. And some of the Open zoning that was inland became their Residential zoning or their Multi-Family zoning, instead of having it up against the shoreline. So that's the reason for doing Kohanaiki.

SELF: So the public was included in that?

YUEN: Right.

SELF: Okay. And now could we move to Appellant's Exhibit B? That's this one.

YUEN: And that would be, this is actually more the, this is really the type of thing that the nonsignificant zone change is a very useful tool. And what happened here is this is an adjustment in Kukio between Residential and Open zoned areas. I remember the project, I remember what happened. I can't, it's really hard to go into what the details of this are. It really doesn't involve a lot of area being moved. It really does involve small adjustments between zoning of adjacent pieces of property. Let's see if we can have a map here. You know, from what's presented here I really have a hard time describing exactly what happened here. Hang on. I can't describe exactly what happened here -.

SELF: That's okay.

YUEN: From what's here on the exhibit. I can say though that there had been a number of nonsignificant zone changes in Kukio that primarily involved, before this, that involved adjustments of the Open zone versus the Residential zone. And what happened in Kukio is that the golf course was zoned Open and was adjacent to Residential zones; and when they got into the fine details of how they were going to build the golf course, they found that it didn't exactly work out right. And so they would come in for nonsignificant zone changes to adjust exactly where the golf course would be versus the Residential lots, sometimes involving a few feet, or a few dozen feet, relatively small areas. There had been a series of these in Kukio, and I don't remember the details of what happened on this one. And I can't remember the, from this you can't really see what got switched. But the total acreage that got changed is not that much.

SELF: Okay. And then briefly what about, could you do the same thing for Appellant's Exhibit C which involved the Stanford Carr development?

YUEN: Yes. Well, there were two here. And the November 2, 2007 one is a very, very small one. The May 22, 2007 one involved a larger area. It's not 100 acres. And I'm going from memory here but I think what it involves is the -. If you go to the page that's shown as Figure 11, you see the area that's labeled RM-4? There are several. But the one that's in the right, upper right-hand corner of what's labeled as project site, I think the only thing that happened here was that that, and then you see there's an O that's below it. I think a portion of that O got moved to the RM-4 and the RM-4 got moved into the O. That's what happened there.

SELF: Okay.

YUEN: And this is an area, again, that was very much affected by a prior nonsignificant zone change; and we're not dealing with an area that's actually the way the County Council had zoned it. This is the one that I've been talking about. You see the area there that's V-1.25 in this map here on Figure 11?

SELF: That's Figure 11.

YUEN: On Figure 11. That's the area that got moved about 2 ½ miles from a different part of the Mauna Lani property and it was placed on this property; and the RM-4 zone that was here got moved 2 ½ miles to the other location on Mauna Lani. And this is the kind of thing that to my way of thinking should not be done administratively and called a nonsignificant zone change.

SELF: Okay. And is there anything else you'd like to add?

YUEN: Well, I think I already explained this but it was just that the chronology was a little bit, that Mr. Fuke gave was a little bit wrong because there was a nonsignificant zone change before. There was such a thing before the current, before the language was changed in December 1996. It was much more limited though in terms of what you could do. It was made broader in December 1996; and then it has been changed back by this ordinance that was passed in April of 2008. It has been changed back to the way it was before December 1996.

SELF: Okay. As a summary, so there were red flags, so to speak, that went up with this particular request for nonsignificant zone change that caused you to question whether or not this was in the best interest of the public and whether or not the Council should actually weigh in on this, is that correct?

YUEN: Right.

SELF: Okay, thank you.

GIMPEL: Mr. Maehara, do you have any cross-examination of this witness?

MAEHARA: Yes, sir. Chris, you've raised some very detailed engineering issues with regard to the project which is the subject of this proceeding now. Was the same kind of detailed engineering review done for all these other nonsignificant zoning change applications, well, specifically with regard to the ones that are represented by Exhibits A, B, and C?

YUEN: For the Kohanaiki, yes. I mean that was done in connection with an SMA permit application where the development would occur in the location of the nonsignificant zone change. So at the same time the nonsignificant zone change was being processed there was an SMA Permit being processed the same time. So we were aware exactly of what the archaeology was in the area, what the viewplanes were, what the drainage situation was, what the tsunami inundation situation was. We were very much aware of what was going to happen on the ground with that nonsignificant zone change.

MAEHARA: And what about Kukio? Were there any detailed engineering studies done before you made your discretionary decision?

YUEN: The Kukio is a very small area. I wouldn't say that there was a specific study done or review, but from what I can see it involves pretty small areas within the Kukio development. You can't really tell how much areas are being changed by the parcel designation because what they're giving you is a table that shows the size of the whole parcel and not the area of land that's actually being changed by the nonsignificant zone change. That's a hard one for me to discuss though, you know, because I can't really tell from, you know, you're presenting me with one letter that's part of the file. The file itself would have more information, then I could see what they actually did. What the whole picture was I can't really tell from the letter.

MAEHARA: Well, that's one of the concerns here because in your two-page letter of denial there's no reference to any engineering problems that you considered in your decision; and that's why this line of questioning with regard to detailed engineering that's taking place.

YUEN: Well, I'm trying to answer your questions. On the question on the, and I have a hard time with Kukio simply because I can't remember exactly, I can't really tell what was happening on that one from what I have in front of me here, and I don't remember it very well.

And then, finally, for the third one you showed, we also had a pending SMA permit for that project, and we were aware of what was the situation on the ground there when that was granted.

