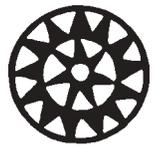
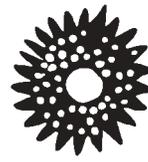


UNIVERSITY OF HAWAI'I

# Making Your Voice Count: A Citizen Guide to Contested Case Hearings

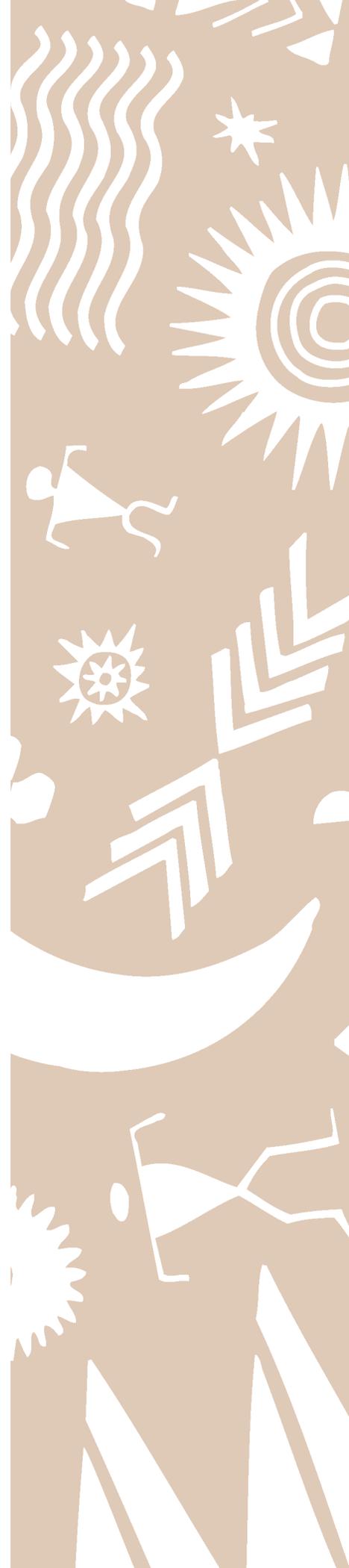


A Workbook of the  
Environmental Law Program by  
Professor M. Casey Jarman, Director  
William S. Richardson School of Law  
University of Hawai'i at Mānoa

© Environmental Law Program 2002

# TABLE OF CONTENTS

Acknowledgements .....	2
Introduction .....	3
Chapter One: Quasi-Judicial Hearings .....	5
Chapter Two: Proving Your Case .....	11
Chapter Three: Lawyering Skills .....	23
Appendix A: Agency Contact Information.....	35
Appendix B: Sample Proposed FOF/COL.....	37
Appendix C: Sample Petition for Intervention.....	75
Appendix D: Agency Rules for Intervention .....	83
Appendix E: Sample Witness and Exhibit Lists.....	87
Appendix F: Expert Witness Resumes.....	93



# ACKNOWLEDGEMENTS

The Environmental Law Program (ELP) at the William S. Richardson School of Law would like to thank the Hawai'i Community Foundation for their financial support. Without their kokua, this Workbook/Video project would not have been possible.

Many others helped to put the Workbook together: Marlene Booth, my Director/Producer, who taught me the magic of video; ELP student research associates Kim Moffie and Della Au who have never failed me no matter what I have asked; law students Kim Tsumoto and Doug Wong who volunteered many hours of research; Mike Tamaru whose publication design skills are unmatched; and the Workbook reviewers who freely shared their expertise, Linnel Nishioka, Deputy Director, Department of Land and Natural Resources; Presley Pang, Associate General Counsel, University of Hawai'i and former Deputy Attorney-General assigned to the Land Use Commission; William Tam, Alston Hunt Floyd & Ing and former Deputy Attorney-General assigned to the Water Commission; and Esther Ueda, former Executive Officer of the Land Use Commission.

My actors deserve special mention as well: colleague and friend Chris Iijima, Associate Professor of Law at the Richardson School of Law; Richardson Law School alumni Michael Wong (class of '01); Daisy Hartsfield (class of '01); Rochelle Vidinha (class of '01); Doug Codiga (class of '94); David Forman (class of '93); Linda Chow (class of '88).

Special thanks go to the following: colleague and friend Denise Antolini, Assistant Professor of Law, Richardson School of Law; Lawrence Foster, Dean of the Richardson School of Law; Land Use Commission; Water Commission; and Department of Land and Natural Resources.

**Associate Professor M. Casey Jarman**

Workbook Author, Video Executive Producer, and  
Director, Environmental Law Program

# INTRODUCTION

This Workbook is designed as a companion to the video “Presenting Your Case: Highlights of an Agency Hearing.” Together they are tools to assist you in representing yourself or your community group in a quasi-judicial (contested case) hearing before an administrative agency in Hawai‘i, more particularly three agencies: Land Use Commission (LUC), Commission on Water Resources Management (Water Commission), and Board of Land and Natural Resources (BLNR). Presenting your position effectively is essential to ensuring your voice is heard and taken seriously by agency decision-makers.

The Workbook is divided into three major chapters. The first chapter explains what quasi-judicial hearings are and how they work. The second discusses how you prove your case. The third chapter describes the lawyering skills needed to effectively present your case. Each chapter contains practical exercises to help you apply the skills presented in the chapter. The Appendices at the end supplement the text by providing selected laws and rules, agency contact information, and sample forms.

Please feel free to share these materials with your friends and family. Knowledge is power—share and use it wisely.





## NOTES

# CHAPTER 1: QUASI-JUDICIAL HEARINGS

## INTRODUCTION

A quasi-judicial hearing is one in which the agency's procedures resemble a civil trial in court. Known in Hawai'i as **contested case hearings**, their purpose is to protect the legal rights of those who will be affected by an agency's decision. Contested case hearings, which are more formal than public hearings but less formal than court hearings, are governed by strict procedural rules. The overriding purpose of the procedures is to ensure that the best and most relevant information is presented to the decision-making body, thereby assuring that the various and often conflicting legal interests of the parties are considered.

Each agency has published its own rules that dictate how hearings are to be run. You can obtain a copy of an agency's rules either through requesting them from the agency itself, from the Lieutenant Governor's office, or through the agency's web site. Although most agencies have put their rules on their web sites, they are considered unofficial copies of the rules, so you may want to get an official copy as well. Appendix A lists the web sites for the LUC, BLNR, and Water Commission.

Contested case hearings generally follow three phases: pre-hearing, hearing, and post-hearing. At the **pre-hearing** stage, both procedural and substantive matters may be discussed. Setting hearing dates, exchanging witness and exhibit lists, and stipulating (agreeing) to certain things, such as which witnesses qualify as experts and the order in which witnesses will be called to testify, are examples of procedural matters. Deciding what issues will be discussed at the hearing is an example of a substantive matter. All the parties, the person who will preside over the hearing itself, and one or more staff members of the Board or Commission usually attend the pre-hearing. **Scene One of the accompanying video demonstrates a pre-hearing.**

The primary purpose of the second phase, the **hearing**, is to gather evidence from the parties through oral testimony and written documents. Procedural matters often arise as well. For example, a party may need to amend its witness or exhibit list or there may be a full-blown discussion about whether the agency has jurisdiction (legal power) to decide the case. Not all hearings are presided over by one or more members of the Board or Commission. The LUC, DLNR and Water Commission have the legal authority to appoint an



**A contested case hearing follows three phases:**

**Pre-Hearing**



**Hearing**



**Post-Hearing**

## Vocabulary

Land Use  
Commission  
(LUC)

Commission on Water  
Resources  
Management (Water  
Commission)

Board of Land and  
Natural Resources  
(BLNR)

Findings of Fact  
(FOF)

Conclusions of Law  
(COL)

Decision and Order  
(D&O)

individual, known as a hearings officer, to take all the evidence and make a formal recommendation to the decision-making body on what the decision should be and why.

After all the testimony is in and the hearing itself is closed, the **post-hearing** phase begins. During this third phase, parties prepare proposed Findings of Fact (FOF) and Conclusions of Law (COL) that essentially tell the decision-makers what the outcome should be and why. Through their FOF/COL, parties present to the decision-makers the facts they believe they have shown to be both true and relevant to the decision, what the decision should be, and the legal basis for the recommended decision. (See Appendix B for a sample proposed FOF/COL.)

Each party serves (gives) their FOF/COL on the other parties and the decision-making body or the hearings officer if one has been appointed. The parties have the opportunity to respond in writing to the findings or conclusions in other parties' FOF/COL. The decision-makers review all the FOF/COL and exceptions (objections) filed by the parties and develop their own proposed FOF/COL which is given to all the parties. This is followed by a hearing where the parties have the opportunity to orally argue their position on the proposed FOF/COL. When a hearings officer is used, the hearings officer prepares a proposed Decision and Order (D&O) that it gives to the decision-makers. Parties are given the opportunity to file exceptions and present oral argument on the proposed D&O prior to the final decision being made. Filing written exceptions is particularly important if you are before BLNR or the Water Commission as they generally do not permit parties to present oral argument unless they have filed exceptions.

Accepting or adopting the proposed FOF/COL could occur at that meeting or a later meeting. Agencies other than the LUC can discuss the proposed FOF/COL or D&O and make their decision in private; however, the Sunshine Law, discussed below, requires that the Land Use Commission discuss and make their decisions at public hearings only. Once the decision is made, the agency prepares and adopts a final Decision and Order (D&O) that includes their FOF and COL. A party unhappy with the agency's decision can ask the courts to review the decision.

## PARTIES

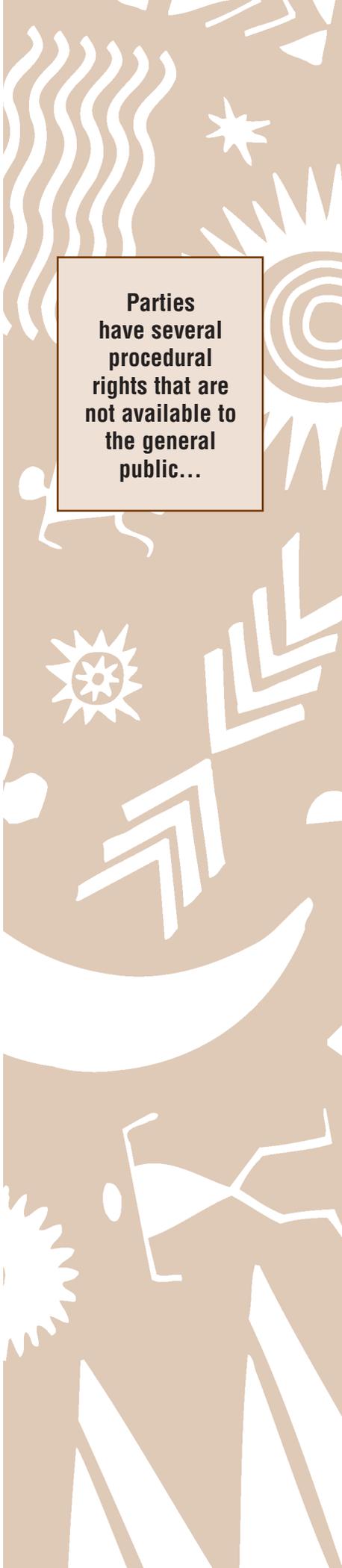
Citizens or community groups who can show that a decision to be made by an agency could affect their legal rights can become **parties** to a contested case hearing. Parties have several procedural rights that are not available to the general public, such as the right to put on evidence both orally and in writing, to cross-examine other parties' witnesses, and to rebut testimony presented by others. A party can also seek judicial review of an agency decision. But becoming a party means that you will have to be well-organized so that you can gather the information you need, arrange for witnesses, and meet deadlines for submission of material all in a timely manner.

Many members of the public choose simply to give their own testimony at a contested case hearing rather than to become parties. However, if you believe you have a strong interest in the outcome, you should seriously consider becoming a party; most agencies permit, and even encourage, parties to limit their participation in the contested case hearing to those issues most important to them. By doing so you lessen the amount of time and work you have to devote to the hearing while at the same time preserving your option to appeal the decision if you disagree with it.

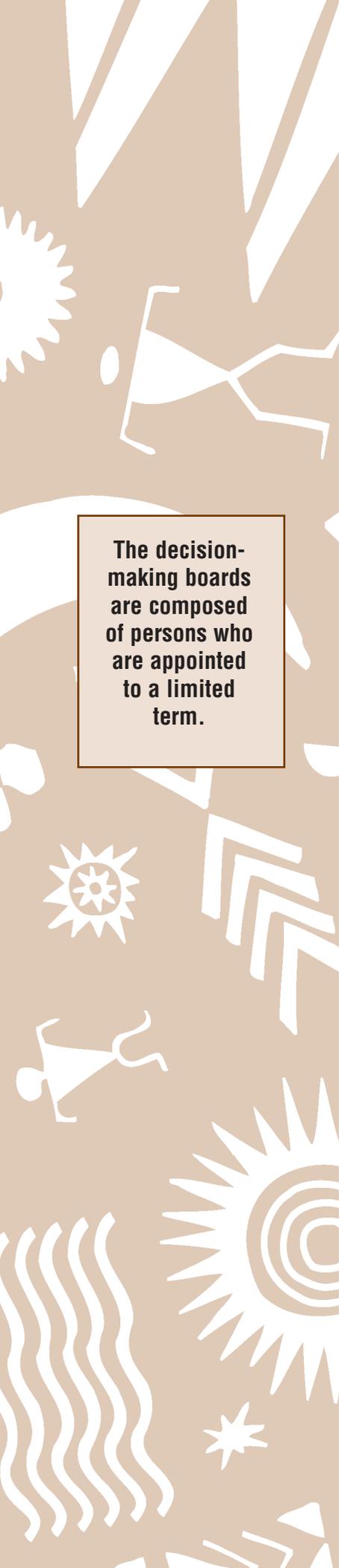
In some agency contested hearings, certain entities are required by law to be parties, while others must petition the agency to obtain party status. For example, in a Land Use Commission boundary reclassification petition, the state land use law mandates that the petitioner who is requesting the boundary amendment, the state Office of Planning, and the County Planning Department of the county where the land is located be parties. Others become parties by formally requesting to be intervening parties, known as intervenors. Agency rules and case law set out the requirements to gain intervenor status. The next chapter discusses in detail how to apply for intervention.

## DECISION-MAKERS

In a contested case hearing, one or more agency officials may be the **decision-maker**. As mentioned earlier, when more than one person is responsible for making the final decision, the decision-makers may appoint one per-



**Parties  
have several  
procedural  
rights that are  
not available to  
the general  
public...**



**The decision-making boards are composed of persons who are appointed to a limited term.**

son, who may or may not be one of their members, to preside over the contested case hearing. If that person alone hears all of the evidence, she or he is called a hearings officer. If the full commission or board chooses to hear the evidence, one member will serve as presiding officer at the hearing. If a hearings officer is not appointed, then a quorum of the board or commission must be present to hear the evidence. Hawai‘i’s Administrative Procedure Act requires decision-makers who are not present when the evidence is taken to familiarize themselves with the record prior to voting.

The decision-making boards are composed of persons who are appointed to a limited term. For example, members of the LUC are appointed by the Governor for 4-year terms and then must be confirmed by the legislature. Typically boards represent a cross-section of backgrounds and interests. While some members may be lawyers, having a legal background is not usually a pre-requisite. While some may have particular professional experience, such as engineering, others may not. All serve without pay, volunteering their time. Because hearings are generally held during work hours on week days, being on a board or commission requires members to take time away from their jobs. Because of the range of backgrounds and interests and because their work is done “for free”, it is important for parties to present their arguments clearly, in plain language, and in terms that make common sense to the lay person.

## **AGENCY STAFF**

**Staff members** handle the day to day administrative business. They are professionals who support the work of the Commissioners and Board members by processing the paperwork, providing information, working with the parties to ensure that documents are filed in a timely matter, scheduling hearings, and maintaining records, as well as other important tasks. Their assistance is crucial to the functioning of the LUC, BLNR, and Water Commission. They are the point persons for the parties and the general public. Most parties have regular contact with the staff. Although they are not the decision-makers, it is important to remember that they are a source of valuable information and are there to serve the public. They will give you whatever assistance they can; however, it is up to you to know the law and put together your case.

## SUNSHINE LAW AND EX PARTE CONTACTS

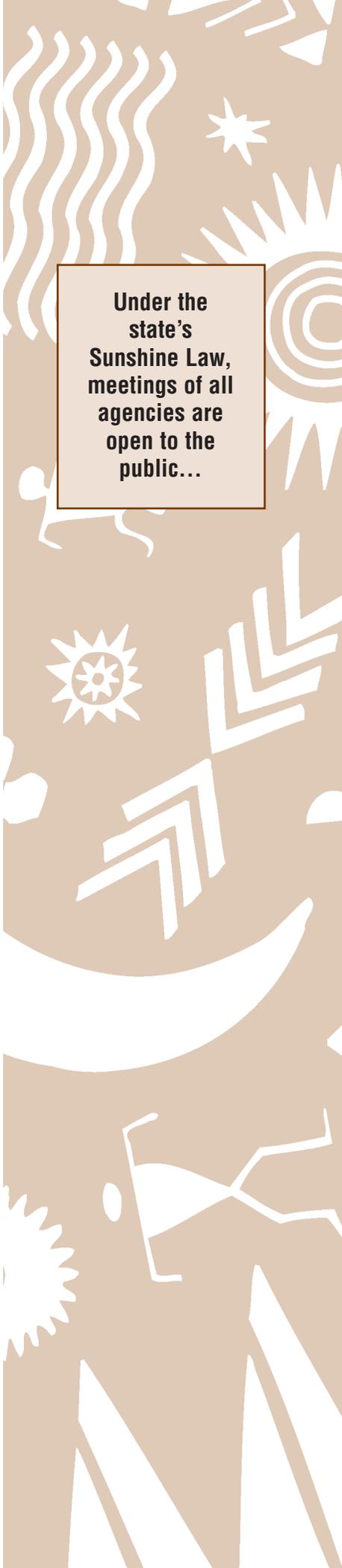
Under the state's **Sunshine Law**, meetings of all agencies are open to the public and people must be given the opportunity to present oral and written testimony on any item on the agency's agenda. However, only the LUC is required by the Sunshine Law to take public testimony from members of the general public at contested case hearings. Neither BLNR nor the Water Commission accept public witness testimony at contested case hearings.

For most contested case decisions, the decision-makers can discuss the case among themselves and vote in private, although their decisions are usually announced in public. The only exception is the Land Use Commission whose members cannot "deliberate towards a decision" in private. All of their discussions and voting must be done in a public hearing, unless it falls under one of the Sunshine Law's few exceptions.

Parties and members of the public should not have private conversations with the decision-makers prior to the final vote being taken and recorded. If such contacts, known as **ex parte contacts**, do occur, the decision-maker must make them public at the next formal hearing date.

## CONCLUSION

Quasi-judicial hearings, while meant to be more informal than court hearings, can be quite complex and take several months or even years to complete. For some decisions, the legislature has given the agencies time limits by which they must make their decision. Failure to decide within the time limit may result in a decision by default in favor of the applicant. As you enter into a quasi-judicial hearing process, keep in mind any time limits as you decide your own strategy for putting evidence before the decision-maker. The next chapter discusses what you need to do to prove your case.



Under the state's Sunshine Law, meetings of all agencies are open to the public...



## NOTES

# CHAPTER 2: PROVING YOUR CASE

## INTRODUCTION

This chapter covers what you need to do to prove your case. As a **petitioner or intervenor**, your goal is to convince the decision-makers to make the decision that best protects your/your group's interests. To do so, you must be aware of and meet any pertinent legal standards. And because most agency decisions permit a certain amount of discretion on the part of the decision-makers, you want them to exercise that discretion in your favor. You must review both the statute that authorizes the decision and the substantive rules the agency uses to make its decision to find the legal standards.

To be able to prove your case, you must qualify to be a party. If you or your group is not the one making the initial request from the agency, then you must apply to the agency to allow you to participate in the contested case hearing as an intervenor. Once you have intervenor status, you need to put on witnesses and introduce exhibits that will support your position. You must also be prepared to rebut evidence put on by other parties if you disagree with their evidence. The evidence you present should be relevant to the legal issues that are being decided in the contested case hearings. During opening and closing arguments you will have the opportunity to show how the evidence supports the legal conclusion you want the agency to make. In this chapter you will learn how to (1) qualify as an intervenor, (2) develop strategies for putting together your witnesses and exhibits, and (3) make effective opening and closing arguments.

## INTERVENTION

Persons or groups who want to become parties in a contested case hearing and are not required by law to be parties must file a written petition to intervene with the agency. Each agency's rules set out the criteria that you must meet to be an intervenor and the deadline for filing your petition. Some agencies freely allow intervention; others are more reluctant to do so. In this section we will go through the criteria to intervene in a petition for a land use boundary amendment before the Land Use Commission. A sample petition can be found in Appendix C.

**Persons or groups who want to become parties in a contested case hearing and are not required by law to be parties must file a written petition to intervene with the agency.**



**A Notice of Intent to Intervene**

in an LUC boundary amendment hearing may be filed with the Commission staff within thirty (30) days of the date that the Petitioner files the boundary amendment petition. The LUC gives the public notice of the filing of a petition primarily in three ways:

1. publishing notice in the Office of Environmental Quality Control Bulletin,
2. sending out notice to persons on their mailing list who have requested to be notified, and
3. publishing in the newspaper the formal notice of hearing on the petition.

