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LAND USE COMMISSION

STATE OF HAWAI'I

ACTION

DOCKET NO. A94-706 KA'ONO'ULU RANCH

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TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for a Public Hearing
at the Courtyard Maui Kahului Airport, Haleakala Room,
532 Keolani Place, Kahului, Maui, Hawai'i, commencing
at 10:00 a.m. on November 15, 2012, pursuant to
Notice.

REPORTED BY: HOLLY M. HACKETT, CSR #130, RPR
Certified Shorthand Reporter

A P P E A R A N C E S

COMMISSIONERS:

KYLE CHOCK, CHAIR
SHELDON BIGA
LANCE M. INOUE
CHAD McDONALD
ERNEST MATSUMURA
NICHOLAS TEVES, JR.

EXECUTIVE OFFICER: DAN ORODENKER
CHIEF CLERK: RILEY HAKODA
STAFF PLANNERS: BERT SARUWATARI
DEPUTY ATTORNEY GENERAL: SARAH HIRAKAMI, ESQ.

AUDIO TECHNICIAN: WALTER MENCHING

Docket No. A94-706 KAONOULU RANCH (Maui)

For the Intervenors
Maui Tomorrow Foundation, Inc.,
South Maui Citizens for Responsible Growth
Daniel Kanahale:
TOM PIERCE, JR., ESQ.

For the County:
MICHAEL HOPPER, ESQ.
Deputy Corporation Counsel
JANE LOVELL, ESQ.
Deputy Corporation Counsel
WILL SPENCE, Planning Drtr.
ANN CUA, Planner

For the State:
JESSE SOUKI, ESQ.
Director Office of Planning
RODNEY FUNAKOSHI
Office of Planning

Respondents:
JOEL KAM, ESQ.
Honua'ula Partners, LLC
JONATHAN STEINER, ESQ.
Pi'ilani Promenade South, LLC
Pi'ilani Promenade North, LLC
Honua'ula Partners, LLC

I N D E X

DOCKET WITNESSES	PAGE
CHARLES JENCKS	
Continued Direct Examination by Mr. Steiner	8
Cross-Examination by Mr. Yee	68
Cross-Examination by Mr. Pierce	87
Redirect Examination by Mr. Steiner	155
WILLIAM SPENCE	
Direct Examination by Ms. Lovell	168
Cross-Examination by Mr. Steiner	199
Cross-Examination by Mr. Kam	200
Cross-Examination by Mr. Yee	202

1 CHAIRPERSON CHOCK: Good morning. I'd like
2 to call our meeting to order. The first item of
3 business is the adoption of minutes. Do we have a
4 motion to approve?

5 COMMISSIONER TEVES: So moved.

6 COMMISSIONER MATSUMURA: Second.

7 CHAIRPERSON CHOCK: Moved and seconded.
8 Any opposed? Minutes are approved. Executive
9 Officer, our meeting schedule.

10 MR. ORODENKER: Thanks, Mr. Chair. Our
11 next meeting is scheduled for December 6th and 7th
12 once again on Maui, the West Maui Land oral argument
13 and decision making scheduled for December 6th. If
14 this hearing needs to be continued we have time for
15 Ka'ono'ulu Ranch.

16 On December 7th we have the Waiko
17 Industrial site visit. On January 10th and 11th, 2013
18 once again we're back here on Maui, West Maui Land
19 Adoption of Order and any proceedings required for
20 this Ka'ono'ulu Ranch. We'll also be addressing the
21 LUC Administrative Rules on January 10th and 11th.

22 January 24th and 25th once again here on
23 Maui for Waiko Industrial Investment.

24 xx

25 xx

1 CHAIRPERSON CHOCK: Thank you very much,
2 Dan. This is a continued hearing on Docket No.
3 A94-706 for Order to Show Cause. Will the parties
4 please identify themselves for the record.

5 MR. STEINER: Good morning, Chair,
6 Commissioners. Jonathan Steiner on behalf of Pi'ilani
7 Promenade North and Pi'ilani Promenade South and
8 Honua'ula Partners, LLC.

9 MR. KAM: Good morning, Chair and
10 Commissioners. Joel Kam for Pi'ilani Promenade South,
11 Pi'ilani Promenade North and Honua'ula Partners, LLC.

12 MR. HOPPER: Michael Hopper, deputy
13 corporation counsel. With me is Deputy Corporation
14 Counsel Jane Lovell representing the Maui County
15 department of planning. With us is Planning Director
16 Will Spence and Planner Ann Cua.

17 MR. YEE: Good morning. Deputy Attorney
18 General Bryan Yee on behalf of the Office of Planning.
19 With me is Rodney Funakoshi and Lorene Maki from the
20 Office of Planning.

21 MR. PIERCE: Good morning. Tom Pierce on
22 behalf of Intervenors. And with me today is Mark Hyde
23 to my left from South Maui Citizens for Responsible
24 Growth. And also behind me is Irene Bowie for Maui
25 Tomorrow and Daniel Kanahele.

1 CHAIRPERSON CHOCK: Good morning. Let me
2 briefly update the record. On November 1st through
3 the 14th the Commission received public testimony from
4 25 individuals and organizations whose names are on
5 file. On November 9th the Commission mailed the
6 Orders on the motions for this docket that it
7 addressed at the November 1st meeting.

8 Let me briefly describe our procedure for
9 today. First, the Commission will hear public
10 testimony. After the conclusion of public testimony
11 the proceedings will begin with the continuation with
12 the Petitioner's presentation. County will then make
13 its presentation followed by OP and Intervenor.

14 At the conclusion of the presentations and
15 after questions from the Commissioners the Commission
16 will conclude the evidentiary portion of the
17 proceedings. Oral argument and decision-making dates
18 will then be scheduled and the Commission will conduct
19 its deliberations on the Order to Show Cause.

