

LEEWARD PLANNING COMMISSION  
COUNTY OF HAWAI'I

HEARING TRANSCRIPT  
AUGUST 28, 2009

A regularly advertised hearing on the applications of **KOHALA LLC (REZ ORD. 97 102/SMA 379)** was called to order at 10:23 a.m. in the King Kamehameha's Kona Beach Hotel, Ballroom I, 75-5660 Palani Road, Kailua-Kona, Hawai'i with Chairman Rodney Watanabe presiding.

PRESENT: Rodney Watanabe  
Brandi Beaudet  
Lani Bowman  
Frederic Housel  
Wayne Iokepa

ABSENT & EXCUSED: Geraldine Giffin

Brandon Gonzalez, Deputy Corporation Counsel  
BJ Leithead Todd, Planning Director  
Norman Hayashi, Planning Program Manager  
Phyllis Fujimoto, Staff Planner  
Jeff Darrow, Staff Planner  
Maija Cottle, Staff Planner

And approximately ten people from the public in attendance

**APPLICANT: KOHALA LLC (REZ ORD. 97 102/SMA 379)**

Report on the status of the Kohala LLC project as requested by the Planning Commission at its November 24, 2008 meeting.

WATANABE: We are now on some unfinished business. The applicant is Kohala LLC. This is a change of zone request, no, well, I guess it was a request for an extension, yeah, 97 102, as well as SMA 379. So, Mr. Lim? Mr. Lim, typically we have the staff give us a follow-up. Are we going to go through, are you going to go through this? Mr. Darrow?

DARROW: We can just give a brief presentation just showing the location, and then the applicant will be giving a presentation.

WATANABE: Okay, thank you.

DARROW: Is that okay?

WATANABE: Yeah, so, let's -. Mr. Darrow.

DARROW: Thank you, Mr. Chairman. The applicant is Kohala LLC, and they are here to report on the status of the project.

Just for reference, the location of this particular area is within the North Kohala District. More specifically, we are looking along the Māhukona coast. The actual project location is identified with a dot. It is directly across the entrance to the Kohala Ranch Estates. Just to the south would be Kawaihae, and this particular area is located just to the north of that particular location.

This is an aerial photo again kind of identifying the project area. And then again we have the entrance to the Kohala Ranch Estates. This is the General Plan for the particular area. Again, we are identifying the project location with a dot. And you'll notice that the different colors identify the General Plan designation. For this particular property we are looking at yellow as Low-Density Urban and white as Extensive Agriculture, and those are both located on the property. Along the coastline of the entire coast we have a portion of Open General Plan designation. And with that, if we could pass it on to the applicant.

WATANABE: Thank you. Mr. Lim and Mr. Mooers, may I swear you in, please? Do you swear or affirm to tell the truth now before the Planning Commission?

LIM: I do.

MOOERS: I do.

WATANABE: And, well, both of you know the drill, so name and address from each of you cause I guess you are going to shift back and forth.

LIM: That's correct. Steven Lim from Carlsmith at P. O. Box 121, Hilo 96721.

MOOERS: Gregory Mooers, P. O. Box 1101, Kamuela, Hawai'i 96743.

WATANABE: Okay, thank you. Are you going to begin, Mr. Lim, with the basic chronology?

LIM: Yes, I'll refresh the people who were involved. I see there're three of the Planning Commission members who sat through many hours of long testimony, and we have two new ones. So welcome to the Kohala LLC continuing saga.

We left off, I think, last with the Planning Commission in November of 2008. And all of this started in approximately mid-2007 with the Planning Director's attempt to downzone the property. What we had are RS-15 zoning, potential total density of about 110 lots. They received an SMA Permit, No. 379, for 50 single family lots in about 1997, and proceeded along with development efforts. One of the prior owners passed away, so they transferred it over afterwards to Kohala LLC who then proceeded to develop its plans.

And as the members who sat on the Commission previously know, we went through 2007 and 2008 in numerous procedural battles in an effort to try to maintain our entitlements. We attempted to negotiate with the Planning Director at that time, but we were not successful. And in the end what happened was the rezoning that was proposed by the Director went forward to the County Council for 5-acre zoning. When it was up at the County Council, Pete Hoffmann changed it to 15-acre zoning. And at that point, I think, the Mayor and the Planning Director felt

that that was going to be too much of a downzoning that would subject them to liability. They knew that we had already retained mainland counsel and Hawai'i counsel for the takings litigation both at the Hawai'i Supreme Court level and the U.S. Supreme Court level. And so I think that they felt that we were ready to go and they didn't feel comfortable that the 15-acre zoning, downzoning was going to be passing constitutional muster.

