

BOARD OF APPEALS
COUNTY OF HAWAI‘I

TRANSCRIPT
October 11, 2024

The County of Hawai‘i Board of Appeals took up the petition for **1250 OCEANSIDE, LLC (PL-BOA-2024-000104 & PL-BOA-2024-000105)** at 9:38 a.m. This was a hybrid meeting held in person at the West Hawai‘i Civic Center Council Chambers, Building A, 74-5044 Ane Keohokālole Highway, Kailua-Kona, Hawai‘i 96740 and via the Zoom online platform. The meeting was called to order with Chair Cathy Lewis presiding.

MEMBERS PRESENT: Cathy Lewis (Chair), Daina “Noe” Saiki (Vice Chair), Rachel Able, Stacey Aguiar, Scott Martin, Lisa McNamarra, and Scott Trefethen.

ALSO IN ATTENDANCE: Sylvia Wan, Esq. (Deputy Corporation Counsel for the Board), April Surprenant (Staff to the Board), and Ashley DeVera (Board Secretary).

1250 OCEANSIDE, LLC (PL-BOA-2024-000104)

Appeal of Planning Director Declaratory Ruling Docket No. 24-0001 dated April 29, 2024, in Response to C & J Coupe Family LP Petition for Declaratory Ruling (PL-INT-2024-007028) dated February 7, 2024, and Supplement to Petition for Declaratory Ruling dated March 27, 2024, Regarding the Dedication of Mauka Haleki`i Extension, Makai Haleki`i Extension, and Connector Road to the County and a Request of Public Hearing.

Location: Kealahkekua, South Kona

TMK: (3) 8-1-004:070 & 8-1-030:055

1250 OCEANSIDE, LLC (PL-BOA-2024-000105)

Appeal of Planning Director Declaratory Ruling Docket No. 24-0002 dated April 29, 2024, in Response to 1250 Oceanside LLC Petition for Declaratory Ruling (PL-INT-2024-007099) dated February 28, 2024, Regarding Planning Director Not Ruling Upon Certain Requests, and Related to the Dedication of Mauka Haleki`i Extension, Makai Haleki`i Extension, and Connector Road.

Location: Kealahkekua, South Kona

TMK: (3) 8-1-004:070 & 8-1-030:055

PARTIES PRESENT: Derek Simon, Ian Wesley-Smith (Representative for 1250 Oceanside, LLC), Kenneth Kupchak, Mark Murakami (Representative for C & J Coupe Family Limited Partnership), Britt Bailey, Jean Campbell (Deputy Corporation Counsel for the Planning Department), and Zendo Kern (Planning Director).

There were approximately eighteen members of the public in attendance.

LEWIS: Now as I mentioned the parties, excuse me, stipulated to a consolidation of these matters because they revolve around the same factual scenario and to make a streamlining of the procedures here. It’s a little unclear from our rules maybe just a tiny little bit whether that could stand on its own, so in an abundance of caution, we’re going to vote on whether to accept that stipulation and so has everybody had a chance to take a look at that.

WAN: And I'll just clarify for the record, Chair, the stipulation is for the presentation of the evidence, so the cases will still remain two separate cases since they're dealing with two separate declaratory rulings, but the stipulation is for the presentation of the case. So, both of the cases will be heard together, however the—I think they're still okay with there being two separate orders from this body.

LEWIS: So, it's a limited consolidation and—so then I would entertain a motion whether to grant or deny that even though it's not a motion to accept or deny the stipulation.

WAN: So, it's the stipulation to hear the cases together.

ABLE: I motion to accept the stipulations.

LEWIS: Second?

TREFETHEN: I second.

LEWIS: Okay, thank you. Any discussion? Does anybody have any questions or discussion? Okay, all right—well everybody signify with aye if you agree to accept the consolidation.

SURPRENANT: Should we do a roll call vote?

LEWIS: I don't know.

WAN: I mean we can, I don't know if it's necessary just because it's a procedural motion. Okay, I think—I think—.

LEWIS: You know if somebody—let's see how the vote goes.

SURPRENANT: Okay, all right.

LEWIS: All right, all those in favor please signify by saying aye.

ALL BOARD MEMBERS: [*all voted in favor*].

LEWIS: Any opposed? None opposed. Then that will then carry forth, we will accept your stipulation. Thank you for working on that, appreciate that.

SIMON: Excuse me, Chair.

LEWIS: Yes.

SIMON: I could address one house keeping matter real quick. For the benefit of making sure of a clear record, you know, unfortunately our exhibits for the two appeals there's the numbering doesn't quite totally match up and in hindsight I apologize for that. I think for the sake of keeping this efficient, we'd like to refer to one set of exhibits. In the PL-BOA-2024-000104 appeal we can provide clarification for you know post hearing to provide a cross reference to the exhibits, so that the board has those in front of them as they prepare their order.

WAN: Oh, okay. I'm sorry, I believe this request is just a tad premature—

SIMON: Okay, yeah.

WAN: Because we haven't even had the parties announced themselves yet, so why don't you go ahead and announce who you are and what party you represent.

SIMON: Absolutely, good morning, Chair Lewis, board members. My name is Derek Simon, with me today is Ian Wesley-Smith. In the audience is Michael Vitousek, our client representative and we represent 1250 Oceanside, LLC.

LEWIS: Okay, I'm going to ask you to speak a little louder and closer to your microphone as you go forward—and go ahead.

MURAKAMI: Good morning, Mark Murakami and Kenneth Kupchak on behalf of the Coupe Family Limited Partnership, who have intervenor status on both appeals and the Coupes are seated behind me.

LEWIS: Okay.

BAILEY: Good morning, Chair Lewis, members of the board. My name is Britt Bailey, I'm Deputy Corporation Counsel here on behalf of the County of Hawai'i Planning Director, Zendo Kern.

LEWIS: Okay, thank you. Appellant, did you provide notice to the surrounding property owners as required and file the return.

SIMON: We did Chair and proof of that service has been filed with the board.

LEWIS: Okay, I think I saw that actually. All right, we'll proceed with the hearing. I want everybody to know that we have read the record in this case. We've reviewed your proposals and arguments, so keep that in mind and try to keep repetition and we need to keep this thing a little bit reined in.

I'm going to give you just a little bit of extra time that we normally would give because of the intervenor, but if I feel we're getting a little bogged down or whatever, please know that I may give you a little bit of a nudge. We'll try not to repeat.

The legal issue before the board here is whether the Director's decisions, two different declaratory orders that were issued, if they should be reversed, affirmed, modified—and so, with that in mind I'll begin with the appellant. We'll have openings of about ten minutes and then we'll go into the presentation of witnesses in the case.

SIMON: Thank you very much, Chair Lewis. Again, good morning, Board Members. I have a short PowerPoint I'd like to show while I go through my opening remarks, if that's okay. Okay, as you guys all know we are here today to talk about the Hokuli'a project. I got to share my screen, my apologies. There we go, sorry it's not—orientation is not great, but this is just a nice over—head shot of the overall project. You can see the shoreline park that—are we okay—you can see some of the shoreline park you'll be hearing about later today, down there wrapping around the coast and then the rest of the project as you move further up the hill, mauka.

I want to speak clear about who my client is and who my client is not. We represent 1250 Oceanside, LLC. It is not the original developer of the project, that was 1250 Oceanside Partners. Kind of confusing, very similar names, but not the same people. And so, that entity originally got approval for the project back in the 1990's. Unfortunately, pretty soon thereafter encountered a

number of problems, lawsuits, other issues, including the lawsuit by Mr. Kelly that you heard him speak about earlier. Ultimately, that entity ended up defaulting on its loans and losing control of the project in 2007.

Our client stepped in, in 2014 and really got the project back on track. I know they take a great bit of pride in doing so. I think that their number one priority when they came in was to repair the relationship with the community and the stakeholders. I think you heard that from Mr. Medeiros. I think you heard that from Mr. Kelly. It's really allowed the project to go forward in the best possible way.

A big piece of that was completing all the archaeological mitigation. This site has, I don't know if it's hundreds or thousands of archaeological sites, but they're significant and they're all over and so that's all been completed. Oceanside donated twenty million dollars towards completion of the bypass, which is of course now open to the public. It completed extensive improvements for the beach park and also dedicated some land for the Kona Scenic Park, just located up the hill from the project.

I want to talk briefly about the intervenor because there's some history and context here. You heard some comments earlier, there was prior litigation involving the intervenor over the bypass. It went on for about ten years, it resulted in two Hawai'i Supreme Court opinions and an attempt to get reviewed by the United States Supreme Court. All this is to say, I think if you read the hearing brief from the intervenor, there's a lot of animosity there and frankly I think my client thinks that's both misplaced and unnecessary. They're really focused on going forward in the most cooperative and collaborative way possible, but unfortunately, we find ourselves here today.

I think that's frozen. Okay, so there's really four big entitlements or approvals that you'll hear us discussing today, I just want to run over those real quick. There's two rezoning ordinances from 1996, there's a development agreement from 1998, and a variance that was approved by the Planning Department in January of 2011, provide relief from certain requirements for roadways. You also heard Mr. Kelly testify to that earlier.

Okay, the roads we're really going to be focused on, there's three of them. There's the—what we call the Mauka Haleki'i extension, that essentially extends Haleki'i up from the intersection of the bypass and Hokuli'a to the Kona Scenic Subdivision right there by the park. That roadway was dedicated to the County in 2012, has been open to the public ever since. We have what we call the Makai Haleki'i Extension that—that's an extension of Haleki'i into Hokuli'a, and then we have this connector road. It's basically a road that runs parallel to the coast north and south, terminates at the north and south boundaries of Hokuli'a and I believe that's the road that you heard Mr. Medeiros speaking about earlier.

All right, here's a little visual, just to give you the lay of the land a little reference. You can see the Māmalahoa bypass there in orange. To the right of that in purple you can see that Mauka extension going up the hill to the subdivision. Pink, you can see Haleki'i extends down into the project and then again that connector road in blue extending north and south and you can see it at dead ends at the boundaries of Hokuli'a. There's currently no other roads for it to connect to. Here's a couple of close-ups, I can just skip through these. Here's the connector road to the south where it terminates at intervenors property, again nothing for it to connect to at this time. Here's a photograph of that same spot where it terminates to the south, and you can see the tree line there

in the background. That's essentially the common boundary and—between Hokuli'a and intervenors property.

We'll get through these, so again I noted this project was approved in the 1990's. A lot has changed, and I think you heard some of that public testifiers speak to that. I think one thing that the initial developer learned very quickly, there was significant community opposition to development in this area, particularly south in the area of Keopuka. Those lands are now subject to conservation easement, but once they were slated to be developed by the original developer and possibly connected to Hokuli'a via that connector road. The reality is no developments occurred north or south, that's not something that was really contemplated back in the 1990's and the communities really expressed a strong desire to maintain the rural character of particularly south Kona, in the area of Hokuli'a.

A lot of these community sentiments were, you know, kind of reflected in the 2008 adoption of the Kona Community Development Plan. You know, limits rezonings outside of the Kona urban area, again maintains the desire for rural character. The maps, the concurrency maps doesn't really show any new roadways planned or proposed for this area. So, some things have changed, some things haven't, but it's important to note the current context.

Quick background on this on this appeal, I know declaratory ruling appeals is probably not something that comes before the board often. In 2023 March of last year, the intervenor filed a lawsuit against both the County and my client—essentially alleging that Oceanside wasn't complying with and the County wasn't enforcing those ordinances and development agreements I spoke about earlier. Ultimately, the court directed the parties and intervenor specifically to go seek out declaratory rulings from the Planning Director, as a way to get clarity and guidance from the Planning Director on some administrative matters and that was ultimately done is why we are here today.

I can skip through these. It's just kind of an explanation of declaratory rulings. There's a State statute and a County level administrative rule that allow parties to seek out clarity from the Planning Director. Here's an explanation from the Hawai'i Supreme Court, I will not read you. Okay, so following the Court's ruling, the intervenor filed an initial petition and a second follow-up supplement to that petition. There was a total of twenty-six requested rulings from the Planning Director. Oceanside's position was sort of that on their face, those petitions really didn't seem to be a good faith attempt to get the clarity the court was looking for, and as a result of that, Oceanside went ahead and filed its own petition seeking twenty-four declaratory rulings. Falling in one of five categories and really went out of its way to try to prevent—you know—present simple straightforward questions that are capable being answered very easily.