The following information must be included in your notice:

1. your name and mailing address and
2. the nature and extent of your interest in the petition.

Certified copies of your Notice of Intent must be served upon the petitioner, the state Office of Planning, and the county planning department of the county where the land is located, i.e. delivered either in person or by mail with a return receipt that evidences the party received the notice. Most potential intervenors attach their Petition to Intervene to their Notice of Intent. When the Petitioner receives your Notice of Intent, she must serve you a copy of her boundary amendment petition.

After you have served your Notice of Intent and your Petition to Intervene on the parties and you have received your proof of service (your receipt), you must file the original and fifteen copies with the Commission staff. Your deadline for doing this is within fifteen days (15) from the date that the LUC officially publishes notice of the upcoming contested case hearing. It is critical to meet the deadlines because the LUC, as well as most other agencies, will not accept late filings of these documents unless you have good cause. Good cause is hard to show. If you are late and the agency doesn't believe you have good cause, you will have lost your opportunity to intervene.

Your **Petition to Intervene** should state the legal and factual bases that support your desire to be a party. It must include the following information:

1. the nature of your right to intervene;
2. nature and extent of your interest and, if an abutting landowner, a T-M-K description of the property; and
3. how the contested case hearing will affect your interest.

Your petition must also address any of the following that are applicable:

1. alternative ways of protecting your interests;
2. the extent to which your interests are represented by other parties;
3. how your interests differ from other parties;
4. how your participation will assist in adding relevant information to the record;
5. how your participation will broaden the issues being decided; and
6. how your intervening would serve the public interest.

As long as the deadlines for filing are met, the LUC cannot refuse intervention to the following:

1. agencies and departments of the state and of the county where the land is located,
2. persons who have a property interest in the land, and
3. persons who “can demonstrate that they will be so directly and immediately affected... that their interest in the proceeding is clearly distinguishable from that of the general public.”

**Your Petition to Intervene should state the legal and factual bases that support your desire to be a party.**



## A. Qualifying for Intervention

Now let's look at each of these ways to qualify for intervention.

The **first**, being a state or county agency, is easy to prove, but not applicable to individuals and community groups. To prove the **second**, you must have a legal property interest, such as owning all or part of the land, having a lease on the land, or having an easement on the land. These, too, are generally easy to prove by presenting legal documents (a title report noting the various encumbrances, for example), but most public interest intervenors hold no such property interests in the land.

The **third**, the one most difficult to demonstrate, is also the one public intervenors are most likely to take advantage of. Because the Hawai'i Supreme Court has found that traditional and customary gathering rights of native Hawaiians are interests distinguishable from the general public's interests, individuals or groups who can show that they have such rights and that the proposed development will have a direct and immediate impact on these rights stand an excellent chance of being granted intervenor status under this provision. A boundary amendment that would permit a residential subdivision to be built in a way that would cut off mauka-makai access to the coast to gather salt is an example of one that would have a direct and immediate impact upon gathering rights.

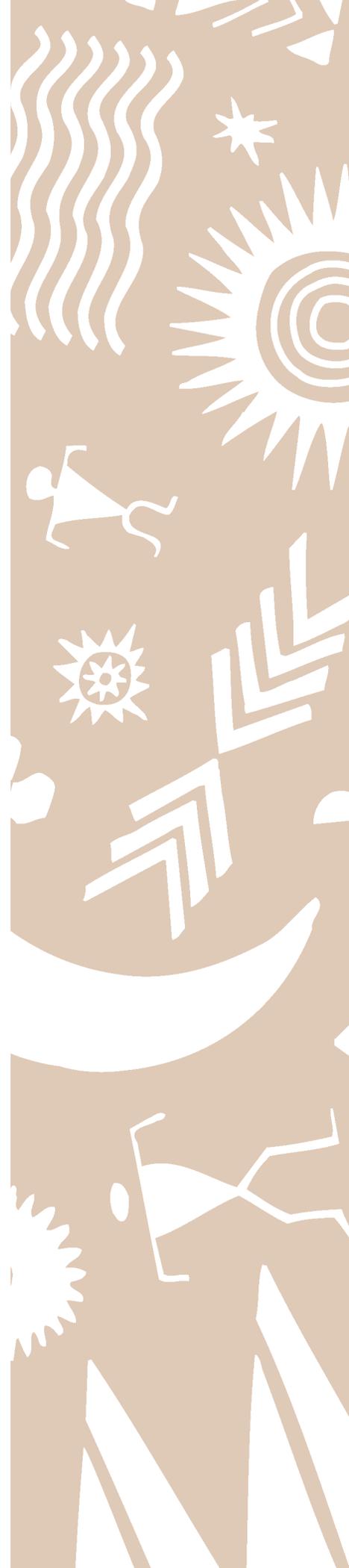
Showing a recreational or aesthetic interest that is different from that of the general public can be a bit harder. Let's say for example that the proposed development is adjacent to state forest land that contains one or more public trails and the development would cut off one or more accesses to the trails. A person who occasionally hikes on Hawai'i's public trails, including the ones where some access would be cut off by the development, may have a difficult time showing his interests are distinguishable from the general public who also have access to the trails. However, a hiking club or a person who consistently and for a long time has been hiking those particular trails would have a better chance. Another example would be a group whose purpose is to protect a natural area from environmental threats and who can show that the develop-

ment would cause such a threat of harm to the area. In the video that accompanies this workbook, in the Motion to Intervene, a fictional group called Friends of Haleakalā, whose purpose is to protect Haleakalā National Park from environmental degradation and overuse, is requesting intervention in a boundary amendment that would permit the extension of the runway at Maui Airport. Friends of Haleakalā asserted that the increase air pollution from the jets and increased car traffic caused by more tourists arriving in Maui could cause air pollution problems in the Park. Because their group exists for the purpose of protecting the resources of the Park, they arguably have an interest distinguishable from the general public, even though the general public has equal access to the Park.

If you or your group does not fit into any of the above three categories, you still may be granted intervenor status if you can show

1. you have some interest that will be affected by the boundary classification,
2. no other party to the hearing has an interest substantially the same as yours, and
3. your participation won't make the hearings inefficient or unmanageable.

However, whether to allow you to intervene under these circumstances is solely within the discretion of the Commission. For example, let's say that the Commission decided that the Friends of Haleakalā's interests are not clearly distinguishable from the general public; therefore they didn't qualify for intervention above. However, if the Friends of Haleakalā were able to show that no other party, including the Office of Planning and the county, has their level of interest and expertise in protecting air quality and that their participation would not cause undue delay in the hearings or make them unmanageable, the LUC could grant them intervenor status.



## **PRACTICE EXERCISES**

The following two exercises require you to apply the Land Use Commission and Water Commission intervention criteria to a hypothetical situation.

### **Intervention Exercise I**

A landowner has petitioned the LUC to reclassify approximately 250 acres of land from the agriculture to the urban district so that he can develop a residential and commercial subdivision. The property is located in a coastal area, with a half-mile of ocean frontage. The developer plans to eventually sell all of the lots in fee simple. The oceanfront single-family residential lots will be set back approximately 50 feet from the beach. A popular surf spot known as “the line” straddles one edge of the property line. An inactive, mostly overgrown fishpond is located on the property. According to the petition, the developer plans to revive the fishpond, restock it, and build a restaurant adjacent to it. The restaurant will serve fish harvested from the pond. The koloa (Hawaiian duck), an endangered species, has occasionally been seen in the fishpond. Pacific green sea turtles, a threatened species, and Hawaiian monk seals, an endangered species, have been observed occasionally both in the water and on the beach in the general vicinity of the property. A private wastewater system will be built to service the subdivision. Potable water will have to be piped in from wells mauka of the property. Electricity and phone service will be available from lines that already exist in the area. Solid waste will be deposited in the local county-owned and operated landfill approximately 25 miles from the subdivision.

Based upon the above scenario, decide which of the following individuals and groups would qualify for intervention and state what grounds you base your decision on:

- a local historic preservation non-profit group;
- a local surfer who surfs “the line” regularly, as well as other surf spots on the island;
- the Sierra Club;
- the Office of Hawaiian Affairs;
- the National Marine Fisheries Service (federal agency that has management responsibility for the turtles and monk seals);
- an adjacent landowner;
- the local chapter of the Hawaiian Civic Club;
- a citizen who lives in the area and who opposes further development of the coastline.

## Intervention Exercise II

Hydropower, Inc. has petitioned the Water Commission to build a small hydroelectric facility on Waianuenu Stream. It will require the building of a dam at mid-elevation and will change the daily flow rate of the stream significantly. The dam has the potential of seriously impacting native and non-native fish and plants that live in and along the stream, as well as native birds that are listed as endangered under the Endangered Species Act. It could also affect future withdrawals of water from the stream for domestic and other uses. Assuming a contested case hearing is needed prior to the Water Commission granting a permit to Hydropower, under the Water Commission rules, decide which of the following individuals and groups would qualify for intervention and give your reasons for your decision: (Appendix D contains the Water Commissions rules regarding intervention.)

1. the state Department of Agriculture;
2. a downstream landowner;
3. upstream taro farmers;
4. the Hawai'i Stream Protection Alliance (a non-profit group dedicated to preserving in-stream uses of Hawai'i's streams);
5. the U.S. Fish and Wildlife Service (federal agency responsible for recovery of endangered species); and
6. Hawaiian Electric Company, Inc.



## WITNESSES AND EXHIBITS

### A. Preparing Witness and Exhibits Lists

Parties present two types of evidence at hearings: **oral** (through witness testimony) and **documentary** (such as written documents and video-tapes). Documentary evidence is entered into the record as an **exhibit**. Each party is responsible for putting together a witness list and an exhibits list that it gives to the other parties and the agency prior to the hearing. In many instances, witness and exhibit lists are initially exchanged at the pre-hearing.

**Scene One of the video that accompanies this workbook shows the exchange of witness and exhibit lists at a pre-hearing conference.**

Each exhibit on your exhibit list should be given a number. Witnesses should be listed in the order in which you plan to call them. You may also be asked to provide (1) an estimate of the time it will take you to do your direct exam of each witness and (2) the identification numbers of the exhibits you plan to have the witnesses refer to in their testimony. For BLNR and the Water Commission, parties are given instructions at the pre-hearing conference on how to number the exhibits. Generally they use a system where each party gets a letter of the alphabet and numbers their exhibits accordingly, e.g. A-1, A-2, etc. Always be aware of and follow the rules of the agency and any pre-hearing orders regarding timeframes for submittal of materials.

Throughout the course of the hearing, parties amend their witness and exhibits lists as needed. If you need to amend your lists, you should bring copies of your amended lists to the hearing with enough copies for the parties and the decision-makers. Each list should be labeled. For example, your first list should be titled “Intervenor’s First List of Witnesses.” If your witness list changes, it should be titled “Intervenor’s First Amended List of Witnesses.” The same procedure should be used for your Exhibit List. See Appendix E for sample witness and exhibits lists. Witness and exhibit lists are officially entered as part of the record during the hearing. **Scene Three of the video demonstrates how to enter exhibit and witness lists into the record.**

To make the hearings run more efficiently, parties are usually required to give all the parties and the decision-makers copies of any documentary evidence prior to the date of the hearing when the exhibit will be introduced. BLNR and the Water Commission require written statements of all witnesses

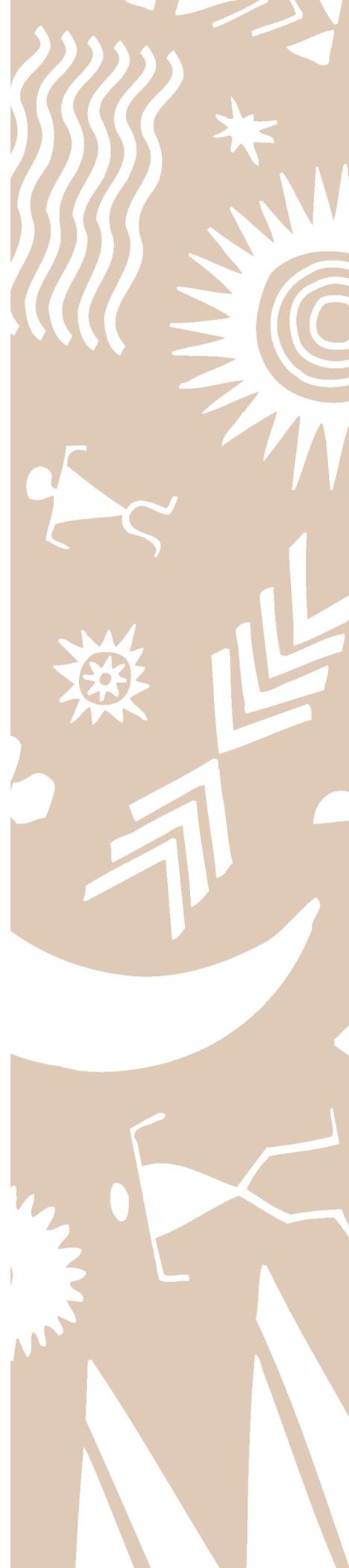
prior to testifying; LUC parties also may be asked to prepare written testimony for their witnesses. The written testimony should contain all the information you want to bring in through the witness and should be signed by the witness. See Chapter III below for how to prepare a direct examination.

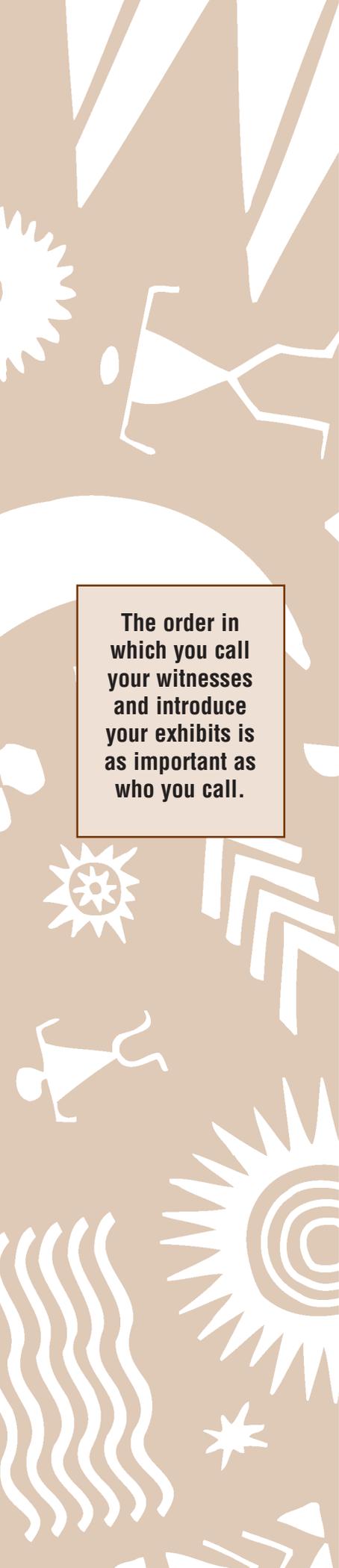
## **B. Strategies**

Deciding who to put on your witness list, which documentary evidence you will introduce through a witness, and the order of their testimony is a critical strategic part of putting on your case. The “who” question is very important. You want to choose witnesses who have credibility and whose testimony will be relevant to the issue being decided. Don’t flood the decision-makers with witnesses—more is not always better. Use only those you need to make your case. Study the witness lists of the other parties. Sometimes you can elicit information when you cross-examine their witnesses, thereby reducing the number of witnesses you need to call.

As with your witnesses, you need to choose your exhibits wisely. The written word can hold more weight in the minds of the decision-makers than oral testimony, particularly if it consists of reputable scientific studies. Complex written materials should be summarized and/or outlined in writing and made an exhibit as well. That way the decision-makers can follow easily the witness testimony about the document. In addition, visual and audio aides can help reduce the boredom that comes with listening to oral recitations (remember your own attention span in school or at hearings you might have attended). Also, visual aides are known to assist decision-makers in remembering testimony.

For example, let’s suppose you want to have your witness discuss information contained in an environmental impact statement (EIS) and the EIS has been entered as an exhibit. The part you want to draw the decision-makers attention to contains complex data about the amount of water available in a stream, current instream and offstream uses, and current and projected pollutant loads for the stream. You realize that to non-scientifically trained laypersons the information in the EIS can be difficult to follow. But you want the decision-makers to understand the information and the significance of it. Your job is to construct an exhibit that clearly and succinctly outlines and summarizes the information in the EIS that the decision-makers can use during your witness’s testimony.





**The order in which you call your witnesses and introduce your exhibits is as important as who you call.**

Another use of exhibits is to lend credibility to the witness's testimony. Suppose your witness is testifying to noise levels in a subdivision that is on the flight path of a runway that the state wants to expand. Your witness lives in the subdivision so is exposed to the noise daily. Suppose also that according to the "experts", the noise levels the residents in the subdivision experience are just below the legally acceptable noise threshold. You might consider introducing two types of exhibits with this witness. First, any studies that say that legally acceptable sound levels are still annoying and potentially harmful. Second, a videotape recording of a family barbeque in the backyard as planes are flying overhead.

The order in which you call your witnesses and introduce your exhibits is as important as who you call. Whenever possible, lawyers try to begin and end with their most important witnesses and documentary evidence. The theory behind this approach lies in the principle that people seem to remember most clearly the first and last information that they hear. Another consideration is whether you have a witness who can go first to give the "big picture", i.e., explain what you believe are the important issues for the decision-makers to focus on. Such a witness should be able to put your position in context and give the decision-makers a preview of what they will hear in greater detail from your other witnesses.

## **OPENING AND CLOSING STATEMENTS**

In addition to putting on witnesses and exhibits, you may be called upon to make statements at the beginning and end of the contested case hearing. Although not as commonly used at contested case hearings as they are in civil and criminal trials, they are important tools in building your case.

### **A. Opening Statements**

The purpose of an **opening statement** is to give the decision-makers a framework to look at the problem from your particular point of view. You should thus emphasize what you believe are the important issues they are facing and how the evidence will show that the issues should be resolved in the way that you suggest. For example, in the video accompanying this workbook, the intervenor, Friends of Haleakalā, is concerned about the impact of increased air

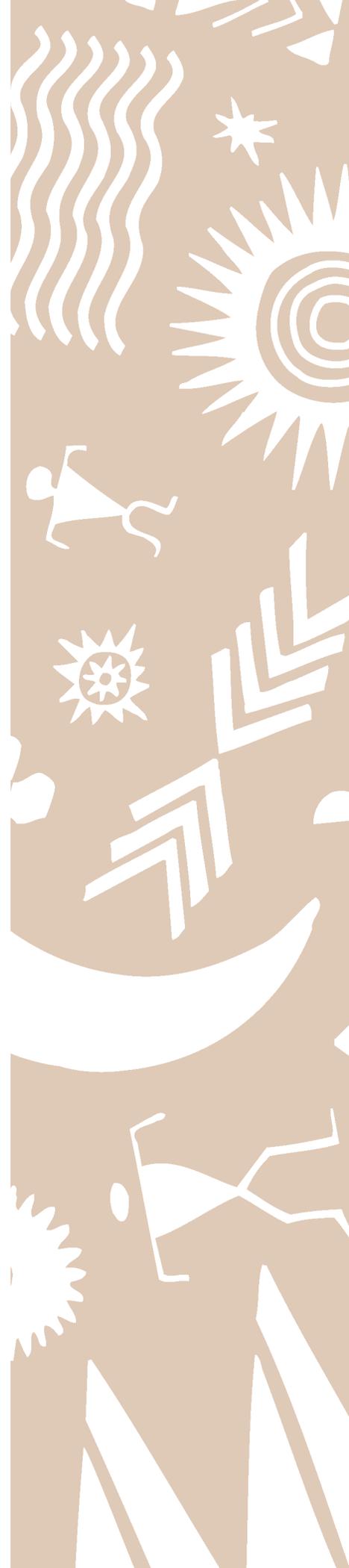
pollution from the extension of the Maui Airport runway and the negative impacts this pollution could have on Haleakalā National Park. They claim that a significant source of the air pollution will come from the increase in the number of cars on the roads resulting from an increase in tourists. The Department of Transportation, the petitioner, is likely to categorize the increase in cars as a traffic problem near the airport and will have experts dealing with routing traffic, putting in new signals, and such. In their opening statement, Friends would focus the decision-makers' attention on increased cars being an off site air pollution problem as well as an on-site and near-site traffic problem. They would also relate how their witnesses will demonstrate that the air pollution will reach Haleakalā National Park and the negative impacts that such pollution will have on the Park as both a spectacular natural and cultural feature and as a major Maui tourist destination. If the Friends believe no way exists to mitigate the air pollution impacts caused by the runway extension, they would go on to tell the decision-makers that they will show that the benefits of the runway extension do not outweigh the negative effects of the air pollution. The only logical conclusion, they will assert, will be to deny the petition.