So what we did was, since the Planning Commission meeting in November of last year, we've been in planning efforts. We work with Greg Mooers who can give you a little bit of a report on where we are today. And I think what you'll see is that what we are thinking about proposing – and I want to stress this is still very early on in the game – what we are thinking of proposing is going to be similar to what the Planning Director was proposing. However, we feel that the 3-acre, is what we are going to propose, RA 3-acre zoning is going to be more in keeping with the neighborhood. As you see in the Kohala Ranch, is a project up there, the light-blue is 3-acre zoning. The next door to us is 5-acre zoning. So it's all consistent with the neighborhood.

And what we are doing today is a status report without asking for any vote by the Planning Commission. But we would like comments from you, so we can take that back into our planning effort. We wanted to come and give you something to look at and to chew on because I think it's important for my client to have some feedback from you and to then decide whether we either come back in on time extension on the existing SMA Permit or we file a brand new change of zone and an SMA Permit. So we're going to be discussing that issue with the Planning Director. We'd obviously like to preserve the entitlements that we have until there is a final action on the eventual approvals for the project, if we were so lucky. So I'll go ahead and turn that over to Greg Mooers to describe. His efforts have been over the course of the last several months.

MOOERS: Thank you, Steve. Steve approached myself about, or asked me if I take a look at the project maybe from a fresh perspective. I worked with Belt Collins Hawaii to provide planning and engineering backup to reevaluate the project site. Really two areas I looked at initially – one with the institutional consideration which is the General Plan, the zoning, the existing permitting, SMA, of not only this property but the surrounding property, and then the second issue was looking at infrastructural issues, the actual topography of the property, setbacks from the ocean, setbacks from the roadway, gulches, archaeological sites, and try to come up with what we felt was the best use of the property without disturbing the existing landforms. We went through several iterations, have been back and forth over the site many times, and believe that where we are headed with this, the site plan that is shown there – do you have the individual site plans or -? Just the big site plan. So what we tried to do is, the first thing we did is we drew a line at 150 feet away from the roadway to provide a setback from the roadway – if you are familiar with the topography here and also if you look at the aerial photo, the property does drop away from the roadway quite a bit – so that, like moving 150 feet out, it would eliminate any visual impact of someone driving on Akoni Pule Highway and looking to the distance or horizon and to Kohala coast from seeing any structures at all; the only structure you would see is if you are at the edge of the road and you look down on the property. There are no coastline views from the roadway; in other words you do not see the surf line anywhere along this property because of the topography and because of the existing vegetation. The second thing we did is we drew up a 150-foot setback along the ocean to move all of structures back away so there will be no impact visually looking from the ocean up toward the highway, or try to minimize the impact, I should say. The other thing we did is we placed and sited all of the archaeological features

which had been identified by Paul Rosendahl in his inventory survey; so we have various sites in this area and other areas both burials and habitation sites that had been identified along buffers, and we stayed away from that. Then we looked at the gulches. There is one, it's rather a pronounced gulch here, which you'll notice there is no continuation of the roadway from the northern part of the property to the southern part of the property; Belt Collins' estimates are about \$2,250,000 to \$2,500,000 to bridge that ravine. Right now it has two 8-foot culverts under Akoni Pule Highway, so it's a very well-defined, established gulch, and to try to build an internal bridge over it would be prohibited; it wouldn't make any sense at all to try to bridge here. So we are showing of the two access points, permitted access points we have here, which one lines up directly opposite to the Kohala Ranch intersection and then moving, southern access to the southern side of this gulch to access these four proposed lots here.

This particular configuration provides a situation where there is a minimal amount of disruption to the existing landforms, so that we are keeping grading cost down, keeping setbacks up. We are trying to avoid all the archaeological features so that we don't have to go through data recovery where that would be expensive, you know, where we have to remove the sites; if we can preserve the sites in place, and that's what we would like to do. And certainly moving away from the 50 lots that had been proposed by the current zoning, that gives us the opportunity to avoid a lot of those constrains. So that kind of leads you to where we are today and the thought process as we have as far as how this site plan was developed. If you have any questions, I'm certainly willing to answer.