In April of this year, the Director issued two declaratory orders now before you today. There was three requests he determined he could rule upon from Coupe's petitions and eight requests from Oceanside's. You will see the orders are quite similar. There's some additional rulings on Oceanside's order related to variances and some additional rulings on the Coupe order related to its request for a public hearing before the Planning Director, but that's about the extent of the differences.

WAN: Two minutes remaining.

SIMON: Thank you, I'll try to hurry up. Real quick, outline of what's been appealed. These are issues specific to the Oceanside order, that's appeal number PL-BOA-2024-000105. We believe there are some requests the Planning Director determine he could rule upon but failed to answer. He determined he could not issue any declaratory rule on the development agreement. He determined that certain request sought the review of prior Planning Department action, and we also feel the Planning Director went ahead and issued some rulings that were not requested by Oceanside, which we contend he lacks authority to do.

Three issues, these are the three kind of overlapping issues in both orders. It's a question of whether one of the ordinances requires dedication of these roadways we've been talking about. Whether the Planning Director qualified the dedication of that—the 2012 dedication of the Mauka Haleki'i extension, I think there's been some clarity since then, we'll talk about later. And then, finally whether the Director ruled that the roads have not been constructed as required under the ordinances.

I just want to close with a couple quick points, I know I'm short on time and I'll be quick, but I want to make sure we're clear about what this appeal is not about. Oceanside's not seeking to deny the public access. Annually about, between eight and ten thousand people visit the shoreline park, which is accessed through Hokuli'a via a public access easement. That's been in place for over twenty years. Last year alone is just shy of ninety-two hundred of people that visited the park, and Oceanside is not here in an attempt to shirk its obligations. It's mindful of what it owes to the community, it's simply here to get clarity and guidance from the Planning Director and ultimately this Board before we return to court. So, we can get some clarity and guidance.

What are we asking for today, we think that the most appropriate course of action would be to remand both orders to the Planning Director. Answer some of our questions, correct some other errors, and then we can proceed forward and we're of course mindful the Board has the authority to do that itself as well. Thank you all very much.

LEWIS: Thank you very much. All right, so intervenors then.

MURAKAMI: Thank you.

LEWIS: Thank you.

WAN: I'm sorry, before we move on to the intervenor. Can you please, appellant, can you please provide those slides to the Board after this hearing is—

SIMON: Yeah absolutely, I was working on them last night, so I didn't have time to file them, but I'll get them filed.

WAN: Thank you. Sorry, I didn't mean to interrupt.

MURAKAMI: The Coupe family has owned the land south of Hokuli'a for generations. Hokuli'a's gated community had the potential to disrupt north and south access forever, so in 1996, the County included in 96-7 and 96-8 the requirement to build roads and dedicate them to the County for public use. Oceanside had the same requirement for the bypass highway and the Coupe family and others lost lands to build Hokuli'a's road. That bypass road was ultimately built and dedicated to the County.

In its fourth, or fifth, or sixth, and its hard to keep track, attempt Oceanside now tries to escape the dedication requirement for other smaller roads. They are built and could easily be dedicated. Oceanside has done it before, yet Oceanside resists. It has resisted for so long, that the Coupe family filed a lawsuit to make them comply. In court, Oceanside and County thought the decision to find Oceanside in material breach of the development agreement was a question that belonged with the Planning Department first, so we submitted an extensive petition for a declaratory ruling from Director Kern. The Director issued a very narrow decision finding that most of our petition, as well as Oceanside's petition, was beyond his scope and jurisdiction and beyond the authority of the Planning Department. His decision says that as a condition of zoning its lands, Hokuli'a has to dedicate roads to the County. We think that the roads have to be dedicated to county road standards. The County has accepted less in the past, but in any event the Coupe family agrees with the core of his decision.

Now today, before this panel or the Board and to be clear this is Oceanside's appeal to the Board. It is not the Coupe family's appeal to the Board and during litigation over the bypass fifteen years ago, the community—I think represented or misunderstood what was actually going on. The County filed a condemnation lawsuit to take the Coupe family's lands. Judge Ibara, after a six-week trial found that the development agreement improperly delegated the condemnation power from the County to Oceanside and he found it to be unconstitutional and that decision stands to this day. The County brought a second condemnation lawsuit and that's the one that was actually litigated.

Oceanside's burden today is steep. This Board's Rule 8-4 says that in order to modify or overturn Director Kern's decision, Oceanside has to show, and this Board has to find one that the Director's decision violates the law; two the Director's decision is clearly erroneous; or three the Director's decision is arbitrary or capricious, abuses discretion, or is a clearly unwarranted exercise of discretion. Oceanside's appeal fails on all fronts.

Now in court, Oceanside insisted that the interpretation of the development agreement and these ordinances were the Planning Director's kuleana. The Director's declaratory ruling power is limited, and he issued a narrow decision that said the ordinances 96-7 and 96-8, as a condition of zoning, required the dedication to the County of the Makai extension and the connector roads. We agree and Oceanside is not shown and can't show how that ruling should be overturned under Rule 8 of the Board Rules. As such, it should be affirmed. Thank you.

LEWIS: Thank you very much. Okay and last but not least then we'll have the department go ahead and—

BAILEY: And mine is quite short so—despite the volume of material that's been filed in this matter here today and despite the almost thirty years of litigation that serves as the backdrop to this issue—what you have before you today is actually rather straightforward and narrow. The issue before you is whether or not the Director in issuing his declaratory rulings abused his discretion, clearly erred, or violated the law. We contend that the Planning Director's declaratory rulings are more than acceptable, and we respectfully request that you affirm these rulings.

Pursuant to Rule 3-1 of the Planning Department Rules, the Director may issue a declaratory order as to the applicability of any statutory provision, ordinance, or any rule or order of the Director or the Department, that is the Planning Department. Although the Director has fairly broad discretion

particularly in answering the questions within his purview, he does not have discretion to rule on matters that are beyond his scope of authority or beyond his jurisdiction. The Director's declaratory rulings before you, present careful and proper responses to the requests that fall within his scope and authority and jurisdiction.

Today, it's quite likely that the appellant, 1250 Oceanside and/or the intervenor will attempt to have this Board consider materials that are well beyond the basis or the narrow nature of the appeals. It's quite likely that 1250 and/or Oceanside or excuse me, 1250 Oceanside and/or the intervenor may ask questions of the witnesses relating to matters, again that are beyond the scope of these appeals.

What is before this Board is whether the Director, in issuing the declaratory orders, abused his discretion, clearly erred, or violated the law. The answer is no, and we respectfully request that this Board affirm the rulings. Thank you very much for your attention today.

LEWIS: Thank you very much. Okay, we'll move on to the presentation of the case and your first witness and—

SIMON: Good morning, Chair. Our first witness is Michael Vitousek, the client representative for 1250 Oceanside LLC.

LEWIS: Thank you.

SURPRENANT: Mr. Simon, just so you know, we might need for you speak a little bit closer into the mic—yeah or either of you who is speaking and you—can borrow one of the wireless—okay, you just have to be close. Thanks.

WESLEY-SMITH: Here you go, Mike. Thanks—and you might want to grab one of the exhibit sets from up there and there's also a copy for each Board member if they'd like to follow along.

WAN: Just one of them—so Deputy Corporation Counsel Sylvia Wan—so at this point in time I'll just note the appellant's request for the Board to consider it's exhibits filed in case PL-BOA-2024-000104 as it's exhibits.

SIMON: Let me try to be a little more clear.

WAN: Sure, please.

SIMON: When we filed these two appeals, they were separate and there were slightly different exhibits for both appeals and they had different exhibit numbering, and it makes it a little confusing. The other parties have not done that, but I think the most efficient way to go about this we would propose is referencing the exhibits in PL-BOA-2024-000104. They're all also in the record of PL-BOA-2024-000105 and we can provide some kind of filing with the Board post hearing, just indicating where the exhibits are in the appeal number PL-BOA-2024-000105. Yeah, just a little chart—something for clarity, you know make sure that the Board has a clean record. Thank you.

BAILEY: May I interrupt for just a moment. In the stipulation that was just accepted by this Board, it states that to ensure a clear record, the parties shall make reference to the specifics of the appellee's orders by case number during the consolidated presentation. The County would assert

at this point that if there is a reference to exhibits, I know you're wanting to do this for the sake of efficiency, but if there could be a cross reference within the presentation itself rather than a later filing, I think that would make a much clearer transcript.

WAN: So—do you understand what the request is?

SIMON: I do—and so I think our thought was rather than—you know matching up two different exhibit numbers every time we talk about an exhibit, that I think post hearing it could be resolved pretty easily.

WAN: So—I guess at this point, if you're—if you know where the exhibit is in both, please reference that or at the very least when you're presenting an exhibit, say what case number that exhibit exist under.

SIMON: Yeah—

WAN: Does that make sense? Is that okay?

BAILEY: That's fine.

WAN: So, if you do have a different exhibit that's only present in one of the cases, please announce it.

SIMON: Absolutely.

WESLEY-SMITH: Good morning, Mike.

VITOUSEK: Morning.

WESLEY-SMITH: Could you please state your full name for the record.

VITOUSEK: My name is Michael Kaleihoku Vitousek.

WESLEY-SMITH: And what's your role with Oceanside?

VITOUSEK: I'm a manager of land and development.

WESLEY-SMITH: So just a few quick questions about your background if that's okay. Where are you from?

WAN: I'm sorry, in all of this discussion, I forgot to swear in the witness. Can I please swear in the witness?

WESLEY-SMITH: Oh, of course, yeah.

WAN: Thank you. I apologize. Can you please state your name for the record?

VITOUSEK: My name is Michael Kaleihoku Vitousek.

WAN: Thank you. Do you affirm that the testimony that you're about to provide to the Board in this hearing is the truth, the whole truth, and nothing but the truth.

VITOUSEK: I do.

WAN: Thank you, now you may proceed.

WESLEY-SMITH: Okay, so where are you from Mike?

VITOUSEK: I was born in Kapiolani Hospital on Oahu but grew up here on the Big Island.

WESLEY-SMITH: And where do you live now?

VITOUSEK: My wife and I bought by my great grandparents' house, Ka'awaloa. It's two miles south of Hokuli'a project.

WESLEY-SMITH: What's your education background?

VITOUSEK: I have a master's degree in archaeology and historic preservation from University of Hawai'i Manoa.

WESLEY-SMITH: And can you tell us your career background before you worked for Oceanside.

VITOUSEK: Before coming over to Hokuli'a Oceanside, I was the lead archaeologist for the State Historic Preservation Division of Department of Land and Natural Resources.

WESLEY-SMITH: And what were your responsibilities for that job?

VITOUSEK: With DLNR we would review development projects for impacts on cultural resources. We would review inventory surveys and mitigation plans and ensure compliance with those plans to make sure that historic properties were protected.

WESLEY-SMITH: How long did you do that for?

VITOUSEK: Six years.

WESLEY-SMITH: Have you served on any government boards or commissions?

VITOUSEK: I have.

WESLEY-SMITH: And what was that.

VITOUSEK: I did a full term on the Leeward Planning Commission and had to hold over a little bit since they couldn't find a replacement.

WESLEY-SMITH: What was your role there?

VITOUSEK: I was the South Kona representative and served two years as Chair of Planning Commission.

WESLEY-SMITH: Okay, so turning to your present position, how do you view your role with Oceanside?

VITOUSEK: Day to day role is being a developer's representative on association boards, project management for development activities, but the overall role I see as—developing a relationship between the developer and the community and then between the community and the developer.

WESLEY-SMITH: Thank you, so just some quick background about the developer. Do you know the name of the original developer for the project?

VITOUSEK: The original developer was 1250 Oceanside Partners.

WESLEY-SMITH: And do you know anything about what that entity was.

VITOUSEK: Never had any involvement with them, but my understanding is that it was a real estate developer from Scottsdale Arizona named Lyle Anderson in partnership with Japan Airlines.