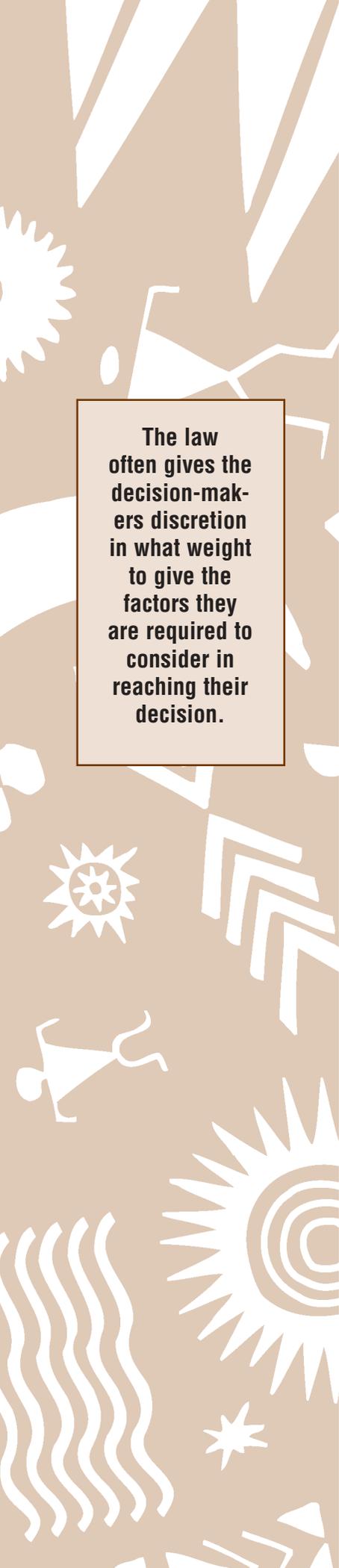
Thus, through their opening statement, the Friends will have focused the decision-makers on what they believe to be a critical and project-stopping issue. As a result, during the hearing the decision-makers will be weighing the evidence they hear in light of the air pollution problem, even before Friends puts on their witnesses to prove their opening statement assertions.

## B. Closing Statements

**Closing statements** are made after the end of the evidentiary portion of the hearing. Sometimes they are made prior to the official close of the hearing. Often they are made on the day the outcome is to be decided. If so, the parties will have had the opportunity to review the decision-makers' proposed findings of fact and conclusions of law prior to making their closings. Sometimes parties will have the opportunity to make their statements both at the end of the hearing and after having received the proposed decision. How you structure your closing statement will depend in part on what stage in the process you will be making it. Closing statements are usually done orally; however, at times only written statements are accepted.

If made before the decision-makers have issued their proposed decision,





**The law often gives the decision-makers discretion in what weight to give the factors they are required to consider in reaching their decision.**

your statement should restate the decision you believe should be reached and use the evidence they have heard to support your position. In a closing statement you will not only highlight your evidence, but also tell the decision-makers why they need to disregard any contrary evidence put on by another party. You should ground the arguments you make in both the factual evidence they have heard and the law that they are bound to apply. The law often gives the decision-makers discretion in what weight to give the factors they are required to consider in reaching their decision. Tell them why the weight of the evidence supports the legal conclusion you want them to draw.

How you make your closing statement is largely a matter of personal style. Remember, however, that your task is persuasion. Knowing that, keep in mind the following points. First, be brief and to the point—don't review every bit of evidence—only that which you believe is critical to the outcome. Second, you can acknowledge “good” points made by other parties with competing interests, but show how or why your view is “better” or “more appropriate.” Third, stick to the high ground. Do not engage in personal attacks or excessive sarcasm. Fourth, imagine that you are the decision-maker and come up with an argument that you would feel is fair and just for all sides. Finally, be respectful.

**Scene Seven of the accompanying video demonstrates post-hearing arguments.**

## CONCLUSION

This chapter discussed procedural aspects of proving your case. Equally important is understanding the substantive legal criteria that the agencies are bound to follow in making their decisions. Those criteria differ for each type of decision the agency is making and are found in the laws and rules that the agency is administering. Relating all of them is outside the scope of this workbook. However, it is critically important that you familiarize yourself with those legal criteria as you make your decisions on how to prove your case.

# CHAPTER THREE: LAWYERING SKILLS

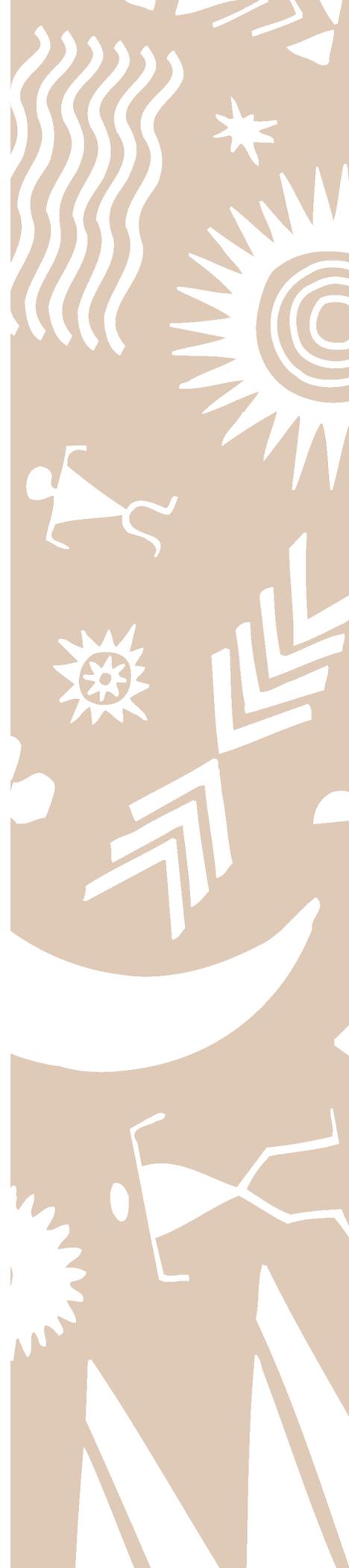
## INTRODUCTION

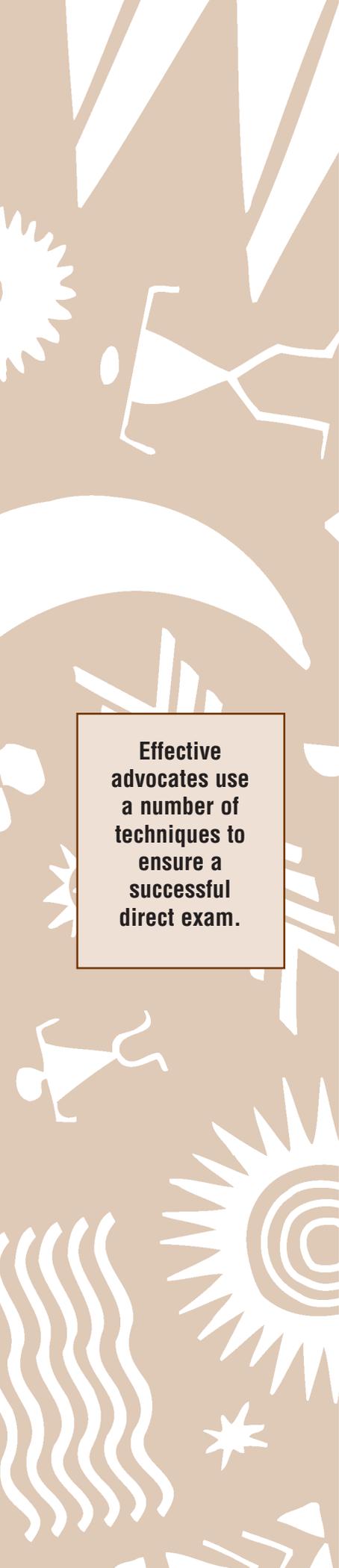
With all the preliminary procedural matters taken care of, it is now time for the evidentiary portion of the hearing where all the parties present their cases to the decision-makers. Most of the time, the intervenors present their case last. For example, in a land use boundary amendment petition, the petitioner usually goes first, followed by the county and state, and then the intervenor. By now you should have copies of the other parties' witness and exhibit lists, as well as many, if not all, of their exhibits. You will know in what order they plan to call the witnesses and what documents each witness will be using to support his testimony. You will have already formulated your plan for calling witnesses and introducing exhibits as well.

This chapter introduces you to the skills that advocates need to effectively present their position to the decision-makers. Because these are techniques used by lawyers in trials, I refer to them as **“lawyering skills”**. They include direct examination, cross-examination, qualifying witnesses as experts, and introducing and objecting to evidence.

Keep in mind that these are “quasi-judicial” hearings. The overriding purpose of the procedures is to allow presentation of the best and most relevant information in an organized process that gives all parties the opportunity to be heard. Common sense—and even common courtesy—carry the day far more often than hyper-technical objections or “over lawyering.” The time for highly technical legal arguments will come if or when a party appeals a decision of the agency to the courts.

Your job before the agency is to **“make the record”**, i.e., to bring forward the evidence in support of your position, test the significance of the evidence not in your favor, make known your objections, and clearly state what it is you want the decision to be and why. With these goals in mind, let's review the way that information gets presented to the decision-makers.





**Effective advocates use a number of techniques to ensure a successful direct exam.**

## DIRECT EXAMINATION

**Direct examination** (also direct exam) is the term used to describe the way in which an attorney questions her own witnesses. The purpose of direct exam is to elicit relevant and credible information from your witness that can be easily remembered by the decision-makers and which supports your position. To be relevant, the testimony must relate to the legal issues that are being decided. For example, if the main issue is how to allocate the water in Waikāne Stream, the amount of water in Waiāhole Stream generally would not be relevant. However, if taking water from Waiāhole Stream affects the amount of water flowing in Waikāne Stream, then the amount of water in Waiāhole Stream could be relevant.

The testimony you elicit should also be credible. If your witness is known to have a bias regarding the issue at hand, then you need to buttress that witness's testimony with objective documentary evidence or with another witness whose point of view is either neutral or even biased the other way.

Finally, the testimony should be memorable. If the witness is being used to put on highly technical information, it is your job to ask questions that will permit the witness to present the information in a way that is easy to follow and that will be easily remembered. Having outlines, charts, and graphics all help make testimony memorable.

Effective advocates use a number of techniques to ensure a successful direct exam. First, make your questions short and to the point. Avoid asking questions that require more than one answer. The following question is the type you should avoid: "Do you know what the prevailing winds around the Maui airport are and, if so, to what extent would those winds transport air pollution from the airport to Haleakala National Park causing a deterioration in the Park's visibility?" Instead, you could break it into a series of questions, such as: "What are the prevailing winds around the Maui airport? (witness answers). Could those winds transport air pollution from the airport to Haleakala National Park? (witness answers yes). Under what wind conditions might that happen? (witness answers). If that were to happen, what effect might that air pollution have on visibility at Haleakala National Park? (witness answers).

Second, it is as important to plan the order in which you want to ask questions of your witnesses as it is to decide on what order to call the witnesses themselves. Ask all your questions on a particular subject at the same time and

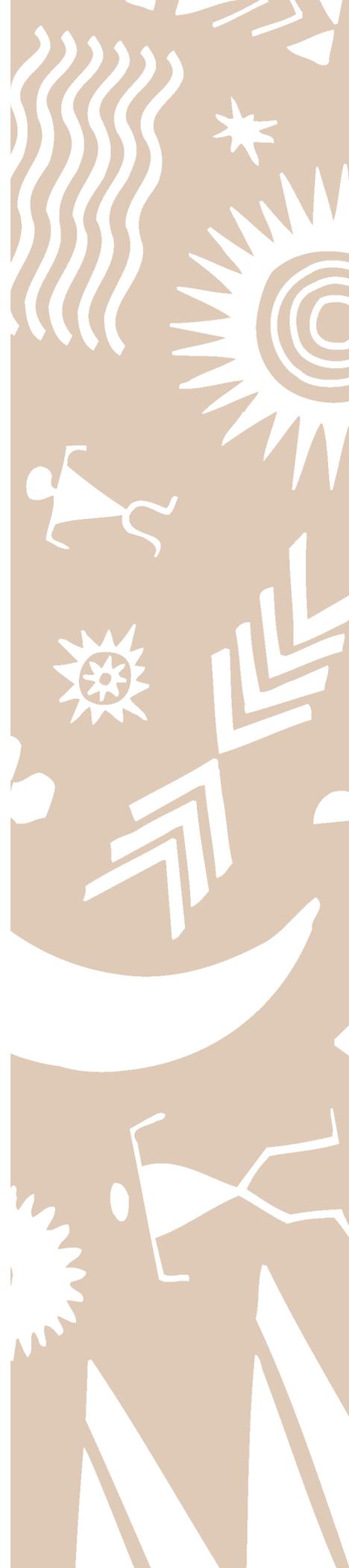
in a logical sequence. Try to present your witness's most vivid and important testimony first. For example, you could ask the questions in the paragraph above in the sequence they are written or change them around for more dramatic effect in the following way. "Please describe the serious negative effects that air pollution can have on visibility at Haleakalā National Park. Could those effects occur from air pollution transported on the prevailing winds from the Maui Airport to the Park? What are the prevailing winds at the airport? Under what conditions would those winds be likely to cause serious enough air pollution from the airport to reduce visibility at Haleakalā National Park?"

Third, don't interrupt your witness; let her finish answering your question before asking the next question. If your witness is digressing or going into more detail than you want, you may interrupt, but do it politely. For example, you could say: "Excuse me Ms. \_\_\_\_\_, I'd like to interrupt for just a moment. A minute ago you stated that \_\_\_\_\_. (Then ask your next question to get the witness back on track.)"

Fourth, be aware of whether the decision-makers are following the testimony. If they look bored and testimony has been going on quite a while, you could suggest a break or, if it is too soon for a break, ask only a few more questions on that subject and move on to another area of the witness's testimony, preferably one that will have an exhibit for the decision-makers to refer to. This will help re-focus their attention. If the decision-makers look confused, chances are your witness is not being clear. You should politely intervene. For example, you might say, "Excuse me Mr. \_\_\_\_\_. I want to make sure that I understand your analysis. Did you say that...?" Don't volunteer that you think the decision-makers are confused. If anything, make it appear that you are the one confused. For example, don't say: "Excuse me Mr. \_\_\_\_\_. I think the Commissioners might need some clarification here." Rather say something like, "Excuse me Mr. \_\_\_\_\_. Could you please clarify something for me? Are you saying that...?"

Fifth, be aware of your own witness' state of comfort. Some witnesses may be well-practiced in appearing and giving testimony. Some may be frightened and timid. Try to develop a conversation with your witness. Keep in mind a few prompting questions if it looks like your witness is freezing up, wandering, or mumbling.

Sixth, you can refer to your notes from time to time, but don't appear





**Don't have witnesses read scripted text, particularly if it is long.**

to be reading from a script. A fully scripted presentation does not give enough flexibility to explore points raised by the decision-makers. If you are permitted or required to submit written testimony from your witness beforehand, have your witness summarize the main points only. Don't have witnesses read scripted text, particularly if it is long. Verbatim reading is not an effective use of time.

In conclusion, remember that direct examination of your witnesses is the primary way of getting the information you believe to be important and relevant to the decision-makers in the order and format that you want them to hear it. Take the time to develop your questions and only deviate from them during direct exam when necessary. The following two problems are designed to help you develop your direct examination skills.

### **Direct Examination Problem #1**

Let's assume you have a choice of two witnesses to put on to address the potential air pollution problems in Haleakala National Park from the extension of the Maui runway, one a consulting meteorologist who has written several articles on the problem of air pollution in national parks and the other a meteorologist from the University of Hawai'i whose research involves modeling the dispersion of smog from car exhaust in California and on O'ahu. If you could only choose one, whose testimony do you believe would be more credible? More relevant? More memorable? Why? If you were able to use both witnesses, what type of information would you want to elicit from each witness? What types of visual aides might you develop to use during the direct exam? What type of documentary evidence might you introduce through these witnesses?

## Direct Examination Problem #2

The following is a report prepared by your witness in response to a Faunal Survey done by the petitioner's consultant. Prepare direct examination questions to ask at the hearing. After we go over the questions you will have the opportunity to ask the questions during a mock direct examination.

### Summary of Dr. Little's Report prepared by Dr. Bean

The petitioner hired a well-respected bird biologist, Dr. Moore, to survey the 102 acres of land in the petition area. He conducted the survey in a two day period, March 18 and 19, 2001. The purpose of the survey was to document the species and numbers of birds that inhabit or use the petition area, as well as to assess whether the habitat is one that could be used by any bird species on the state or federal threatened or endangered species lists.

In his report, Dr. Moore gave a general description of the site prior to describing his survey methods and results. He and his assistant set up eleven count stations along three transects within the project area. Counts were made for six minutes at each station twice a day, once in the early morning hours that represent the usual peak times of bird activity and once in the evening when the nocturnal birds would likely be seen. Dr. Moore and his assistant observed 10 species of birds, all non-native and common: Erckel's Francolin, chickens, spotted and zebra doves, mynas, Japanese white-eyes, house sparrows, java sparrows, house finches, and northern cardinals.

Dr. Moore drew the following conclusions: (1) The diversity and density of bird species was lower than expected, probably due to recent drought conditions. (2) The habitat is not conducive to use by native bird species. (3) Based upon a previously published report, it is possible that the endangered endemic Dark-rumped petrel occasionally overflies the area in the summer and fall months. Because of this, he recommends that external lighting planned for the development be shielded to reduce the potential incidence of petrels colliding with external lights and man-made structures. (4) The development will not have any significant negative impact on bird populations in the petition area and its vicinity.

Dr. Moore admits in his report that a two-day survey is insufficient to document with certainty all species of birds that could use the petition area. However, he believes that the survey is sufficient because the terrain would likely only be habitable for other non-native common species.

Dr. Moore failed to note that two other federally endangered flying species, the Hawaiian hawk (*'io*) and Hawai'i's only land mammal, the hoary bat, have been known to frequent the general vicinity of the petition area. A comprehensive survey of the *'io* is about to be finished and published by biologist David Bean. Any conclusions regarding impacts on the *'io* should await this pending publication. Very little research has been done on the bat; therefore it is important that more surveys be taken to determine whether and how often it uses or inhabits the petition area prior to permitting any development that could alter the habitat. Without more and the latest information, it is impossible to know what impact this proposed development might have on these two endangered species.

## CROSS-EXAMINATION

**Cross-examination** gives you the opportunity to ask questions of the other parties' witnesses following their direct exam. At the outset, it is important to realize that it is not always necessary to cross-examine every witness put on by the other parties. As with your direct exam, you should have a strategy for cross-examining the other parties' witnesses. In developing your strategy, first decide the importance of the testimony the witnesses will be presenting. For example, if the witness is simply describing the development project, generally little will be gained from cross-examining the witness on details of the project. However, if a witness is discussing a key issue, such as the sustainable yield of an aquifer, and you disagree with the witness's assertions or conclusions, you will most likely want to cross-examine the witness to point out the weaknesses in her testimony.

**At the outset, it is important to realize that it is not always necessary to cross-examine every witness put on by the other parties.**

Second, ask yourself whether it is more helpful to present your side to the decision-makers through cross-examining another party's witness or through introducing your own witness, or maybe both. If the other party's witness is a highly credible and reputable expert in the field of water resources, you will have a difficult time impeaching the expert's conclusions. However, if you can offer your own credible and reputable expert whose conclusions differ from your opponent's expert, you will be able to raise doubts in the minds of the decision-makers as to the other witness's conclusions. On the other hand, if you have good reason to disagree with the conclusions of their witness and you don't have your own expert available, cross-examination may be your only option. When conducting such a cross-exam, try to resist efforts to show that the witness is lying. Rather than attacking the witness's truthfulness, try to show that the information she presented is erroneous or incomplete or that the conclusions she drew are not supported by the evidence.

Third, is the witness's testimony damaging to your theory of the case? If not, you may want to forego cross-examination in the interest of time and efficiency (which is always at the forefront of the decision-makers' minds!). If the witness's testimony is favorable to your case in whole or in part, you may want to highlight some of the witness's conclusions in your cross-exam so that they are firmly implanted in the decision-makers' minds. But remember to keep it short and to the point!

Fourth, as with direct exam, design your cross-exam to elicit relevant information. You can also use cross-examination to show that the witness is biased. For example, if the Department of Transportation calls the executive director of the Maui Hotel Association to testify in support of extending the Maui Airport runway, you may want to ask questions designed to show that the members of the Association stand to benefit economically if the runway is extended. You could also question their ability to be able to draw any conclusions regarding negative environmental impacts if they don't have any expertise in environmental assessment.

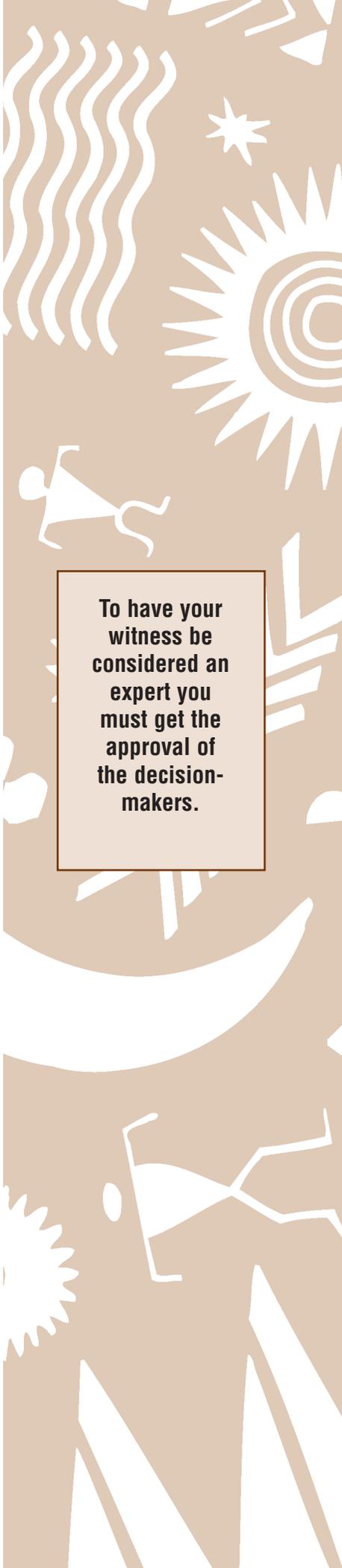
Fifth, in conducting cross-examination, you run the risk of getting an answer that you don't want. Be prepared for that by knowing how you will refute the answer either through the cross-examination or through your own witness later on or in your final argument. Preparing your cross-examination ahead of time and doing your best to predict what the witness will say based upon the information you have will decrease the chances of getting answers that hurt your case.