WATANABE: Do we have any questions of Mr. Mooers or -? Yes, Mr. House.

HOUSEL: How many lots are you now considering?

MOOERS: This would, this represents twelve lots.

HOUSEL: Twelve lots. And this is 37 acres, is that correct?

MOOERS: That's correct.

HOUSEL: Okay. And what type of zoning are you asking for?

MOOERS: That would, well, we would be asking for RA-3a, which is Residential and Agricultural 3-acre zoning. I think initially, the current zoning allows for up to 50 homes to be built on the property, and the previous Planning Director had asked for seven; so we've gone from 50 to twelve. It's slightly more than what Mr. Yuen had asked for, but we believe it's a reasonable use given the surrounding zoning. And you may recall a month and a half ago I was before you with a FA-3a zoning just above the highway that you gave a favorable recommendation to. So we believe that's consistent with the much of the surrounding zoning.

HOUSEL: In your current proposal, the properties that, the lots that seem to be on the north end of the property have fairly long driveways, is that correct?

MOOERS: One does, yes.

HOUSEL: And those would be paved?

MOOERS: We haven't really gotten that level yet, but I assume it would be, there would be some sort of all-weather surface whether it's chip seal or gravel or concrete stripes, you know, as a driveway; it would be something to try to minimize runoff obviously.

HOUSEL: Right, right, that's my concern. It looks like there is a, from the aerial view there is a substantial slope on the land, right?

MOOERS: There is, and that would be a consideration. I know in the neighborhood Wailea there are a couple of driveways where they actually have a little diversion ditches and catchment systems and drywells along the driveway – they are quite small, they are, you know, 2-foot by 2-foot, but for that purpose. But clearly that issue would have to be addressed at the time of plan approval or subdivision.

HOUSEL: Right. Okay. That's all I have. Thank you.

WATANABE: Thank you.

LEITHEAD TODD: Mr. Mooers, I guess when I'm looking at this, and something that we hadn't really discussed when there was an earlier presentation, would be where would you be looking at mauka-makai access and lateral access for the public?

MOOERS: Okay, currently we are looking at, the requirement is four parking stalls in the current SMA, and we are looking at this northern access here with the access in across the road and then down directly to this park or the beach here – it's not really a beach but to the bay, that area. So that's where the proposed access is. There are a number of lateral access trails across here that would be left undisturbed.

LEITHEAD TODD: And one of the reasons I'm asking is we've had issues occur in other areas with, especially after the 2006 earthquake where we had to move trails further inland, and so in taking a look at the area I would want to make sure that there was enough of a buffer or an area between where the trails are and where the houses are sited, so that if there was a need to move the trails inland to make them safe and traversable, that there would be enough room where we wouldn't be in somebody's living room or end up mauka of somebody's house in order to move them. That would be one of the considerations we would be looking at when it gets to us.

MOOERS: Sure. Quite understand it. This coastline here fortunately is really shallow – this is actually into the water, you can walk into the water here – as opposed to further up the coast by Puakea Bay where we have that situation. I think we've talked about that where I work for the State in establishing a trail, a coastal trail there; the problem was that that was on the cliff and the cliff kept falling into the ocean and marching it back toward the houses. But this area here I don't think we're going to have that type of problem. There's certainly plenty of room; we've got 150 feet and this area is all relatively stable. The shoreline is rocky but it's not a cliff, so I think we are in pretty good shape here.

LEITHEAD TODD: Are there any known resources? Is this a good fishing area? Historically, is this an area where people have accessed to do fishing or other types of activities?

MOOERS: Yeah, that whole coastline area, I think, we would have to consider this is an important cultural resource and would be left open. And people, you know, do like to hike along here and surf, and across the ocean out here is used by kayakers and divers - no particular really good surf spots along here but it is a resource, cultural and recreational resource for the community.

LEITHEAD TODD: Okay. What's the width of the property?

MOOERS: About 600 feet.

LEITHEAD TODD: Okay, thank you.

MOOERS: So we are taking a 150-foot mauka and a 150-foot makai – so 25 percent and 25 percent. We'll just develop the strip in between.

LEITHEAD TODD: And the length of the property?

MOOERS: I'm guessing 1,600, 1,800 feet.

WATANABE: Ms. Bowman.

BOWMAN: I have a question. You talked about a lateral access that they can go in the water. Isn't the little peninsular sticking out fairly steep?