MAEHARA: But in all three decisions, in all three letters granting the nonsignificant zoning change applications the only justification given was that it met the General Plan, there was no net increase or decrease in any particular zoning designation, there was no increase or decrease in any density and, accordingly, it met the conditions of Section 25-2-45, if I'm correct with my reference.

YUEN: Under the terms of the prior ordinance those qualified for a nonsignificant zone change, yes; and the letter recites why it qualified for it. They weren't denials. They didn't recite, it didn't list every consideration that went into the thinking of granting it. For Kohanaiki, for example, I mean if we wanted to we could have given a very detailed reason for doing the nonsignificant zone change.

MAEHARA: All right. Now with regard to the flood problems, the drainageway problems that you point out in this docket -. And you indicate that, well, you may not have stated it but the implication is, well, there's no SMA that's going to be required here so we don't know what the detailed engineering with regard to the floodway treatment will be. But won't there be more than sufficient opportunity for the applicant, the developer and the County to review the many different ways of, engineering-wise, mitigating this flood issue with regard to developing in the corner of the development there?

YUEN: Well, in some ways the County controls are not as good once the zoning has been granted for a piece of property because there are still considerations under Chapter 27 of the County Code. But this is not actually a floodway that's designated in the FEMA Maps. It

was found and designated as a floodway when the applicant did their own studies of the project, but it's not regulated. It's not a FEMA regulated floodway under Chapter 27. So, yes, I actually, I do have real concerns about zoning this property for a residential use.

MAEHARA: Isn't it a fact that the applicant in fact did submit an application for a project district zoning for this development in October of 2007 which would have given the Planning Department, the Planning Commission, the Council more than sufficient opportunity to review these other issues in detail?

YUEN: Right.

MAEHARA: And you were aware of the fact that this application was pending?

YUEN: The project district application?

MAEHARA: Correct.

YUEN: We rejected the project district application because it had an environmental impact statement trigger.

MAEHARA: But you were aware of the fact that the applicant had applied and submitted it, and then you rejected it?

YUEN: Right.

MAEHARA: Okay. Chris, you referred to this project as, initially, prior to this particular applicant being involved in the project, but I guess the prior owner of the project, as an affordable housing project, because it proposed 60 percent affordable housing. Was that your testimony?

YUEN: Yes.

MAEHARA: Wasn't it a fact that the 60 percent affordable housing policy was the policy of the State Office of Planning that was being applied to each petition that went to the Land Use Commission at the time of the, basically the Waihee administration?

YUEN: Right. But it was passed with that condition.

MAEHARA: Because the State imposed it and not because the applicant was proposing an affordable housing project?

YUEN: Well, there were some representations about the type of project and that there would be a lot of affordable housing within the project. I think some of the 60 percent was going, you know, they did plan to do some of the 60 percent off-site. But we could go back and look at this; and there were representations about a good deal of the project being affordable.

MAEHARA: One last question on cross, and I go back to, I believe this Exhibit C, that portion of Exhibit C in the May 22nd letter from your office. You indicated that this was a minor

nonsignificant zoning change application and there was very little change in zoning here. But at the bottom of your, the letter from your Department May 22, 2007 in the box there, the total says 100.797 acres proposed zoning refinement. Is 100 acres plus zoning change a mere refinement?

YUEN: Well, there wasn't a change to 100 acres in this November 2007. The TMK involved is 100 acres. The TMK had, if you look at Figure 11, that whole area that's shown -. You see on the left side of North Kaneku Drive, that whole block there that's then surrounded by A-5a, that whole area is 100 acres. All right? And it's broken up into different zoning designations. And what this did was it took this corner of this whole 100 acres that's shown as RM-4 and flipped that with the Open zoning in the project. So as I said the 100 acres applies to this whole block, but the 100 acres was not changed. The same thing is true by the way with Kohanaiki. The whole area is 440 acres, something like that; but there was not 440 acres that were actually changed by the nonsignificant zoning change.

MAEHARA: I have no further questions on cross-examination.

GIMPEL: Any recross?

SELF: Just one. So just to reiterate, your decision to deny this particular nonsignificant zoning change was based on the fact that it would be better public policy for a change such as this to be decided by the Council, and that was stated in your denial letter dated May 22, 2008? Correct?

YUEN: Right.

SELF: Okay, thank you. No further questions.

GIMPEL: That should have been redirect; and now recross.

MAEHARA: No further recross.

GIMPEL: No further recross. All right. Any more witnesses? It is now 10 minutes after 12. What I propose is this, we break for lunch, we will come back and hear final arguments, and then take the case under consideration and make a decision. So it's 10 after 12. Let us adjourn until around, make it 1:30.

MAEHARA: Mr. Chairman, if I might call Mr. Fuke as a rebuttal witness to address some of these issues that just came up on the County's testimony?

GIMPEL: All right. That would be acceptable. We'll allow that. Okay, thank you. And then be prepared with final arguments after that; and then we will -.

MAEHARA: Yes, sir.

GIMPEL: Thank you.

RECESSED The Chair called a recess at 12:10 p.m.

RECONVENED

The meeting reconvened at 1:30 p.m.

GIMPEL: All right, we're back in session. I believe we left it where Mr. Maehara was going to ask some redirect questions of Mr. Fuke. Is that correct?

MAEHARA: Yes, sir.

GIMPEL: All right. Proceed.