Cross-examination, when done well, is a critical tool to help ensure that the decision-makers have all the relevant information and know what weight to give it. It should be approached cautiously and used strategically to help support your position. If you can't articulate in your mind a clear benefit to cross-examining a witness, then forego the cross-exam.

**Scenes Four and Six of the video accompanying this workbook demonstrate direct and cross examination of lay and expert witnesses.**

## QUALIFYING WITNESSES AS EXPERTS

When parties need to present scientific or highly technical evidence, they try to use experts to testify to those matters. Decision-makers give more weight to the opinions and conclusions of experts than lay persons on such subjects. Therefore, parties try to qualify as many witnesses as experts as possible. To have your witness be considered an expert you must get the approval of the decision-makers. The best way to accomplish this is by submitting a detailed resume as one of your exhibits.



**To have your witness be considered an expert you must get the approval of the decision-makers.**



Before doing so, you must decide what field of expertise you want your witness to be qualified in. This is very important. For example, a person with a Ph.D. in archeology may be qualified as an expert in identifying native Hawaiian historic cultural sites and how best to evaluate and preserve them, but may not be qualified as a cultural expert on native Hawaiian cultural practices. A person with a Ph.D. in anthropology may be qualified in both. Or a kupuna from an area could be an expert in native Hawaiian cultural practices even though he has no specialized educational training. You must look closely at the witness's educational training, work history, and personal experiences to determine the area of expertise and whether the witness can qualify as an expert.

You should also find out whether the person has been qualified as an expert in other hearings before the decision-making body you are in front of or any other tribunals. As a general rule, a person who qualifies in one hearing will be qualified in subsequent hearings in front of the same or similar boards and commissions.

In most instances, parties identify at the pre-hearing which witnesses they want to qualify as experts. Often times at the pre-hearing, the parties will agree on (stipulate to) which witnesses are experts. It is best to have the parties agree ahead of time to the qualifications of your witness as an expert because decision-makers rarely refuse to qualify witnesses as experts when all parties are in agreement. The pre-hearing is also the time for you to initially express your objections to the proposed expert status of other parties' witnesses. You will then be offered the opportunity to give your reasons at the beginning of the hearing when the procedural matters are being taken care of. Occasionally a party will wait until he calls the witness to request for expert status; if so, you would make your objection then.

**Scene Five of the accompanying video demonstrates a party qualifying witness as an expert.**

### **Expert Qualification Problem**

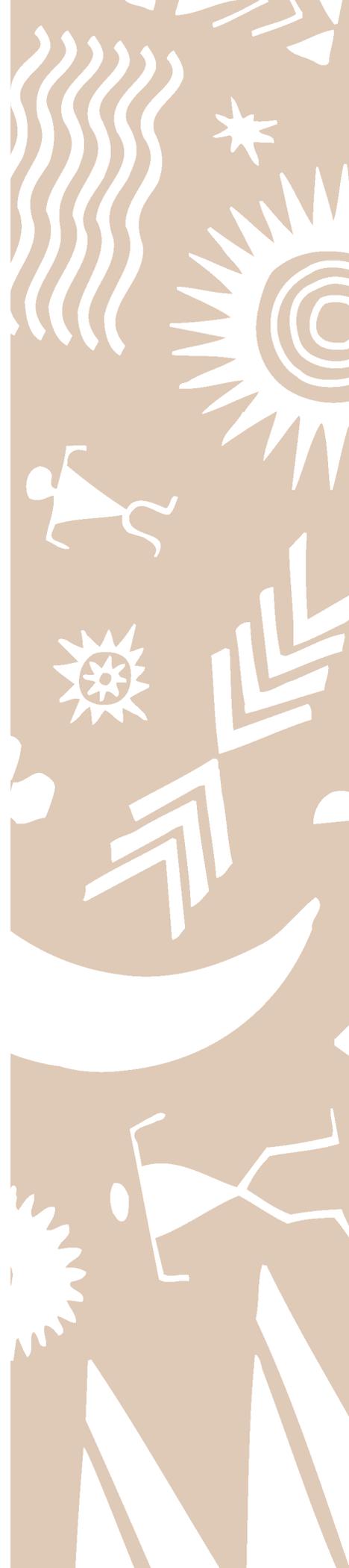
Read the resumes provided in Appendix F and decide what area(s) you believe the witnesses could be qualified as an expert in and why.

## Introducing and Objecting to Evidence

In a quasi-judicial hearing, parties prove their case by putting before the decision-makers oral and documentary (written) evidence. Documentary evidence, which is admitted through witness testimony, consists of items such as reports, charts, graphs, environmental assessments, newspaper articles, etc. You need to give each document an exhibit number (see discussion in Chapter II) and refer to it by that number when it is introduced or referred to during the hearing. You must give copies of your documentary evidence to all of the parties and to the decision-makers; this is usually done prior to the hearing date so that everyone will have had the opportunity to read it before your witness talks about it.

If possible, introduce the documentary evidence through the person who wrote it. If not, you will need to decide which of your witnesses is best able to testify about the information in the document and introduce it through that witness. If the document is of a scientific or highly technical nature, it is better to introduce it through one of your expert witnesses. Use the original copy of the document if it is available; if not, be sure your copy is legible and be prepared to tell the decision-makers why the original is not available.

In regular court trials, complicated rules of evidence govern what evidence can be admitted, when, by whom, and how. Fortunately, the rules in contested case hearings are much simpler. You need to look at the procedural rules of the agency to find out what evidentiary objections are available. For example, the Land Use Commission rules specify only three types of objections: irrelevant, immaterial or unduly repetitious. For all intents and purposes, irrelevant and immaterial mean the same thing: the testimony or document, while it may be interesting, does not relate closely enough to the issue. For example, assume that the issue is whether a rock pile is a cultural site constructed by native Hawaiians or a rock dump site created when land was cleared for planting sugar. A drawing that shows the sugar field and an area where the rocks were to be piled during cultivation would be relevant. A drawing showing a similar but essentially identical field and rock pile on another island is less likely to be relevant. Testimony by a field hand that he and others had put rocks at the site would be relevant. Testimony that he and others ate lunch at the site would be irrelevant.





Unduly repetitious means that the same or similar evidence has already been introduced on the issue and that more evidence is not needed to prove the point. For example, in the rock pile example above, it would be unduly repetitious to have five field hands testify that they each put rocks on the pile.

If you believe that evidence being put on by another party is irrelevant, immaterial, or unduly repetitious, you make your objection and the grounds for it immediately after the question is asked of the witness and before the witness answers. The presiding officer will either sustain your objection (rule in your favor and instruct the witness not to answer) or overrule your motion and permit the witness to answer.

Because you are making a presentation to a panel of “lay” decision-makers, you have a little more leeway and will probably be more effective if you state your objection in plain English. For example, don’t simply say, “Objection, relevancy!” and then wait for a ruling. Take the opportunity to say why, thereby refocusing the decision-makers. For example: “Commissioners, it appears as though Mr. Foreman is about to talk about the stream flow in Waiahole. However, this case is about the stream flow in Waikane and how the biota are affected. What bearing will the proposed testimony have on the issues at hand?” Or, if your objection is repetitious testimony: “Objection, unduly repetitious. Witness X, or Witness Y, has already said \_\_\_\_\_. Is there anything different this witness will add?” In other words, phrase your objection in a manner that the decision-maker will silently say to himself, “Yeah, that’s right.”

If a party objects to a question you ask, do not ask another question until the decision-maker has ruled on the objection. You may be asked to respond to the objection and make your argument why you think the objection should be overruled. If a party objects to your question for any reason other than the ones permitted in the agency’s procedural rules, you can request that the decision-maker overrule the objection on the grounds that there is no legal basis for the objection.

When and how often to object should be part of your strategy. But because contested case hearings are meant to be more informal than court hearings, you should use evidentiary objections sparingly.

## CONCLUSION

Developing effective lawyering skills takes time and practice. If you think you may be involved in a contested case hearing in the future, try to observe one or more hearings of that agency first. Use what you have learned through this workbook and the video to critique what and how the lawyers are handling the case for their clients. Incorporate what you see lawyers doing well into your own case and be sure to avoid those things that the lawyers are not doing well. Go over your direct exam questions with your witnesses prior to the hearing and let the witnesses help you anticipate what questions might be asked them during cross examination. Also, have your witnesses and others assist you in preparing cross-examination questions for other parties' witnesses. If you are well-prepared, it will show. As a result, you will gain more credibility with the decision-makers.





## NOTES

# APPENDIX A

## AGENCY CONTACT INFORMATION

### **Department of Land and Natural Resources**

1151 Punchbowl Street  
Honolulu, HI 96813  
(808) 587-0400  
[www.state.hi.us/dlnr](http://www.state.hi.us/dlnr)

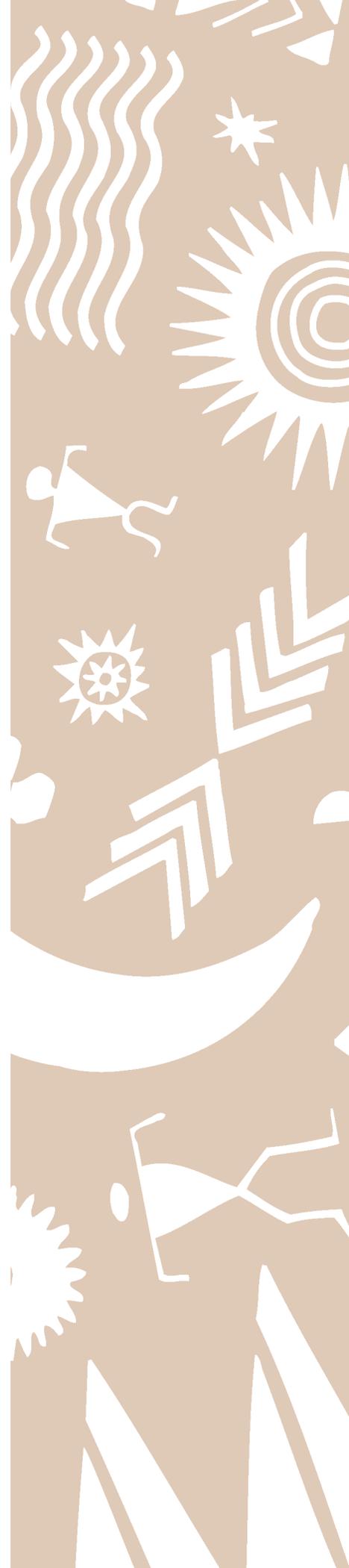
### **Commission on Water Resources Management**

1151 Punchbowl Street  
Honolulu, HI 96813  
(808) 587-0214  
[www.state.hi.us/dlnr/cwrn](http://www.state.hi.us/dlnr/cwrn)

### **Land Use Commission**

State Office Tower  
235 Beretania Street, 4th Floor  
Honolulu, HI 96813  
(808) 587-3822

The LUC does not have a separate website, although it is working on building one. You can access LUC rules through the website of the Department of Business, Economic Development, and Tourism website at [www.state.hi.us/dbedt](http://www.state.hi.us/dbedt).





# APPENDIX B

## SAMPLE OF PROPOSED FINDINGS OF FACT/CONCLUSIONS OF LAW

Of Counsel:

BAYS, DEEVER, LUNG, ROSE & BABA

A. BERNARD BAYS        0969-0  
Attorney at Law,  
A Law Corporation  
LIANE L. BROWN        5569-0  
Alii Place, 16th Floor  
1099 Alakea Street  
Honolulu, Hawaii 96813  
Telephone: (808) 523-9000

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition	)	DOCKET NO. A99-729
	)	
Of	)	PETITIONER'S PROPOSED FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW, DECISION
THE NEWTON FAMILY LIMITED	)	AND ORDER; CERTIFICATE OF SERVICE
PARTNERSHIP, a Hawaii limited	)	
partnership,	)	
	)	
To Amend the Land Use District	)	
Boundary of the Conservation District, at	)	
Kukuau, County of Hawaii, State of	)	
Hawaii, in order to reclassify a portion of	)	
certain land consisting of approximately	)	
885.40 acres from Conservation to	)	
Agricultural	)	

**PETITIONER'S PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, DECISION AND ORDER**

Petitioner The Newton Family Limited Partnership, a Hawaii limited partnership, through its counsel, Bays Deaver Lung Rose & Baba, pursuant to the request of the Land Use Commission at its meeting on August 9, 2001, submits its proposed Findings of Fact, Conclusions of Law, Decision and Order.

**FINDINGS OF FACT**

**I. PROCEDURAL MATTERS**

1. Petitioner The Newton Family Limited Partnership submitted to the State Land Use Commission (the "Commission") a Petition to Amend the Land Use District Boundary of the Conservation District in order to Reclassify Certain Land From Conservation to Agricultural on August 31, 1999 (the "Petition"), pursuant to Chapter 205, Hawaii Revised Statutes, as amended ("HRS"), and Chapter 15-15, Hawaii Administrative Rules, as amended ("HAR"), to amend the State land use district boundaries by reclassifying approximately 885.40 acres of a 1,645.823 acre parcel owned by Petitioner situated in Kukuau, South Hilo, County, Island and State of Hawaii (the "Property") from the State Land Use Conservation District to the State Land Use Agricultural District. The Petition included a Draft Environmental Assessment ("DEA") as required by section 343-5(a)(7), HRS.

2. Petitioner is a family limited partnership organized in the State of Hawaii. Its general partners are George N. Newton, Trustee of the Revocable Trust of George N. Newton dated April 5, 1976, and Mary Jo Newton, Trustee of the Revocable Trust of Mary Jo Newton dated April 5, 1976. The limited partners are the four adult children of George and Mary Jo Newton (collectively, the "Newton Children"). Petitioner's mailing address is P. O. Box 426, Kailua, Hawaii 96734.

3. On September 23, 1999, the Commission met in Waikapu, Hawaii, to consider whether the anticipated effects as discussed in the Petitioner's DEA to reclassify the petition area from the State Land Use Conservation District into the State Land Use Agricultural District constituted a "significant effect" pursuant to Chapter 343, HRS. At the meeting, the Commission granted in part and denied in part Petitioner's Motion to Continue Action On Its

Petition To Amend the Land Use District Boundary of the Conservation District Lodged on August 31, 1999, filed on September 23, 1999. On October 12, 1999, the Commission issued its written Order.

4. On November 15, 1999, the Petitioner filed a Supplement to the Petition which included a Supplement to the DEA.

5. On November 17, 1999, the Petitioner filed a Secondary Supplement to the DEA dated November 16, 1999.

6. On November 19, 1999, the Commission met in Hilo, Hawaii, to continue its consideration of the Petitioner's DEA. At the meeting, the Commission granted the Petitioner's oral request to allow the Petitioner additional time to supplement the DEA to address concerns raised by the Commission and the State of Hawaii Office of Planning ("OP"). On January 21, 2000, the Commission issued its written Order.

7. On January 21, 2000, the Petitioner filed a Third Supplement to the Petition which included a revision to the DEA dated January 17, 2000.

8. On February 2, 2000, the Petitioner filed a Fourth Supplement to the Petition which included a Fourth Supplement to the DEA dated February 2, 2000.

9. On February 3, 2000, the Commission met in Hilo, Hawaii, to continue its consideration of the Petitioner's DEA. At the meeting, the Petitioner filed a Fifth Supplement to the DEA dated February 2, 2000. The Commission requested that the Petitioner provide the Commission with further information, including proposed conditions to mitigate potential impacts, to complete the preparation of the DEA, pursuant to section 11-200-9(b)(2), HAR. The Commission, upon its own motion, continued the meeting until such time that a revised and



complete DEA was received from the Petitioner. On February 18, 2000, the Commission issued its written Order.

10. On November 1, 2000, the Petitioner filed an Amended Petition which included an Amended DEA ("ADEA") dated October 30, 2000.

11. On December 8, 2000, the Commission met in Honolulu, Hawaii, to continue its consideration of the Petitioner's ADEA. At the meeting, the Commission made a preliminary determination of a finding of no significant impact for an environmental assessment. The Commission further required the Petitioner to submit the ADEA with the assurances, clarifications and other revisions noted and agreed to by the Petitioner's counsel at the meeting relating to the size of the proposed project and the proactive measures the Petitioner proposes to take to ensure against "significant effects" on the environment in the future. On January 24, 2001, the Commission issued its written Order.

12. On January 25, 2001, the Petitioner filed a 1<sup>st</sup> Amendment to Amended Petition, which included an ADEA dated January 23, 2001. This ADEA reflected the assurances, clarifications and other revisions previously agreed to by the Petitioner's counsel.

13. The ADEA was subject to a 30-day public review and comment period pursuant to section 343-5(c), HRS. The review and comment period ended on March 10, 2001.

14. The Petitioner filed a Final Environmental Assessment ("FEA") with the Commission on April 6, 2000.

15. On April 19, 2001, the Commission met in Honolulu, Hawaii, to consider whether the anticipated effects as discussed in the Petitioner's FEA to reclassify the petition area from the State Land Use Conservation District into the State Land Use Agricultural District constituted a "significant effect" pursuant to chapter 343, HRS. The Commission determined

that the proposed action would not have a "significant effect" on the environment and therefore did not require an EIS. On June 5, 2001, the Commission issued its written Order.

16. The Commission conducted a prehearing conference regarding the Petition on June 29, 2001, at which time proposed evidence was discussed, and exhibits and lists of witnesses were exchanged by the parties.

17. On June 22, 2001, the County of Hawaii submitted its Testimony of the County of Hawaii Planning Department in Support of the Petition.

18. On June 25, 2001, OP submitted its Testimony of the Office of Planning in Support of the Petition.

19. The Commission opened the hearing on the Petition on August 9, 2001, in Hilo, Hawaii, pursuant to notices published in the Honolulu Star Bulletin and the Hawaii Tribune-Herald on May 23, 2001.

20. No persons appeared to testify as public witnesses, and no written testimonies or letters were submitted.

21. At its meeting on August 9, 2001, the Commission directed the parties to submit by August 31, 2001, proposed Findings of Fact, Conclusions of Law and Decision and Order.

22. On August 29, 2001, the August 31 deadline to submit proposed Findings of Fact, Conclusions of Law and Decision was, by the agreement of the parties, extended until September 7, 2001 due to the Petitioner's untimely receipt of the transcript of the August 9 hearing.

23. The parties submitted their proposed Findings of Fact, Conclusions of Law, Decision and Order on September 7, 2001. Exceptions were filed on \_\_\_\_\_.

II. DESCRIPTION OF THE PROPERTY

24. The Property is located in the Upper Kukuau area, Southwest Hilo, County, Island and State of Hawaii, is designated as Hawaii Tax Map Key No. 2-4-08:33, and consists of approximately 1,645.823 acres of unimproved land. (Petitioner's Exhibit 1, p. 4, Exhibit 1A [Map 4], Petitioner's Exhibit 3, p. 1). It measures approximately 3,900 feet wide by 18,500 feet long, with the length extending upward from the 1,420 ft. elevation to the 2,400 ft. elevation, at an average slope of approximately 5%. (Petitioner's Exhibit 1, p. 4). The Property does not contain any gulches, major drainage ways, promontories or rock cliffs. (Petitioner's Exhibit 1, p. 4).

25. The Property is owned by the Petitioner in fee simple. (Petitioner's Exhibit 3, p. 1).

26. The annual rainfall averages approximately 230 inches. (Petitioner's Exhibit 3E, p. 16.)

27. The U.S. Natural Resources Conservation Service identifies the soils on the Property as Keei Series (rKGD), extremely rocky muck. This soil consists of well-drained, thin organic material very dark brown muck up to about 10 inches thick overlying pahoehoe lava bedrock. Permeability is slow, but water moves rapidly through cracks. Runoff is medium and its erosion hazard is slight. This soil is used mostly for pasture. Its Capability Classification is VIIs, non-irrigated, which indicates that the soil, when not irrigated, has very severe limitations

that make it unsuitable for cultivation and restrict its use largely to pasture or range, woodland or wildlife. (Petitioner's Exhibit 3F, P. 18 and Exhibit 3H, p. 21.)