20 Mr. Steiner, are you prepared to proceed
21 with your witness Mr. Jencks, I believe?

22 MR. STEINER: I am, thank you.

23 CHAIRPERSON CHOCK: Proceed.

24 MR. PIERCE: Mr. Chair, I do have one
25 housekeeping measure I just wanna raise before we

1 begin if I may.

2 CHAIRPERSON CHOCK: Sure.

3 MR. PIERCE: Just real quickly, I was
4 looking at the Order on -- the Order denying without
5 prejudice Intervenor's motion in limine. And I just
6 wanted to put on the record we would like to have
7 standing objections related to that. It was our
8 understanding that that was the case after it was
9 denied.

10 And the reason I say that is I don't want
11 to be objecting to everything. It's just to keep it
12 that I just want the record to reflect that it was a
13 standing objection to those things we identified in
14 the Motion in Limine.

15 CHAIRPERSON CHOCK: Thank you, Mr. Pierce.
16 Appreciate that. Go ahead.

17 MR. STEINER: Is the witness still under
18 oath?

19 CHAIRPERSON CHOCK: Yes, sir.

20 THE WITNESS: Yes, I certainly am.

21 MR. STEINER: Thank you.

22 CHARLES JENCKS
23 being previously duly sworn to tell the truth, was
24 examined and testified as follows:
25 xx

1 CONTINUED DIRECT EXAMINATION

2 BY MR. STEINER:

3 Q Good morning, Mr. Jencks.

4 A Good morning.

5 Q When we left off a couple of weeks ago on
6 Friday when you had testified regarding your
7 background and then your involvement in your capacity
8 as deputy of the Department of Public Works and
9 director of the Department of Public Works, your
10 involvement with the LUC petition back in 1994 and
11 then the change in zoning process. And that's kind of
12 where we left off.

13 Before we continue with as far as
14 chronological what happened next I think it might help
15 the Commission. Could you just give a brief overview
16 of the progress of the entitlements of the Project
17 from back in 1994 through today. Just briefly to kind
18 of orient them as far as what happened.

19 A Sure. Just briefly. I was the deputy
20 director of Public Works for the county of Maui
21 beginning in 1991 through to '93 -- '94, excuse me.
22 And I at the time participated in the state Land Use
23 Commission hearings for the project that took place on
24 Maui. I was actually called on by the mayor to
25 participate as other department heads were. So I

1 testified at that hearing.

2 I also then participated as the director of
3 Public Works from '94 through 2000. When the
4 application came before the county for the change in
5 zoning I participated at the director's level in that
6 discussion as well as in the planning commission but
7 also the Maui county council, and also participated in
8 the development of the Kihei-Makena community plan as
9 a member of the mayor's staff reviewing the plan and
10 the process of the planning commission and the
11 Council.

12 Q Then can you bring us up to the present
13 what happened? Just briefly?

14 A Up to the present time I left the county of
15 Maui in 2000, went into the private sector. In 2005
16 the property was acquired by Maui Industrial Partners.
17 Maui Industrial Partners was the subset of another
18 partnership I was working for at the time.

19 They asked me to take over, process this
20 Project through the subdivision process, which I did,
21 which culminated in the final map in 2009 for the
22 purposes of selling a portion of the property and
23 ultimately development of an affordable housing
24 project on one parcel of the property as a condition
25 of approval for the Honua'ula Project.

1 Q So, Mr. Jencks this process from when there
2 was a boundary amendment back in 1994 it took until
3 2009 to get through the stages of the, getting the
4 change in zoning, then getting the subdivision
5 approval?

6 A That's correct.

7 Q And when was the change in zoning
8 completed?

9 A The change in zoning application was
10 completed in 1999.

11 Q Okay. What was your first involvement with
12 entitlements for the property in the capacity as a
13 representative of Maui Industrial Partners?

14 A Well, as I stated earlier the property was
15 acquired by Maui Industrial Partners from Mr. Henry
16 Rice in 2005. And immediately upon our acquisition of
17 the property my job was to pick up the Project from
18 where it left off with Mr. Rice, the previous owner.

19 He had applied for and received preliminary
20 approval on a 4-lot large lot subdivision for the
21 property which is nearly identical to the subdivision
22 that's before us today.

23 My job was to pick that map up, get a
24 preliminary approval, pick that map and start through
25 the process of getting a final map. That process

1 basically involved hiring a team of technical
2 consultants including a civil engineer, a traffic
3 signal consultant for the design of the traffic
4 signals, a traffic engineer, series of consultants. I
5 pulled them together.

6 And then we initiated the series of
7 meetings with the county of Maui as well as the state
8 department of transportation because primarily the
9 major infrastructure needed for this Project, for any
10 project on this 80 acres, involved the state
11 department of transportation because of the Pi'ilani
12 Highway and the designated corridor of the
13 Kihei-Upcountry Highway.

14 Q And the subdivision that was applied for,
15 as you said, it was not for 123-lot subdivision, it
16 was a four-lot subdivision.

17 A That's correct. It was a 4-lot
18 subdivision. Mr. Rice, reading the file, made it
19 clear during his testimony to the Commission in the
20 early '90s that he wasn't sure exactly how the Project
21 would be built. He would perhaps sell off pieces. He
22 would perhaps do it himself. He wasn't sure.

23 So in my opinion his application for a
24 4-lot, large lot subdivision kind of followed up on
25 that line of logic. Any subdivision, any project of

1 this size begins with a large lot subdivision. That's
2 the beginning process. Then they sell the parcel or
3 that you may decide to re-subdivide that large lot
4 into many more parcels. It's start off with a large
5 lot subdivision.

6 So his application made sense to me. And
7 like I say that's basically the same map we're working
8 with today.

9 Q Could you take a look at what's been marked
10 as Pi'ilani Exhibit 11. It's in the book in front of
11 you. There's two sets of exhibits. The first set are
12 the Honua'ula exhibits and then following that after
13 the green tab are the Pi'ilani exhibits.