MAEHARA: First of all, housekeeping, Mr. Fuke earlier in his testimony made reference to two large maps. We never entered them into the record. So I'd like to enter them in. First of all, well, it's referred to as Exhibit 21 here. I'd like to enter it into this proceeding as Petitioner's Exhibit E. It's the location map.

GIMPEL: Any objections?

SELF: No.

GIMPEL: No. So entered.

MAEHARA: And then the second one would be, well, it's again entitled Aina Lea Affordable Housing, oh, excuse me, Site Master Plan; and if we can enter this as Exhibit F.

GIMPEL: Any objection?

SELF: No.

MAEHARA: And we will submit reduced size copies, 8 ½ by 11 copies, for you. Now Mr. Fuke, I just want to ask you some questions that came up following testimony by the Planning Director. You were a former employee of the Planning Department for the County of Hawaii?

FUKE: Yes, I was.

MAEHARA: For how many years and in what capacities?

FUKE: I worked for the Planning Department for 13 years, 8 of which as its Director.

MAEHARA: Now as an employee and also as the Director of the Department, are you familiar with the nonsignificant zoning change application process?

FUKE: Not so much as the Director but more so as subsequently over 20 years of doing land use consulting work with the amendments on the nonsignificant zoning change process occurs like subsequent to my departure from the Planning Department.

MAEHARA: From your experience can you discuss the procedural, the process involved in the submittal, review, processing and decision-making on these applications?

FUKE: Sure. As noted in my earlier testimony I think that, you know, I tried to point out that, you know, generally when you have master planned projects such as Bridge Aina Lea, Kohanaiki, Mauna Lani, so on and so forth, the properties are zoned by metes and bounds description. So during the course of doing the finer design of construction phase then there's a need to make some lot line adjustments. During my tenure as Planning Director a lot of these adjustments were made through the formal rezoning process, that is to say the applicant files an application with the County Planning Department, gets reviewed by the Planning Commission, and ultimately gets reviewed and approved or acted upon by the County Council.

The nonsignificant zone change process was designed to kind of minimize having to take situations like that through the more laborious process of Planning Commission review and County Council action. So a law was passed, and pursuant to that law the Planning Department adopted rules as the Department has for different procedures. And the rule that's applicable, you know, that clarifies or at least amplifies that particular aspect of the nonsignificant zone change component of the Zoning Code is Rule No. 8.

You do have, the Department also has another Rule, it's called Rule No. 5. Rule 5 governs the application and processing requirement for all rezoning actions. Within the rules themselves if the ordinance does not spell out the reasons for the application filing requirements, the filing fee fee, so on and so forth, then the expectation is to have the rules kind of amplify upon that. There is a significant difference in terms of the application, filing requirements, informational requirements for nonsignificant zone change versus a new zoning application. For example, in new zoning applications as reflected in both the Code as well as the Planning Department Rule 5, it requires an environmental report, you know, the equivalent which would be like an environmental assessment or environmental impact statement. That is not similarly required or articulated as being a submittal requirement for, excuse, that is not a similar requirement, you know, for the nonsignificant zone change. Both rules, also Rule 5, as it relates to nonsignificant zone change, and Rule 8, excuse me, Rule 5 relating to zoning applications and Rule 8 relating to nonsignificant zone change also kind of discusses the reasons under which the Planning Director could approve, or deny, or recommend the approval or the denial of zone change applications or nonsignificant zone change applications, as the case might be.

MAEHARA: Chris in his testimony made reference to the amendment to the particular section we're dealing with, the nonsignificant zoning change process. And I can best describe some personal uncomfortableness in the exercise of his discretion pursuant to the section, a push for an amendment to the law through the County Council. What's your, would you have addressed it the same way as the Planning Director?

FUKE: Well, you know, in situations where, well, the nonsignificant zone change if you look at the rule and also if you look at the law it basically articulates very stringent guidelines or criteria under which, you know, a request can or cannot be approved. You know, the rules or the law does not, the ordinance rather, you know, does not specifically state that the Planning Director can introduce other aspects like, you know, his personal philosophy or his perception of what public policy may or may not be. And that being the case, then if you look at the nonsignificant zone change and, you know, you follow the rules, you follow the ordinance, and you look at all of the previous applications -. And I've had a chance to comb through the Department's files to see whether there were any nonsignificant zone change applications that

were denied over the last four or six years, and I couldn't find anything, any applications that were denied which did not meet the criteria as expressly outlined in both the ordinance as well as the rules.

Now if the Planning Director believes that there should be further definition or clarification as far as, you know, how do you define "may" as opposed to "shall" -. And in this case like as I mentioned earlier we do concede that the Director does have the authority, discretionary authority, to approve or deny applications along these lines; and so it's like a "may" as opposed to a "shall." But in situations like that, also, like the Director also has authority to review and approve variances, for example. And so in situations like the water variance, what had happened was that the Director ultimately came forth and published Rule No. 22 which governed how the Department would handle water variances. And so when you look at the water variances then it becomes a little bit clearer in terms of now these are the new expressions of administrative policy; and so you can follow that. But previous to that, not previous to that, but at this point in time if you look at Rule 8 which governs nonsignificant zone change, there is absolutely no discussion, you know, relative to public policy type of consideration or things that one might perceive as being like public policy. So the direct answer to your question is that the rules, I'm not saying that the Director could not exercise his discretion. I think the Director does have the discretion. On the other hand, to stray in the manner that the decision was made when you look at all previous decisions and if it's not allowed or at least provided in some form as far as a criteria for making a decision in the Department's rules, then I think that it's a reach.