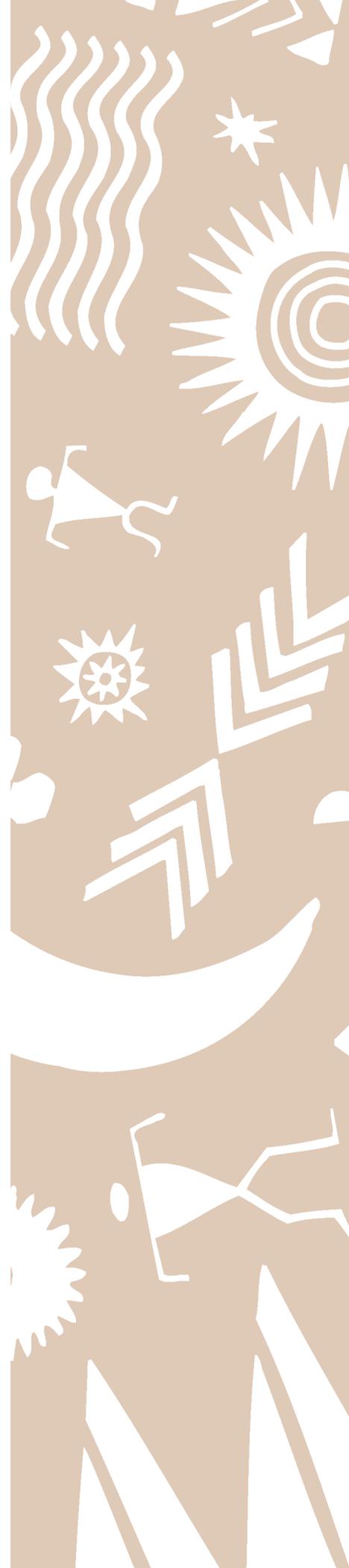
28. A 150-foot wide easement designated for electrical transmission line purposes runs partially along the northern boundary of the Property. This easement serves the Hawaii Electric Light Company, Inc. (HELCO) site which is located on the makai boundary of the Property. (Petitioner's Exhibit 3E, p. 15.)

29. A 40-foot wide unimproved access easement runs along the Property's entire northern boundary. This easement can be accessed from Wilder Road and services the Property and adjacent mauka subdivisions. (Petitioner's Exhibit 3E, p. 15.)

30. Puna Sugar Company, Ltd., formerly known as "Ola'a Sugar Company," is the current holder of a right-of-way for one or more flumes granted by Akana Amelia Richardson in favor of Ola'a Sugar Company by instrument dated November 5, 1900, recorded in the Bureau of Conveyances of the State of Hawaii in Liber 212, Page 747, as modified by Quitclaim Deed dated March 31, 1938. (Petitioner's Exhibit 1G at Ex. A.) The abandoned flume and the dirt road which parallels the route of the flume, commonly referred to as the "Ola'a Flume Road," traverses and effectively bifurcates the Property at approximately the 1,950 foot elevation. (Petitioner's Exhibit 3D, p. 13, Exhibit 3R, p. 3.) The Ola'a Flume Road connects Kaumana Drive and Stainback Highway, and delineates the approximate alignment of the future county secondary arterial. The Conservation District-Agricultural District boundary proposed by the Petitioner also coincides with this route. (Petitioner's Exhibit 3D, p. 13.)

### III. DESCRIPTION OF THE PETITION AREA

31. The portion of the Property which is the subject of the Petition (the "Petition Area") consists of approximately 885.40 acres located on the lower portion (makai) of





the Ola'a Flume Road. (Petitioner's Exhibit 3, p. 1, Exhibits 3A-3D.) The Petitioner intends to retain the remaining 760.423 acres of the Property mauka of the Ola'a Flume Road (the "Remainder Area") within the Conservation District. (Transcript p. 94, ln. 14-17, p. 113, ln. 2-12; Petitioner's Exhibit 3, p. 1, Exhibits 3B, 3C.)

32. Land use maps prepared by the Territorial Planning Board in 1900 indicate that while the Remainder Area has remained in forest use, the Petition Area has changed over the years from sugarcane production to forestry and grazing. (Petitioner's Exhibit 3D, p. 13.)

33. The Petition Area is primarily in forest and heavy shrub vegetation. A modest amount of grazing occurs within the Petition Area by cattle from adjacent lands. (Transcript P. 126, ln. 12-21, p. 135, ln. 21-p. 136, ln. 1; Petitioner's Exhibit 3D, p. 13, Exhibit 3E.)

#### IV. PROPOSAL FOR RECLASSIFICATION

34. The Petitioner requests reclassification of the Property from the Conservation State Land Use District to the Agricultural District in order to subdivide the Property into nine (9) parcels, consisting of eight (8) agricultural parcels within the Petition Area, and one (1) large conservation parcel being the Remainder Area. (Petitioner's Exhibit 3, p. 1, Exhibit 3d, p. 5.) The eight (8) agricultural lots will range in size from approximately 80 acres to 153 acres. (Petitioner's Exhibit 3D, pp. 5 and 8.)

35. The Petitioner proposes to distribute five (5) of the agricultural lots to George and Mary Jo Newton, and each of the Newton Children. The three (3) remaining agricultural lots will be sold to non-family members at fair market value as a means of offsetting

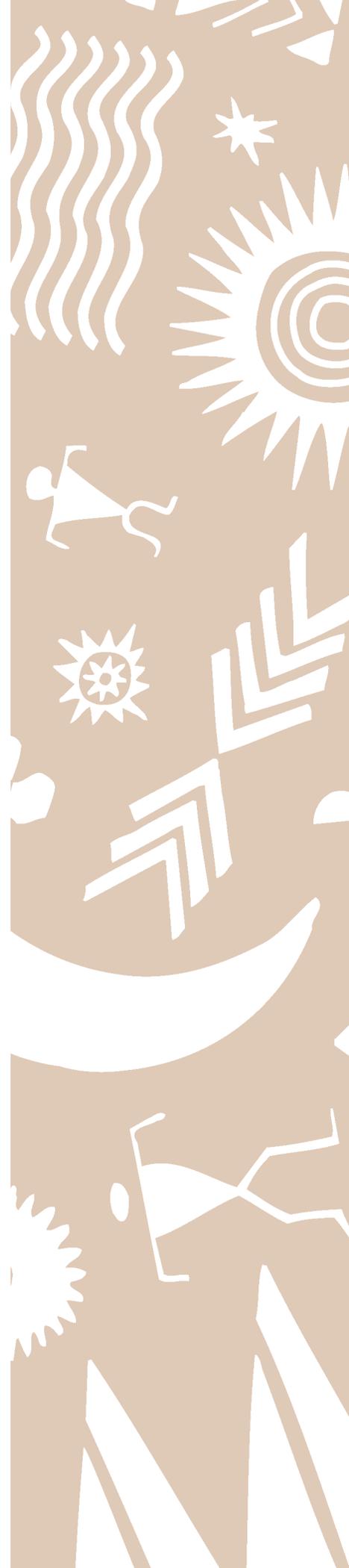
the cost of the subdivision infrastructure improvements. The Remainder Area will be retained by the Petitioner. (Transcript p. 89, ln. 19-25, p. 113, ln. 13-18; Petitioner's Exhibit 3, p. 1.)

36. Structural improvements on the Property would include up to eight (8) residences within the Petition Area, and a possible residence, subject to the approval of the Board of Land and Natural Resources, on the Remainder Area. (Transcript p. 114, ln. 20-23; Petitioner's Exhibit 3K, p. 34.)

37. Agricultural activities in the Petition Area would be for personal and limited commercial use. Potential limited agricultural activities include vegetable gardens, citrus orchards, fruit or nut tree groves, greenhouse plant and flower nurseries, pasture or grazing. (Petitioner's Exhibit 3I, p. 23.) No large-scale agricultural production or operations are planned or will be allowed. (Petitioner's Exhibit 1, p. 15, p. 44.)

38. The proposed subdivision will be accessed by a private road to be constructed along an unimproved easement from Wilder Road, which is located approximately 2,900 feet below the eastern boundary of the Property line. Alternate access to the proposed subdivision would require the use and extension of an existing County of Hawaii Department of Water Supply 20-foot wide service road. (Transcript p. 95, ln. 19-25, p. 96, ln. 1-25, p. 101, ln. 1-17; Petitioner's Exhibit 3K, p. 44.)

39. The Petitioner intends to use private funds to develop the off-site and on-site infrastructure; including the roadways, sewage disposal units and water, electrical power, and telephone utilities required to service the proposed subdivision. (Transcript p. 93, ln. 6-11; Petitioner's Exhibit 3D, p. 10.)



V. PETITIONER'S FINANCIAL CAPABILITY TO UNDERTAKE THE PROPOSED DEVELOPMENT

40. The Petitioner owns the Property free of any mortgages or liens.

(Transcript p. 114, ln. 3-4; Petitioner's Exhibit 1G.) As of September 15, 1997, the Property had an appraised value of \$1,235,000. (Petitioner's Exhibit 1H.)

41. The income received from the sale of three (3) of the eight (8) agricultural lots will be used to offset the construction expense for the infrastructure improvements.

(Transcript p. 93, ln. 6-11, p. 113, ln. 23-p. 114, ln. 2; Petitioner's Exhibit 3D, p. 10.) These parcels will be sold after the County approves plans for the proposed roadway and utilities, and bonding of the improvements is completed. (Petitioner's Exhibit 3D, p. 11.)

VI. STATE AND COUNTY PLANS AND PROGRAMS

42. The Property is designated within the State Land Use Conservation District and is located in the Resource Subzone. (Petitioner's Exhibit 3, p. 1.)

43. The Hawaii County General Plan Land Use Pattern Allocation Guide (LUPAG) Map designates the Property as Conservation Area, which includes forest and water reserves, natural and scientific preserves, open area and lands within the State Land Use Conservation District. (Transcript p. 100, ln. 16-20, p. 153, ln. 19-25, p. 155, ln. 6-11; Petitioner's Exhibit 3M, p. 67, Exhibit 3N, p. 68.) The LUPAG Map designates the area immediately to the north and east of the Property as Orchards, and to the south and west as Conservation. (Petitioner's Exhibit N, P. 68.) Those areas have been designated as such since the adoption of the 1971 General Plan. Under the current General Plan Revision Program, the Petition Area is proposed to be designated Extensive Agricultural. (Petitioner's Exhibit 3M, p. 67, Exhibit 4.)

44. Land immediately to the northeast of the Property is County-zoned Agricultural (A-10a and A-20a), and to the southeast is Agricultural (A-20a and A-30a). Land to the south of the Property is in the Upper Waiakea Forest Reserve. (Petitioner's Exhibit 3N, p. 69, Exhibit 30, p. 70.)

45. Although the Property is still shown within the Hilo Forest Reserve on the United States Geological survey (USGS) maps, it is no longer in the current State forest reserve jurisdiction. According to the Department of Land and Natural Resources, the Property was included in the Hilo Forest Reserve under a voluntary 30-year surrender agreement with the State of Hawaii, formalized in 1948. In February 1996, the Department of Land and Natural Resources, Division of Forestry & Wildlife indicated that the Property was withdrawn from the forest reserve by the State of Hawaii. (Petitioner's Exhibit 1, p. 5, Exhibit 1B.)

46. According to the State Department of Agriculture's Agricultural Lands of Importance to the State of Hawaii (ALISH) Map, the Property is unclassified. (Petitioner's Exhibit 3F, p. 18, Exhibit 3H, p. 20.) The Land Study Bureau's overall suitability rating for agricultural purposes classifies the Property as "D" or "Poor", with the exception of a small portion of land at the northeast corner of the Property classified as "E" or Very Poor." (Petitioner's Exhibit 3H, p. 21.)

47. According to the Flood Insurance Rate Map (FIRM) prepared by the Federal Emergency Management Agency (FEMA), the Property is designated as Zone X, an area determined to be outside the 500-year flood plain. (Petitioner's Exhibit 1H, p. 11, Exhibit 3K, p. 40.)



48. The proposed subdivision is consistent with the Population and Physical Environment objectives and policies of the Hawaii State Plan, as provided by Chapter 226, HRS. (Petitioner's Exhibit 3M, pp. 54-62.)

VII. NEED FOR GROWTH AND DEVELOPMENT

49. Although the uses proposed for the Petition Area will not directly address affordable housing needs for the general public, they do meet the needs of a smaller segment of the market by providing affordable opportunities for members of the Newton Family to become homeowners in Hawaii. (Petitioner's Exhibit 3M, p. 58.)

VIII. ECONOMIC IMPACTS

50. The proposed subdivision will involve residential and small-scale agricultural use for which residual sales are expected to be very small. (Transcript p. 159, ln. 12-15; Petitioner's Exhibit 3K, pp. 41-42.) Commercial agricultural use will be limited and is not expected to serve as the primary source of income for the residents. (Petitioner's Exhibit 3K p. 42.)

51. The value of the land is expected to increase after the infrastructure is installed, resulting in increased government revenues from property taxes. (Petitioner's Exhibit 3K p. 42.)

52. The proposed subdivision is not expected to result in any significant adverse economic impacts and will likely generate increased revenues for the State and County governments. (Petitioner's Exhibit 3K, pp. 41-42.)

IX. SOCIAL IMPACTS

53. The community surrounding the Property is characteristically country and serene, with large parcels of agricultural lands, open space, forest reserves and rural residences.

The proposed subdivision will be consistent with the type and density of development in the area. (Petitioner's Exhibit 3K, p. 43.)

54. The proposed subdivision is not expected to significantly impact or change the social character of the area. (Petitioner's Exhibit 3K, p. 43.)

X. IMPACTS UPON RESOURCES OF THE AREA

A. Agricultural Resources

55. Based on the limited suitability of the Property for agricultural use, the proposed subdivision will not have any adverse impact upon agricultural resources or productivity (Petitioner's Exhibit 3F, p. 18 through Exhibit 3I, p. 23.)

B. Flora and Fauna

56. The Property supports three kipuka: two in the Petition Area and one in the Remainder Area. (Petitioner's Exhibit 3I, p. 28, Exhibit 3J, p. 29, Exhibit 3K, p. 30.) The kipuka in the Remainder Area is the largest and most significant. (Petitioner's Exhibit 3K, p. 31.)

57. The 'aku'aku (*cyanea platyphylla*) is the only species of flora listed as a protected species by the U.S. Fish and Wildlife Service ("USFWS") that was located on the Property, and only a single species was found in the Remainder Area. (Transcript p. 94, ln. 8-9, p. 97, ln. 25-p. 98, ln. 2; Petitioner's Exhibit 3K, p. 31.) No USFWS protected species were located in the Petition Area, which is dominated by alien species and was used in the past for grazing and possibly logging. (Petitioner's Exhibit 3K, p. 25, Exhibit 3S, pp. 5, 8.) In addition, areas in the Petition Area where wetland vegetation indicator species were identified were not large enough to require planning considerations. (Petitioner's Exhibit 3K, pp. 32-33.)

58. The proposed improvements will involve clearing of only approximately 42 acres (or 5%) of the 885.40-acre Petition Area for residences, agricultural activities and infrastructure and therefore will have a very insignificant impact on the Property's vegetation. (Petitioner's Exhibit 3K, p. 34, Exhibit 3S, p. 13.)

59. Various bird and mammal species exist on the Property. Two endemic bird species, the Hawaiian Hawk and the Hawaiian Hoary Bat, were both sighted on the Property. (Petitioner's Exhibit 3I, pp. 25, 28, Exhibit 3R, p. 6.) Any further clearing or improvements in the Petition Area will not have a significant impact on native or federally protected avian or mammalian species, including the Hawaiian Hawk and the Hawaiian Hoary Bat. (Petitioner's Exhibit 3I, p. 27, Exhibit 3R, p. 10.)

60. The Petitioner has unilaterally agreed to establish protective use covenants for the proposed subdivision which will ensure that:

- a. in developing the Petition Area, large stands of native forest trees and clusters of major native vegetation will be avoided (Petitioner's Exhibit 3K, p. 34);
- b. the construction of dwellings in the Petition Area will be focused on areas that are already cleared (Petitioner's Exhibit 3K, p. 34); and
- c. the proposed subdivision will not change the overall character of the area or generate major increases in resident population (Petitioner's Exhibit 3K, p. 34).

61. In addition, the Petitioner has unilaterally agreed to take the following precautionary measures in developing the proposed subdivision:

- a. mitigation measures, to be approved by the USFWS and DLNR shall be implemented to avoid any negative effects to existing rare, endangered or threatened

species, including the Hawaiian Hawk and the Hawaiian Bat (Transcript p. 142, ln. 19-24; Petitioner's Exhibit 3Q, p. 1);

b. prior to clearing and grubbing the alignment of the subdivision roadway and utilities, a 500-meter wide survey of the alignment will be conducted for the existence of Hawaiian Hawk nests or Hawaiian Bats (Transcript p. 164, ln. 12-23; Petitioner's Exhibit 3Q, p. 1);

c. flood lights or high intensity lighting will not be used in or about the Petition Area, which condition shall run with the land (Petitioner's Exhibit 3Q, p. 1);

d. mitigation measures as required by appropriate governmental agencies will be incorporated to avoid or minimize any negative effects on existing rare, endangered, or threatened native species of flora (Petitioner's Exhibit 3Q, p. 2); and

e. best management practices will be used during construction of the proposed subdivision to control erosion and prevent runoff from damaging native forest resources (Petitioner's Exhibit 3Q, p. 2).

C. Archaeological/Historic Resources

62. The ground survey fieldwork performed by Paul H. Rosendahl, Ph.D., Inc. ("PHRI") revealed that there are no archaeological or cultural sites or features of any kind in the Petition Area. (Petitioner's Exhibit 3K, pp. 36, 38, Exhibit 3T, p. 3, Exhibit 3V, pp. 8-9.) This confirmed a 1996 assessment study where no cultural sites or features of any kind were found. (Petitioner's Exhibit 3K, p. 36.) In addition, the State Historic Preservation Division ("SHPD") made a determination of no significant historical sites. (Transcript p. 168, ln. 15-19; Exhibit 3U; SHPD Letter dated August 22, 2001.)



63. No valued cultural historical or natural resources have been identified in the Petition Area and no traditional and customary native Hawaiian rights are exercised in the Petition Area. (Transcript p. 130, ln. 14-19, p. 131, ln. 5-15, p. 133, ln. 17-20; Petitioner's Exhibit 3K, p. 38, Exhibit 3M, p. 63, Exhibit 3T, p. 3, Exhibit 3U, Exhibit 3V, pp. 8-9.) Since such resources and activities have not been identified, they will not be affected or impaired by the proposed subdivision. (Transcript p. 131, ln. 5-15, p. 133, ln. 17-24.) There are no ceded lands in the Petition Area or the Remainder Area. (Petitioner's Exhibit 3K, p. 38.)

64. Sufficient information has been submitted to the Commission to meet the obligation to enter specific findings of fact and conclusions of law regarding the identity and scope of valued cultural historical or natural resources and traditional and customary native Hawaiian rights found or practiced in the Petition Area. (Transcript p. 106, ln. 5-8, p. 107, ln. 16, p. 108, ln. 1, p. 110, ln. 25-p. 111, ln. 10, p. 143, ln. 14-19, p. 144, ln. 3-7, p. 168, ln. 7-11; Petitioner's Exhibit 3T, Exhibit 3V, p. 9.) In this case, after a comprehensive cultural study no resources or rights could be identified, and therefore none will be affected or impaired by the proposed subdivision. (Transcript p. 130, ln. 14-19, p. 131, ln. 5-15, p. 133, ln. 12-24; Petitioner's Exhibit 3K, p. 38, Exhibit 3M, p. 63, Exhibit 3T, p. 3, Exhibit 3U, Exhibit 3V, pp. 8-9.)

65. In addition, the Petitioner has unilaterally agreed to take the following precautionary measures in developing the proposed subdivision:

a. prior to any land alteration, an archaeological survey will be completed of the acreage that would be disturbed by any specific development, including roadway, driveway, house site and agricultural site (Petitioner's Exhibit 3Q, p. 2);

b. to the extent that any archaeological sites are located within the Petition Area, Petitioner and its successors will work with SHPD to develop a data recovery and mitigation/preservation plan with input from the local native Hawaiian community and relevant Hawaiian groups (Transcript p. 137, ln. 25-p. 138, ln. 8; Petitioner's Exhibit 3Q, p. 2);

c. in the event that any previously unidentified archaeological resources are encountered during the development of the proposed subdivision, Petitioner and its successors shall immediately stop work and contact SHPD (Petitioner's Exhibit 3Q, p. 2);

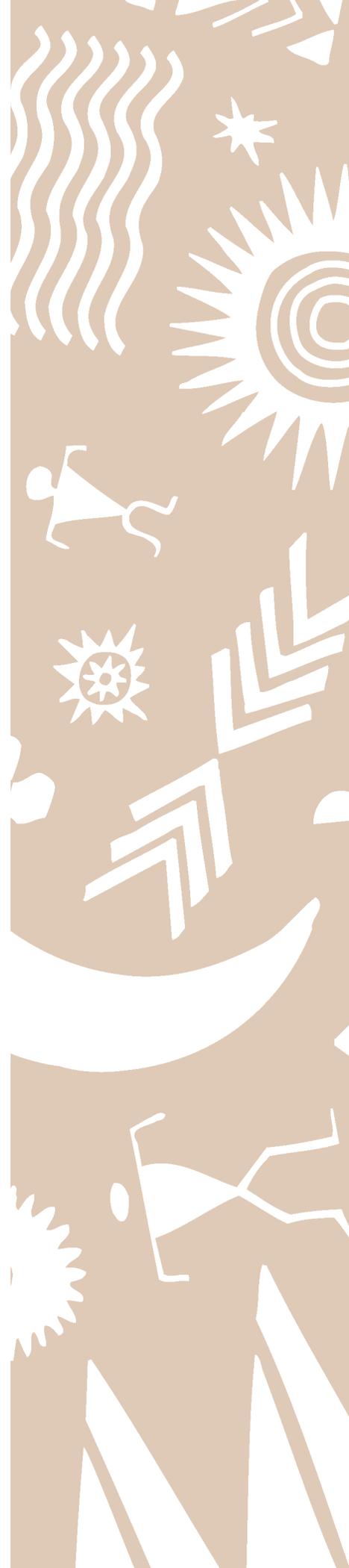
d. although there is no evidence of the exercise of traditional and customary rights by native Hawaiians in the Petition Area and no evidence of the existence of valued cultural, historic or natural resources that would be the objective of such traditional rights, Petitioner and its successors will preserve and protect all rights customarily and traditionally exercised for subsistence, cultural and religious purposes by descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights (Petitioner's Exhibit 3Q, p. 3);

e. these precautionary measures will be included as conditions which run with the land and shall be included in all sales documents relating to the lots in the Petition Area and in each deed conveying title to a subdivided lot. (Petitioner's Exhibit 3Q, pp. 2-3.)