WESLEY-SMITH: Does Oceanside have any relationship to that original developer?

VITOUSEK: We do not.

WESLEY-SMITH: Does the original developer have any continuing involvement with the project?

VITOUSEK: They don't.

WESLEY-SMITH: So, we're talking about two ordinances here, 96-7, 96-8, and then a development agreement, but were those obtained by the original developer.

VITOUSEK: Yes, they were.

WESLEY-SMITH: So, after the original developer obtained those ordinances and the development agreement, did it run into problems with developing Hokuli'a?

VITOUSEK: Oh, absolutely.

WESLEY-SMITH: What were some of those problems?

VITOUSEK: Well as some of the public testifiers mentioned, there was a lawsuit that shut the project down, centered on the protection of natural and cultural resources.

WESLEY-SMITH: Did the original developer run into financial problems?

BAILEY: Objection to relevance.

VITOUSEK: There was massive financial problems that were created by the global financial crisis in 2008.

WESLEY-SMITH: Okay, we'll try to go quickly. What ultimately happened to the original developer after these legal problems and financial problems?

VITOUSEK: They lost control of the project. The bank who they borrowed from foreclosed on the original developer, replaced the developer with an asset management company.

WESLEY-SMITH: Okay and what did that mean for the physical project and for—you know, the community while these problems were happening.

VITOUSEK: Basically, the project sat idle in mothball status for number of years.

WESLEY-SMITH: Okay and Oceanside came into control of Hokuli'a in around 2014, is that correct?

VITOUSEK: Yep.

WESLEY-SMITH: Has Oceanside approached the development of Hokuli'a differently than the original developer?

VITOUSEK: Absolutely, I mean—our primary goal is building community relationships, fixing the problems that have been left for us, and making sure that we're in compliance with all aspects of the project.

WESLEY-SMITH: Okay, so I want to run—there's been mentioned in the briefs about—or a suggestion that Oceanside is trying to avoid providing public benefits, so just real briefly, I want to run through some of the public benefits. So, let's talk first about the bypass—Derek can we bring up exhibit twenty please? And Mike, in the meantime, could—

WAN: Could you clarify which—

WESLEY-SMITH: Exhibit twenty from case PL-BOA-2024-000104.

WAN: PL-BOA-2024-000104, thank you.

WESLEY-SMITH: PL-BOA-2024-000104, yeah and Mike in the meantime, could you describe what Oceanside contributed to the bypass.

VITOUSEK: Sure, so the original developer 1250 Oceanside Partners constructed the bypass between Keauhou and Haleki'i Ahupua'a and then when we came on in 2014, we contributed twenty million dollars to the County in order to complete the bypass requirements from Haleki'i to Ka'awaloa and Nāpo'opo'o intersection.

WESLEY-SMITH: And that bypass is the one shown in orange or yellow.

VITOUSEK: Yeah, gold—maybe.

WESLEY-SMITH: Okay and in your experience, does the public use the bypass regularly?

VITOUSEK: Oh, absolutely. Yeah, it definitely served to resolve some major regional connectivity and traffic issues.

WESLEY-SMITH: Okay, let's talk about the shoreline park. As it sounds like, it's basically that entire shoreline area running the whole length of the project. How many acres is the shoreline park?

VITOUSEK: The shoreline park is one hundred forty acres of conservation zoned land.

WESLEY-SMITH: Can the public access the shoreline park?

BAILEY: I'm going to object as to relevance as to these declaratory orders before you today.

LEWIS: I'm going to sustain this time.

WESLEY-SMITH: Okay.

LEWIS: Yeah, let's get a little more honed in on the actual issues.

WESLEY-SMITH: Okay, so—what, I think in the introduction they already talked about intervenor Coupe's role, so let's just skip right to what we're here for, which is the roads that are at issue.

VITOUSEK: Okay.

WESLEY-SMITH: So, looking back at exhibit twenty, we already discussed the bypass which is colored in yellow. Can you tell us about the Mauka Haleki'i extension which is in purple there?

VITOUSEK: Sure, the Mauka Haleki'i extension runs between the Kona Scenic Subdivision and Kealahou down to bypass, which is now known as Ali'i Drive. That road is one of the roads that was required to be dedicated under the ordinance. It was subject to a variance in 2011, that allowed the road to be constructed to a rural standard and was subsequently dedicated to and accepted by the County, 2012.

WESLEY-SMITH: And has it been a public road since then?

VITOUSEK: It has, yeah, it serves Kealahou and provides access to Kona for Kealahou community including the Kona Community Hospital.

WESLEY-SMITH: Okay, so looking at the Makai Haleki'i extension, is that the road colored in pink?

VITOUSEK: Yes.

WESLEY-SMITH: And then that connects to the connector road which is colored in light blue?

VITOUSEK: Yes.

WESLEY-SMITH: Okay, so if you come down Makai Haleki'i extension and turn towards the top of the page, which is north on the connector road, where does that go?

VITOUSEK: Haleki'i Street currently dead ends at the Ackerman Ranch, Honuaino four Ahupua'a.

WESLEY-SMITH: Okay and what is the Ackerman Ranch used for today?

VITOUSEK: It's a cattle ranch. They do cow calf operation and then I think they recently got a special use permit to do a wedding venue up next to the bypass.

WESLEY-SMITH: Okay and then where that light blue road dead ends, it looks like there's also a road going down into that neighborhood. So, if you get to that dead end, where does that road take you?

VITOUSEK: So, at the ninety-degree angle, the road heading makai from there is Hawai'i Loa Drive and that takes you down into phase two of Hokuli'a and to the shoreline park parking lot.

WESLEY-SMITH: And—so the Makai Haleki'i extension and the connector road are both currently private, correct?

VITOUSEK: Currently, yes.

WESLEY-SMITH: But they do have a recorded public easement, correct?

VITOUSEK: That's correct, yes.

WESLEY-SMITH: And there's also a recorded public easement over that private road bringing the public down to the shoreline park, right?

VITOUSEK: Correct.

WESLEY-SMITH: So, there's essentially a public easement all the way from the bypass to the shoreline park?

VITOUSEK: That's correct.

WESLEY-SMITH: And under the ordinances in the development agreement, is there any obligation to dedicate that final private stretch of road?

VITOUSEK: Are you referring to Hawai'i Loa Drive?

WESLEY-SMITH: Hawai'i Loa Drive.

VITOUSEK: No, there's no requirement to dedicate Hawai'i Loa.

WESLEY-SMITH: So, no matter what, to get to the shoreline park there's still going to be at least partially a private road with a public easement.

VITOUSEK: Correct.

WESLEY-SMITH: But public access will always be protected.

VITOUSEK: Public access is protected by the shoreline park management and public access plan which is a condition of the development. Yeah.

WESLEY-SMITH: Okay, looking at the connector road again, you come down Makai Haleki'i extension, you turn south towards the bottom of the page, where does the connector road take you?

VITOUSEK: That road, Lauhoa Drive, that dead ends at the Coupe family property, Onouli 2 Ahupua'a.

WESLEY-SMITH: Okay, so when the developer agre—when the development agreement was entered into in 1990, do you know why the connector road was planned and designed the way that it is?

VITOUSEK: You know—

BAILEY: Objection calls for speculation.

LEWIS: Were you present during that period of time?

VITOUSEK: No, I was not.

LEWIS: I would say sustain then; I'll sustain that.

WESLEY-SMITH: I'll try a different question.

LEWIS: Go ahead.

WESLEY-SMITH: So, Mike based on your experience on the Leeward Planning Commission, do you have any knowledge about community plans in this area?

VITOUSEK: Yes.

WESLEY-SMITH: And based on your knowledge of community plans, do you know that in the 1990's whether there was a vision for different development in this area?

VITOUSEK: My understanding is in the 1990's, there was not the same level of restrictions that are placed on that area as there are today through the Kona Community Development Plan.

WESLEY-SMITH: And based on your role with Oceanside, isn't it true that in the 1990's Oceanside was planning to develop the Ackerman Ranch and properties to the north.

LEWIS: You're leading your own witness, don't lead your own witness.

WESLEY-SMITH: Okay.

LEWIS: If he knows—

VITOUSEK: Yeah, so I am—I am aware of Oceanside Partners prior plans to develop this region. Those master plans are available in our files, I'm very familiar with them. Oceanside Partners did plan to develop Ackerman Ranch as phase four of Hokuli'a that was included as property that they had previously owned, that was lost during the bankruptcy. They also had plans to develop the property to the south, Keopuka under a different development name of Pacific Star, so they were multiple development plans by the same previous entity to develop other properties in this region.

WESLEY-SMITH: So, in the 1990's Hokuli'a's the original developer planned to develop both to the north and to the south of Hokuli'a.

VITOUSEK: That's correct.

WESLEY-SMITH: And so, what was the role of the connector road in—in all of this development?

VITOUSEK: The connector road was intended to serve those properties as a connection between them, amongst them. Provide connectivity between the different developments and—with the increased density of the surrounding area, to provide limited through traffic in order to take the pressure off of the bypass highway.

WESLEY-SMITH: So, do you believe that the connector road would have been extended into the developments north and south.

BAILEY: Objection calls for speculation.

LEWIS: I'll sustain.

WESLEY-SMITH: Mike, has anything changed based on your knowledge regarding development plans at present?

VITOUSEK: Yes.

WESLEY-SMITH: What about—what has changed regarding development plans for properties to the north where the Ackerman Ranch is located

BAILEY: Objection as to relevance.

LEWIS: I'll allow.

VITOUSEK: So, the properties to the north and south of the Hokuli'a ordinances are subject to the Kona Community Development Plan, which restricts rezoning of agricultural land outside of the Kona urban area or rural transit-oriented development areas. I think Derek put that on his slide as Land Use Policy 3.8.

WESLEY-SMITH: Are you aware of any current development plans for properties north of Hokuli'a around where the Ackerman Ranch is?

VITOUSEK: I'm not aware of any and you know as part of this process, we reached out to all of our neighbors to see how they might be affected by the requirement of a public road leading through their properties and all of our neighbors told us that they don't have any plans to develop their properties so at this time—

WESLEY-SMITH: And would it be difficult for them to develop their properties if they wanted to.

BAILEY: Objection as to relevance.

LEWIS: Let's move on from that.

WESLEY-SMITH: Okay.

LEWIS: Sustain.

WESLEY-SMITH: Just to close the loop, are you aware of any development plans for properties to the south of Hokuli'a?

VITOUSEK: I'm not aware of any.

LEWIS: Okay, we'll close that chapter.

WESLEY-SMITH: Okay, so to your knowledge at this point, is there anything for the connector road to connect to?

VITOUSEK: The connector road is built out connecting to the properties to the north and south.

WESLEY-SMITH: So right now, it connects to the Ackerman Ranch into the Coupe property.

VITOUSEK: Correct.

WESLEY-SMITH: I think you mentioned the Kona Community Development Plan. Does that Community Development Plan speak to regional roadways?

BAILEY: Objection as to relevance, outside the scope of the appeal that we're hearing today.

LEWIS: Okay, I'll sustain.

WESLEY-SMITH: Okay, so focusing on construction standards, what does the Kona Community Development Plan call for in this area?

BAILEY: Same objection.

LEWIS: Sustain.

WESLEY-SMITH: Could I give a proffer of proof?

LEWIS: If you can show it's relevant.

WESLEY-SMITH: Yeah, so what we're trying to show is that there could be good reason for the County to not want to accept dedication of roads that don't lead to any—

LEWIS: That's not the question before us, no.

WESLEY-SMITH: Okay, we'll move on. Can we pull up exhibit nineteen? Okay, we'll move through this real quick Mike. Looking at this first photo, what does that show?

VITOUSEK: That is the southern end of Lau Loa Drive terminating at the Onouli 2 Ahupua'a.

BAILEY: And again, I'm—I'm not trying to be annoying. I am just trying to make sure that the record's very clear. He's showing exhibit nineteen on the screen and I'm not sure which case this applies to.

WESLEY-SMITH: It's from case PL-BOA-2024-000104. So, Mike is this where the connector road dead ends into intervenor Coupe's property?

VITOUSEK: Yes.

WESLEY-SMITH: And can we scroll down to the third and fourth photo. What does this photo show, Mike?