14 A Okay.

15 Q So if you could take a look at Exhibit 11
16 please.

17 A Okay.

18 Q It's got a tab Exhibit 11.

19 A This is 11 here.

20 CHAIRPERSON CHOCK: If you could just give
21 the Commission a second to find that as well.

22 MR. STEINER: Ready, Chair?

23 CHAIRPERSON CHOCK: Go ahead.

24 Q (By Mr. Steiner): Do you recognize this
25 document?

1 A Yes, I do.

2 Q Is this one of the documents that was part
3 of the subdivision application you were just
4 describing?

5 A Yes.

6 Q Could you describe what this document is?

7 A This letter -- part of the subdivision
8 approval process for this particular Project required
9 the submittal of landscape plans for the right-of-way
10 for the Kihei-Upcountry corridor as well as
11 improvements on Pi'ilani Highway.

12 The plans were developed and then submitted
13 to the county of Maui. They went before the arborist
14 committee. And this letter signifies that those plans
15 were approved by the arborist committee through the
16 department of planning, signed by Mr. Michael Foley.

17 Q This letter is to a Mr. Ken Jencks.

18 A Ken Jencks is my brother.

19 Q And how was he involved in this Project?

20 A My brother was involved in this Project
21 going back to the beginning when he worked for
22 Phillips Brandt and Reddick, PBR Hawaii. He did some
23 of the initial landscape design work for PBR for
24 Mr. Rice.

25 And so what I did was I hired Ken who at

1 the time was working for Mr. Bryan Maxwell who had
2 offices here on Maui, to implement that design system
3 and plan, irrigation and planting. So Ken and
4 Mr. Bryan Maxwell developed the plans and processed
5 them through the county for me.

6 Q You mentioned that this letter is from the
7 department of planning signed by Michael Foley. Do
8 you see that?

9 A That's correct.

10 Q And is this the same Michael Foley who's
11 listed as an expert witness by the Intervenors in this
12 case?

13 A That's correct.

14 Q And what was Mr. Foley's role at that time?

15 A Mr. Foley was the director of planning.

16 Q And based on your experience in working for
17 the county and in land development in Hawai'i what's
18 the significance of Mr. Foley signing this letter?

19 A Mr. Foley signed this letter means that his
20 department, he approved the plan.

21 Q Okay. And that's the landscape plan,
22 correct?

23 A That's correct.

24 Q What's the Project name listed on the front
25 page of this letter which Mr. Foley authored?

1 A The Project name is Ka'ono'ula Marketplace.

2 Q Now, in some of the earlier documents that
3 I've seen and that the Commission has seen, the name
4 of the project is Kaonoulu Industrial Park. What, if
5 any, is the significance of the different name on this
6 Project?

7 A Well, when I first picked up the Project in
8 2005 it was Ka'ono'ula Light Industrial. And
9 immediately upon purchasing the property, as is common
10 practice, those kinds of transactions go into the
11 Pacific Business News. So everyone in Hawai'i knows
12 who's buying what, especially a large acquisition. It
13 was a \$22 million acquisition.

14 I immediately started getting calls from
15 people who were interested in buying a parcel of land.
16 One of those was the McNaughton Group out of Honolulu.
17 We had spent probably nine months, 10 months working
18 with the McNaughton Group on their proposal Letter of
19 Intent. And therefrom came the name Ka'ono'ula
20 Marketplace.

21 Q Does "marketplace" denote something
22 different from an industrial park?

23 A It's an evolution from the industrial park
24 name to a project that more accurately reflected what
25 was needed in the marketplace at the time.

1 Q Did you have any discussion with anybody
2 from the county of Maui where Mr. Foley was present
3 where the subject of the discussion was the subject of
4 this property that we're talking about today being
5 developed to include a retail component?

6 A Yes, I did.

7 Q Could you describe that meeting, please?

8 A After acquisition, and understanding that
9 there were entities interested in this Project like
10 the McNaughton Group, it was incumbent upon me to get
11 clear direction from the county of Maui as to what
12 would be allowed in the Project, because we would be
13 making representations to people as to what could be
14 developed on the property.

15 So what I did was I developed a series of
16 alternative plans with different types of --
17 representing different concepts we received from folks
18 like the McNaughton Group on what could be built on
19 the property.

20 And I took those plans and I scheduled a
21 meeting with the office of the mayor who at the time
22 was Alan Arakawa in his first term as mayor of Maui
23 County. I believe those meetings started in 2005.

24 And what I did was I went in and met with
25 the mayor. And I asked him to include at that

1 meeting the Director of Planning Michael Foley, the
2 Deputy Director of Planning which was Mr Don Couch,
3 who's now a councilmember, and I think Senior Planner,
4 his name is Clayton Yoshida.

5 And the reason why I wanted all those
6 people present was I wanted clear, unambiguous
7 direction as to what it was I could do with this
8 property, what the permitted uses could be especially
9 in the context of the zoning which is light industrial
10 and the community plan which has some specific
11 provisions with regard to commercial and light
12 industrial in South Maui.

13 So we had the meeting. And essentially my
14 plan broke down the Project as follows: So just
15 briefly follow me here. I broke down the entire
16 88 acres. I took out eight acres for infrastructure,
17 roadway widening lots, and the Upcountry Highway with
18 a net of 80. I then included 48 acres of retail,
19 27 acres of B-3 which is the least neighborhood level,
20 commercial in the zoning categories, and light
21 industrial and then five acres of housing.

22 The five acres of housing was driven by the
23 fact that at this time, 2005-2006, I was deeply
24 involved in another project called Honua'ula Waialea
25 670. And one of the issues I was trying to solve for

1 the county was the provision of a homeless resource
2 center in South Maui.

3 For those of you who aren't from Maui then,
4 and as today, there's a relative scarcity of small,
5 easily developable parcels in South Maui.

6 The county had been successful in
7 developing a center on the west side of Maui in
8 Lahaina. They had been successful in developing one
9 on Waiale Drive in Wailuku. And I heard that they
10 were looking for a parcel. So I met with the director
11 of Housing and Human Concerns, Alice Lee.