MOOERS: This one here?

BOWMAN: Yeah.

MOOERS: Yeah, there is a jeep trail that runs along above all of that too, so that provides lateral access in addition to what you can do along the ocean.

BOWMAN: Okay, thank you.

MOOERS: Yeah, there is no, there will be no attempt to deny pedestrian lateral access along this shoreline at all. And if you see, most of the homes are really set quite far back when you get out on the property, and actually, and I've stood out there with GPS system, actually stood on each one of these sites, and it is quite a way back from the ocean.

BOWMAN: Thank you.

WATANABE: Any further questions? Let's see. Now, it's not a formal polling, because today I wish I could give you something more formal. But I think maybe as background material, I think that the heart of all this – and you can correct me if I'm wrong, Mr. Lim – is a question of when rights were actually vested within the property because we were talking about

downsizing, and quite honestly I think all of us were in agreement that RS-15 was not what we wanted to see there. And the question was how far do you downsize before you, shall we say, take too much of vested rights. And I believe – you might want to share with some of the newer members what you’ve already vested – as I recall, you have a water commitment with, is that Kohala Ranch, already tied in – I think the number was \$600,000 or something to that effect – and that you had already done some engineering at least, which was one of the requirements of the previous, one of the conditions of the previous permit that required you to engineer utilities that go under the roadway. Is that correct?

LIM: That’s correct, yes. We have existing water agreements for the project that was sufficient to service the 50 lots; so we do have the water necessary to go forward. And all that discussion was primarily related to the expenditures that we had made for the project, and it was significant. So I feel that the proposal that we are looking at -. And we still have to go back to the owner to make sure that they’re agreeable to what we are doing. They gave us preliminary approval to come here and present this plan to you; so we wanted to get your comments. One of the things that we have to get, if we were to propose the plan that you see before you, is we have to get the State Department of Transportation to approve the relocation of that access way. So a lot of it is still up in the air. So that’s why I’m characterizing it as a status report rather than a presentation of a plan, you know, for formal comment.

WATANABE: Yeah, do you foresee any issues with the, what you call, the additional access to the highway?

MOOERS: It’s not an additional access; we have two, currently we have two access points. But the current vehicular access point -.

WATANABE: Oh, just so you have connectivity within.

MOOERS: Yeah, we would have to relocate it from north of that gulch to south of the gulch.

WATANABE: Okay.

MOOERS: But we do have two access points at this time.

WATANABE: Okay, very good. Discussion? Ms. Bowman?

BOWMAN: Well, I just want to thank you for updating us because I think it’s important and then we don’t have to deliberate when you come. And of course, personally, living in Kohala I would like to not see any development makai of the road; but as a Commissioner and, you know, adhering to our County plans, that I realize that you’ve taken a lot of steps into downsizing. So I appreciate this and we’ll see what happens.

WATANABE: Mr. Housel.

HOUSEL: I had a question for Mr. Darrow. I’m sorry I didn’t hear everything that you were talking about regarding the zoning on the adjacent land.

DARROW: The particular – oh, let me grab something from Steve real fast – as mentioned previously, the actual project location is identified in a darker yellow which is Single-Family Residential 15,000 square feet. The zoning to the north and the south, a light green is Agricultural 5-acre zoning. There is some darker green located in this particular area, which is Agricultural 1-acre, and then all the blue identified is Agricultural 3 acres and that's the majority of Kohala Ranch Estates. The brown, you might be familiar with that, I believe that's Kohala By The Sea – it's a Multiple-Family Residential zoning. So you have some multiple-family residential units located on the makai side.

And again, we do have the General Plan for the particular area. The yellow is identified as Low-Density Urban, and we also have some Rural as well as the majority of this particular area is identified as Extensive Agriculture. The area located just to the north is identified for Conservation and I believe that's owned by the State of Hawai'i – that particular property.

HOUSEL: Okay, thank you very much.

WATANABE: Any further comments?

HOUSEL: I guess I have a comment that I'm very concerned the way you are proposing twelve lots there. It is about three acres per lot. It seems to me that I'm uncomfortable with that much density. I would ask you to maybe consider a lower density. That would be my recommendation.

WATANABE: Mr. Iokepa?

IOKEPA: Yes, sir.

WATANABE: You have any feelings on this? They're, you know, they are trying to preserve their rights and yet they are trying to compromise, so -. Your comments would not be binding technically, but it will give them a good feel of what they need to do.