VITOUSEK: That is a historic ahupua'a boundary wall between Onouli 1 and Onouli 2. It's a state inventory of historic places site number one six eight zero zero.

WESLEY-SMITH: So, the connector road dead ends to a historic wall?

VITOUSEK: Yep.

BAILEY: So, again—I'm not sure which exhibit this is or which case we're talking—

WESLEY-SMITH: It's still exhibit nineteen from case PL-BOA-2024-000104 and its exhibit eighteen in case PL-BOA-2024-000105. Mike, to your knowledge has intervenor Coupe granted any public easement from the end of this connector road, say down to the shoreline?

VITOUSEK: Not to my knowledge.

BAILEY: Objection as to relevance.

WESLEY-SMITH: Has intervenor Coupe ever indicated to you that they intend to extend this road into their property?

VITOUSEK: They have not indicated that to me.

WESLEY-SMITH: Okay, so the public can't access into their property from the end of this road?

BAILEY: Objection as to relevance, outside the scope of this appeals—

LEWIS: Sustain.

BAILEY: —this hearing.

WESLEY-SMITH: Okay, so let's focus on construction standards briefly. If this road was built to urban dedicable standards, what would that mean?

VITOUSEK: Be more hardened surface, wider paving curbs, gutters sidewalks, more potential for storm water runoff.

WESLEY-SMITH: So, more concrete.

VITOUSEK: Yep.

WESLEY-SMITH: Okay, and it would be less rural that it's built right now.

VITOUSEK: Correct.

WESLEY-SMITH: Okay, let's get to the heart of Oceanside's position on this matter. So, right now ordinance 96-8 requires dedication of the connector road and the Makai Haleki'i extension road, right?

VITOUSEK: Correct.

WESLEY-SMITH: And there's been discussions about what sort of construction is required. Urban dedicable standard or not in order for that dedication to take place, right?

VITOUSEK: Yes.

WESLEY-SMITH: So Mike, there's some suggestions from intervenor Coupe that Oceanside is essentially ignoring their dedication and construction standard. Is that how you took their opening today?

BAILEY: I'm going to object. This is outside the scope of the orders. There's no language about—

LEWIS: Sustain.

WESLEY-SMITH: Yeah, I think that we're just asking our witness to respond to the assertions make in opening statement.

LEWIS: If you want to do that I—it is—it's not—it's not relevant to this situation, I mean we—I think we kind of see where this is going.

WESLEY-SMITH: Okay. Okay a few questions.

LEWIS: Streamline that pretty—

WESLEY-SMITH: I will streamline it. Understood Chair, thank you. Has Oceanside been ignoring its obligations?

VITOUSEK: No.

WESLEY-SMITH: What has Oceanside been trying to do to address this with the County?

VITOUSEK: We've had multiple meetings with multiple County administrations trying to figure out a plan for how to move forward in the best interest of the community and in the County.

WESLEY-SMITH: How far back can you remember these issues being discussed with the County?

VITOUSEK: Discussions with the County have been ongoing the day I came aboard with 1250 Oceanside, LLC.

WESLEY-SMITH: Can you tell me some of the options that have been discussed with the County regarding these roads.

VITOUSEK: Been—suggestions from the County that the roads be maintained private with public easement. Roads be dedicated to their current condition. Roads be upgraded. There's been a wide variety of suggestions and discussions coming from different administrations within the County.

WESLEY-SMITH: So, you said that some of the discussions are about potentially keeping them private?

VITOUSEK: Correct.

WESLEY-SMITH: And did those discussions though ultimately center on amending ordinance 96-8?

VITOUSEK: Yes.

BAILEY: Again, objection as to the relevance of the appeals before you.

LEWIS: Sustain.

WESLEY-SMITH: Okay, last line of question Mike. So big picture, is it Oceanside's intent to comply with 96-8, whether it's amended or not?

VITOUSEK: Of course, yeah, we're going to do whatever we need to do. Whatever the result is, we're going to comply with it.

WESLEY-SMITH: And does Oceanside want to work with the County?

VITOUSEK: Of course, yeah. Our goal is to work this out, outside of a courtroom. That would obviously be the best situation to resolve something like this.

WESLEY-SMITH: Does Oceanside want to work it out with intervenor Coupe if they're willing?

VITOUSEK: Oh, absolutely. You know we reached out to Mr. Coupe as a neighbor from the beginning. I've had multiple meetings with him trying to get on the same page. County offered to mediate with us, and you know we of course agreed and just their end never came—came along.

WESLEY-SMITH: Okay, so the court didn't order Oceanside to seek declaratory rulings. Can you explain why Oceanside ultimately sought its own rulings?

VITOUSEK: So—we wanted a declaratory ruling because—we're trying to establish what exactly the requirements are that we need to hit. I mean it feels like we've had kind of a moving target over the years with different administrations, so we're really trying to clarify what technical requirements we have in order to be in compliance with them.

WESLEY-SMITH: How do you think that declaratory rulings will—will help you figure out how to do that?

VITOUSEK: Well, if—if we get a clear answer to our questions about—that they were posed, then—then we will have a firm idea of what's needed to comply with them.

WESLEY-SMITH: Does Oceanside believe that the County right now has answered the declaratory requests that it's asked?

VITOUSEK: I don't feel like I have enough information to make a decision on what our exact plan is to be in compliance, so I would definitely appreciate having some more information and in specific answers to the questions that we ask so that we know what our path forward is, that we know what the finish line is.

WESLEY-SMITH: Okay, that's all I have. Thank you, Mike. Thank you, Chair and Board.

LEWIS: Okay, you can cross.

MURAKAMI: Thank you. Mr. Vitousek, good morning, thank you for joining us today.

VITOUSEK: Mahalo.

MURAKAMI: Your dad's the land use attorney at Cades—

VITOUSEK: What's that?

MURAKAMI: Your dad's the land use attorney at Cades Schutte?

WESLEY-SMITH: Objection, relevance.

VITOUSEK: Yes.

LEWIS: Hang on a minute, I'm sorry, is there a—

MURAKAMI: I asked a question trying to get to know him and what his background is.

LEWIS: Okay, keep it short—we've got enough. Thank you.

MURAKAMI: I think you said yes.

VITOUSEK: Yes.

MURAKAMI: Okay, thank you.

LEWIS: Okay.

MURAKAMI: Is there a cost difference between a road that's constructed to your rural standard, to a county road standard.

VITOUSEK: What do you mean by a county road standard?

MURAKAMI: Urban county road standard.

VITOUSEK: An urban standard—

MURAKAMI: To be a dedicated public road. Is there a cost difference to construct?

VITOUSEK: To be a dedicated public road, it could be urban or rural standard.

MURAKAMI: Can do—have you—have you calculated the cost to construct either?

VITOUSEK: I have not.

MURAKAMI: Are you aware that Oceanside has done so?

VITOUSEK: I am not aware.

MURAKAMI: Okay, so sitting here today, you don't know that there's a cost difference between the road that's constructed, the connector road today, and what it would take to be dedicable.

VITOUSEK: My understanding is that a rural roadway can be dedicable.

MURAKAMI: In fact, one was dedicated from Hokuli'a correct?

VITOUSEK: Yes, a road was—multiple roads were dedicated from Hokuli'a.

MURAKAMI: And were those constructed to county road standards?

VITOUSEK: Which standards are you referring to?

MURAKAMI: Whatever ones that were accepted. Tell us what they were constructed to.

VITOUSEK: My understanding—

WESLEY-SMITH: Objection, relevance.

LEWIS: Go ahead, overruled.

VITOUSEK: Sorry, can you repeat the question?

MURAKAMI: Okay, you testified earlier that—improving the connector roads to the county road standards would harden the concrete, it would increase runoff, correct?

VITOUSEK: No, I said that an urban dedicable standard would—would increase the paved surface and potential for runoff.

MURAKAMI: Okay, and what is the current road today, the connector road. Is that constructed to an urban standard?

VITOUSEK: It is not constructed to an urban standard.

MURAKAMI: Is it con—is it constructed to any county standard?

VITOUSEK: I'm unaware, I don't—I don't know.

MURAKAMI: Okay and what would the cost be? Have you—are you aware that Oceanside has computed the cost to do the construct—to construction to increase that to an urban standard.

VITOUSEK: I'm unaware.

MURAKAMI: No idea. How long have you worked at Oceanside?

VITOUSEK: Eight years.

MURAKAMI: Okay and before or while you were on—excuse me. You were appointed to Leeward Planning Commission once you moved over from SHPD to Oceanside, correct?

VITOUSEK: After a couple of years, yeah.

MURAKAMI: Okay and while you were on the Leeward Planning Commission, was the development plan you were mentioning adopted?

VITOUSEK: Which development plan?

MURAKAMI: You mentioned the Kona Community Development Plan.

VITOUSEK: There was an amendment to the Kona Community Development Plan that was adopted during my time on the Leeward Planning Commission, yeah.

MURAKAMI: And did that impact Hokuli'a, the Ackerman Ranch, and the Coupe properties?

VITOUSEK: Yes, any subsequent amendment of the land—of the Kona Community Development Plan would impact all the properties in the area.

MURAKAMI: And did you vote on that?

WESLEY-SMITH: Objection, relevance.

LEWIS: Yeah, I'll sustain.

MURAKAMI: Now on the commission, you had an opportunity to review zoning ordinances, correct?

VITOUSEK: On the Planning Commission?

MURAKAMI: Correct.

VITOUSEK: We review zoning ordinances and provide a recommendation to the County Council.

MURAKAMI: And variances?

VITOUSEK: No.

MURAKAMI: Okay, development plans?

VITOUSEK: What do you mean by development plans?

MURAKAMI: The development plans come before you—in when you're at the Leeward Planning Commission.

VITOUSEK: The community development plan?

MURAKAMI: Or individual landowners development plans, plans for developing for subdividing.

VITOUSEK: Again, I'm not from—understanding what you mean by development plans.

MURAKAMI: I'm—what I'm trying to do is establish that you understand zoning and development plans writ large. Maybe let's start there. You do understand that based on all your experience, correct?

VITOUSEK: I have pretty good experience with zoning issues, yep.

MURAKAMI: Okay, have you taken a look at ordinances 96-7 and 96-8?

VITOUSEK: Yes.

MURAKAMI: And does 96-8 require those roads, the connector roads and the makai extension, to be dedicated to the County?

VITOUSEK: They do.

MURAKAMI: Are you familiar with variance 10-27?

VITOUSEK: Yes.

MURAKAMI: Did you have any role in the preparation of it—or application of it?

VITOUSEK: No.

MURAKAMI: So, you got to your new job, and you looked at it, read the whole file?

VITOUSEK: Correct, yep.

MURAKAMI: Did—did in your review of the file, did the Coupe family ever get notice of that variance application?

WESLEY-SMITH: Objection, relevance.

MURAKAMI: If you know.

BAILEY: Joined.

LEWIS: I'll allow it.

VITOUSEK: Yes, we have records of the public notice that was distributed, as well as pictures of the signs that were posted according to the regulations.

MURAKAMI: Okay and that was in general to the public at large, correct?

VITOUSEK: The notification was to the individual adjacent lot owners.

MURAKAMI: So—

LEWIS: Okay, we'll move on from that—we'll move on from that, that was—

MURAKAMI: Are you familiar with the development agreement?

VITOUSEK: Development agreement discussed today.

MURAKAMI: For Hokuli'a.

VITOUSEK: Yes.

MURAKAMI: Is Oceanside planning on dedicating the Makai Haleki'i extension and connector roads to the County?

VITOUSEK: Oceanside plans on complying with whatever the requirements are necessary.

MURAKAMI: And 96-8 is one of those requirements, correct?

VITOUSEK: Correct.

MURAKAMI: And that plainly requires it to be dedicated, correct?

VITOUSEK: Yes.

MURAKAMI: Are you aware of the timing of when that dedication was supposed to take place? Under the ordinance and development agreement.

VITOUSEK: I'm unclear about the timing.

MURAKAMI: What's your sense of when it should have been or when it's supposed to be done?

VITOUSEK: My sense is that it would be done when there's something to connect to for some—serve some sort of regional connectivity issue.