12 And I suggested to her that perhaps this
13 piece, a portion of this piece of this 80 acres of
14 this parcel, this Honua'ula Light Industrial could be
15 broken out for a homeless shelter and then I would
16 get, I would get some credit for that in the context
17 of my entitlement work on Waialae 670 Honua'ula. And
18 she was receptive.

19 So when I met with the mayor and Mr. Foley
20 and Couch and Yoshida, I made sure that I included
21 that because I wanted them to understand clearly that
22 I not only had retail, it had some element of light
23 industrial but I also had a housing component.

24 I wanted them to give me clear direction.
25 Clearly, unambiguously: Is this okay? Does this

1 comport with your interpretation, your opinion what
2 the zoning allows and what the community plan allows?

3 Q Okay. And as you said, Mr. Foley was
4 present at these discussions in his capacity as the
5 director of the department of planning, correct?

6 A That's correct.

7 Q Did Mr. Foley ever express to you during
8 any of those meetings that the amount of proposed
9 retail was unacceptable?

10 MR. PIERCE: (off mic) Objection. (on mic)
11 Objection. That would be hearsay in this particular
12 situation it would be not only inadmissible but it
13 would be prejudicial.

14 CHAIRPERSON CHOCK: Mr. Steiner, how is
15 that representation material to our case at hand
16 today?

17 MR. STEINER: Mr. Chair, Mr. Foley has
18 submitted testimony indicating, opining in fact, as an
19 expert based on his experience including his
20 experience as the director of the department of
21 planning, that the proposed development is not
22 compatible with the zoning or the community plan. And
23 this goes directly to what he's going to testify.

24 So it's material to rebut anticipated, and
25 in fact already submitted written testimony of

1 Mr. Foley. I think it's directly relevant.

2 CHAIRPERSON CHOCK: Just want to remind the
3 parties that we're here on a Show Cause hearing based
4 on the original D&O, not necessarily on
5 representations that might have been made in the
6 mayor's office at that time. So if you can kind of
7 keep that in mind as we continue moving through these
8 proceedings.

9 MR. STEINER: I'll try to keep it brief.

10 CHAIRPERSON CHOCK: Thank you.

11 Q (By Mr. Steiner): Did Mr. Foley ever
12 express that the amount of proposed retail was
13 inconsistent with the community plan?

14 A No.

15 Q Did he ever express to you that the amount
16 of proposed retail is inconsistent with the district
17 boundary amendment here before the Land Use
18 Commission?

19 A No.

20 Q And did he ever express that the inclusion
21 of affordable housing on this parcel was inconsistent
22 with the community plan?

23 A No. In fact what I got back from that
24 discussion was the idea of combining housing,
25 especially that type of housing, with employment

1 opportunities. So it was a very positive thing.

2 Q And he never expressed that the inclusion
3 of either retail or zoning -- I mean or affordable
4 housing was inconsistent with any zoning, community
5 plan or boundary amendments?

6 MR. PIERCE: Objection. That's been asked
7 and answered. Now we're getting redundant with
8 Mr. Steiner's questioning.

9 MR. STEINER: It's my final question along
10 these lines.

11 THE WITNESS: No.

12 Q (By Mr. Steiner) Just to wrap up this line
13 of questioning. Did he ever subsequent thereto while
14 he was director of the department of planning, ever
15 raise any of those kinds of objections?

16 A No, he did not.

17 Q Did anybody from the county of Maui?

18 A No, sir.

19 Q I'd like to show you what's been marked as
20 Exhibit 18. Do you recognize this document?

21 A Yes, I do.

22 Q Could you describe what this is.

23 A This is a letter from the Department of
24 Public Works signed by Milton Arakawa who was the
25 director of Public Works at the time. It's a final

1 subdivision approval letter for the Ka'ono'ulu Ranch
2 large lot subdivisions and the Ka'ono'ulu Ranch water
3 tank subdivision for the Project.

4 Q That's the Pi'ilani Project that we're here
5 on today, correct?

6 A Correct.

7 Q What is this -- there's a discussion of
8 subdivision bond. What is that?

9 A There are two methodologies for getting a
10 final subdivision map approved for Maui County. One
11 is to subdivide the land, design all the improvements,
12 make the improvements, and then get a final
13 subdivision map once all the improvements are in
14 place.

15 The other commonly used practice is to
16 subdivide the parcel, get the construction plans
17 approved and then bond for those improvements, receive
18 a final map so that you can then sell the property.

19 In this approach what we did was we
20 processed the final map through to completion and
21 posted a bond for the total value of the improvements
22 which was \$22,058,000 and change to cover the -- it's
23 basically a performance guarantee in exchange for
24 receiving the final subdivision map for the county of
25 Maui.

1 Q And that bond or actually "bonds" in this
2 case, is represented on this page?

3 A That's correct.

4 Q And this approximately 22 million in bonds,
5 that was posted by the previous owner Maui Industrial
6 Partners, is that correct?

7 A That's correct. We -- this letter was
8 received in August of 2009. Generally what has
9 happened is that the bond is a lump sum surety device
10 that's given to the county. You essentially pay about
11 1 percent of that value for the privilege of getting
12 that bond from the surety.

13 At this point in time in the economy it was
14 very difficult to get any kind of surety bond for
15 anybody. And the bonding company we finally convinced
16 to give us this bond insisted that instead of giving
17 us a lump sum bond they wanted it broken down into
18 construction categories, hence the 15 individuals
19 bonds totaling the total bonded amount.

20 Q When the property was sold to Pi'ilani and
21 to Honua'ula, what happened with this bond?

22 A Two things. There are two options. One,
23 the new owner could convince the surety to keep that
24 bond in place and just continue on with the bond that
25 was in place. Or you could switch it out for another

1 bond.