MAEHARA: Finally, Chris raised some concerns with regard to drainage and floodway concerns that were not addressed in his denial letter. I'm going to ask you, draw your attention to petitioner's Exhibit F which is the Site Master Plan. And as one of the planning consultants for this project are you familiar with, first of all, the drainage patterns in the area, and particularly was there any attention given to the drainway that Chris raised some concerns about today?

FUKE: The direct answer to your question is that, yes, I'm generally familiar; but I'm not an engineer so I don't profess to have like technical, you know, information or knowledge relative to the drainage patterns in that area. But what I'd like to do, however, is to kind of like go back again and, you know, to redirect the whole focus back on the criteria for the approval or denial of a nonsignificant zone change application. And, you know, if you're looking at the rules, and the rules kind of begin to say like what are the informational requirements. If the applicant had submitted or if whatever the applicant submitted was not sufficient in terms of enabling the Planning Director to make a determination, then like in the other situations like the zone change process or the other application that is before the Board this morning, that was heard before the Board this morning, you know, there should be like an iterative process between the applicant and the Director, excuse me, you know, in terms of saying like you should address that, you shouldn't address that. But none of that dialogue did take place. And I think that if, my understanding is that because the rules do not specifically state that you need to provide the same level of information on a zone change application as you would like a nonsignificant zone change, then I think that the process is a little bit different. That notwithstanding, what I'd like to, you know, and the direct answer to your question relating to the affordable housing project -. This map here, which is Exhibit F, is a map that was presented to the Land Use Commission at its hearing in 2005. And this is the same map, and that's why it's labeled as Exhibit 7. But for this purpose it's Exhibit F. It shows the direction of like where

the affordable housing is; and that's in this general area. What the nonsignificant zone change was attempting to do was to essentially accommodate this affordable housing project. And generally, you know, and I regret not having a reduced version for all of the Board Members, but you can generally see where the drainage pattern is; and it kind of like skirts the property. And at the northern edge of the property you'll see a band of green. That kind of reflects where, the drainageway. So the short answer to your question is that, yes, there are some drainage issues associated with the property. But can it be accommodated? The answer is yes. And it was taken into account when this land use map was presented to the Land Use Commission.

MAEHARA: Thank you. No further questions.

GIMPEL: Ms. Self, you had some questions?

SELF: I would like to have just a couple of follow-up questions to Mr. Yuen to clarify some of the things that were stated.

GIMPEL: Go ahead.

SELF: And, okay, so Mr. Yuen you just heard Mr. Fuke just describe the affordable housing again. Could you please describe to the Board your understanding of the affordable housing?

YUEN: They went to the LUC and said they were ready to go, if they had this change from 60 percent to 20 percent they were ready to issue a construction contract to start developing this affordable housing. So they have this, I don't remember the year but I thought it was 2006, not 2005. Mr. Fuke says it's 2005 that they presented this revised site plan to the LUC, which doesn't match their zoning. Then they come to the Planning Department for a nonsignificant zone change in March 2008 and say they've got to get this thing going by summer to break down to do this project. I don't get it. That's the first thing on the affordable housing side. And if they're going to go to the LUC and say they're basically ready to do this, to do it according to that site plan, they have to change the zoning.

SELF: Okay. And just for clarification are the implications the same that here the Director must grant this nonsignificant zoning change?

YUEN: Although Mr. Fuke says that the Director has discretion, he says that if it's not something that's specifically stated in the rules he thinks it's a stretch to deny an application for -. Let's take the flooding. It doesn't say in the rules that if you are trying to move the zoning from being say an Open zone that's in a flood plain and now you're trying to swap it so now you have a Residential zone in the flood plain, I mean it doesn't say that in the rules that you can't, in Rule 8, that you shouldn't do that as a Director. But that's why the Director has discretion, is to use, there are a host of factors that go into any kind of a land use decision. And so you use your discretion and your judgment not to do something dumb like put a Multi-Family Residential zoning across the flood zone on the property, the flood plain on this property. So what they are doing in their site plan is taking an area that was zoned for Agriculture 5-acres, which means Agricultural zoning minimum lot size 5 acres, and changing that to this Multi-Family Residential zone right where the drainageway crosses the corner of the property.

SELF: Okay. That's all the questions. But we would also, we failed to ask the Chair to admit the Zoning Map that Mr. Yuen referred to during his testimony. This is a zoning map attached to Ordinance No. 96-153. And so we would ask that that also be admitted into the record.

GIMPEL: Any objections?

MAEHARA: No objection.

GIMPEL: All right. We'll admit that. What's the next letter for the Planning Director's -?

SELF: It would be PD-B.

GIMPEL: PD-B, okay. We'll call that PD-B. Thank you. So admitted. All right, before we proceed with final argument, I'd like to ask if any Members of the Board have any questions of either of the parties?

TAVARES: Yes, I have one.

GIMPEL: Ms. Tavares, go ahead.

TAVARES: Okay. For the applicant, I want to get more clarification on how you determined that this whole change is a nonsignificant change, rather than being significant at 22 acres?