MURAKAMI: And is that sense from the documents themselves?

VITOUSEK: The documents themselves don't say anything about when they're supposed to be dedicated, so the agreements that are discussed sort of seem to indicate that was the purpose of that road was to connect for public use.

MURAKAMI: So, you're saying that your testimony today is that in your read of 96-7, 96-8, and the development agreement, that there is no timing requirement of when the road is to be dedicated?

VITOUSEK: Yeah, we're unclear on what that timing requirement is, which is why we sought clarification.

MURAKAMI: And when you say you sought clarification, can you explain what process you did to seek that clarification.

VITOUSEK: We appealed a ruling by the Director of Public Works to the Board of Appeals.

MURAKAMI: Let me unpack that a little, is that this appeal today?

VITOUSEK: Yeah.

MURAKAMI: That's an appeal from Planning to the Board, correct?

VITOUSEK: Yes.

MURAKAMI: Who at the County in light of your experience, both at Hokuli'a as well at your background of the Leeward Planning Commission, what department or division is in charge of reviewing the road construction standards for the County?

VITOUSEK: My understanding is that that's both Planning Department and Department of Public Works.

MURAKAMI: And in fact, we saw that the Planning Department actually said this is a Public Works question in Director Kern's decision, correct?

VITOUSEK: I'm not—I'm not sure what you mean by that.

MURAKAMI: Director Kern, in his decision said that road dedication standards are within the Public Works kuleana and not his, do you recall that language?

VITOUSEK: I don't recall that exact language.

MURAKAMI: Has Oceanside expended funds on surveying or doing the title work on preparing a dedication package for these roads to the County?

VITOUSEK: Not that I know.

MURAKAMI: Has—was the Makai Haleki'i extension road designed to meeting county road standards?

WESLEY-SMITH: Objection, relevance.

LEWIS: You can answer it quickly.

VITOUSEK: Sure, I'm not sure what—what standard you're referring to there. I believe it meets the rural standard.

MURAKAMI: And so, is it Oceanside's position that 96-7, and 96-8, and the development agreement requires these roads to be constructed to the county urban standard?

VITOUSEK: No, that's not my understanding.

MURAKAMI: Okay, then what standard do you think or does Oceanside plan on when it reviews this—these requirements?

VITOUSEK: I don't understand the question.

WESLEY-SMITH: Yeah, objection. Compound question asking about three entitlements.

LEWIS: Also, I'm going to—I'm going to sustain the objection because it's at this point it's sort of speculative—calls for speculation.

MURAKAMI: Has Oceanside done any engineering studies to undertake what improvements would be required to the Haleki'i Makai extension and the connector roads?

WESLEY-SMITH: Objection, relevance.

LEWIS: Sustained.

MURAKAMI: Has Oceanside complied with the timeline in the development agreement?

VITOUSEK: Yes.

WESLEY-SMITH: Same objection.

MURAKAMI: Your view of 96-7, and 96-8, as well as a development agreement. Were these roads supposed to be dedicated before subdivision?

WESLEY-SMITH: Objection, asked and answered, relevance.

LEWIS: Sustain.

MURAKAMI: Oceanside has tried in the past to lift the dedication requirement, correct?

VITOUSEK: Oceanside has sought amendment of the ordinance.

MURAKAMI: To remove the requirement to dedicate the roads?

VITOUSEK: Yes.

MURAKAMI: In fact, in 2020 Oceanside's attorneys sought that exact thing from the Planning Department, correct?

VITOUSEK: I'm sorry, what was that?

MURAKAMI: In 2020, Oceanside's attorneys sought to amend the development agreement and the ordinances to lift that requirement.

WESLEY-SMITH: Objection, relevance. We weren't permitted to talk about this on direct.

LEWIS: Sustain and your time is coming to a close so—

MURAKAMI: Does Oceanside have a gate house?

VITOUSEK: No.

MURAKAMI: A guard house?

VITOUSEK: We have a greeters hale.

MURAKAMI: A greeters hale, and where is that located?

VITOUSEK: Located at the intersection of Haleki'i Street and Ali'i Drive.

WESLEY-SMITH: Objection, relevance.

LEWIS: Sustain.

MURAKAMI: Can I be allowed to get there?

WAN: I just have a reminder that we're—we're trying to keep this very tight and all across should be towards what was said at direct, so I'm letting you know you're kind of getting outside of the scope of things.

WESLEY-SMITH: Can I just say, these are questions for the lawsuit, and they don't have relevance to declaratory rul—

LEWIS: It's not relevant to what we're doing here today. It may be relevant in some other universe, but not right here today.

MURAKAMI: Is the Makai Haleki'i extension and connector roads freely open to the public today?

VITOUSEK: They are open to the public in order to allow access to the shoreline park pursuant to the shoreline park management and public access plan and the public easement that's dedicated for it.

MURAKAMI: And do they have to go through the hale to get there?

VITOUSEK: They do.

MURAKAMI: And does that hale have human being—

WESLEY-SMITH: Objection, relevance.

LEWIS: I'll allow it.

VITOUSEK: Does—does the hale have a human—

MURAKAMI: Security guard?

VITOUSEK: A greeter, yes.

MURAKAMI: Greeter. No further questions.

LEWIS: Okay.

VITOUSEK: Mahalo.

LEWIS: You go ahead and cross, but just remember to—if somebody objects, try to, it's hard—it's hard, but try to remember not to answer.

VITOUSEK: Oh, sorry.

BAILEY: I just have a couple of follow-up questions. You mentioned at the beginning of your testimony, the change circumstances between the 1990's and today, do those change circumstances in any way change the obligations of the ordinances 96-7 or 96-8?

VITOUSEK: Not as the—the ordinances are written.

BAILEY: Thank you. As to the hale or the guard shack that's on Haleki'i Makai extension, you mentioned there's a human there. Does that human actually require cars to stop and are they questioned?

VITOUSEK: Yes, the public access is predicated on the management plan which allows the park to be restricted in the event of emergency or to protect sensitive areas or if the parking is full. So, if the parking lot is full, then we can't allow additional public access as overcrowding could impact the natural and cultural resources in the park.

BAILEY: What about if someone just wanted to drive on the public access road, it has an easement on it and not park. Would you restrict that person who just wants to drive?

VITOUSEK: I don't know.

WESLEY-SMITH: Objection, relevance.

LEWIS: It's already answered.

BAILEY: No further questions.

LEWIS: Objections on the record. That's it? Okay.

WESLEY-SMITH: Could I real quick, like three questions on redirect?

LEWIS: Yes.

WESLEY-SMITH: If I may.

LEWIS: Yes.

WESLEY-SMITH: Okay, since there's been talk about the greeter hale, you mentioned a shoreline management plan. Could you tell me very briefly what that is and what its objective is?

BAILEY: Objection to the relevance of this redirect, especially since he just objected a moment ago to the question.

LEWIS: I—and I'm going to sustain that too.

WESLEY-SMITH: Could I give a proffer of proof Chair?

LEWIS: An offer of proof? Is that what you're saying?

WESLEY-SMITH: Yeah.

LEWIS: You can come up here and—I mean—

WESLEY-SMITH: Well, I just basically—both Counsel just focused at the end on the greeter hale, so I'd like to just ask like two or three questions about that, thirty seconds.

LEWIS: Go ahead.

WESLEY-SMITH: Okay, got thirty seconds. Could you please explain the shoreline management plan and what the goal of that plan is?

VITOUSEK: Sure, the shoreline park management and public access plan was a condition of the overall development projects that they approve a magic—management plan for the park that would be dedicated for public use. It provides restrictions and rules that are intended to both ensure public access but protect the natural and cultural resources from overuse.

WESLEY-SMITH: And so, what role does the greeter hale play with regard to that management plan?

VITOUSEK: Greeters hale provides access to the shoreline park, they provide information on the shoreline park rules, they give them a handout on what the park rules are, what the natural and cultural resources need to be protected are, they're providing information. And then, if the park is closed for any of the legitimate reasons, then they would be restricting access to the park in the interest of public safety.

WESLEY-SMITH: Okay, that's it. Thank you.

LEWIS: Thank you.

BAILEY: I have a question on redirect, but I'll see if Mr. Murakami has questions.

LEWIS: Any redirect? Recross—I mean.

BAILEY: Where does the easement start to the shoreline park?

VITOUSEK: What do you mean by start?

BAILEY: Where does it begin? Does it begin at the top of Haleki'i Makai extension?

VITOUSEK: Sure, I believe it—I believe it's from that end. It would start at Haleki'i Makai, the top of the intersection between Haleki'i and Ali'i Drive.

BAILEY: Okay, no further questions.

LEWIS: Okay, all right. Call your next witness.

SIMON: Our next witness is the Planning Director, Zendo Kern.

BAILEY: Would it be possible to take a five-minute break?

LEWIS: Yes.

BAILEY: Thank you.

LEWIS: We'll take a break; we'll recess for five minutes or so—

WAN: I'll just note for the record, it is presently 10:55 a.m., we'll reconvene at 11:00 a.m.

[At 10:55 a.m., the Board took a short recess.]

[The Board returned from recess at 11:01 a.m.]

LEWIS: Are we okay, is it time?

WAN: It is.

LEWIS: Okay, I guess we are ready to get going again. What do I have here?

WAN: So, I'll just note the board is reconvening at 11:01 a.m.

LEWIS: Thank you for this. All right so we can reconvene, Mr. Kern can be—

WAN: So—

LEWIS: Sworn in.

WAN: Can you please, I'll just notice that we do have a witness within the witness box. Can you please state your name and then I'll administer the oath.

KERN: Zendo Kern, Planning Director.

WAN: Do you affirm that the testimony you're about to give in this hearing is the truth, the whole truth, and nothing but the truth?

KERN: Yes, I do.

WAN: Thank you, you may proceed with your questioning.

SIMON: Thank you, Chair. Good afternoon, Director Kern. How long have you been the Planning Director here?

KERN: Afternoon—couple months short of four years.

SIMON: Okay and so it's safe to say you're familiar with the petitions that were filed by Coupe and Oceanside?

KERN: Yes.

SIMON: And the request in those petitions?

KERN: Yes.

SIMON: Would you agree that Oceanside and Coupe asked you different questions?

KERN: There were different questions asked.

SIMON: Okay, and I assume you're familiar with your own declaratory orders, correct?

KERN: Yes.

SIMON: As we sit here today, do you stand by your rulings in those orders?

KERN: Yes.

SIMON: Okay, Chair I'd like to hand the witness copies of the orders, and I have additional copies in case anybody would like one. Those will be exhibit number one in both appeal PL-BOA-2024-000104 and PL-BOA-2024-000105.

WAN: If you have additional copies, we do have—two members requesting a physical copy, if you can.

SIMON: And for the record that those are exhibits number one in both appeal number PL-BOA-2024-000104 and appeal number PL-BOA-2024-000105.

WAN: Thank you. I'm just going to note for the record that Board staff is handing out the exhibits to the Board presently.

LEWIS: Thank you.

WAN: And just to clarify for any that may be viewing in the audience, these are the same exhibits were electronically filed with the Board as well, correct?

SIMON: That's correct yes and they're also in the County's exhibits as well as exhibit B.

WAN: Thank you.

SIMON: Let me get my copy real quick, I apologize. Okay, you have both orders in front of you Director Kern?

KERN: Yes, I do.

SIMON: Would you agree that the orders are pretty similar in terms of the rulings you issued?

KERN: They're similar.

SIMON: Okay, there's some stuff in the Coupe order about your denial of his request or their request for a public hearing.

KERN: And there's some different questions within your petition that goes into details or roadways, etc.

SIMON: Variances and stuff?

KERN: Correct.

SIMON: Yeah, thank you. Okay, so both orders include a section titled compliance and non-compliance that are—that are basically identical, is that correct?

KERN: Can you reference what number that would be?

SIMON: Yeah, let me get you to the page. You can look at the Oceanside order, it's at page eleven.

LEWIS: These are the same right, oh no there not.

KERN: Page eleven compliance and non-compliance.

SIMON: Yeah, would you agree that that section is included in both orders?

KERN: Yes.

SIMON: Okay and for the Oceanside order, which requests from Oceanside was that section responsive to?