D. Groundwater Resources

66. The Property does not contain any perennial streams or lakes. (Petitioner's Exhibit 3I, p. 23.) The groundwater under the Property is approximately 800 feet below the site. (Petitioner's Exhibit 3I, p. 24.)

67. The Petition Area is in the Hilo Aquifer System of the Northeast Mauna Aquifer Sector. The proposed subdivision is expected to draw water from the County water





system for domestic and limited agricultural uses, to be supplemented by rainwater. (Petitioner's Exhibit 3I, p. 24.)

68. Groundwater resources will not be impacted by the anticipated discharge of wastewater or by the limited use of fertilizers or pesticides for yard maintenance and limited agricultural activities. (Petitioner's Exhibit 3I, p. 24.)

69. In addition, because there is no existing County wastewater collection system in the vicinity of the Petition Area, the Petitioner has agreed, upon the approval of the Petition, to develop a wastewater plan in conformance with the applicable provisions of the Administrative Rules of the Department of Health, State of Hawaii (Chapter 11-62) to be approved by the Department of Health, State of Hawaii. (Petitioner's Exhibit 3Q, p. 3.)

E. Recreational/Scenic/Cultural Resources

70. There are no recreational resources, areas, or sites known in the Petition Area. (Petitioner's Exhibit 3M, pp. 53, 62.)

71. The proposed subdivision will be a low-profile, low-density development which will not significantly change the visual or scenic characteristics of the Property. The Petitioner will establish design guidelines for residences and common areas of the subdivision to insure development compatibility with the natural beauty of the area. (Petitioner's Exhibit 3M, p. 56.)

72. There are no specific traditional cultural properties, areas, or sites known in the Petition Area. (Petitioner's Exhibit 3K, p. 37, Exhibit 3T, p. 3, Exhibit 3V, p. 8.)

F. Coastal/Aquatic Resources

73. The Property is not located in a coastal area, and therefore the proposed subdivision will not have any negative impact or effect on any coastal or aquatic resources. (Petitioner's Exhibit 3M, pp. 62, 64.)

XI. ENVIRONMENTAL RESOURCES

A. Noise

74. The proposed subdivision is not expected to result in any significant noise impact. (Petitioner's Exhibit 3K, p. 38.)

75. Petitioner has agreed to employ mitigations measures, if necessary, to reduce or lessen the impact on nearby residents of the short-term or temporary noise expected during site preparation and construction. (Petitioner's Exhibit 3K, p. 38.)

B. Air Quality

76. The proposed subdivision is not expected to result in any significant adverse impact or effect on air quality. (Petitioner's Exhibit 3K, p. 39.)

C. Water Quality

77. The proposed subdivision is not expected to result in any adverse impact or effect on the groundwater quality. (Petitioner's Exhibit 3M, p. 56.)

XII. ADEQUACY OF PUBLIC SERVICES AND FACILITIES

A. Highway and Roadway Services

78. Access to the proposed subdivision will be provided by Wilder Road, a two-lane, 24-foot-wide paved County road, which extends from Kaumana Drive. (Transcript p. 96, ln. 19-22.) Kaumana Drive is the major mauka-makai right-of-way that connects Hilo and

West Hawaii via the saddle between Mauna Kea and Mauna Loa. (Petitioner's Exhibit 3K, p. 44.)

79. The proposed subdivision, which is limited to eight (8) residential lots, will have very little impact on local roadways, which are presently well below the capacity of the right-of-way. (Petitioner's Exhibit 3L, p. 47.)

B. Water Service

80. Approximately 5,400 gallons of water per day (based on County standards) will be required to service the domestic needs of the proposed subdivision. There will be little to no need to use County water for irrigation purposes. (Petitioner's Exhibit 3L, p. 48.)

81. Petitioner intends to connect to the 12-inch gravity line at least 100 feet below the County reservoir and pump water to the Petition Area through a 4-inch transmission line located within the Petitioner's proposed access easement. (Petitioner's Exhibit 3L, p. 48.) There is sufficient water available to service the proposed subdivision from the primary and secondary wells in the area. (Petitioner's Exhibit 3I, p. 24, Exhibit 3M, p. 56). None of these sources is expected to be negatively impacted by the proposed subdivision. (Petitioner's Exhibit 3I, p. 24.)

C. Wastewater Disposal

82. The Petition Area is not presently serviced by a public wastewater collection system. Privately-funded individual wastewater disposal units will be utilized to serve the proposed subdivision. (Petitioner's Exhibit 3L, pp. 48-49.)

D. Drainage

83. Roadway improvements will be minimized and drainage will occur over natural swales. (Petitioner's Exhibit 3M, p. 56.)

84. There are no sources of County water directly makai of the Petition Area. (Petitioner's Exhibit 3L, p. 49.)

E. Solid Waste Disposal

85. The Petition Area is not presently serviced by a solid waste collection and disposal system. (Petitioner's Exhibit 3L, p. 49.)

86. Solid waste collection and disposal for the proposed subdivision will be handled by a private contractor, or in the alternative, each parcel owner will be responsible for the disposal of his or her own solid waste. (Petitioner's Exhibit 3L, p. 49.)

87. The proposed subdivision is not expected to generate a significant amount of additional solid waste. Existing landfill and/or transfer stations are adequate to accommodate the solid waste generated by the residents of the proposed subdivision. (Transcript p. 161, ln. 5-11; Petitioner's Exhibit 3L, p. 50, Exhibit 3M, p. 57.)

F. Schools

88. The educational needs of any children residing in the proposed subdivision will be provided by Hilo High, Hilo Intermediate, and Kaumana Elementary schools. Each of these schools has adequate resources to accommodate the small number of additional students that may move into the proposed subdivision. (Petitioner's Exhibit 3L, p. 50.)

G. Police and Fire Protection

89. Police protection will be provided to the proposed subdivision by the Hawaii County Police Department. The nearest police station is the Hilo Police Station located on Kapiolani Street in the central business district. (Petitioner's Exhibit 3L, pp. 49-50.) Fire protection will be provided to the proposed subdivision by the Hawaii County Fire Department. Fire emergency calls will be accommodated by the Kaumana Fire Station located

on Kaumana Drive, with assistance from the Central Fire Station in downtown Hilo, if necessary.

(Petitioner's Exhibit 3L, p. 50.)

H. Electrical Utility Services

90. The electrical power and telephone service demand for the proposed subdivision is expected to be small, and will be provided via overhead lines from Wilder Road where HELCO and GTE Hawaiian Tel lines are currently available. (Petitioner's Exhibit 3L, p. 49.)

XIII. COMMITMENT OF STATE FUNDS AND RESOURCES

91. The conceptual plan for the proposed subdivision includes the privately funded development of all basic infrastructure needed to serve the subdivision. The proposed subdivision does not call for a substantial commitment of government-supplied services or facilities that would not be required without the subdivision.

XIV. CONFORMANCE TO AGRICULTURAL DISTRICT STANDARDS

92. The proposed reclassification of the Petition Area conforms to the State Land Use Agricultural District standards set forth in § 15-15-19, HAR, in the following respects:

a. The Petition Area is already limited pasture use and such use can be expanded if more acreage is opened for cattle grazing. (Petitioner's Exhibit 3 at p. 53.)

b. The Petition Area is contiguous to agriculture zoned lands. (Petitioner's Exhibit 3 at p. 54.)

c. The Department of Land and Natural Resources has indicated that the Petition Area is suitable for limited timber production. (Petitioner's Exhibit 3 at p. 53; Exhibit 1F.)

XV. CONFORMANCE WITH THE GOALS, OBJECTIVES AND POLICIES OF THE HAWAII

93. The proposed reclassification of the Petition Area generally conforms to the following goals, objectives, priorities and policies of the Hawaii State Plan, as defined in Chapter 226, HRS:

a. Section 226-11, HRS, Land-Based, Shoreline and Marine Resources. An archaeologist, a botanist and a zoologist were retained to review and assess the presence and significance of archaeological and natural resources on the Property. The archaeological study suggested that the Ola'a flume system should be preserved. The flora and fauna studies indicated that the Remainder Area consists of significant native flora and fauna species. The Remainder Area will be left in the Conservation District. Approximately 42 acres of the land in the Petition Area (or 5% of the Petition Area) will be improved or developed. This will minimize the impact on the natural character of the area as well as to promote conservation practices. Rural or agricultural standards, in lieu of urban standards, for road and utility improvements will be utilized to ensure compatibility with the surrounding environment. (Petitioner's Exhibit 3 at p. 54.)

b. Section 226-12, HRS, Scenic, Natural Beauty and Historic Resources. This project is a low-profile, low-density development. The visual characteristics of the Property will not significantly change. Improvements will be designed to complement the scenic qualities of the area. Unobtrusive, low-key design elements will be used for the farm dwellings, and rural or agricultural, in lieu of urban, standards will be used for the infrastructure. (Petitioner's Exhibit 3 at p. 55.)



c. Section 226-13, HRS, Land, Air and Water Quality.

Improvements will have very little effect on the environment. There will be no curbs, gutters or sidewalks (drainage will occur over natural swales). Area water resources will not be noticeably impacted. Groundwater resources will not be noticeably impacted. The threat to life and property from natural hazards such as forest fire, lava flow, earthquake, flooding and hurricane is not significantly greater than the threat to the rest of the region, including Hilo. (Petitioner's Exhibit 3 at p. 56.)

d. Section 226-15, HRS, Solid and Liquid Wastes. The proposed

subdivision is not expected to be a major generator of solid and liquid waste. The proposed subdivision creates an educational opportunity on the benefits of recycling green waste as mulch for their backyard gardens or crops, re-using bottles and cans as storage containers, and applying scrap wood as fuel or wood repair projects. (Petitioner's Exhibit 3 at p. 57.)

e. Section 226-16, HRS, Water. Rainfall in the vicinity is abundant.

Catchment tanks or basins will be used. The county water system would provide only for the domestic needs in the Petition Area. (Petitioner's Exhibit 3 at p. 57.)

f. Section 226-19, HRS, Housing. The proposed subdivision meets

the needs of providing affordable housing to the Newton Children. The Petition Area is located in a desirable beautiful setting above Hilo town. It is minutes away from public facilities and services. (Petitioner's Exhibits 3 at p. 58.)

XVI. STATE PLAN/RELATIONSHIP WITH APPLICABLE PRIORITY DIRECTION AND FUNCTIONAL PLANS

94. The proposed reclassification of the Petition Area generally conforms to the following functional plans:

a. Section 226-104, HRS, Population Growth and Land Resources priority Guidelines. Off-site and on-site infrastructure will be developed using private funds. A vast majority of the Petition Area will also be maintained in its natural condition. The Remainder Area will remain in the Conservation District, thereby maintaining critical environmental areas. Rural or agricultural roadway standards will be used. There will be no more than eight residences in the Petition Area. The Property is not located on the shoreline. Thus, shoreline protection is not required. (Petitioner's Exhibit 3 at p. 59.)

b. Chapter 344, HRS, State Environmental Policies. Residents will be able to pursue their interest in nature as well as engage in limited agricultural activity and backyard gardening. Open space and abundant natural resources in land, plants and wildlife exist. The density of the development is in character with the area, and the overall ambience, which is tranquil and open. (Petitioner's Exhibit 3 at p. 59.)

c. State Agriculture Functional Plan (1991). The proposed subdivision will have no negative impact on important or best agricultural lands. The proposed subdivision puts additional lands into agricultural use on a limited scale. Relatively high rainfall provides natural irrigation. Thus, reducing dependence on county potable water for use in irrigation. (Petitioner's Exhibit 3 at p. 60.)

d. State Conservation Lands Functional Plan (1991). The Property is not located on the shoreline. No aquatic resources were surveyed. Terrestrial resources, however, including floral and faunal species, were surveyed and assessed in terms of significance. (Petitioner's Exhibit 3 at p. 60.)

e. State Historic Preservation Functional Plan (1991). An archaeological assessment was conducted on the Property which included a review and



evaluation of archaeological and historical documents, including archival literature, legends, records, boundary awards, and cartographic sources relative to the Property, an inspection level fieldwork, and a written report. Significant sites will be protected and preserved by the owner, as required by SHPD. Follow-up research and an evaluation report on cultural concerns was also prepared and submitted to SHPD. The proposed subdivision would not have any significant or adverse effect on any existing cultural practices or sites. (Petitioner's Exhibit 3 at p. 61.)

f. State Housing Function Plan. The proposed subdivision meets the needs of providing affordable housing to the Newton Children. (Petitioner's Exhibit 3 at p. 62.)

XVII. CONFORMANCE WITH COASTAL ZONE MANAGEMENT OBJECTIVES AND POLICIES

95. The proposed reclassification on the Petition Area generally conforms to the following objectives and policies:

a. Recreational Resources. The proposed subdivision does not interfere with any existing or planned recreational opportunities along the shoreline. Public access to coastal recreational resources will not be obstructed or interfered with. The proposed subdivision will be in compliance with existing state water quality standards and point and nonpoint sources of pollution regulations.

b. Historic Resources. An archaeological assessment was conducted, including a review and evaluation of archaeological and historical documents, including archival literature, legends, records, boundary awards, and cartographic sources relative to the property, an inspection level fieldwork, and a written report. Significant sites will be protected and preserved by the Petitioner, as required by the SHPD. (Petitioner's Exhibit 3 at p. 63.)

c. Scenic and Open Space Resources. The proposed subdivision is not coastal dependent. It is a low profile, low-density project with very large lots. Only a small

portion of the Petition Area will be developed with farm dwellings and possible limited agricultural activities. The Remainder Area will remain in its natural state and maintain existing scenic qualities and visual corridors. (Petitioner's Exhibit 3 at p. 63.)

d. Coastal Ecosystems. Inventory studies of appropriate resources on the Property have been conducted, and an assessment of the proposed subdivision anticipated impacts on the natural resources has been undertaken. The valuable coastal ecosystems of the island's coastline and marine waters will not be disrupted. There are no stream waters on the Property that will discharge into the ocean. The proposed subdivision will comply with existing state water quality standards. (Petitioner's Exhibit 3 at p. 64.)

e. Economic Uses. The proposed subdivision is not coastal dependent. There will be no interference with coastal dependent activities, including their social, visual and environmental qualities. (Petitioner's Exhibit 3 at p. 64.)

f. Coastal Hazards. There is no danger from tsunami inundation, storm waves, shoreline erosion and coastal subsidence. There are no streams or rivers on the Property, thus no riverine flooding is anticipated. The Property is not located in any firm flood designated areas. The Property is not located in an area that is subject to point and nonpoint source pollution hazards. (Petitioner's Exhibit 3 at p. 65.)

g. Beach Protection. The proposed subdivision is located more than five miles from the shoreline and will not impact shoreline resources. No shoreline erosion-protection structures are proposed and no interference with existing recreational and waterline activities is anticipated. (Petitioner's Exhibit 3 at p. 66.)



XVIII. RULING ON PROPOSED FINDINGS OF FACT

96. Any of the proposed findings of fact submitted by the Petitioner or the other parties not already ruled upon by the Commission by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

97. Any conclusion of law herein improperly designated as a finding of fact should be deemed or construed as the conclusion of law; any findings of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

XX. CONCLUSION OF LAW

98. Pursuant to Chapter 205, HRS, and the Hawaii Land Use Commission Rules under Chapter 15-15, HAR, and upon consideration of the Land Use Commission decision-making criteria under Section 205-17, HRS, this Commission finds upon a clear preponderance of the evidence that the reclassification of the Petition Area, consisting of approximately 885.40 acres of land in the State Land Use Conservation District at Kukuau, South Hilo, Island, County and State of Hawaii, identified by Hawaii Tax Map Key No.: 2-4-08: por. 33, into the State Land Use Agricultural District, is reasonable, conforms to the standards for establishing the Agricultural District boundaries, is non-violative of section 205-2, HRS, and is consistent with the Hawaii State Plan set forth in Chapter 226, HRS, and with the policies and criteria established pursuant to sections 205-17 and 205A-2, HRS.

99. Article XII, § 7 of the Hawaii State Constitution requires the Commission to protect native Hawaiian traditional and customary rights:

The State reaffirms and shall protect all rights customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians

who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

**XXI. PROPOSED ORDER**

100. IT IS HEREBY ORDERED that the Property being the subject to this Docket No. A 99-729 filed by the Petitioner The Newton Family Limited Partnership, comprised of 885.40 acres of land in the State Land Use Conservation District at Kukuau, South Hilo, Island, County and State of Hawaii, identified by Hawaii Tax Map Key No. 2-4-08: por. 33, and approximately shown on Exhibit "A" attached hereto and by this reference made a part hereof, is hereby reclassified into the State Land Use Agricultural District, and the State land use district boundaries are amended accordingly.

101. Based upon the findings of fact and conclusions of law stated herein, it is hereby determined that no customary and traditional native Hawaiian rights and practices have been identified in the Petition Area, that the proposed reclassification will not significantly affect or impair the exercise of such rights and practices, and that the reasonable exercise of such rights and practices will be protected, to the extent feasible, by the conditions of approval set forth herein.

102. The reclassification of the Petition Area shall be subject to the following conditions:

a. The proposed subdivision will be restricted to a maximum of 8 lots, with a minimum lot size of 80 acres. Each deed conveying title to a subdivided lot will include a 20-year restriction commencing upon final subdivision approval against further subdivision, and a general prohibition against large-scale commercial agriculture operations, animal hospitals, campgrounds and other similar open area recreational activities, mausoleums, group living facilities, golf courses, golf driving ranges, golf maintenance facilities, and golf



clubhouse, adult care homes, churches, community buildings, day care centers, hospitals, stadiums and sports arenas and schools. The foregoing restrictions shall be amended or modified only upon the prior approval or consent of a majority of the then owners of subdivided lots in the Petition Area and, a majority vote of the Land Use Commission and the County Planning Director. The foregoing restrictions shall run with the land.

b. Endangered birds and bats, including the Hawaiian Hawk and the Hawaiian Bat, have been observed in the Petition Area. Therefore, Petitioner and its successors shall implement mitigation measures to avoid any negative effects to existing rare, endangered or threatened species. Such mitigation measures will include leaving any large stands of native forest trees and clusters of native vegetation intact, and focusing residential sites to areas that were previously cleared. Petitioner and its successors shall not develop the Petition Area into a project which would change the overall character of the area or generate major increases in resident population. Petitioner and its successors shall preserve the existing lowland native forest, and protect the Hawaiian Hawk and the Hawaiian Bat. Any such mitigation measures that are initiated shall be first approved by the U.S. Fish and Wildlife Service, and the State Department of Land and Natural Resources.

c. Prior to clearing and grubbing the alignment for the subdivision roadway and utilities, a 500-meter wide survey of the alignment will be conducted for the existence of Hawaiian Hawk nests or Hawaiian Bats. The U.S. Fish and Wildlife Service (“USFWS”) and the State Department of Land and Natural Resources will be provided with a copy of the results of such survey and consulted on the appropriate conservation measures required.

d. Floodlights or high intensity lighting will not be used in or about the Petition Area that could disorient the Newell's Shearwater, Dark-rumped Petrel, the Hawaiian Hawk and the Hawaiian Bat. This condition shall run with the land.

e. There are kipuka in the Petition Area which harbor native forest. Petitioner and its successors shall implement such mitigation measures as are required by appropriate governmental agencies to avoid or minimize negative effects on existing rare, endangered or threatened native species. Such mitigation measures will include, but not be limited to, maintaining the Remainder Area in conservation, leaving large stands of native forest trees and clusters of native vegetation intact, containing residential sites to areas that were previously cleared, prohibiting the development of the Petition Area into a project which would change the overall character of the area or generate major increases in resident population, and the use and enhancement of existing native lowland forest as much as possible for landscaping.

f. Best management practices will be used during construction to control erosion and prevent runoff from damaging native forest resources.

g. Other than the Ola`a flume system (which will be preserved for historic preservation purposes to the extent necessary), a reconnaissance study of the area has revealed that there are no known archaeological sites in the Petition Area. The State Historic Preservation Division of the Department of Land and Natural Resources, State of Hawaii ("SHPD") has determined that an intensive inventory survey can be deferred until parcel-specific development plans are prepared. Petitioner and its successors shall complete, prior to any land alteration, an archaeological inventory survey of the acreage that would be disturbed by any specific development, including roadway, driveway, house site and agricultural site. This condition shall be included in all sales documents pertaining to the lots in the proposed



subdivision and in each deed conveying title to a subdivided lot. This condition shall run with the land.