FUKE: Well, first of all, what we had done was looked at the criteria, you know, for the approval or denial, under what circumstance a project could be considered as nonsignificant. So having said that, the other reasons that, you know, were articulated in the subsequent correspondence, you know, by the applicant relating to this application was that, first of all, nonsignificant in the sense that all of the surrounding property owners that would have been affected by this project are owned by the applicant. And, hence, normally you would have like notices to surrounding property owners that exceed like, you know, 300 feet from the property line. In this situation here none was sent because the owners own all of the property. So in terms of like any public or neighboring type of concern that would be affected, you know, by the public, there would not have been any type of a public impact.

Secondly is that from the project itself, as our map had kind of like indicated, what it amounted to was a shifting of one area to another area. It's not like shifting, and they're all like within the project. It's not like what the Director had mentioned about the other example that he had cited where you move, you know, a property from, you know, a zoning designation 2 ½ miles from, you know, its current location. In this situation here it's like about, I think about a half a mile away from each other, but they're all within the specific project, and there is no development. So as far as the expectations on adjoining property owners, there are none.

TAVARES: So from the beginning, if we go all the way back to the beginning, what triggered you needing to go to the State for the original change of zoning?

FUKE: The properties were initially designated in the Agricultural District. And so under the system of State law to do any type of "Urban" type of uses, as what they're trying to do over here, you need to have the properties reclassified by the State Land Use Commission from the Agricultural into the Urban District, which was what occurred back in 1999. And once it gets -.

TAVARES: The whole parcel?

FUKE: Pardon?

TAVARES: The whole parcel was changed into Urban?

FUKE: It's 1,020 acres of the area, but the total project is 3,000 acres. But 1,020 acres were reclassified into the Urban District. Subsequent to that then when it was reclassified it was reclassified with conditions. Likewise when the County approved the rezoning of the property that created, you now, all that small little lines, there were also conditions of approval. The applicant had to go back to the Land Use Commission and requested some modification on the affordable housing condition. Because the State, at that time when the project was initially approved by the Land Use Commission there was a requirement that the applicant provide a 60 percent affordable housing, had a 60 percent affordable housing obligation. And I think it was pointed out by counsel on the cross-examination of the Director this was really like the policy or the position of the Land Use Commission through Governor Waihee's administration. Since that time, however, when the new, when there was a different governor and things were different, then the Land Use Commission was deferring all of the affordable housing requirement to the respective counties. And so what the applicant did back in the 2005 was to go back to the Land Use Commission and say, you know, we can't do a 60 percent, everybody else right now based upon prevailing policy is going only on whatever is required on the respective counties. And so they went back to the Land Use Commission and requested a modification of that condition to go back to whatever the County was requiring. The Land Use Commission said fine, you know, you can do 20 percent because that's what the prevailing County affordable housing requirement is, but the only exception is that you have to construct 385 by the year 2010.

Normal situation would be you just comply with the County affordable housing requirement and your affordable housing obligation gets staged in as your project gets developed. The 385 was an obligation on the entire project. So that became a very onerous task on the part of the developer, before they can even do everything else, to do all of its affordable housing obligation up front. So it has been a very tough road on the part of the applicant to meet this requirement. Quite possibly they will not be able to meet this requirement by 2010 because it's, you know, it's only two years from now, given also the credit crises that we have right now.

So over the last four months we have been in discussions with the County administration to see whether we could participate in the construction of the Kaloko Transitional housing project. We've had a number of discussions with the administration. I think that, you know, there may or may not be a settlement or an understanding, an agreement to do it. And if there is an agreement then our plan is to, at least the applicant's plan, is to go to the Land Use Commission and request for a modification of that obligation by doing a series of things. One would be to do the Kaloko Transitional Housing Project, you know, within a fixed period of time; and the other was to do the 100 work force housing in conjunction with the ILWU.

TAVARES: Okay. Thank you.

GIMPEL: Any other questions? I have just a couple of questions for clarification purposes. Mr. Yuen, your May 22, 2008 letter denying the application for nonsignificant zone change poses a couple of issues. One you state in your first sentence that, "Your request for a nonsignificant zone change dated May 13, 2008 is hereby denied." Do you maintain that the request was filed on May 13th or March 25th?

YUEN: Well, to be fair to the applicant, they originally submitted an application on March 25th. I believe the chronology of this was that staff asked for a clarification of the maps and that further maps were submitted by May 13th. At the same time although there's normally a 30-day processing time for the nonsignificant zone change, they agreed to an extension of that time for that decision to I believe May 30th. So this letter refers to the May 13th request. We are not claiming that the ordinance, the change in ordinance passed, was effective April 21st. We are not claiming that they were too late and that they come under the April 21st ordinance. They did submit the original application on March 25th.

GIMPEL: That wasn't clear from your letter.

YUEN: Yes, I understand.

GIMPEL: Because your letter in the second paragraph, the letter dated May 22nd, then refers to that Ordinance which took effect on April 21, 2008 saying that it expresses generally a policy that only small zoning changes, much smaller than requested here, should be made by administrative action. So my concern is, is that your letter of May 22nd at least impliedly indicates that you're going to apply the ordinance that passed effective April 21st. Because you said in the first sentence, as I said, that their application was dated May 13th. Now you are affirming that you are not applying that ordinance that took effect on April 21st, is that correct?

YUEN: We're not applying it in the terms of it being the controlling ordinance. I do refer to it -. And I understand what you're saying about it, it may be leaving the impression that the ordinance itself says you can't do this. But the ordinance expresses a policy which had been enacted, which is by that point it had been enacted by the Council as a policy and it had actually gone through the Planning Commission as a policy. So as a rationale for denying the nonsignificant zone change within the discretion of the Director, that's why it is being mentioned.