IOKEPA: Right, you know, because I live up in North Kohala as Lani does, first and foremost I don't like to see development. However, you know, prudence would be mandated here as far as how much development you put in there. So if you can reduce it, that would be in my opinion the thing to do for the coastline. That's it.

WATANABE: With regard to the three acres that they are proposing and, is it twelve lots? Twelve lots, yeah? Is that in your mind enough of a -.

IOKEPA: Reduction?

WATANABE: Reduction, inclusive of, I believe they are proposing a 150-foot setbacks on both sides, mauka and makai, of the property – so shoreline and roadway. Do you feel that's reasonable, or -?

IOKEPA: Yeah, considered, yeah -.

WATANABE: So then, at this stage – I realize you don't have the whole plan – but at this stage Agricultural 3-a is a sufficient reduction then in your mind? Because Mr. Housel indicated he would like to see something lesser than Ag 3-a, and actually the next step would be Ag-5, yeah, that was where the previous Commission really got stuck on; we couldn't, as you can see from the record, achieve any quorum.

LIM: I think our position was that under the existing zoning of RS-15, we could do something like 110 lots; the SMA Permit that we have still is 50 lots. So we felt that coming back with the Ag-3 was a reasonable compromise that both gave my client, you know, the ability to have a return on the project and to preserve the drainage issues, setback issues and all the other things. And I think that's what Mr. Mooers was hired to do is kind of go out there and find a suitable sites, home sites in the area, so that we could try to place these in a reasonable place because there is a lot of topography and some sloping areas. So we were able to do that. So we would of course ask for your support for the 3-acre zoning. The lots themselves are going to vary in size from below, if we stick with this plan, I think one's down the smallest of 1.9 acres and others are as high as 3.9, 3.8 acres. So we would probably be doing some form of Planned Unit Development to reduce the lot sizes, but overall the average density is about three acres.

IOKEPA: I have had a question. As far as that being zoned Agriculture, do you have any idea as to what kind of agricultural items there would be?

MOOERS: I think the zoning - It's in the State Urban District and right now zoned Residential. So the RA zoning is a Residential-Agricultural 3-acre, but the likelihood of growing agricultural products there is very low. That would just be the density. But currently it's not in the State Ag District and doesn't have Agricultural zoning, so we are not looking at the agricultural productivity of this property.

IOKEPA: Okay. I would concur with Mr. Housel that if you could reduce it, I mean, increase it to five acres, I think that would be better suited for the area.

WATANABE: Okay. Mr. Beaudet, any feelings on this?

BEAUDET: I think the measures taken with this development are adequate. I agree with the two-sided setback and open access for public use of the coastal area. And given the terrain or the topography of the shoreline, I think the 150-foot setback is key in order for transportation of people along the coastline. It's always nice to see less than more development, but personally, given the surrounding development, I think it fits with the other subdivisions in the area and I would agree that your current layout could be accommodated.

WATANABE: Okay, well, I guess I'll have my comments. I've been with this one from the beginning. And certainly in my mind we were seeking, or I was at least, seeking some type of compromise. The compromise that we were discussing during those failed negotiations was, you know, I believe something in the neighborhood of 25 units. To see this density further eroded to shall we say twelve units, I think, is a major hurdle. I certainly appreciate that. During our original discussion we were requesting, you know, we were requesting 100-foot setback, and the standard setback really is 40 feet, yeah? And you've come up with the 150 feet. And I think

I really appreciate that and the fact that you are going to keep the public access in there. And it seems like basically all the features that we were trying to achieve are achievable now especially with the lower density. And so you know, where you might have concerns with the rooftop shall we say piercing through the vistas from the highway, I think you have a plan now based on the topography that could pretty much eliminate, reduce significantly if not eliminate, that problem. With regard to the agricultural part, you know, it's my understanding that the area is fairly arid, so I'm not certain that even if one wanted to produce agriculture, if it would be feasible. I understand fully where you are coming from with regard to the, you know, lack of potential for agriculture, shall we say? And personally, as I had indicated in past discussions, I would prefer see us come to some type of agreement rather than see this proceed through the judicial system, and from that standpoint I think this is a very healthy compromise. Of course, I'm just one vote, yeah? I realize that, you know, the light green area is 5-acre, and I don't have any particular strong preference between 5-acre or 3-acre, mainly because in my mind agriculture is not particularly feasible at this location. And so I guess that's about the best that we can give you right now, unless there's any other -. Any further comments, Mr. Housel?