2 In this case what happened was the surety
3 didn't want to transfer so the new owners posted a
4 cash bond with the county of Maui for \$22 million.

5 Q And which new owner is that?

6 A It would be -- I think it was Cliff
7 Development.

8 Q So there's 22 million posted for these
9 infrastructure developments as we speak.

10 A In cash.

11 Q Do these bonds all represent and relate to
12 work which Pi'ilani will have to do in order to
13 develop the property?

14 A Yes, sir.

15 Q The second time on the list for \$2,299,046,
16 what's this for?

17 A That is the total amount for the
18 improvements for the east Ka'ono'ula Street which is
19 the Upcountry corridor through the property.

20 Q That's the amount that's going to be spent
21 to improve that area?

22 A That amount, that's the roadway
23 improvements. There are other elements to that
24 corridor but that's just the roadway component.

25 Q And am I correct that that 2.3 million

1 that's being spent to build the first portion, the
2 bottom, I guess the west portion of the Pi'ilani -- or
3 the Kihei Upcountry Highway?

4 A That's correct.

5 Q What about the land that's going to be used
6 there? Is that something that the county's buying?
7 Or how is that gonna work?

8 A As a part of the final subdivision approval
9 there were three roadway lots that were provided. One
10 is for the Upcountry corridor which will be given to
11 the state, and then two roadway lots fronting on
12 Pi'ilani Highway that would also be dedicated to the
13 state. So there are no land values as a part of this.
14 It's all going to be dedicated to the state.

15 Q When you say "given to the state" who's
16 giving it to the state?

17 A The landowner.

18 Q Eclipse or Pi'ilani?

19 A That's correct.

20 Q And they're going to spend approximately
21 2.3 in building this roadway?

22 A That's correct.

23 Q If Pi'ilani is not allowed to develop the
24 Pi'ilani Promenade Project, would it still spend this
25 money towards this improvement?

1 A I doubt it.

2 Q Based on your experience on Maui both in
3 the public and the private sector and as the deputy
4 director and director of Public Works for the Maui
5 County, what's the significance of the Kihei Upcountry
6 Highway?

7 A Well, the Kihei Upcountry Highway started
8 fully a decade ago as a way to get folks from the Maui
9 Research and Technology Park in Central Kihei up to
10 the top of the hill as a part of a DOD Project.
11 Because we had technology in the R&T park in Kihei and
12 a lot of technology going on at the top at Haleakala.

13 There was a complete study done on
14 alternative routes. This route was the final route
15 that was accepted and an EIS was done. This
16 Project -- you're correct -- this is the first
17 completed increment if it is completed. It has driven
18 -- the Project kind of just sat dormant for a while.

19 This Project, the Promenade, has now driven
20 the state to start the discussions on land control.
21 They're got engineering studies in design in play
22 right now. They're starting to talk to the landowners
23 about acquiring the land to build this highway.

24 So this -- I would see that this Project
25 and its ability to fund this has driven the state to

1 really get off -- and start actually getting this
2 thing built.

3 Q The next item, the third item on Exhibit 18
4 is the bond for \$1,411,106. What's that for?

5 A That's the Pi'ilani Highway widening
6 improvements. That provides for the accel-decel lanes
7 and all the improvements in the highway corridor.

8 Q That's the highway corridor on Pi'ilani
9 Highway at the intersection of this future Kihei
10 Upcountry Highway?

11 A And as it fronts the property.

12 Q Those are the improvements that Mr. Phillip
13 Rowell discussed, correct?

14 A Yes, that's correct.

15 Q And the eighth item on Exhibit 18 is an
16 item of \$4,802,784. What is that for?

17 A That is for a -- it's for a
18 1 million-gallon domestic water tank. The county of
19 Maui Department of Water Supply required us to, in
20 compliance of our source development for the Project,
21 to build a 1 million-gallon tank at an elevation that
22 was, of course, outside the Project Area. So I had to
23 negotiate with Mr. Rice on the acquiring of an acre
24 worth of land and subdivide that for the water tank.

25 So this tank will be built for the county

1 to serve North Kihei because they have some pressure
2 problems and supply issues in North Kihei. So we're
3 going to build the tank, dedicate it to the county,
4 connect it to the Central Maui System as a part of the
5 Project.

6 Q When you say, "We're gonna build it" that
7 means Pi'ilani is going to pay for it.

8 A That's correct.

9 Q You say it's a \$1 million water tank.
10 Would the Pi'ilani Promenade Project use that entire
11 million gallons of water?

12 A It's a 1 million-gallon tank.

13 Q I'm sorry.

14 A That's okay.

15 Q Thank you. Would the Pi'ilani Promenade
16 Project use that entire 1 million gallons of water?

17 A No, I think we're probably something less
18 than 20 percent of the total supply.

19 Q Where would the rest of the water be used
20 or who would it benefit?

21 A Well, like I said previously it would be
22 used to address fire flow issues in North Kihei,
23 pressure control issues in North Kihei and also help
24 to potentially in the future serve the new high
25 school.

1 Q And if Pi'ilani is not allowed to develop
2 this Pi'ilani Promenade Project, would it still spend
3 the money to construct this water tank?

4 A No.

5 Q Are there any other benefits that have been
6 dedicated to the -- that benefit the Kihei-Makena
7 community that Pi'ilani is providing as part of this
8 development?

9 MR. PIERCE: Mr. Chair, we're going to
10 object. Once again this has nothing to do with
11 whether or not there's a violation. It may be
12 relevant in the second phase of the case in terms of
13 what the remedies are. But at this stage this is
14 redundant and irrelevant.

15 CHAIRPERSON CHOCK: I'm going to reassert
16 the comment I made about 10 minutes ago. We're not
17 here to retry the merits of the original D&O. We're
18 here to determine whether or not the representations
19 that were made by the Petitioner at the time is in
20 compliance with the direction of the Project is
21 heading.

22 I'm not sure how this million gallon well
23 has anything to do with that. What does it have to do
24 with that, Mr. Steiner?