GIMPEL: So then I take it that your discretion that you exercised in denying this application took into account the policy that had been adopted by the Council after the application was filed?

YUEN: The policy, as far as the policy being approved by the Council by final vote, that is correct. As far as my advocacy of that as a policy, that went back some time before, actually to the introduction of the ordinance, which was well before this application was received. And, you know, I drafted an ordinance to submit to the Council that said you shouldn't do nonsignificant zone changes beyond rather small acreages; and I have that, you know, I

submitted it to the Commission, I submitted it to the County Council. Then I get a nonsignificant zone change that's outside the bounds of the, in terms of acreage, outside the bounds of those kinds of limits for which I have the discretion to approve or deny. And so I'm going to follow this same policy that you shouldn't do it.

GIMPEL: Hypothetical question.

YUEN: Yes.

GIMPEL: Had the Council not passed the ordinance what would you have done?

YUEN: I would have still denied this.

GIMPEL: Based upon a policy that had not been approved by the Council. Thank you. Okay. It was a hypothetical. It really is in that way. So -.

YUEN: There are some problems with this application.

GIMPEL: I understand.

YUEN: There are some problems with this application besides -.

GIMPEL: Yes.

YUEN: Besides the overall, besides the question of how far on an administrative level you should be able to change zoning that's been enacted through a public process that goes through the County Council. Beyond that philosophical question, there are some problems with this application.

GIMPEL: And you've pointed those out. Thank you. All right. I think we're ready for closing argument now. Mr. Maehara, go ahead.

MAEHARA: All right, thank you. I'm not quite sure now where to begin. You raise some interesting issues there. Well, let's just start at the beginning. Planning Director says there are some issues other than what's before, basically, this Board, what was contained in the nonsignificant zoning change application. But those aren't issues that this Board should be dealing with. Those aren't issues that the Board has any factual information on. You know, they're not reflected in the record anywhere, they're not reflected in the denial letter. You know, again, paraphrasing Section 25-2-45 which was in effect at the time this application was filed, a nonsignificant zoning change must comply with the designations for the properties set forth in the General Plan and any development plan adopted by ordinance and must not result in a net increase in density allowed in the zoning districts containing the affected areas. This project meets all those three criterion. No. 1, it's designated Urban Expansion under the General Plan; it meets the Land Use Pattern Allocation Guide Map and the existing zoning maps for this area that provide for the development of golf course, single and multi-family and commercial uses. And, most importantly, it does not, the request for the nonsignificant zoning change does not result in any net increase. In fact, as we showed in our memorandum it provides for a net decrease in density for the zoning areas. And so for those reasons we felt that we meet the requirements of

the section, notwithstanding these other issues that the Director is throwing up in the air without specifically identifying other than to say the drainage. That said, I acknowledge that the Director does in fact have a lot of discretion here.

But one thing that just came up in his just recent testimony is of concern. The Deputy Corporation Counsel early on acknowledged that the proceedings here are being dealt with pursuant to the Statute that existed at the time the application was filed. But all of a sudden we find out now that although they are applying the law that was in effect and not trying to retroactively apply the new law that the Council passed subsequent to our application, the Planning Director is retroactively applying this new supposed public policy that he interprets that the County Council has adopted subsequent to our filing of our application; and I think that is improper. It's a retroactive application of a policy that was interpreted by the Director based upon County Council action.

Going back to one of the first things that we stated, this application is about affordable housing. Condition 1 of our Land Use Commission's Decision and Order required that we provide these 385 units on site on or before, now we needed certificates of occupancy on or before November 17, 2010. That's the deadline we're looking at. The Planning Director correctly points out that he has the discretion to make this administrative zoning change or to not make it. However, in exercising his discretion he cannot act in an arbitrary or capricious manner. We submit that in this matter, in this particular docket, he has acted in such an arbitrary or capricious manner. In his denial letter he cites two reasons for this denial.

First he states that the area in question that is the subject of the application is a "large land area," apparently too large an area for him to exercise his discretion to administratively rezone 22.5 acres from the Agricultural District into the Multi-Family District and an exact 22.5 acres from the Multi-Family District into the Agricultural District, no net increase or decrease in either the Agricultural or the Multi-Family District. Secondly he states that the applicant can simply apply with the County Council for a zoning change or project district zone in order to accomplish the same result as the nonsignificant zoning change application would provide. The response is, first reason, that area is too large. We have cited numerous instances in my memorandum that was submitted along with the appeal where the Director had administratively rezoned a number of other projects with acreages far in excess of what we're dealing with here, basically 45 acres total. As pointed out in our Exhibit C that we submitted today, just seven months prior to denying this application this same Planning Director in exercising his discretion approved another nonsignificant zoning change application in that docket NZC 07-08, the Stanford Carr docket, just across the highway from the project area within the Mauna Lani Resort that adjusted the zoning boundaries to provide for approximately 46 acres of Multi-Family zoned lands and approximately 55 acres of Open zoned lands, a total of 101 acres, or twice the size of the request contained in our nonsignificant zoning change application. Again, seven months later he states that this request comprising a total of 45 acres, less than half of that other application, is being denied as too large. This is arbitrary and capricious.