HOUSEL: Well, I had one more comment. I'm sure you heard the discussion we had on gated communities prior, right? I certainly would encourage you not to put a gate, you know, on these roads to block access, you know, to the public.

LIM: I think for shoreline properties like this in remote areas, I think the issues are different than what you do something in Keauhou. And so I can't tell you now that we won't be putting a gate in, but I do know that they are providing for public access, and the State parcel to the north is an additional way to get down. So I heard what your discussion was.

HOUSEL: Okay, thank you.

WATANABE: Okay. I'm sorry, I missed that part; I was kind of getting some legal advice here.

LIM: So I guess our final request is, this is a status report, is that there is still pending SMA Permit 379, and the last time the Commission said either file your new permit request or you come up and give us a status report; so we are here giving you the status report. So I guess my request would be that the, like you did before, that the Chairman determine that we are making sufficient progress and to defer our request, the applicant's time extension request for SMA Permit No. 379 to the earlier of a new change of zone and SMA filing or one year from the date of today's hearing to come back and report again.

WATANABE: So you are looking for another year. The earlier of one year or -?

LIM: That's correct. And we expect to be back much sooner than that.

WATANABE: Yeah, that's my concern here cause we are deferring quite a bit. And I'm going to have to ask Counsel for some advice here because I have, I guess, utilized the position to make the decision in the past. Is this still considered a contested case so -?

GONZALEZ: No.

WATANABE: No. So but then does that mean I have to ask for vote, or -?

GONZALEZ: To defer?

WATANABE: To defer. In the past the ruling was the Chair could defer it. And that's the part I'm not too clear about right now. How about, you want to think about that for a minute? Okay. Mr. Lim, let's give Counsel some time to consider this – whether we need to, you know, have actual votes from the membership or whether it's within my power to defer. And I would ask you to be seated because during the course of all this discussion we did have an individual from the public who would like to testify; so we're certainly obliged to have them testify.

LEITHEAD TODD: I just want to make one comment. Given the fact that we are in a meeting and this is a public record, if we are going to ask advice of legal counsel, it either has to be on the record or it has to be in executive session. But I don't think we can have private conversations where the counsel gives you legal advice on something that's not on the record or in executive session. That's just my thought about Sunshine.

WATANABE: Okay, thank you. I was expecting him to announce it; so I thought it would be in the open. I have one person, one individual, Debbie Hecht.

HECHT: My name is Debbie Hecht, and I'd like to comment on the Kohala -.

WATANABE: Okay, may I swear you in, ma'am?

HECHT: Pardon me?

WATANABE: May I swear you in?

HECHT: Sure.

WATANABE: Would you raise your right hand, please? Do you swear or affirm to tell the truth now before the Planning Commission?

HECHT: Yes.

WATANABE: Thank you. And just for the record, as you were going on, please, the full name and address, and then -.

HECHT: My name is -.

WATANABE: You may begin your testimony.

HECHT: Is Debbie Hecht. P. O. Box 4148, Kailua-Kona. One thing important to know about this Kohala property that you may not know is that sedimentation from grubbing and grading is killing the reef and affecting fishing in that area. There are two parcels totaling 273

acres slated for conservation and purchased by the 2% Funds along this coast. It is the, as I understand, the Kohala community would like the coast preserved completely. And this is a great buffer really to protect fishing in this area. The 2% moneys and matching funds are being sought by the County right now as we speak to acquire Kaiholena and also Paoo. So please consider that when you are considering any development on this coast. I would recommend a covenant condition and restriction along with your agreement to zone any of this property with building envelopes and grading limitations on these properties. Thank you.

WATANABE: Okay, wait. I have to take, we may have some questions from the Commissioners, so let me at least address that. Do we have any questions? None? Okay, thank you for your testimony. Sir, you are wanting to provide testimony, is that correct?

FRANKEL: Yes, please.

WATANABE: Okay. Well, may I swear you in then?

FRANKEL: Sure.

WATANABE: Do you swear or affirm to tell the truth now before the Planning Commission?

FRANKEL: Sure. Yes, I do.

WATANABE: Name and address, please.