h. To the extent that any archaeological sites are located on the Petition Area, Petitioner and its successors shall work with SHPD in developing a data recovery/ mitigation/ preservation plan. This plan will include input from the local native Hawaiian community and relevant Hawaiian groups, including the State Office of Hawaiian Affairs. The plan shall be approved by SHPD, and a certified copy thereof filed with the Commission, prior to any land alteration affecting such sites. This condition shall be included in all sales documents pertaining to the lots in the proposed subdivision and in each deed conveying title to a subdivided lot. This condition shall run with the land.

i. Petitioner and its successors shall immediately stop work and contact SHPD should any previously unidentified archaeological resources such as artifacts, human burials, rock alignments, pavings or walls be encountered during the development of the proposed subdivision. This condition shall be included in all sales documents pertaining to the lots in the proposed subdivision and in each deed conveying title to a subdivided lot. This condition shall run with the land.

j. Although there is no evidence of the exercise of traditional and customary rights by native Hawaiians in the Petition Area and no evidence of the existence of valued cultural, historical or natural resources that would be the objective of such traditional rights, Petitioner and its successors will preserve and protect all rights customarily and traditionally exercised for subsistence, cultural and religious purposes by descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. This condition shall be included in all sales documents relating to the lots in

the Petition Area and in each deed conveying title to a subdivided lot. This condition shall run with the land.

k. In connection with the subdivision of the Petition Area, Petitioner shall, if necessary, dedicate to the County of Hawaii an 80-foot right-of-way located near the Ola'a flume system to accommodate the County's planned secondary arterial.

l. There is no existing County wastewater collection system in the vicinity of the Petition Area. Petitioner and its successors will develop a wastewater plan in conformance with the applicable provisions of the Administrative Rules of the Department of Health, State of Hawaii (Chapter 11-62, "Wastewater Systems"). Petitioner's wastewater plan will be approved by the Department of Health, State of Hawaii.

m. Petitioner and its successors shall develop a grading plan that will leave undisturbed the stands of forest in the Petition Area that extend to as low as the 1,600-foot level, leaving these stands as a buffer for the Remainder Area.

n. Petitioner and its successors shall use native trees and shrubs wherever possible when landscaping the proposed agricultural subdivision.

o. Petitioner and its successors prior to any construction activities, including grading or grubbing, shall consult with the Department of the Army (DA) to determine if a DA permit will be required and to ensure compliance of development plans with the Federal Emergency Management Agency.

p. Petitioner and its successors prior to any construction activities, including grading or grubbing in the Petition Area, shall undertake an inventory level archaeological survey and provide the survey results to the DLNR State Historic Preservation Division (SHPD) and the Office of Hawaiian Affairs (OHA) for review and approval. Should





any previously unidentified burials, archaeological, or historic sites such as artifacts, marine shell concentrations, charcoal deposits, or stone platforms, pavings or walls be found, the Petitioner, developers, and/or landowners of the affected properties shall stop work in the immediate vicinity and the SHPD shall be notified immediately. Subsequent work shall proceed upon an archaeological clearance from the SHPD when SHPD finds that mitigative measures have been implemented to SHPD's satisfaction.

q. Petitioner and its successors shall provide written notification to all prospective buyers of proposed lots within the proposed subdivision of the potential odor, noise, and dust pollution resulting from surrounding Agricultural District land.

r. Petitioner and its successors shall notify all prospective buyers of the proposed lots within proposed subdivision that the Hawaii Right-to-Farm Act, Chapter 165, Hawaii Revised Statutes, limits the circumstances under which pre-existing farm activities may be deemed a nuisance.

s. Petitioner and its successors shall fund the design and construction of drainage improvements required as a result of the development of the Petition Area to the satisfaction of federal, state and county agencies.

t. Petitioner and its successors shall fund and construct adequate individual wastewater transmission and disposal facilities, as determined by the County of Hawaii Department of Public Works (DPW) and the State Department of Health (DOH).

u. Petitioner and its successors shall participate in the funding and construction of adequate water source, storage, and transmission facilities and improvements to accommodate the proposed project. Water transmission facilities and improvements shall be coordinated and approved by appropriate state and county agencies.

v. Petitioner and its successors shall stake the centerline for the proposed access Road and hire consultants to conduct a 500-meter wide survey of the roadway alignment and provide the U.S. Fish and Wildlife Service and the State Historic Preservation Office a report of their findings.

w. Petitioner and its successors shall maintain the Remainder Area in Conservation and subject all development thereof to the approval of the State DLNR.

103. The Commission may fully or partially release the conditions provided herein as to all or any portion of the Petition Area upon timely motion and upon the provision of adequate assurance of satisfaction of these conditions by the Petitioner.

104. Within 7 days of the issuance of the Commission's Decision and Order for the subject reclassification, the Petitioner shall (a) record with the Bureau of Conveyances of the State of Hawaii a statement that the Petition Area is subject to conditions imposed by the Land Use Commission in the reclassification of the Petition Area, and (b) shall file a copy of such recorded statement with the Commission.

Done at Honolulu, Hawaii, this \_\_\_\_ day of \_\_\_\_\_, 2001, per motion on \_\_\_\_\_.

**LAND USE COMMISSION, STATE OF HAWAII**

By \_\_\_\_\_

Dated: Honolulu, Hawaii, \_\_\_\_\_





**BAYS, DEAVER, LUNG, ROSE &  
BABA**

By   
A. Bernard Bays  
Liane L. Brown

Attorneys for the Petitioner  
The Newton Family Limited Partnership

Dated: Honolulu, Hawaii, SEP 7 2001

In the Matter of the Petition of The Newton Family Limited Partnership, a Hawaii limited partnership, Docket No. A99-729, Petitioner's Proposed Findings of Fact, Conclusions of Law, Decision And Order

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition ) DOCKET NO. A99-729  
of ) CERTIFICATE OF SERVICE  
THE NEWTON FAMILY LIMITED )  
PARTNERSHIP, a Hawaii limited )  
partnership, )  
To Amend the Conservation Land Use )  
District Boundary into the Agricultural )  
land Use District for Approximately )  
885.40 Acres of Land at Kukuau, County )  
of Hawaii, State of Hawaii, TMK 2-4-08: )  
por. 33 )  
\_\_\_\_\_ )

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Proposed Findings of Fact, Conclusions of Law,  
Decision and Order, was served on the following by mail, postage prepaid, on September 7,  
2001, addressed as follows:

DAVID W. BLAINE  
Office of Planning  
State of Hawaii  
Land Use Division  
P.O. Box 2359  
Honolulu, Hawaii 96804

CHRISTOPHER YUEN, Director  
Planning Department  
County of Hawaii  
25 Aupuni Street, Room 109  
Hilo, Hawaii 96720-4252

LINCOLN ASHIDA, ESQ.  
Corporation Counsel  
County of Hawaii

The Hilo Lagoon Center  
101 Aupuni Street, Suite 325  
Hilo, Hawaii 96720

HAWAIIAN ELECTRIC LIGHT COMPANY, INC.  
P.O. Box 1027  
Hilo, HI 96721

PUNA SUGAR COMPANY  
P.O. Box 3230  
Honolulu, Hawaii 96801

DATED: Honolulu, Hawaii, September 7, 2001.



---

A. BERNARD BAYS  
LIANE L. BROWN

Attorneys for Petitioner

# APPENDIX C

## SAMPLE PETITION FOR INTERVENTION

JEFF MIKULINA, DIRECTOR  
Sierra Club, Hawai'i Chapter  
P.O. Box 2577  
Honolulu, HI 96803  
Telephone: (808) 538-6616

### BEFORE THE LAND USE COMMISSION OF THE STATE OF HAWAII

IN THE MATTER OF	)	Docket No. A00-734
	)	
Castle & Cooke Homes	)	PETITION TO INTERVENE;
Hawai'i, Inc. & Pacific Health	)	CERTIFICATE OF SERVICE
Community Inc. request to remove	)	
1,247.983 acres of land from the	)	
agricultural district.	)	

### PETITION TO INTERVENE

#### NATURE & EXTENT OF INTEREST AND RIGHT

The Sierra Club petitions to intervene pursuant to HAR 15-15-52 (d):

All other persons may apply for leave to intervene, which shall be freely granted, provided the commission or its hearing officer may deny an application to intervene when, in the commission's, or hearing officer's discretion it appears that:

- (1) The position of the applicant for intervention is substantially the same as the position of a party already admitted to the proceeding; and
- (2) The admission of additional parties will render the proceeding inefficient and unmanageable.

The Sierra Club is a California non-profit corporation, registered to do business in the State of Hawaii, with its principal place of business in Hawaii at 1040 Richards Street, Room 306, Honolulu, HI 96813 (phone: 538-6616). The Sierra Club is a national conservation organization comprised of approximately 700,000 members, with state chapters and groups focusing on local issues. The Sierra Club's Hawai'i Chapter represents over 4000 members who





live in the state of Hawai'i. The Sierra Club's O'ahu Group represents over 2400 members who live on O'ahu. The general purposes of the Sierra Club, Hawai'i Chapter and the O'ahu Group include: educating the public about Hawaii's natural resources through hikes; exploring Hawaii's wild places and natural resources; restoring and preserving ecosystems through hands-on service trips; protecting open space through lobbying and litigation; ensuring sound planning through proper application of Hawaii's environmental laws; protecting the integrity of the state's Land Use Law and the Land Use Commission.

The Sierra Club has a long-standing interest in rational land use planning; protecting the integrity of the Land Use Law, agricultural lands, open space and water resources; fighting suburban sprawl; and supporting sound transportation planning. Sierra Club members advocate for preservation of prime agricultural lands in Hawaii. They drive on H-1 and H-2 freeways. Sierra Club members hike trails on Koa Ridge and trails that overlook the petition area. The Sierra Club and its members have educational, cultural, recreational, aesthetic, scientific and environmental interests that would be directly and indirectly affected by development of Koa Ridge and Waiawa.

**APPROVAL OF RECLASSIFICATION WOULD ADVERSELY AFFECT THE SIERRA CLUB'S INTERESTS**

Approval of the petition risks aesthetic and environmental interests that would be directly and indirectly affected by this proposed reclassification of over 1200 acres from the agricultural to the urban district. The Sierra Club and its members invest time and money in their efforts to promote sustainable agriculture, maintain open space resources, ensure sustainability of freshwater resources, protect the scenic beauty of Hawaii, and reduce pollution.

The Sierra Club is interested in the continuance of diversified agriculture on Oahu, both for preservation of open space and increased agricultural self-sufficiency. The petition seeks to rezone lands classified as “prime agricultural,” removing these lands from current and potential productivity. The proposed land use will require additional withdrawals of groundwater from the Waipahu-Waiawa aquifer, which is currently undergoing a downward revision in its sustainable yield. Using more groundwater for residential development further reduces the water available for diversified agriculture in the area. Development of the area considered by the petition significantly alters the viewplanes from the H2 corridor and from hiking trails in the Koa Ridge area and the upper elevations along the Koolau range. The Sierra Club works both locally and around the country to promote the concepts of “smart growth,” where distinct, compact communities are built around shopping and working opportunities. The proposed land use is primarily residential and isolated from nearby city centers, thereby requiring an automobile to perform many types of errands. Such sprawl means more cars and associated air and water pollution. The proposed development diminishes efforts to revitalize the identity of Waiawa and Waipahu and diminishes efforts to establish a working Second City in Kapolei. The proposed development will result in more traffic gridlock along the H2 and H1 corridors and collector highways, reducing travel efficiencies and leading to greater emissions of carbon dioxide and other pollution from idling vehicles. The petition action will result in the creation of more impermeable surface in the petition land area, producing more runoff, a greater opportunity for pollution such as oil and household chemicals to reach Pearl Harbor, and further reductions in Waipahu-Waiawa aquifer regeneration. The proposed development will reduce the likelihood of native habitat from reestablishing in the petition land area. The proposed development will strain





existing county infrastructure or will require new county infrastructure and services that compete with other environmental and civil projects for finite taxpayer resources.

**NO OTHER MEANS TO PROTECT INTERESTS**

There are no other mechanisms by which the Sierra Club can cross-examine the developer and its witnesses to establish facts; present detailed expert testimony; or ensure that a decision is based on a record established by the parties, with no ex parte communications.

**THE SIERRA CLUB'S INTERESTS ARE NOT REPRESENTED BY OTHER PARTIES**

The Sierra Club represents broad environmental interests—not NIMBY interests. We know of no other party that will raise concerns regarding this developments affects on prime agriculture, water, viewplanes, the viability of the Second City, transportation and infrastructure.

**OUR PARTICIPATION WILL HELP IN DEVELOPING A COMPLETE RECORD**

By asking questions, presenting witnesses, pointing out inadequacies in mitigation measures, and framing the legal issues, we will help the Commission to make a more fully-informed decision.

**OUR PARTICIPATION WILL NOT UNREASONABLY BROADEN THE ISSUE**

I will not render the proceeding inefficient or unmanageable. I will present no more than two witnesses and will not attempt to delay the proceeding in any way.

**SIERRA CLUB'S INTERVENTION WOULD SERVE THE PUBLIC INTEREST**

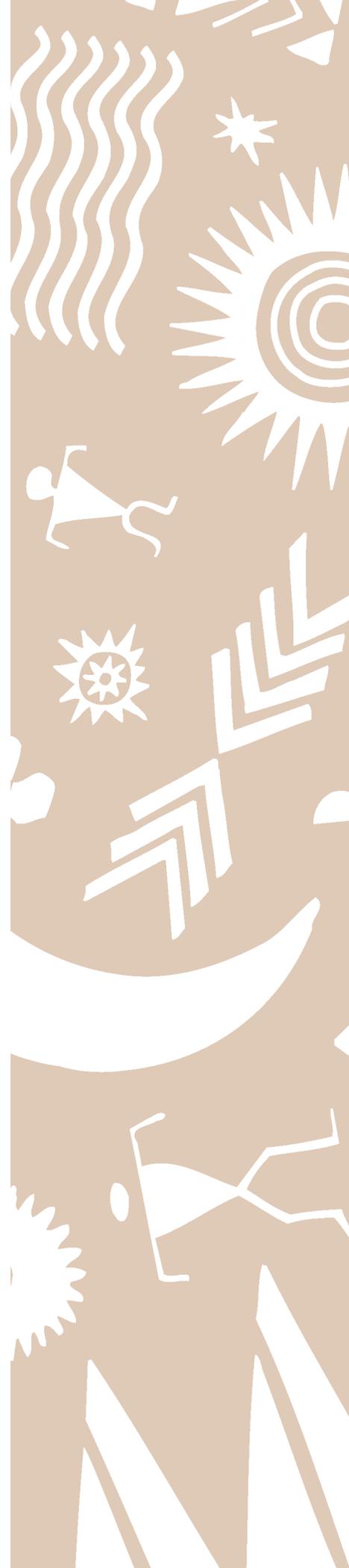
The Sierra Club's intervention would allow issues of island wide importance to be addressed in a formal manner. Many of the Sierra Club's concerns transcend the boundaries of the petition action, yet are intimately affected by the petition. The use of finite public water resources, the visual impacts on sweeping viewplanes, the maintenance of sufficient prime agricultural lands on Oahu, and the efficiency of vehicular transportation outside of the petition area all significantly impact the Sierra Club's interests and the public at large.

**CONCLUSION**

Based on the forgoing, the Sierra Club respectfully request that the Commission grant leave to intervene.

Dated: Honolulu, Hawai'i June 26, 2001

  
\_\_\_\_\_  
Jeff Mikulina



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Sierra Club's petition was served upon the following by U.S.

Postal Service certified mail:

Dickson C.H. Lee, Esq.  
Takushi Funaki Wong & Stone – A Law Corporation  
Grosvenor Center, Suite 1400  
733 Bishop Street  
Honolulu, HI 96813

Harry A. Saunders  
Executive Vice President and Chief Operating Officer  
Castle & Cooke Homes Hawaii, Inc.  
100 Kahelu Avenue – Second Floor  
P.O. Box 898900  
Mililani, HI 96789-8900

Rodney Y. Sato, Esq.  
95-155 Waikalani Drive  
Mililani, HI 96789

Dr. Randall Suzuka  
Pacific Health Community, Inc.  
650 California Avenue  
Wahiawa, HI 96786

City and County of Honolulu  
Planning Commission  
650 S. King Street  
Honolulu, HI 96813

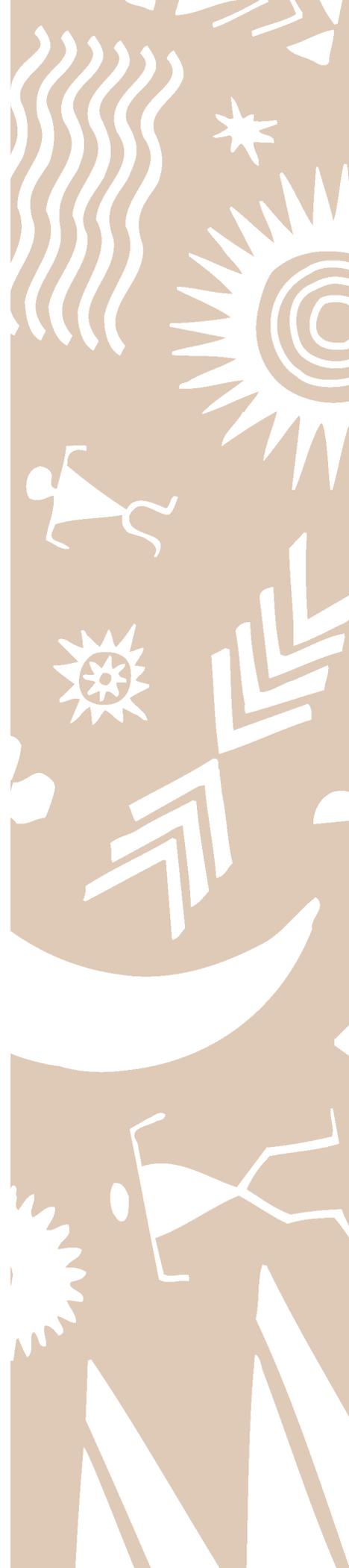
City & County of Honolulu  
Department of Planning & Permitting  
650 South King Street  
Honolulu, HI 96813

and that a copy of the petition was served by hand to:

Office of Planning  
235 S. Beretania  
State Office Tower  
Honolulu, HI 96813

Dated, Honolulu, Hawai'i this day of June 26, 2001

  
\_\_\_\_\_  
Jeff Mikulina





# APPENDIX D

## AGENCY RULES FOR INTERVENTION

Land Use Commission  
Commission on Water Resources

### INTERVENTION RULES – LAND USE COMMISSION

§15-15-52 Intervention in proceeding for district boundary amendments. (a) The petitioner, the office of planning, and the county planning department within which the subject land is situated shall appear in every case as parties, and make recommendations relative to the proposed boundary change.

(b) Within thirty days of the date of the notification of petition filing pursuant to section 15-15-50(d), persons who intend to intervene may file a notice of intent to intervene with the commission. The notice of intent to intervene shall provide, but not be limited to, the following information:

- (1) The person's name and mailing address; and
- (2) The nature and extent of the person's interest in the petition.

The notice of intent to intervene shall be served upon the petitioner, the office of planning, and the respective county planning department. Upon receipt of a notice of intent to intervene, the petitioner shall serve a copy of the petition filed with the chief clerk upon the potential intervenor. All persons who wish to formally intervene shall comply with subsections (e), (f), (g), and (h).

(c) Persons who may intervene upon timely application include:

- (1) All departments and agencies of the State and of the county in which the land is situated; and
  - (2) All persons who have a property interest in the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public.
- (d) All other persons may apply for leave to intervene, which shall be freely granted, provided the commission or its hearings officer may deny an application to intervene when, in the commission's, or hearings officer's discretion it appears that:
- (1) The position of the applicant for intervention is substantially the same as the position of a party already admitted to the proceeding; and
  - (2) The admission of additional parties will render the proceedings inefficient and unmanageable.

(e) In a boundary amendment proceeding, petitions to intervene and become a party shall be in conformity with subchapter 5 and filed with the commission. An original and fifteen copies of the petition for intervention with proof of service on all parties shall be filed with the commission within fifteen days after the notice of hearing is published pursuant to section 15-15-51(c). Except for good cause shown, late filing shall not be permitted.

(f) The petition for intervention shall make reference to the following:

- (1) Nature of the petitioner's statutory or other right;
- (2) Nature and extent of the petitioner's interest, and if an abutting property owner, the tax map key description of the property; and
- (3) Effect of any decision in the proceeding on the petitioner's interest.

(g) If applicable, the petition shall also make reference to the following:

- (1) Other means available whereby the petitioner's interest may be protected;
- (2) Extent the petitioner's interest may be represented by existing parties;
- (3) Extent the petitioner's interest in proceeding differs from that of the other parties;
- (4) Extent the petitioner's participation can assist in development of a complete record;
- (5) Extent the petitioner's participation will broaden the issue; and
- (6) How the petitioner's intervention would serve the public interest.

(h) Petitions for intervention shall be accompanied by a filing fee of \$50. The fee shall be waived for state and county agencies.

(i) If any party opposes the petition for intervention, the party shall file a pleading in opposition within seven days after being served.

(j) All petitions to intervene shall be heard prior to the scheduled hearing.