25 MR. STEINER: This goes to what's going to

1 be built on the Project, what's going to be
2 constructed on the Project as well as how it's going
3 to benefit the community. But it does directly show
4 what the Project is going to be to show to contrast
5 with what was represented to the Commission.

6 CHAIRPERSON CHOCK: I'll give you a little
7 more latitude in this area.

8 MR. STEINER: Okay. I'm almost done with
9 this area.

10 Q To get right to it, Mr. Jencks, is Pi'ilani
11 Promenade also dedicating further land for a MECO
12 station?

13 A Yes. Part of the subdivision will include,
14 I think it's a one and-a-half acre parcel for a new
15 MECO -- Maui Electric Company substation.

16 Q And that substation, is that considered a
17 light industrial use under the current zoning code?

18 A Yes, it is.

19 Q Could you take a quick look at Exhibit 17.
20 Just for the Commission could you identify what this
21 exhibit is?

22 A That is the large lot map that was
23 finalized by the county of Maui.

24 Q There's a signature on it on the right.
25 Does signify something?

1 A That should be the signature of the
2 director of Public Works.

3 Q What does that signify?

4 A That he approves the map.

5 Q So that shows the subdivision was approved,
6 is that correct?

7 A Yes.

8 Q Following subdivision approval what
9 happened next with regard to the property?

10 A Following subdivision approval. Well, we
11 were approached by -- the subdivision approval was
12 received in August of 2009. Prior to that I had
13 received zoning approval for Honua'ula, Waialae 670.
14 And part of that was a condition that I provide 250
15 affordable housing units on the Project; 125 rental
16 and 125 owner-occupied fee simple units.

17 We were also then approached by -- it was a
18 long period of time when there was nothing happening
19 in the marketplace. We were approached by Eclipse
20 Development to purchase the remaining land. And we
21 discussed with them their potential plans which pretty
22 much followed the original approach with McNaughton
23 Group. The land was then sold to Eclipse.

24 And shortly after the final map was
25 received in August 2009 as well as the 13 acres to

1 Honua'ula for the affordable housing in 2009.

2 Q When these parcels were sold was the Land
3 Use Commission informed of this sale?

4 A Yes they were.

5 Q How were they informed?

6 A By letter.

7 Q Letter from?

8 A The letter would have come from -- on the
9 Honua'ula transaction would have come from the main
10 office in Los Angeles for the ownership/partnership
11 from Maui Industrial Partners as well as for Eclipse.

12 Q Like to show you Exhibit 19 please. Do you
13 recognize Exhibit 19?

14 A Yes. These are the signed civil
15 construction plans for the Project.

16 Q What, if anything, is the significance of
17 the signatures on the right side of the first page of
18 Exhibit 19?

19 A All those signatures indicate the approval
20 of state and county agencies in the review of the
21 civil plans.

22 Q So all of these different agencies of the
23 state and the county have reviewed these plans and
24 approved them, is that correct?

25 A That's correct.

1 Q Like to show you what's been marked as
2 Exhibit 31 which is the site plan. I don't know
3 whether any of the Commissioners brought the booklet
4 with them that we passed out last time. Maybe I
5 should have saved it for this time. We do have these
6 to follow along. If you do have your booklet you can
7 also follow along.

8 A (Indicating large blow-up diagrams) If I
9 may. This is the, this is the concept plan for the
10 Pi'ilani Promenade Project. The entire 88 acres is
11 this larger polygon. This 13-acre area here where the
12 legend is is the affordable housing site which is
13 13 acres.

14 The balance is the Upcountry corridor here,
15 the Pi'ilani Highway here. It's a total of 88 acres.
16 Approximately 80 acres is actual development area.
17 The balance of the 8 acres is this corridor and the
18 road widening lots on Pi'ilani Highway.

19 As presently proposed the elements are a
20 retail outlet center on this side. Then on the south
21 side of the corridor a retail center, for lack of a
22 better term. This is approximately 300,000 square
23 feet. And this is about 350 as I recall. General
24 square footage numbers the Project is fully parked on
25 site and basically represents the four parcels, parcel

1 1, 2, 3, 4 that are in the large lot map.

2 Q And the parcel on the north side that's
3 been referred to, it's referred to as the Maui Outlet
4 Center, is that correct?

5 A That's correct, this parcel here.

6 Q And that's the first phase that's intended
7 to be developed, is that right?

8 A That's correct. And this is the location
9 of the Maui Electric substation here.

10 Q How big is that parcel that's going to be
11 dedicated for a substation?

12 A I think it's about an acre and-a-half.

13 Q And that's considered a light industrial
14 use.

15 A That is correct.

16 Q What type of tenants are anticipated for
17 the Maui Outlet Center site?

18 A Well, there's about 60 spaces. That's
19 going to be driven by demand. The tenants are
20 principally tenants that are not on Maui at this point
21 in time. They might be tenants that would be located
22 on O'ahu that want to come to Maui.

23 They might be tenants on Maui that are
24 looking for larger, more up-to-date and better
25 visibility space on Maui. Or they might be tenants

1 that simply aren't here in the state that want to
2 locate to Maui.

3 Q And on the south side of the Project has
4 the landowner determined yet what tenants are going to
5 go in on that side?

6 A We have not. The spaces that are shown
7 here are done to illustrate massing for the purpose of
8 just basic design and laying out parking to see what
9 can fit on the property.

10 Q Has the developer determined to dedicate
11 any portion of this property to light industrial uses?

12 A Yes. As I was saying earlier when we first
13 acquired the property in 2005 we were immediately
14 getting calls. I remember one of the calls I got on a
15 regular basis was from Home Depot on acquiring one of
16 the parcels for a home improvement center in South
17 Maui.

18 The logic was that with all the future
19 developments on south Maui there was a clear demand
20 even though there was an existing facility in Kahului.
21 So what we've been talking about, we know what the
22 outlet center is and we know what this generally is in
23 terms of square footage on this site.