FRANKEL: My name is David Frankel. My address is P. O. Box 1185, Volcano 96785. I'm an attorney here representing other clients on another matter you'll be talking about later on. But I also represent Maika'i Kamakani 'O Kohala, which was fairly involved in this matter along with Kāko'o in the rezoning effort. And I just want to point out a couple of things that we talked about earlier. It is my understanding that the SMA Permit for this project is no longer valid; that they do not currently have an SMA Permit. If that's the case, they have, there is no vested rights issue, there is no vested rights issue at all. The Ninth Circuit Court of Appeals upheld the, when the Honolulu City Council rezoned Queen's Beach area from Resort to Preservation, that rezoning was not a taking. The U.S. Supreme Court in the Lucas decision, Justice Scalia said the value of a property can produce 95 percent and it still would not constitute a taking, if the property owner's rights are not yet vested. I also want to point out the norm now for setbacks is really 1,000 feet, not 40 feet; if you look at the Kona CDP for example, 1,000-foot setback is what's talked about. So it's really discouraging to hear the Commissioners sort of jockeying for accepting a three-acre density project when the debate before was, well, between five acres and 15 acres. And now, and that's where the negotiation was. That was discussion between five and 15 acres. And now you are talking about whittling down to three – that's kind of discouraging. Thank you.

WATANABE: Well, I'm not going to debate that with you. I sat through all those, and at our discussions it was not between five and 15; the 15 came up at the County Council -.

FRANKEL: That's correct, that's correct. And you -.

WATANABE: Yeah, this is the Commission -.

FRANKEL: That's right.

WATANABE: This is not the Council.

FRANKEL: Right. But this Commission approved the five acres and went to the Council and -.

WATANABE: This Commission never approved the five acres, sir. This Commission never arrived at the decision. We never got a majority vote, so, okay?

FRANKEL: That's correct. It came from the Planning Director; you folks did not reject that.

WATANABE: Right, okay? Thank you. Okay, if that is all that we have with the public testimony, then I believe Mr. Gonzalez is ready to provide us with -.

STAFF: One more.

WATANABE: Oh, give us a second then.

FLAHERTY: Aloha, my name is Charles Flaherty. I live -. P. O. Box 922, Captain Cook, Hawai'i 96704.

WATANABE: Okay, can I swear you in?

FLAHERTY: Oh, yes, go ahead.

WATANABE: Do you swear or affirm to tell the truth now before the Planning Commission?

FLAHERTY: Yes, sir.

WATANABE: Thank you. You may begin your testimony.

FLAHERTY: Thank you very much. I participated in the debate on the County Council when this issue came before the County Council, and it was very clear that it was the public's and the Council's wish that this property, actually they were wanting it to be zoned to, I think, where there are only three houses on the property. There was some debate about the Supreme Court ruling as far as whether it's a taking or not, and I myself have done research, and just want to reiterate what Mr. Frankel said that this does not constitute a taking, that standard is that if at least ten percent of the property value is maintained, then that is not a taking. So I just wanted to reiterate that, and communicate to you all what the County Council, when this matter was before the Council what their position at that time was and the community's as well. Thank you very much.

WATANABE: Thank you. Do we have any questions? I guess not. Thank you. You may be seated. Mr. Gonzalez, are you ready to provide us with some guidance?

GONZALEZ: Okay, so as agendaed today, this item is for a status report only; there is no decision making or action for the Commission to take today. Therefore, as to the applicant's request for a further deferment for one year or a Council action, I think it would be best if that is put into writing, submitted to the Department, and then they can be properly agendaed for the next meeting, and then the Commission can then take action on what they want to do, whether it's by the Chair's prerogative or by the Commission as a whole. That's my advice.

WATANABE: Okay, thank you. Mr. Lim, do you concur? I know you probably want to have a decision now, but I'm inclined to follow Counsel's advice.

LIM: No, we accept that advice. And what we'll do is we'll have to go back to the client to report what we've heard today, and maybe that we just file the application pretty soon anyway. So we'll get back to you. If we feel like there is going to be a delay, then we'll make that formal request to the Commission.

WATANABE: Okay, thank you. So then there being no decision to be made, that would conclude our discussions today then, yeah?

LIM: Thank you very much. And I'd like to for those who expressed their opinions for something that's less density than three acres, to keep your minds open. And we'll come back.

WATANABE: Thank you for the update.

The discussion ended at 11:10 a.m.

Respectfully submitted,

Noriko Sauer, Secretary  
Leeward Planning Commission