The second reason stated in the Director's denial letter is that the applicant can simply achieve the same result as the nonsignificant zoning change application by submitting an application for a change in zoning or for project district zoning with the County Council. In fact, the applicant had attempted just what the Director was suggesting. Again, confronted with the November 2010 housing deadline the applicant filed an application for project district zoning; and this was

done in October of 2007, roughly three years prior to the delivery date for the affordable housing. The main reason for filing the application for the project district was to provide more flexibility in the planning and development of the project and also to provide a large enough Multi-Family area within which it could develop the affordable housing. The project district application as I stated was filed in October 2007 with the Planning Department. However, this Planning Director at that time determined that the application could not be reviewed and processed by the Department until an environmental impact statement for the entire 3000-acre development was prepared, submitted, reviewed and accepted by the Planning Department. With this requirement for the preparation and acceptance of a full EIS the timetable for meeting the Land Use Commission affordable housing condition was very tight if not impossible to meet. It was for this reason that the applicant filed this nonsignificant zoning change application. Accordingly there was good reason for the applicant to file this application in order to attempt to meet the deadline for the affordable housing requirement. And for the Planning Director to now deny the nonsignificant zoning change application stating that the applicant can file a project district application knowing full well that this applicant attempted to file just such an application is arbitrary and is capricious. For those reasons we're asking that that decision be overruled. Thank you.

GIMPEL: Thank you. Ms. Self.

SELF: Yes. Okay, I want to go through, let me get back to the real issue in this case. Section 25-2-45 of the Zoning Code, even prior to the amendment that took place by Council on April 21, 2008 stated that the Director may administratively grant any nonsignificant zoning change. It did not say "shall." Section 1-4(a)(16) of the Hawaii County Code defines "may" as permissive and discretionary. "Shall," on the other hand, in the Code is defined as mandatory. Now by including the word "may" rather than "shall" this means that the County Council left it up to the Planning Director, left it up to the Planning Director's discretion to grant or not grant. They did not require the Director to grant a nonsignificant zoning change. If you take what the appellant is saying, this would mean that the Director would not have any discretion. So, in other words, if the Council wanted to require the Planning Director to grant all nonsignificant zoning changes that meet the criteria that are listed under 25-2-45, they wouldn't have said the Director "may" administratively grant. They would have said "shall" administratively grant. This is also a decision by the Hawaii Supreme Court case in the Leslie case, which our Director is very familiar with; and that's when the judge even said this is a mandatory word "shall" and so you "shall" have all these things in your tentative approval. Okay? So now getting back to his discretion, the Hawaii Supreme Court in the case of Paul's Electric Service versus Befitel, the cite is 104 Haw.412 in the year 2004, held that an agency's discretionary determinations are entitled to deference, and an appellant has a high burden to surmount that deference. Now more recently than the Paul's Electric case, in 2007 the Hawaii Supreme Court held in Colony Surf versus Director of the Department of Planning and Permitting, the cite for that is 116 Haw.510, in that decision the Court held that while an administrative agency's interpretation of the ordinance that is responsible for implementing is normally accorded great weight, no deference is required when the agency's interpretation conflicts with or contradicts the manifest purpose of the ordinance it seeks to implement. So what is the purpose of 25-2-44? Obviously when you read the language of this section of the Code the whole purpose of passing this was to limit how much discretion the Director has by making sure that, okay, it's going to allow him to grant some nonsignificant zoning changes but only, only, if these two criteria are met. Otherwise, he cannot grant one. But this is, just because

it meets this criteria doesn't mean that he is forced to make a decision that he's not comfortable with. This Appellant got his rezoning from the Council based on a plan that did not include what they're trying to do with this nonsignificant zoning change.

And they're talking about their time limit, well, the Director's decision came out on May 22nd of this year. They could have already had this in front of the Council. Council could have already ruled on whether they get a rezoning to include this or not. So it's not that they are in this tight spot where they couldn't have done anything without a nonsignificant zoning change. They would have already gone to the Council, gotten it on the Council agenda, and got a decision from the Council. Okay? So now applying the Court's decisions from the Paul's Electric case and the Colony Surf to this present case, the County Council left it up to the Planning Director's discretion as to whether to grant a nonsignificant zoning change or not, for public policy reasons that you heard the Director testify to. The Director determined that this particular zoning change should be determined by the Council rather than himself. This project has, as you've heard the Director say, has problems. There has been a lot of public testimony about this even when it was up for rezoning at the County Council. If this Director was to grant this nonsignificant zoning change he would be making a decision that does not even get to be reviewed by the County Council, nor would there be public testimony. So he's going to be making a decision that's going to affect the community where there's some flooding and nobody gets to weigh in on this.

Interpretation by the Director does not conflict or contradict the manifest purpose of Section 25-2-45 which is to allow the Director limited discretion to grant nonsignificant zoning changes but only if it meets the criteria provided in that particular section. The appellant is not without recourse in this situation because he can apply for a change of zone pursuant to Section 25-2-44 which will be determined by the County Council. And in turn, that will allow the public to come out and testify, the people in this community that are going to be affected by this. In going back to one of the things that the appellant's counsel mentioned in his argument, the Director explained his reasons for the prior nonsignificant zoning changes. You heard him, he went through every single one of them; and all of those were without the problems presented in this nonsignificant zoning change request. This seems to be a situation where I'm sure that the County Council would appreciate this Director not making a decision and allowing them to weigh in on this, especially given the problems that are associated with this project. So a court would look at this, based on the cases that I've just cited, and look -. The Planning Director is the one who has the expertise in this area, he knows the project. The Court is going to look at this and say, well, unless it contradicts the purpose of the ordinance that he has to implement. Where is the arbitrariness? Where? It's not there. He has done nothing that contradicts this particular provision in the Code. So I would ask that the Board in their deliberation please consider what I've just cited to you, the Hawaii case law I've just cited to you, and look closely at the language in this section of the Code and determine that the Planning Director made a wise decision in not exercising his discretion to grant this, and rather to allow the public to weigh in on this. Thank you.