(k) A person whose petition to intervene has been denied may appeal the denial to the circuit court pursuant to section 91-14, HRS. [Eff 10/27/86; am and comp 8/16/97; am and comp MAY 08 2000 ]  
(Auth: HRS §§205-1, 205-4, 205-7, SLH 1995, Act 235, §2) (Imp: HRS §205-4, SLH 1995, Act 235, §1)

**INTERVENTION RULES - COMMISSION ON WATER RESOURCE  
MANAGEMENT**

§13-167-54 Parties. (a) The following persons or agencies shall be admitted as a party:

- (1) The petitioner shall be a party.
- (2) All government agencies whose jurisdiction includes the land or water in question may be admitted as parties upon timely application.
- (3) All persons within a hydrologic unit who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.
- (4) Other persons who can show a substantial interest in the matter may apply to be a party. The presiding officer or the commission may approve the application only if the applicant's participation will substantially assist the commission in its decision making.

(b) The presiding officer or the commission as provided by law may deny any application to be a party when it appears that:

- (1) The position of the applicant for participation is substantially the same as the position of a party already admitted to the proceedings; and
- (2) The admission of additional parties will not add substantially new information or the addition will render the proceedings inefficient and unmanageable.

(c) All persons with similar interests seeking to be admitted as parties shall be considered at the same time so far as possible.

(d) Where a contested case hearing has been scheduled, any other interested person who qualifies to be a party under subsection (a) may apply to participate, in accordance with this subchapter by filing a written application with the commission not later than ten days before the scheduled contested case hearing or at such earlier time as the commission may designate. Except for good cause shown, late filings shall not be permitted.

(e) The application to become a party shall contain the following:

- (1) The nature of applicant's statutory or other right.
- (2) The tax map key number of the applicant's property as well as the petitioner's property. The nature and extent of applicant's interest.



- (3) The effect of any decision in the proceeding on applicant's interest.
- (4) The difference in the effect of the proposed action on the applicant's interest and the effects of the proposed action on the general public.
- (f) If relevant, the application shall also address:
  - (1) Other means available whereby applicant's interest may be protected.
  - (2) The extent the applicant's interest may be represented by existing parties.
  - (3) The extent the applicant's interest in the proceedings differs from that of the other parties.
  - (4) The extent the applicant's participation can assist in development of a complete record.
  - (5) The extent the applicant's participation will broaden the issue or delay the proceeding.
  - (6) How the applicant's intervention would serve the public interest.
  - (7) Any other information the commission may add or delete.
- (g) If any party opposes another person's application to be a party, the party may file objections for the record no later than ten days prior to the hearing.
- (h) All applications to be a party shall be acted upon as soon as practicable and shall be decided not later than the commencement of the contested case hearing.
- (i) A person whose petition to be admitted as a party has been denied may appeal that denial to the circuit court pursuant to section 91-14, Hawaii Revised Statutes. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §§91-9, 91-9.5)

# APPENDIX E

## SAMPLE WITNESS AND EXHIBIT LISTS

LAND USE COMMISSION

DOCKET NO./PETITIONER: A00-734/CASTLE & COOKE HOMES HAWAII, INC. & PACIFIC HEALTH COMMUNITY, INC.

PARTIES: CASTLE & COOKE HOMES HAWAII, INC. & PACIFIC HEALTH COMMUNITY, INC.

NAME/ORGANIZATION/ POSITION (List in Order of Appearance)	TO BE QUALIFIED AS AN EXPERT IN	SUBJECT MATTER	WRITTEN TESTIMONY (Yes or No)	EXHIBIT NO.	LENGTH OF DIRECT
Mark Hastert Helber Hastert & Fee	Planning	Overview of the land use planning of the Petition lands	No	Ex. 10 Ex. 20 Ex. 21 Ex. 22 Ex. 24	20minutes
Harry A. Saunders Castle & Cooke Homes Hawaii, Inc. Executive Vice President and Chief Operating Officer		Overview of CCHH's development	No	Ex. 25	15 minutes
Jerry Vriesenga Dole Foods		Moving Dole's remaining agricultural operations to other fields	No	Ex. 26	10 minutes
Bruce Plasch	Agriculture	Agriculture	No	Ex. 23 Ex. 27	10 minutes
John Kirkpatrick SMS Research and Marketing, Inc.	Social Science	Socio-Economic Impact Statement	No	Ex. 28 Ex. 10 - App H	10 minutes

8/13/01

Page 1 of 3





LAND USE COMMISSION

DOCKET NO./PETITIONER: A00-734/CASTLE & COOKE HOMES HAWAII, INC. & PACIFIC HEALTH COMMUNITY, INC.

PARTIES: CASTLE & COOKE HOMES HAWAII, INC. & PACIFIC HEALTH COMMUNITY, INC.

NAME/ORGANIZATION/ POSITION (List in Order of Appearance)	TO BE QUALIFIED AS AN EXPERT IN	SUBJECT MATTER	WRITTEN TESTIMONY (Yes or No)	EXHIBIT NO.	LENGTH OF DIRECT
Michael Sklarz (formerly with The Prudential Locations)	Marketing	Market Analysis	No	Ex. 29 Ex. 10-App. A	10 minutes
Ken Ishizaki (or Kay Muranaka) Engineering Concepts, Inc.	Engineering	Infrastructure	No	Ex. 30 Ex. 10-App. B	10 minutes
Tom Nance Tom Nance Water Resource Engineering	Water	Water	No	Ex. 31 Ex. 10-App. B	15 minutes
Gary Funasaki Ronald N.S. Ho & Associates, Inc.	Electrical Engineering	Electrical	Yes	Ex. 32 Ex. 32-A Ex. 10-App. B	10 minutes
David Adams/Tim Noonan D.L. Adams Associates, Ltd.	Acoustical Consultants	Noise	No	Ex. 33 Ex. 10-App. C	10 minutes
Barry Neal B.D. Neal & Associates (dba Darby & Associates)	Air Quality	Air Quality	No	Ex. 34 Ex. 10-App. D	10 minutes

LAND USE COMMISSION

DOCKET NO./PETITIONER: A00-734/CASTLE & COOKE HOMES HAWAII, INC. & PACIFIC HEALTH COMMUNITY, INC.

PARTIES: CASTLE & COOKE HOMES HAWAII, INC. & PACIFIC HEALTH COMMUNITY, INC.

NAME/ORGANIZATION/ POSITION (List in Order of Appearance)	TO BE QUALIFIED AS AN EXPERT IN	SUBJECT MATTER	WRITTEN TESTIMONY (Yes or No)	EXHIBIT NO.	LENGTH OF DIRECT
Evangeline Funk, Ph.D	Biology	Biological Resources (Flora, Fauna)	Yes	Ex. 35 Ex. 35-A Ex. 10-App. E	10 minutes
Hallett H. Hammatt, Ph.D Cultural Surveys Hawaii	Archaeology	Archaeological Inventory Survey Hawaiian Traditional Customs & Practices	Yes	Ex. 36 Ex. 36-A Ex. 10-App. F Ex. 10-App. G Ex. 10- App. F-G-1	15 minutes
Bryant T. Brothers, P.E. Wilbur Smith Associates	Transportation	Transportation	No	Ex. 37 Ex. 10-App. I	30 minutes
James C. Nicholas (rebuttal witness)	Planning	Planning	No		15 minutes
John Mink (rebuttal witness)	Water	Water	No		15 minutes

8/13/01

Page 3 of 3





LAND USE COMMISSION

DOCKET NO./PETITIONER: A00-734/CASTLE & COOKE HOMES HAWAII, INC. & PACIFIC HEALTH COMMUNITY, INC.

PARTIES: CASTLE & COOKE HOMES HAWAII, INC. & PACIFIC HEALTH COMMUNITY, INC.

EXHIBIT NUMBER	DESCRIPTION	PARTY: OBJECTIONS	ADMIT
1	Proposed Reclassification of State Land Use District Map		
2	Legal Descriptions		
3	Tax Maps		
4	Deed		
5	Articles of Amendment to Change Corporate Name		
5-A	Articles of Amendment to Change Corporate Name Petitioners' (Castle & Cooke Residential, Inc. changed its name to Castle & Cooke Homes Hawaii, Inc.)		
6	Lease Pending Fee Purchase Agreement		
7	Designation and Authorization from WHA to PHC		
7-A	July 27, 2000 (letter from Castle & Cooke Homes Hawaii authorizing Pacific Community Health to be a co-petitioner)		
8	Castle & Cooke, Inc. Form 10-Q		
9	WHA Financial Statement		
10	Koa Ridge Pacific Health Center, Environmental Assessment, April 2000		
10-A	Decision Analysts Hawaii, Inc. "East Kapolei Master Plan Development Project: Impact on Agriculture", December 1996, prepared for State of Hawaii Housing Finance and Development Corporation		
11	Pacific Health Community Master Plan		
12	Central Oahu and North Shore Health Care Conference for the 21st Century		

LAND USE COMMISSION

DOCKET NO./PETITIONER: A00-734/CASTLE & COOKE HOMES HAWAII, INC. & PACIFIC HEALTH COMMUNITY, INC.

PARTIES: CASTLE & COOKE HOMES HAWAII, INC. & PACIFIC HEALTH COMMUNITY, INC.

EXHIBIT NUMBER	DESCRIPTION	PARTY: OBJECTIONS	ADMIT
13	Master Plan - American Health Facilities Development, LLC and dated October 1998		
14	Final Report Wahiawa General Hospital 1998 Market Study for the New Facility		
15	Who is Baylor?		
16	TBG Development Company - Overview		
17	Pacific Health Community Newsletters (6)		
18	Letters/Testimony of Support and Interest		
19	LUC's Boundary Interpretation No. 00-39 dated November 9, 2000		
20	Aerial Photo of Petition Lands		
21	Map Showing Central Oahu Land Use Designations (in color)		
22	Koa Ridge Illustrative Plan		
23	Impact of the Koa Ridge Development on the Growth of Diversified Agriculture		
24	Resume of Mark Hastert		
25	Resume of Harry S. Saunders		
26	Resume of Jerry Vriesenga		
27	Resume of Bruce Plasch		
28	Resume of John Kirkpatrick		
29	Resume of Michael Sklarz		
30	Resume of Ken Ishizaki		
31	Resume of Tom Nance		

08/13/01

Page 2 of 3





# APPENDIX F

## EXPERT WITNESS RESUMES

### Matthews Marketing

#### RESUME

**Cindy B. Matthews**  
9237 Frenchman's Way  
Dallas, Texas 75220

214/358-1691  
214/350-2522 (fax)  
[cmatthews@matthews-marketing.com](mailto:cmatthews@matthews-marketing.com)

#### EXPERIENCE

**President, Matthews Marketing, LLC. July 2000 to present.**

Develop and implement business and marketing plans for various health care clients. Conduct market assessments including qualitative market research, and recommend marketing communication strategies to meet client goals.

**Baylor Health Care System, Dallas, Texas.**

**Vice President, Marketing Services, Baylor Health Care System. September 1997 to June 2000.**

Responsible for the marketing efforts of the Baylor Health Care System including market development, product/service line development, market research, telemarketing, marketing communications and advertising. Recommended and implemented marketing strategies and tactics to support organizational objectives.

**Assistant Vice President, Market Development, Eastern Region, Baylor Health Care System. September 1994 to September 1997.**

Responsible for the marketing efforts of the facilities in Baylor's eastern region: Baylor Medical Centers at Garland, Richardson, Ennis, and Waxahachie; Baylor Health Center at Mesquite; Hopkins County Memorial Hospital in Sulphur Springs. Supervised marketing and community relations staff whose responsibilities were to implement marketing efforts designed to achieve revenue/volume goals. Also responsible for the marketing efforts of HealthTexas Provider Network, Baylor's primary care physician and managed care network.

**Director, Community Hospital Marketing, Baylor Health Care System, April 1993 to September 1994.**

Responsible for the planning and implementation of marketing activities for the Baylor community medical centers, including consumer advertising, physician marketing and community relations.

EXHIBIT 44-B



**Cindy B. Matthews**

**Page Two**

**Director of Marketing, Baylor Medical Center at Garland, March 1991 to April 1993.**

Responsible for the marketing efforts of this newly acquired, 206-bed community hospital. Created and implemented branding strategies. Directed the physician marketing program, consisting of sales activities and direct mail communications.

**Administrative Director, Baylor Institute for Rehabilitation, January 1987 to March 1991.**

Supervised all operations of an off-site outpatient clinic. Supervised the hospital's marketing staff whose responsibilities included sales, public relations, and advertising.

**Director of Marketing, Baylor Institute for Rehabilitation, September 1984 to December 1986.**

Responsible for the implementation of a marketing program directed at potential patients and referral sources. Established a referral development program utilizing sales coordinators to visit referral sources in a five state area.

**Speech-Language Pathologist, Callier Center for Communication Disorders, University of Texas at Dallas, Dallas, Texas. June 1980 to September 1984.**

**Speech-Language Pathologist, Early Childhood Program, Plano Independent School District, Plano, Texas. August 1978 to May 1980.**

#### **EDUCATION**

B.S. 1977 Southern Methodist University, Dallas, Texas  
Major: Speech Pathology

M.S. 1978 Southern Methodist University, Dallas, Texas  
Major: Speech Pathology

M.B.A. 1983 University of Dallas, Irving, Texas  
Major: Business Administration

**Cindy B. Matthews**

**Page Three**

**PRESENTATIONS, PUBLICATIONS**

*Author of Marketing Speech-Language Pathology and Audiology Services: A How-To Guide*, published by Singular Publishing Company, San Diego, California, November 1992.

Conducted marketing seminars for the National Employee Assistant Association and the North Carolina Employee Assistant Association, 1998.

Conducted marketing seminars for the American Speech-Language-Hearing Association. These seminars were located in different cities around the country.

Presented marketing workshops for the University at Buffalo, New York; Scarborough General Hospital, Ontario, Canada; Southwest Missouri State University, Springfield, Missouri; the Ontario Speech and Hearing Association, Toronto, Ontario, Canada; the New York State Speech-Language-Hearing Association; the University of Texas at Dallas, Dallas, Texas.

**AWARDS, HONORS**

Awarded the Baylor Health Affiliates Group Hall of Champions award for superior ongoing leadership.

Flashes of Brilliance Award, publications, Academy of Health Services Marketing.

Telstar Award of Excellence, Texas Society for Hospital Public Relations and Marketing in the special publications category.

Silver Award for the production of Baylor Rehab's documentary film, "A Life of Their Own," John Muir Medical Film Festival.

Telstar Award of Excellence, Texas Society for Hospital Public Relations and Marketing in the category of Total PR Campaign.

Bronze Best of Texas, Texas Public Relations Association in the video category.

Merit Award, Dallas Advertising League's TOPS Awards for outstanding sales promotions.

CURRENT REFERENCES PROVIDED UPON REQUEST



### **Rexford E. Palmer, Ph.D. - Biography**

Dr. Rex Palmer has been studying the effects of human impacts on the environment for over 25 years. While still a graduate student, he worked on numerous field studies of endangered plant species. Since receiving his Ph.D. in Botany from the University of California at Davis in 1982 for his work on the evolutionary cytogenetics and ecology of the endangered Santa Cruz tarplant, closely related to the Silversword group of Hawaii, Dr. Palmer has taught at the University of Hawaii and conducted studies of rare and endangered plants in Hawaii, California, Oregon, Washington, Arizona, Nevada, and Peru. He is presently working as a consultant to the U. S. Army Corps. of Engineers.



July 2, 2001

Re: Newton Property LUC Hearing – R. David CV.

Aloha

Attached please find a copy of my general CV. If you want a complete list of publications, reports etc let me know (its 11 pages long).

Aloha

A handwritten signature in black ink, appearing to read "R. David", is written over the printed name "Reginald E. David". The signature is fluid and cursive.

Reginald E. David.

Exhibit 9

PHONE: (808)329-9141 FAX: (808)329-1245  
P.O.Box 1371 KAILUA-KONA, HAWAII 96745



Rana Productions, Ltd.  
PO Box 1371  
Kailua-Kona, Hawaii 96745

Phone: (808)-329-9141  
Fax: (808)-329-1245  
e.mail: r david@kona.net

Employment: 1975- Present: President, Rana Productions Ltd. DBA - Pacific Biological Survey

Professional Experience:

Over the past 18 years I have worked as a terrestrial vertebrate biologist in Hawai'i and the Tropical Pacific. I have concentrated primarily on avian and mammalian species.

Between 1986 and 2000 I participated in over 30 bird surveys for the USFWS and the State of Hawaii on all of the main Hawaiian Islands including Midway and Kure Atolls. I am also experienced in the radar tracking of seabirds and bats as well as ultrasonic censusing of bats. I have authored over 20 peer reviewed papers, one book and over 100 technical reports on birds and mammals. I have extensive field experience in New Zealand, Tahiti, Kiritimat, Guam, Saipan, Tinian, Gilbert Islands, Vanuatu, Republic of Palau, Eastern Siberia, Korea and the western United States.

I have a good working knowledge of both USFWS, U.S. Department of Defense, State of Hawai'i, Government of Guam, CNMI and the Republic of Palau's environmental laws and regulations. I am experienced in preparing Biological Assessments (BA's) required under Section "7" of the Endangered Species Act (ESA) and in negotiating mitigation under Section "7" of the ESA with the USFWS. I also have experience in preparing Natural Resource Management Plans (NRMP's) and DoD, Integrated Natural Resource Management Plans (INRMP's) as well as State of Hawai'i Section 343 Environmental Assessments.

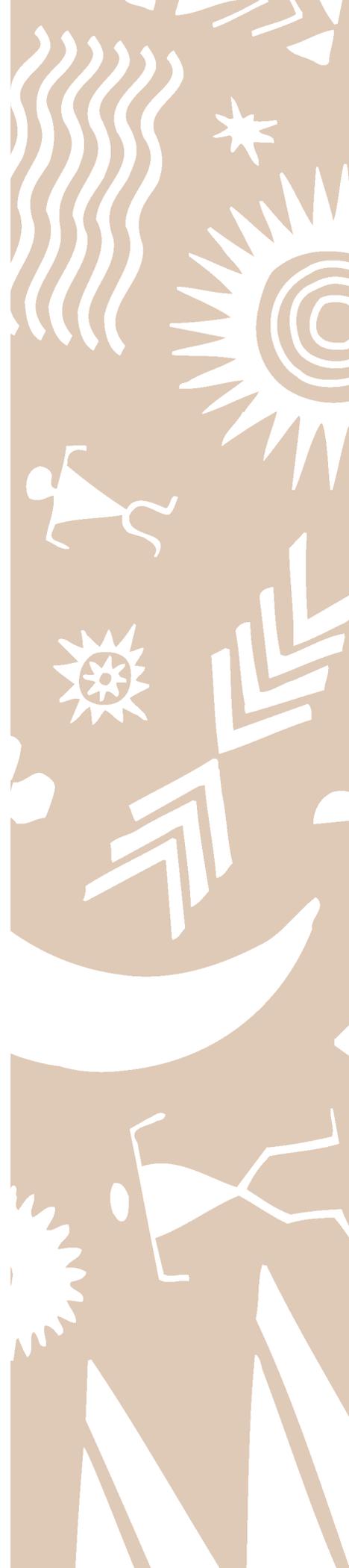
Over the past 6 years I have functioned as the senior biologist on several large projects, responsible for overseeing all biological work performed by scientists covering the full spectrum of biological disciplines from geology to wetlands and marine sciences. I have also performed as the lead biologist representing federal clients before state and federal regulatory agencies on complex projects like the Federal Highways, Saddle Road Project.

Related Activities:

- State of Hawaii Department of Land and Natural Resources, Natural Areas Reserve Commission (NARS) Commissioner: 1999 – Present.
- Hawai'i Natural Heritage Program, Ornithological Advisory Committee.
- The Mauna Kea Management Board – Environmental Committee.
- US Fish & Wildlife Service, 'Alala Recovery Team Member: 1994 – Present.
- National Audubon Society: Board of Directors member: 1993-1997
- Hawaii Audubon Society: Board of Directors member: 1989 - 1996, 1998
- Hawai'i Audubon Society: Treasurer 1998
- Hawai'i Audubon Society: President 1990-1994
- US Fish & Wildlife & DLNR, Hawaii Endangered Waterfowl Recovery Team Advisory Committee

Membership in Professional Societies:

- American Ornithologist's Union,
- Association of Field Ornithologists,
- Cooper's Ornithological Society,
- Wilson's Ornithological Society,
- The Wildlife Society.





## CONTACT INFORMATION

### Environmental Law Program

Website: [www.hawaii.edu/elp](http://www.hawaii.edu/elp)

E-mail: [elp@hawaii.edu](mailto:elp@hawaii.edu)

### Director

Associate Professor M. Casey Jarman

Telephone: (808) 956-7489

E-mail: [jarman@hawaii.edu](mailto:jarman@hawaii.edu)

### William S. Richardson School of Law

University of Hawai'i at Mānoa

2515 Dole Street

Honolulu, HI 96822

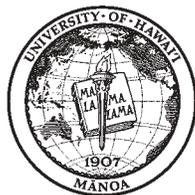
Telephone: (808) 956-7966

Website: [www.hawaii.edu/law](http://www.hawaii.edu/law)

e-mail: [lawadm@hawaii.edu](mailto:lawadm@hawaii.edu)

### General UH Information

Website: [www.hawaii.edu](http://www.hawaii.edu)



University of Hawai'i  
MĀNOA

*The University of Hawai'i at Mānoa  
is an equal opportunity/affirmative action institution.*