24 What we've agreed to commit to and
25 represent to the Commission today that certainly there

1 needs to be a light industrial component in the
2 Project.

3 I've had discussions with the department
4 of planning about what would best exemplify a light
5 industrial use going back to the conversations I had
6 with the mayor and Home Depot and other folks.

7 At present we're more than willing to
8 commit to that concept here: 125,000 gross square
9 feet of area, 125,000 gross square feet, for a use
10 that would exemplify a home improvement center which
11 would address both wholesale/retail in the needs of
12 the community.

13 On this side of the property, on the south
14 side of the corridor, 125,000 gross square feet, about
15 11 and-a-half acres of area which is basically this
16 area here, to include the structure and the parking
17 and all the accessory needs, the loading and all those
18 kinds of things for the property.

19 So that we do in fact or would have a light
20 industrial use on the Project, which according to the
21 department of planning, exemplifies the kind of use
22 they would seek to be light industrial.

23 Q Just so we're clear there hasn't been any
24 lease or tenants signed up for this.

25 A There have not.

1 Q But the developer's willing to commit
2 before the Land Use Commission today that at least
3 this amount of land would be used for these light
4 industrial type uses unless, of course, the developer
5 would come back to the Land Use Commission for further
6 clarification or instruction?

7 A Correct.

8 MR. PIERCE: Objection. I would just
9 object at this stage that there's been no foundation
10 laid that Home Depot is a light industrial use. So it
11 misstates -- it's okay for the witness to talk about
12 the fact that he is trying to get Home Depot in, but
13 it has not been determined that this is a light
14 industrial use. And that's what the question was
15 asking. So it's misstating his testimony.

16 CHAIRPERSON CHOCK: Overruled. Continue,
17 please.

18 Q (By Mr. Steiner) And as far as exactly
19 where this would go, has that been determined or does
20 that still stay flexible?

21 A It would depend a lot on the tenant, and it
22 could be any of the home improvement center providers.
23 It could be anywhere on this side. Just depends on
24 what they're willing to pay and what kind of location
25 they want. But it would be on the south side, the

1 Pi'ilani South.

2 Q And the commitment, as you said, would be
3 for a type of use that supplies both the retail sector
4 as well as contractors, plumbers, so forth, with
5 supplies which would be exemplified by something in
6 the nature of a Home Depot but not necessarily Home
7 Depot; is that correct?

8 A Correct.

9 Q That's what the developer is willing to
10 commit to.

11 A Correct.

12 Q Can we take a look at what's been marked as
13 Exhibit 30, please? Could you describe what this
14 exhibit shows.

15 A This is an exhibit that shows you the
16 basic, the same basic area for the concept plan.
17 Affordable housing site's here, Pi'ilani South,
18 Pi'ilani North, the outlet center, the other retail on
19 this side.

20 Q This shows the different pedestrian and
21 bikeway paths, is that correct?

22 A Correct.

23 Q Could you show for the Commission where
24 bikes would go along the Pi'ilani Highway?

25 A At present the Pi'ilani Highway has on the

1 paved road section a striped shoulder. That's a bike
2 pathway or bikeway. That will continue along. It
3 will continue along on this side of the Pi'ilani
4 Highway on the Frontage Road improvements we make, so
5 that it continues on as designed and requested by the
6 state department of transportation.

7 Q In some public testimony in earlier
8 hearings before the Land Use Commission certain
9 members of the public complained that the current
10 plans don't incorporate a greenways bikeway system
11 along Pi'ilani Highway which is something that they
12 had discussed with Ka'ono'ulu Ranch during the zoning
13 phase.

14 Did Pi'ilani Promenade explore -- or its
15 predecessors explore the possibility of a similar
16 greenways bikeway?

17 A There was a letter that was sent to the
18 department of planning, as I recall, with regard to
19 the discussions between the KCA and Mr. Rice.
20 Mr. Rice represented to the KCA that, in deed, he
21 would like to do a greenway system along the frontage
22 of the highway and the Project as part of the
23 development plan.

24 Q Why don't you describe what that would
25 mean, greenway bike system?

1 A It would mean -- and not as opposed to a
2 bikeway on the roadway surface, on the paved surface,
3 it would mean a walkway and a bikeway in the
4 right-of-way away from the edge of the pavement, a
5 separated Class 1 type trail.

6 We took that request to the state
7 department of transportation, as I stated earlier in
8 2005 when I went in to say, "Okay, how are we going to
9 design this Project? I have a subdivision map. I
10 need your concurrence, you, DOT's concurrence on what
11 I'm going to design." That was one of our topics of
12 discussion.

13 The State said, "Absolutely not. We don't
14 want the off-road trail because it gives people a
15 different place to be. Then you end up with conflicts
16 with vehicles. So you just continue on with the same
17 bicycle trail you have now on Pi'ilani Highway and
18 don't take people off the roadway section."

19 Q So, in other words, Pi'ilani or its
20 predecessor, or Pi'ilani were willing to create this
21 greenways bikeway system but the state department of
22 transportation rejected that?

23 A That's correct.

24 Q What accommodations are made for bikes
25 within the Project?

1 A On the Upcountry corridor, as Mr. Rice
2 represented to the Commission, there is a -- we have
3 the full roadway improvement with medians and
4 shoulders. And on the shoulders on each side there's
5 a separated bicycle pathway and pedestrian pathway
6 separated by a landscaped median.

7 Q What about pedestrians?

8 A Same thing. Pedestrians on both sides and
9 bicycles on both sides.

10 Q What does the blue represent on that
11 drawing?

12 A Inside the Project we have connectors from
13 the Project out to the right-of-way. All of these
14 blue lines indicate walkways, dedicated walkways for
15 pedestrians in the Project itself.

16 Q Now, when I look at certain of these blue
17 lines in the Project it looks like these dedicated
18 pedestrian walkways sort of go right over or sort of
19 between parking spaces. Is that the idea you'd be
20 walking in and out of these cars?