KERN: Give me a moment, there's a lot of questions that were asked.

SIMON: Yeah, can I just ask for the record what the document you're flipping through is.

KERN: Oh, it's just my notes.

SIMON: Okay, so the requests are actually contained in the order, maybe we can just stick to the order since—

KERN: Sure.

SIMON: —I don't know what you have in front of you. They'll start on page five of the Oceanside order. There's just a list of each requests Oceanside submitted.

WAN: I'm just going to note for the Board Members that that's docket number 24-0002 that was handed out to you.

KERN: So, can you—can you repeat the question?

SIMON: Yeah, so both orders contain a section titled compliance versus non-compliance. I want to focus on the Oceanside order. I just want to get an understanding of what requests from Oceanside that that section responds to and again the requests that you determined you—you could address in your rulings or in your orders.

KERN: Ask my attorney to clarify that.

SIMON: I'm not sure what you mean by that, I just want to know—

KERN: You're trying to get to, we asked a lot of questions and then that's the—that's one of the answers.

SIMON: Yeah, yeah, I'm just trying to figure out this section presumably responds to requests or questions that were asked by Oceanside in its petition and I'm just trying to get a sense of which requests those were.

KERN: Well, I would say it actually goes to the dedication requirements.

SIMON: Okay, so—for, okay we'll move on from that. All right, I want to focus on appeal PL-BOA-2024-000105, which is the appeal of the Oceanside order and that'll be docket two in the Planning Director order. You have two—two orders in front of you. Okay, am I correct, does this sound right, that you found a total of eight of Oceanside's requests to be basically properly before you and within your jurisdiction?

KERN: Yeah, we answered eight questions.

SIMON: Does that sound correct to you?

KERN: Yeah.

SIMON: Okay. Are you familiar with Oceanside's general position here in these appeals that you may have not answered to each eight of those requests.

BAILEY: Objection, vague.

LEWIS: I didn't understand what you said, I have a little bit of trouble understanding you, to be honest.

SIMON: Let me slow that down. Are you familiar with Oceanside's? One of the arguments we're making in this appeal is that some of these requests were not answered in your order.

KERN: Yes, I understand that.

SIMON: Okay, so I want to go through those. Let's do them in order. You see dedication requirements, request number one on page five?

KERN: Looking at page five, on docket 24-0002.

SIMON: Yeah.

KERN: Yes, sir.

SIMON: Okay, can you read that first request for us?

KERN: Dedication requirements, whether they express terms of ordinance number 96-7, require the dedication of Mauka Haleki'i extension and Makai Haleki'i extension or connector road.

SIMON: Thank you, and you understand what that question is asking you?

KERN: Yes.

SIMON: What's your answer to that question? I'm just asking you without reference.

BAILEY: Object, the orders speak for themselves.

LEWIS: Yes—I—it's all speaking for itself.

SIMON: Well, If I may, that that's kind of unfair that one of our arguments is that some of these questions weren't addressed in the order and then the—

LEWIS: In the order they were rece—written on the request, you mean. He took them out of order.

SIMON: No, I'm not saying he took them out of order, I'm trying to figure out where the Planning Director determined he could rule on eight of our requests.

LEWIS: Okay, can I just make a suggestion. If there's something you feel he didn't answer, would you find that question and then—

SIMON: This is—this is one of those questions.

LEWIS: You're doing it sort of backwards. I—if you could find the question you feel is unanswered and then ask him where he answered it.

SIMON: No, yeah—yeah where did you answer that—that question Director Kern?

KERN: I believe that was the first question you asked me with related to what I said on page twelve, the ordinance was taken in their entirety, and I said that there were answered based on the dedication requirements.

SIMON: Okay, but doesn't—doesn't this request ask you a more specific question than that?

KERN: That request does, but our answer still stands as they're taken together. The ordinances are taken together.

SIMON: So, you—you have no opinion as to ordinance 96-7 standing on its own?

KERN: The ordinances collectively were brought together, so if we're looking at the question of the road dedication, we have to look at them both together.

SIMON: Okay, so you don't want to answer what just 96-7 requires alone?

BAILEY: Objection, argumentative.

LEWIS: I—I really—I'm sorry I can't always understand what you're asking, and this feels like something that—that's properly in a—in a brief you know. It's an argument, but if there's a factual predicate that you're trying to establish, I want you to show them exactly the question—which question you asked that he did not answer.

SIMON: Okay, and I apologize. Maybe I'm making this more confusing, so let's move on to the next one. Okay, I'll try to short that up—shorten it up. Okay do you see dedication requirements request number two on page five?

KERN: Yes.

SIMON: Okay and do you understand what that question is asking?

KERN: Yes.

SIMON: And is it fair to say it's asking whether there's a date certain or a milestone in the development of Hokuli'a by which these roads have to be dedicated.

KERN: Correct.

SIMON: And what—where do you answer that in—

KERN: In the ordinance does not have a date certain.

SIMON: Okay, thank you. Or development milestone, would you agree with that?

KERN: I would agree that there's an intent on when a road's supposed to be dedicated, but a milestone within there, as written specifically, no.

SIMON: Okay, thank you. Let's move down to construction standard. Request number one that's on page six. You see that?

KERN: Construction standards, yes.

SIMON: Okay, questions number one, do you understand what that question is asking you?

KERN: I do.

SIMON: Okay and where do you respond to this in the order?

KERN: On to. There's a lag here, so I can respond to it on page eight construction standards—question three and—

BAILEY: Would it be okay with the Board if I orient the witness as his attorney?

LEWIS: If you what?

WAN: Orient the witness. Yeah.

SIMON: Chair—Chair, if I may. I don't know if that's entirely appropriate for Counsel to direct a witness as to how to answer.

LEWIS: I agree, I don't know if—

BAILEY: As to answer, it's just—

LEWIS: Let—let the witness have a minute and then we'll just live with his answer.

KERN: You could—maybe you could point me to where you're looking at because I am—

SIMON: Yeah.

KERN: Not seeing it exactly under the construction standards.

SIMON: Yeah, I think that—that's kind of Oceanside's position here is that—that some of these requests just simply were not addressed in the order.

LEWIS: Well, it's our—it's our—it's my feeling that the document speaks for itself and if you're going—if you're going to make an argument about it, you could tell us what you think. If Mr. Kern has an answer great, if he doesn't we'll move on.

SIMON: Well, I mean respectfully, I think you know we've laid out our position and so is the County, but I think the author of these orders should be able to provide some witness testimony on whether or not these requests are answered. We disagree, we're asking the witness whether or not—

LEWIS: But I'm telling you that even if he can't find it, if it's there or not is a question for ultimately for us.

SIMON: Right, I understand. I do think we should be allowed to continue this line of question.

LEWIS: Well, it's taking a little while so—

KERN: Well, I don't think it's in there, so if you want to ask me why we didn't answer it, that might be one thing. If you want to send me on a goose chase.

LEWIS: Somebody can do that on redirect Mr. Kern. Your counsel will take care of that.

SIMON: Okay, I'm going to try to go through this as quickly as possible, but my questions are very simple. Can we do construction, so you agree that you did not respond to answer request number two in the orders, construction standards request two.

WAN: Are you trying to cross-examine it—this witness because that's kind of how your questions are being framed.

SIMON: He's essentially an adverse direct witness, that's essentially how those types of witnesses are handled whether its an administrative proceeding or—

LEWIS: I agree, you might in some instances need to treat him as an adverse witness, but in this case, I think we've been asked and answered, and I want you to move on now.

SIMON: Okay—okay can we move on to construction standards request number two on page six.

LEWIS: Okay, we going to keep doing this on everyone.

SIMON: I don't—I don't know the alternative, Chair and—

LEWIS: Okay, I'll give you one more try and then we'll live with the answer and—and move on.

KERN: The—the ordinance's relevant requirements we end up covering.

SIMON: But—but question two asks a very specific question and you can answer it yes or no. It just says does the ordinance on their face by their terms require compliance with these two provisions of the Hawai'i County Code.

KERN: I stand by our written statement on this.

SIMON: So, you don't want to answer the question.

KERN: No, it's not that.

SIMON: I want to be very clear; I'm not trying to be difficult in any way, we briefed this, the County dug in, stood by its responses and I think we got to be able to probe those with the author of the orders. I don't know what other kind of testimony you could get from Director Kern on these positions we've taken.

LEWIS: Yeah, answer as best as you can Mr. Kern and—

KERN: [*indecipherable*] ordinances in 96 and 97, conditions M-5 require that prior issuance of subdivision approval, any portion of the subject property the applicant shall construct the Mauka Haleki'i extension and the Makai Haleki'i extension and provide the connector road and phasing of the same and shall be provide to the County Department of Public Works. For ordinance 96-7-1516, there to exhibit B ordinance 96, do you want me to read the rest of it because that's what I'll do.

SIMON: No, I'm just trying to find, I mean—okay. Would you agree yes or no that the ordinances do not reference these two provisions of the Hawai'i County Code.

KERN: Do you have a copy of the ordinance for me to review right now.

SIMON: I'm happy to go through that, but this should have been presumably done as part of drafting the declaratory—

KERN: It has and that's why it's written and that's why I'm standing by my written statements here.

LEWIS: Yeah, I'm going to ask you to just move on—

SIMON: Okay, well—

LEWIS: You're going to be able to make your arguments in briefing ultimately.

SIMON: Okay, before we move on, for the record we—our intent was to go through each, it's just eight requests and just have him point out where they were—where they were responded to. If we don't want to go—if the Chair does not want us to go down that line of questioning, that's fine. But I just want to—I don't want to run a foul of anything here, I just want to make our case.

LEWIS: I understand the point you're making. I think that court in review will as well, but I do think we're dealing with documents that we are reviewing and asking him to you know put it together is probably just a waste of our time at this point.

SIMON: That's fine, I'll move on. All right let's move on then. Okay, so in both orders or sorry, let's focus on the Oceanside order, appeal number PL-BOA-2024-000105. In both those orders, you determine you cannot issue declaratory rulings related to the development agreement, is that correct?

KERN: Yes, that's correct.

SIMON: Okay and are you familiar—familiar with Mayor Rule one?

KERN: Yes.

SIMON: Okay and would you agree that under that rule, the Planning Department was delegated the responsibility to administer development agreements.

LEWIS: I really have a hard time understanding you, I'm really sorry.

SIMON: No that—I know that's—that's my fault, I'm not speaking clearly so—

KERN: There's authority given to the Director, but based on the question, we have deemed that is not the appropriate place for us to respond based on it being agreement not an ordinance.

SIMON: Okay, no I understand your position. I'm just asking for you to clarify through Mayor Rule one, the Mayor gave the Planning Department the responsibility to administer development agreements, would you agree with that?

KERN: Can you ask the question again?

SIMON: Okay, so we've established there's a Mayor Rule one and you're familiar with it and part of that rule gave the Planning Department the authority and responsibility for the overall administration of development agreements, is that correct?

KERN: I believe so.

SIMON: Okay and so that you know carrying out those responsibilities as the Director of the Planning Department, would—would that include looking at what a development agreement says and determining what it requires?

KERN: We would be looking at development agreement, yeah.

SIMON: Okay, so you'd have to interpret its provisions, apply it to facts, determine compliance, stuff like that?

KERN: In certain cases.

SIMON: Okay and so—so both orders, and I can direct you there if you want, but both orders make statements about sort of the effect and the requirements of the development agreement. Would you agree with that?

KERN: Yes.

SIMON: So, trying to understand how you can include those statements in the declaratory order, but not respond to requests from Oceanside that ask you to do the same thing.

KERN: Can you repeat that?

SIMON: Okay, so I think you just said that both of these orders, declaratory orders you issued, specifically the Oceanside order includes statements about what is required under the development agreement, would you agree with that?

KERN: Both petitions? I'm sorry I'm just—I'm getting confused over here.

SIMON: Yeah, and I apologize. Seems like I'm confusing more people, so we have the Oceanside order. One of your rulings was that you cannot issue declaratory rulings on questions about the development agreement.

KERN: Yes.

SIMON: Okay, and then you also testified that there are statements in the order as to the requirements of the development agreement, is that correct?

BAILEY: Objection, vague.