GIMPEL: Thank you. Does any Member of the Board have any questions for counsel at this point, or clarification? All right, I think it's time for a decision. May I have a motion regarding this application, or the petitioner's petition to appeal the denial of the nonsignificant zone change. Can I have a motion, please, somebody? We cannot proceed without a motion one way or the other.

HENDRICKS: Motion to uphold the Director's decision.

GIMPEL: Into the microphone, please.

HENDRICKS: Motion to uphold the Director's decision.

TAVARES: Second.

GIMPEL: It has been moved and seconded. Discussion? Pete, Mr. Hendricks, you want to support your motion?

HENDRICKS: Based on what we've heard today, I feel that the Director's decision in question is not arbitrary and capricious but was a discretionary decision within his purview under the Code.

GIMPEL: Anybody else?

MAEDO: I have a question. You know, I'm new on this Board, I'm not familiar with the history of this project. At its inception were landowners, well, you said landowner is this particular, but was the community involved in providing input at all, I mean, in light of what we saw before? Can any of you answer that? Maybe you, Sid.

FUKE: Mr. Chairman, am I at liberty?

GIMPEL: You can respond, go ahead.

FUKE: Yes, there was ample community input, you know, to the point where there was an agreement between the Waikoloa Community Association and the Puako Community Association relating to the project. The agreements had nothing to do about spatial locations of, you know, where affordable housing, or multiple family, or whatever. They dealt with different issues.

In the situation with the Puako Community Association it had to do with the type of wastewater system as it might relate to potential groundwater and coastal water impacts. But they had nothing to do with the land use issues.

Relative to the Waikoloa Community Association, if memory serves me correct it had to do with issues relating to construction of a mauka/makai connector road. And, again, nothing to do with specific spatial locations of where multiple family or the golf course should be situated.

MAEDO: May I ask if this was when it was 60 percent affordable housing? Did they have input now that it's 20 percent?

FUKE: The community weighed in on the rezoning application which had a generic affordable housing condition. At the Land Use Commission level where it was changed from 60 percent to 20 percent, the Land Use Commission had a hearing; and there were people that testified on that application, you know, people from, I believe, Waikoloa, Puako, some from Mauna Lani, the ILWU, and others did testify on it. So there was community input relative to

that. And, again, the testimonies, if memory serves me correctly, had nothing to do with spatial locations of where the affordable housing or the golf course were going to be as what we're proposing over here. It was just dealt with the concept of affordable housing and there was no specific earmark necessarily by the community or as a condition that it had to be a particular location within the 1,020 acres. It was a stipulation that it be within the 1,020 acres. But where on the property was left to the discretion of the existing ordinances and the developer.

GIMPEL: Any other questions? All right I have just a couple of -. I'm very torn on this one. As I understand it, the issue is whether the discretion that was exercised was arbitrary and capricious. Clearly the application for nonsignificant zoning change met the criteria that allows the Director to consider it. In other words, it meets the threshold, little or no change to the overall zoning configurations, and so forth and so on.

Then the question then becomes obviously whether the decision that he made in denying the application was arbitrary and capricious. So we look at on what it was based, and that was based on a couple of things that I can deduce from the testimony: One, the number of acres that were changed, 22 acres as I understand it were changed, the zoning changed. Two, the flooding concerns. And three the public policy that had been stated by the counsel subsequent to the application that he determined, he indicated that his discretion should be to deny it because it involved such a large area.

Now I note in talking about the area covered that the Exhibits A, B and C there were talked about. Although the total area was relatively large, the zoning changes affected less than an acre on each one, as I recall. It says the existing zoning has a column, for example, in Exhibit A, and the net change in acres was practically nothing, practically nothing. There were a few minor shifts in the acres, zoning for various zoning classifications but nothing coming close to the 22-acre change that we're talking about here. Nevertheless, of course, 22 acres out of over 400 is relatively a small percentage so they still did meet the threshold. But that was one difference. So I'm very torn on this.

And I am concerned that in the denial letter that none of these other concerns other than the public policy one were enunciated. There were no flooding concerns considered; and even the public policy one was referred to by reference to the recently enacted ordinance that changed the threshold by which he could consider it. So that still leaves me torn. And I'm going to consider my vote as we go forward. Are there any other comments or concerns for any of the Board? All right, Alice, I think we can call the roll.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Ms. Maedo?

MAEDO: No.

KAWAHA: Ms. Hart?

HART: Aye.

KAWAHA: Chair Gimpel?

GIMPEL: Aye.

KAWAHA: Chair, there are four ayes and one no. Motion is carried.

GIMPEL: Thank you; and I thank all the parties. Your arguments were excellent and I think it was a very, very close call on this one. Thank you.

MAEHARA: Thank you very much for your time.

SELF: Thank you.

GIMPEL: Oh, will you prepare the order.

SELF: Yes.

GIMPEL: Thank you. All right, Ms. Self will prepare the order.

The discussion ended at 2:25 p.m.

Respectfully submitted,

Sharon M. Nomura, Secretary