SIMON: I'm just trying to establish that the orders talk about the development agreement.

LEWIS: Okay, why don't you give us an example and—

SIMON: Yeah, you can look at page, starting on page one carrying on to two.

LEWIS: Page one, what?

SIMON: Starting on page one, that last sentence.

WAN: Of what exhibit?

SIMON: Oh sorry, the Oceanside order.

LEWIS: So, bottom of page one into page two is what you're saying?

SIMON: The sentence starting at the very bottom of page one, "in other words the ordinances and other land use regulations."

LEWIS: Okay, what's the question then?

SIMON: Well, I'm just trying to establish that there's statements in the orders about what's required under the ordinance, I mean under the development agreement. I apologize, I'm really not trying to be difficult here.

LEWIS: What's the question?

SIMON: I asked Director Kern to confirm that there are statements in his orders that could be considered as interpreting the development agreement.

KERN: I don't believe so, I believe we made it pretty clear in our exact answers to the questions as it relates on our interpretation of the development agreement.

SIMON: Okay.

KERN: If you're looking in the background section—

SIMON: I want to give you one more example, on page two it says "furthermore the development agreement required the original developer to post a bond in favor of the County to assure that the improvements relating to various roadway requirements would be constructed prior to the issuance of the first small lot subdivision approval for the project." Would you agree that's a very clear statement about what was required under the development agreement?

KERN: [*indecipherable*]

SIMON: Okay, and so my question here is why are you unable to do that in response to a request asked by Oceanside?

KERN: Well first, you didn't let me finish my response. I agree that it's written down here in the background section, but again our review of the development agreement on when we can opine on that based on what was asked has been answered.

SIMON: Okay, so—so that—so your position is you can make statements about the development agreement and background section, but you cannot respond to requests? I'm just trying to get clarity, that's it.

BAILEY: Objection, argumentative.

LEWIS: Yeah, go ahead. Sustain.

SIMON: Okay, let's—let's shift gears then. Okay, let's go to page twelve of the Oceanside order please.

LEWIS: Page what?

SIMON: Page twelve. Sorry, I'm having a hard time getting this mic close enough to me. You have page twelve in front of you Zendo, I mean Director Kern. My apologies.

KERN: No worries, yes, I do.

SIMON: Okay, and this is titled applicability of a variance, right? That section, it's on page eleven. I apologize.

KERN: I'm looking at page twelve of the Oceanside petition and it starts with "neither ordinance addresses."

SIMON: Yeah, perfect you're in the right spot. Okay, would you agree that this section is not included in the Coupe order that's subject appeal number PL-BOA-2024-000104?

KERN: I don't know, I have to look. I'm not seeing it.

SIMON: Okay, yeah and I just want to clarify so we know what we're talking about. I'm going to give you one example, and we can see how this goes. Okay, do you see the third sentence in that paragraph you just read—started reading, neither ordinance—starts with "neither ordinance." Do you see the third sentence in that paragraph said—starting with "because such a variance."

KERN: Yes.

SIMON: Okay, can you—do you know what request from Oceanside this is addressing?

KERN: Addressing your questions under the sections of variances?

SIMON: Can you give me—what—so, so the point I want to make is that this talks about whether a variance can amend an existing ordinance, right? That sentence you just read.

KERN: Could you repeat that?

SIMON: The sentence you just read, that I pointed out says because such a variance only excuses performance under Chapter 23, variance 1027 cannot and does not affect an amendment of an existing ordinance.

KERN: A variance does not amend an existing ordinance.

SIMON: Yeah, but did Oceanside ask or suggest that a variance could amend one of these ordinances at play here?

LEWIS: Yeah, say that again please.

SIMON: I want to know whether Oceanside ever asked the Planning Director, can we amend an ordinance through a variance.

KERN: There are questions answered around that.

SIMON: Okay, would you agree that—sorry, no I didn't let you finish. Go ahead.

LEWIS: All right, so are you satisfied now though?

SIMON: I think he was looking at the paper to finish his answer. I don't know Chair, I'm sorry.

KERN: Well, there's multiple questions asked around the variance.

SIMON: Okay, would you agree that none of those questions ask whether a variance can amend an ordinance?

KERN: Under variances under Chapter 23, no, the questions are around it, but not specific to that.

SIMON: Okay, thank you Director. Let's shift gears. I won't keep going through those one by one. And I apologize for the confusion. Okay, let's—let's shift gears and talk about certain issues have been appealed that are common to both orders. The order in appeal PL-BOA-2024-000104 and PL-BOA-2024-000105, does that make sense Director Kern?

KERN: I don't know whether it's the audio in this room, the way that you're speaking. I'm having a hard time having—

LEWIS: Thank you.

KERN: Resonate and understand what the questions are and it's quite challenging.

SIMON: Okay, I want to talk for a minute about issues that are common to both orders. The Oceanside and the Coupe order, okay? So, a minute ago, we addressed—we addressed your statements regarding dedication requirements on 96-7, so that's statements in both orders we were talking about the Oceanside order a minute ago, but you have the same answer for both orders, is that safe?

KERN: Yes.

SIMON: Okay, thank you. Okay, well we'll move on. Okay, a portion of both orders talks about the dedication of the Mauka Haleki'i extension and I believe the sub—you know the substance of your ruling was that the 2012 dedication of that road satisfied the requirements of the ordinances.

KERN: The dedication of that Mauka Haleki'i did satisfy the dedication requirement for that section of the road for the ordinance, yes.

SIMON: Okay, thank you and so you know in our briefing and our appeal documents, we pointed out some language “effectively” “to the extent” and the concern was there might be some qualifications that you were putting on that dedication. I think that's been clarified in your hearing brief, but can you confirm today for the Board that the dedication—your determination that the dedication of the Mauka extension was not qualified?

KERN: Sure.

SIMON: Is that—that's a yes?

KERN: Believe so, yes.

SIMON: Okay, we'll move on. Now we're moving quick. Okay—okay I want—do you have one of the orders? Do you have the Oceanside order in front of you? And this is my last point Chair.

WAN: Can you please orient the Board as to which order you're specifically looking at.

SIMON: That'll be the order in docket two, in the matter of Oceanside and I'm looking at page eleven, that last sentence starting with "in order to."

KERN: I believe I'm looking at the in "order to comply with."

SIMON: Yeah, can you go ahead and read that for the Board, please.

KERN: "In order to comply with the ordinances, Oceanside must construct the Makai Haleki'i extension and connector road to a condition approved by DPW," that's the Department of Public Works, "and dedicate the Makai Haleki'i extension and connector road to the County."

SIMON: Okay, thank you. And if I tell you that same statement is in both orders, would you accept that, so we don't have to flip through them.

KERN: Sure.

SIMON: Okay, great. Would you agree that these two roads, we showed them on the screen earlier, they're discussed in the orders. Would you agree that those two roads exist today?

KERN: Yes.

SIMON: Okay and so you know, I know part of your—both orders talk about the different roles that DPW and the County Council play in the dedication process, right? DPW's job to set standards, determine if roads can be dedicated. The Council's job to accept those roads, is that correct?

KERN: Yes.

SIMON: Okay, so it's fair to say whether a road can be dedicated or not is a question for DPW ultimately?

KERN: Yes, and in this case, yes DPW have to accept those standards.

SIMON: Okay.

KERN: Unless they were built to a dedicable standard.

SIMON: Okay, that's a little different from my question. So, that statement I had you read out, are you making any determinations as to the current conditions of those roads and whether they can be accepted for dedication?

KERN: No.

SIMON: Okay, thank you. Let me see if I have any last questions. That's all for now, thank you.

LEWIS: Thank you. Okay cross-examination.

MURAKAMI: Director Kern, my name is Mark M. Murakami. We represent the Coupe family. Can you explain your process on how you came up—you received our request for the declaratory ruling, you received Oceanside's requests. We both asked you a lot of questions. Can you explain the process by which you ended up with these written decisions.

KERN: Sure, so we got the request. We collect—we got together with our staff, our planners that are focused on doing this type of work, our program managers, our attorneys, myself, and we reviewed it and looked at each one that we felt that we would be able to speak to or that we couldn't. And then we made our determination based on what we could opine on and what we couldn't and then to answered those to the best of our ability.

MURAKAMI: And your rules for declaratory rulings are entirely discretionary as to whether you issue them, correct?

KERN: Yes.

MURAKAMI: And so, you in receiving several from us and several from Oceanside opted to only issue declaratory rulings on the items that you actually responded to, correct?

KERN: That's correct.

MURAKAMI: So, it is fair to say that you exercise your discretion and opted to not respond to the other questions.

KERN: Yes.

MURAKAMI: And I'm sorry, competing petitions with 96-7, 96-8, development agreement. There's a lot of material here and so it was our petition that asked you about the development agreement compliance, which you opted to exercise your discretion and not respond to correct?

KERN: Yes.

MURAKAMI: Okay, and it was our petition that asked about the variance process and whether a variance could amend an ordinance correct and you opted not to answer that correct?

KERN: Correct.

LEWIS: That's interesting.

MURAKAMI: In your review of 96-7, 96-8, your opinion and your ruling which is before the Board today, is that Oceanside has not complied with the dedication requirements of those ordinances correct?

KERN: That's correct.

MURAKAMI: Now, I think you alluded earlier to that the—the timing of the dedication was something that you consider, correct?

KERN: Yeah, we—the timing conversation came up earlier, yes.

MURAKAMI: What is the timing requirement for when these dedications are to take place?

KERN: So, in the review of the ordinance, there is no time specific on these, so then we would look at it from an intent perspective and a general process perspective.

MURAKAMI: Okay and then in the intent and process perspective, are there milestones in the Hokuli'a development that you were looking to impose the dedication requirement?

KERN: There were no specific milestones in my review of it.

MURAKAMI: Because it's been twenty-five years correct since the first subdivision, right?

KERN: Yes.

MURAKAMI: And the roads are built in whatever standard they are, correct?

KERN: Yes.

MURAKAMI: Are you aware of any impediment that would prevent Oceanside from dedicating those roads today?

KERN: I am not aware of anything that would stop that process.

MURAKAMI: No further questions. Thank you.

LEWIS: Okay.

BAILEY: Thank you, Deputy Corporation Counsel Britt Bailey on behalf of the Planning Director. I just have a couple of questions, Mr. Kern. When you prepared your declaratory rulings and submitted your orders to 1250, as well as Coupe, did you prepare your rulings carefully?

KERN: Yes.

BAILEY: Did you prepare your rulings thoroughly?

KERN: Yes.

BAILEY: Did you answer questions that were within your scope of authority?

KERN: Yes.

BAILEY: Did you answer questions that were within the discretion of the Planning Director?

KERN: Yes.

BAILEY: Did you answer questions that were not within your scope of authority?

KERN: I did not.

BAILEY: And did you answer questions that were outside your scope of discretion?

KERN: I did not.

BAILEY: No further questions.

LEWIS: Cross-examine. Pardon me, redirect.

SIMON: Redirect, I think here. Quick question Zendo, are you aware of prior efforts by Oceanside—1250 Oceanside, LLC, my client, the appellant here, to dedicate the roads?

BAILEY: Objection to vagueness, particularly which roads because—

LEWIS: I can't understand what you're saying.

BAILEY: As to roads, I'd like some clarity as to what roads he's actually referring to.

SIMON: Okay, yeah absolutely and I apologize for the vagueness. Are you aware of efforts by Oceanside in the past to dedicate the Makai Haleki'i extension and the connector road?

KERN: I'm not sure, we've had discussions about process, but I'm not sure of dedication, at least not during my time.

SIMON: Okay, thank you. That's it. Thank you, Director Kern.

LEWIS: Heard the redirect from—okay. All right, now cross. You want to just recall your witness as your own or how—

WAN: Are there any other further questions for this witness by the parties? Okay.

SIMON: None from Oceanside.

WAN: So, at this point in time, is the appellant—are you concluding your presentation of the case?

SIMON: That's correct.

WAN: Okay, does the intervenor have any presentation of case or any witnesses? Okay. So, then can the appellee present your case?

BAILEY: We don't have any questions beyond what we're already asked, thank you.

WAN: So, you don't intend on calling any other witnesses?

BAILEY: No, our witness was Mr. Kern.

WAN: All right.

LEWIS: If everybody's okay to stick it out for a little bit without a break, we can go into closing unless anybody needs an emergency break. I don't mean to put pressure on you. All right, we'll go ahead then with the closing. Question, you have a question? Okay.

WAN: So, we'll continue with about ten minutes for closing. I'll give you a heads up when you're two minutes to end. Okay?

SIMON: Thank you and I'll try to be briefer than that and I apologize for the quick talking and the poor mic use. I think that—

LEWIS: You're not the only one, so don't feel too bad.

SIMON: Yeah, and this isn't the first time, so I appreciate your patience. You know I kind of went over this earlier and talking about what Oceanside wanted from this process. You know I tried to walk Director Kern through a number of our requests that we thought were pretty straightforward and really capable of being given a clear direct answer and we don't think that happened. And I think that kind of cuts the core of this process that we're trying to go through to get through this lawsuit that's kind of looming over everybody's head, and so I think the most appropriate thing to do is to go back to Director Kern and just see if we can get clarity on these issues.

Some of his testimony today, was consistent with the questions we asked and the arguments we made, but those aren't in his orders and so we need to be able to take that information back to the court. I think you also heard Director Kern make clear that there was no qualification on the dedication of the Mauka Haleki'i extension back in 2012. That was something we raised in our appeal. We weren't sure about this language that was used, I think that's sorted.

I think you also heard Director Kern testify that he's made no determination as to whether or not the makai extension and the connector road can be dedicated in their current form or whether they need to be improved further. And with that, I'll end my closing. Thank you all.

LEWIS: Thank you.

MURAKAMI: It is clear that in 1996, the County passed two ordinances and the Mayor signed, the Council passed them, that rezoned the Hokuli'a project. With those two documents and, which have the force and effect of law, your County Code, along with the development agreement, which was a massive first of a kind development agreement entered into by the, in the State of Hawai'i. The originator of the development agreement statute was the actual attorney that drafted it, signed by Mayor Yamashiro and it bound Oceanside to dedicate roads and construct roads to alleviate the perceived traffic flow issues in South Kona.

There were three roads, the bypass highway is one, the Haleki'i is another, and along the shoreline. There's no gray area that the maps attached to both 96-7 and 96-8 all have the Haleki'i Makai extension and the connector roads. The roads are all referred to similarly. There is no gray area, and you heard from Oceanside today that 96-8 requires the dedication to the County.

Now after twenty-five years from the first subdivision permit in 1999, the Coupe family's position is that those roads should have been dedicated and we brought a lawsuit to accomplish that. The court wanted to hear what the Planning Director's position was about the development agreement, about all the matters that are being litigated, and so we started this process and asked for Director Kern's position on a host long laundry list, about the development agreement, about our perceived breaches of the development agreement, about dedication, timeline, etc.

In his considered decision in response to our requests, as well as Oceanside's requests, he opted and exercised his authorized discretion to answer only a couple questions and those are the questions being appealed to this Board today. We think that Director's decisions were not clearly erroneous and reflected the considered decision of the Planning Department.

We think there's been no showing that and the law is clear, you have 96-7 and 96-8, it's clear, that the County required in 1996 these roads to be dedicated, and they are not dedicated today. There's a—there might be a lot of reasons why not, there might be other policy reasons, but those ordinances still remain on the books and the County Council in a bill signed by the Mayor, he's the only one that can alleviate Oceanside of that obligation. Thank you for your time today. I—we—we request that you affirm the Director's decisions. They—we—we think there's been no showing that they violate an abusive discretion or constitute abusive discretion or contrary point of law. Thank you.

BAILEY: Similar to the presentation that was just provided by Mr. Murakami, we would request that this Board affirm the rulings of the Planning Director. There's been no showing of an abuse

of discretion, there's been no showing that the Director clearly err, and there's been no showing that there's been a violation of law.

What there has been is a little bit of confusion in the types of questions that were asked of the Director and specifically on page nine of PL-BOA-2024-000105, which is where we were oriented during the questioning of Director Kern. He states specifically the questions that were within his scope and those were eight questions and some of those eight questions included variances under Chapter 23, 3, 4, and 5.

He provided additional information to that answer because in the PL-BOA-2024-000104 ruling, where he also provided a similar type of response, those particular questions weren't before him in PL-BOA-2024-000104, they were before the Director in PL-BOA-2024-000105. He provided his response that was not sua sponte, that was a ruling that the variance as he saw it, did not affect those ordinances and the requirement to dedicate.

Currently 96-7 and 96-8 are taken in their entirety. They've always applied to the one thousand five hundred and fifty-some-odd acres of this particular project. They've always been considered together. 1250 is required by those ordinances to dedicate Haleki'i Makai extension, as well as the connector road. Thank you very much. We do respectfully request you affirm the rulings.

LEWIS: Thank you. Okay, well we will now close the hearing, and the Board will deliberate and vote on its decision. So, we start. It's just a reminder, we start with a motion from somebody and second, and then we can get into discussion.

WAN: Chair, would you like to consider maybe a short recess just to allow the Board to digest everything that's been provided and maybe draft whatever the appropriate motion would be?

LEWIS: Okay, it looks like everybody could use a little break. We'll take a five-minute break and thank you very much.

WAN: I'll just note for the record it's 10:56 a.m., we will return at 12:01 p.m.

[At 11:56 a.m., the Board took a short recess.]

[The Board returned from recess at 12:09 p.m.]

AGUIAR: Chair.

WAN: We're going, so we need to call us back to order.

LEWIS: Everybody's here we'll back in order.

WAN: I'll note for the record it's 12:09 p.m.

LEWIS: 12:09 p.m., alright.

AGUIAR: Chair, this is Board Member Aguiar, so I have a request to have a longer recess. We can either go to lunch or I think between a few Board Members, we still need about a total of twenty, minimum twenty-five minutes.

LEWIS: Okay.

AGUIAR: So, up to you. Twenty minutes?

LEWIS: Well alright. You're going to be working on your own, correct?

AGUIAR: Correct. It's because we both, we need individual times with our attorneys.

LEWIS: Yeah, okay. All right, we'll grant that, and we'll take a twenty-minute recess and thank you for bearing with us.

WAN: So, I'll just note for the record, it's currently 12:10 p.m., we will return at 12:30 p.m.

[At 12:10 p.m., the Board took a short recess.]

[The Board returned from recess at 12:38 p.m.]

LEWIS: All right, we're back in session at 12:38 p.m. Thank you for allowing us that break and we're back to consider the question. Why don't we take the first petition, petition number one, which was filed by who.

WAN: So, you're talking about—

LEWIS: Make a decision one at a time right.

WAN: BOA case PL-BOA-2024-000104, that is agenda item number six.

LEWIS: Okay.

WAN: Are you entertaining a motion?

LEWIS: Yes, I'm entertaining a motion on our decision. This is the one filed by Oceanside, yeah. Does anybody have a motion? Noe, do you have a motion? Okay, great.

SAIKI: Noe Saiki, excuse me, Vice Chair. I'd like to make a motion in case number PL-BOA-2024-000104, to affirm the Planning Director's decision in that, the decision was not clearly erroneous, was not arbitrary or capricious, nor an abuse of his discretion. Thank you.

TREFETHEN: I second the motion, Scott Trefethen.

LEWIS: And discussion on that? Stacey?

AGUIAR: Yeah, I guess I just want to point out that I think in reading the appellant's case, I can understand and in hearing the cross-examination or examination of the Planning Director, I can understand the questions needing clarity and/or specifics, but I do not—I also—I didn't think that it rose to the level of the four corners in which we are bound to be making decisions and rulings or overturning the Planning Director's decisions.

And I think that's—that is the parameters of this Board and there are other means for language clarification, changes, ordinance, amendments. Unfortunately, that's not part of our scope of work and I think I can completely understand a lot of the need for wanting specificity, but I do feel that the adequate language in the declaratory document still addresses everything. Maybe not in the specifics of what the appellant's looking for and yeah, that's my commentary.

LEWIS: Thank you. Anybody else? Okay, well we'll call for a vote then, we'll do a roll call vote.

SURPRENANT: Okay. Member Saiki?

SAIKI: Aye.

SURPRENANT: Member Trefethen?

TREFETHEN: Aye.

SURPRENANT: Member Able?

ABLE: Aye.

SURPRENANT: Member Aguiar?

AGUIAR: Yes.

SURPRENANT: Member Martin?

MARTIN: Yes.

SURPRENANT: Member McNamarra?

MCNAMARRA: Aye.

SURPRENANT: Chair Lewis?

LEWIS: Aye.

SURPRENANT: Motion passes.

LEWIS: Okay, thank you. And now onto the second matter.

SAIKI: Chair, I would like to make another motion.

LEWIS: Thank you.

SAIKI: In regards to case number PL-BOA-2024-000105, I move to affirm the Planning Director's decision in docket number 24-0001, in that the decision was not clearly erroneous, was not arbitrary or capricious, nor an abuse of the Planning Director's discretion. I have a few points to make that I just wanted to add. One—

LEWIS: Well should we second it and wait for discussion or is it part of your motion?

WAN: I think you can do that.

SAIKI: It's part of, okay, so I'll just fully point it then—

WAN: Well, you can close your motion and then add your comments in discussion.

SAIKI: Okay.

WAN: We'll do that.

SAIKI: Yeah, you let me know. All right, that's it.

LEWIS: So, you have closed it? Okay.

MCNAMARRA: I'll second that.

LEWIS: Okay, now for discussion.

SAIKI: Okay, so I'd like to make three points about why I decided to affirm his decision. Firstly, he stayed within his jurisdiction and the issues he addressed. Secondly, he also correctly identified issues outside his discretion, for example, the construction requirements for a dedicable road as approved by the Department of Public Works. And finally, the development agreement questions fell outside of his powers outlined by the Hawai'i County Charter and the Planning Department Rule 3. Thank you.

LEWIS: Thank you. Any further discussion? Okay, with that we'll call for the vote.

SURPRENANT: Member Saiki?

SAIKI: Yes.

SURPRENANT: Member McNamarra?

MCNAMARRA: Yes.

SURPRENANT: Member Able?

ABLE: Yes.

SURPRENANT: Member Aguiar?

AGUIAR: Yes.

SURPRENANT: Member Martin?

MARTIN: Yes.

SURPRENANT: Member Trefethen?

TREFETHEN: Yes.

SURPRENANT: And Chair Lewis?

LEWIS: Yes, or aye.

SURPRENANT: Motion passes.

LEWIS: Okay, thank you very much. I do want to thank Counsel, all of you very much for the time and effort you put into that. You made it—

WAN: So, at this point, I'll just note that the prevailing party for both cases is the appellee. So, can the appellee please provide an order to the Board, and we will agendize it at the next hearing for acceptance.

BAILEY: Yes.

LEWIS: Okay, let's make sure all the standards at in there, the—

SURPRENANT: Are you setting a time frame?

WAN: Yes, so I believe our next Kona date would be on the December meeting and if you could have that order filed a month prior and then two weeks later, the appellant and the intervenor can provide any written objections.

BAILEY: So, just to clarify, file it in November?

WAN: Yes.

BAILEY: Okay, and the December date is December 13th, I heard you say earlier.

SURPRENANT: That is correct.

BAILEY: So, right around the middle of November then?

WAN: Yeah, so one month prior to December 15th, so that would be November 15th.

BAILEY: Okay great, thank you.

LEWIS: 13th.

WAN: Oh, I'm sorry, I misheard. December 13th, so the filing deadline would be November 13th and two weeks later from that would be—can somebody look at a calendar for me please?

BAILEY: That's, I think the 28th is Thanksgiving so—

WAN: So, we can push it to the Friday then, the 29th.

LEWIS: Is that enough time for you? Okay, should be.

WAN: Everybody clear? Okay, thank you. Yes, Chair, I think we're concluded on agenda item six and seven at this time.

LEWIS: So, again, I do want to thank Counsel very much for your civility and putting up with my lack of ability to hear and understand the human language and thank you very much for your time. Appreciate it.

[This matter concluded at 12:47 p.m.]

Respectfully submitted,

Ashley DeVera, Board Secretary