21 A No. Actually what happens is -- and this
22 is a good example right here. There's a median right
23 down through the middle of the parking lot connecting
24 this use area to this use area. Pedestrians can walk
25 out of the parking lot to get from point A to point B.

1 Q But they would be walking on a dedicated
2 sidewalk for pedestrians?

3 A That's correct.

4 Q Is that true of the other --

5 A Yes.

6 Q -- examples?

7 A Yes.

8 Q Not just the ones you pointed out.

9 A Correct.

10 Q You mentioned that along Ka'ono'ula Road,
11 the future or Upcountry Highway that pedestrians and
12 bikes would have separate paths?

13 A That's correct.

14 Q Why don't we take a quick look at
15 Exhibit 32. Can you describe what this is.

16 A There are three sections cut through East
17 Ka'ono'ula Street top through or cut through the East
18 Ka'ono'ula, the Upcountry Highway. Then the bottom
19 section is cut through the Pi'ilani Highway showing
20 the improved section.

21 This shows you where the sections would cut
22 on East Ka'ono'ula and then the Pi'ilani Highway here.

23 Q And the one on the bottom, the Pi'ilani
24 Highway, that shows the highway with two bikepaths,
25 right?

1 CHAIRPERSON CHOCK: I'm sorry, Mr. Steiner.
2 What exhibit number is this?

3 MR. STEINER: This is 32.

4 CHAIRPERSON CHOCK: Exhibit 32. Thank you.

5 THE WITNESS: That's correct.

6 Q (By Mr. Steiner): The positioning in the
7 location of those bikeways, that was what was mandated
8 by the state department of transportation along that
9 highway, is that correct?

10 A Correct.

11 Q Why don't you describe how bikes and
12 pedestrians are dealt with on the future Kihei
13 Upcountry Highway spur.

14 A I'll just take the first condition which is
15 the upper section. You'll see this is the
16 right-of-way limit on both sides, which is 125 feet
17 width. It has two lanes of traffic in each direction,
18 a median in the middle. There's, on this side you
19 have a bikeway, a landscape median, a sidewalk, curb
20 gutter, roadway, median, roadway, curb gutter,
21 pedestrian pathway, landscape, bike path.

22 Q Okay. Let's take a look at what's been
23 marked as Exhibit 33. And I'll let the Commission
24 know these are four different pages that are one
25 exhibit.

1 CHAIRPERSON CHOCK: Exhibit 33?

2 MR. STEINER: Yes.

3 Q Could you describe the first page of
4 Exhibit 33?

5 A Is this the correct one?

6 Q Yes.

7 A This is an exhibit that was done to help
8 illustrate the transition between the edge of pavement
9 on Pi'ilani Highway and the buffer that's required
10 with the landscape pallet that has been approved by
11 the county of Maui into the Project.

12 You can see that there's a parking lot in
13 back. Then you have the structures in the background.

14 So this gives you an idea. This is based
15 upon the civil construction plans and the topography
16 that would be created. So you see the edge of
17 pavement, the landscape buffer, parking lot, which you
18 can barely see here, and the structures in the
19 background.

20 Q And this rendering is supposed to show an
21 approximation of what once those structures are built
22 out what approximately they would look like.

23 A Correct.

24 Q Could we take a look at the next page
25 which, Charley, is this one. Could you describe what

1 this second page of Exhibit 33 shows.

2 A If you had a chance to review the record on
3 the Project there was a lot of discussion from Tommy
4 Whitten who at the time was executive vice president
5 of PBR, talking about the site and how it, how it
6 topographically falls from the mauka boundary to the
7 makai boundary, falls at about 4 percent.

8 What we are able to achieve here -- and
9 once again this is the retail outlet side of the
10 Project or the north parcel. You can see people here
11 at grade. You can also see in the background an
12 escalator system. This is a -- it will be a
13 split-level type of facility.

14 So you've the parking lot from Pi'ilani one
15 level and will go up to another level so you'll have
16 additional retail at the top. It is not enclosed.
17 It's not a mall by definition. It's not an enclosed
18 space. It's a retail center.

19 Q When you say it's not a mall could you
20 expand on that a little what a mall is compared to a
21 retail center?

22 A Typically malls are enclosed spaces, highly
23 controlled. This is an outdoor open, as you can see
24 the design is very open and free.

25 Q Again this is a rendering that was made by

1 the developer to kind of show what this would look
2 like when it's built out?

3 A Correct.

4 Q Could we take a look at the next page of
5 Exhibit 33, please. Could you describe what this page
6 of Exhibit 33 shows.

7 A Yes. I described it earlier, the transition
8 between the parking lots and the retail space. And
9 what you see here is parking on both sides and exactly
10 what I was talking about. This is the type of walkway
11 that would transition through the parking lots so
12 people don't have to walk in back of cars to get from
13 their car to the shopping.

14 Q This is heading, again, into the north
15 side, the retail outlet center?

16 A Correct. This is the retail space, outlet
17 space.

18 Q Why don't we take a look at the final page
19 of Exhibit 33. Could you describe what this page
20 shows.

21 A Once again this is the outlet side and this
22 proves to better illustrate the open nature of the
23 facility. It's not an enclosed space. Part of the
24 intent here -- I think you heard testimony in the
25 first meeting about people wanting a place to go and

1 gather. This is a perfect example of that.

2 Q Looks like there's a water feature in the
3 front there.

4 A That's correct.

5 Q Again this -- I see that there are
6 different sort of roof lines and so forth in the
7 rendering. Is that the plan for the development as
8 opposed to an uniform front?

9 A Yes.

10 Q Have any renderings been done for the south
11 side of the Project?

12 A No. Because we don't -- we don't at this
13 point know what it is and who's going to be there.

14 Q So other than the site plan that we
15 presented as Exhibit I think was 31, there's appears
16 no drawings of what that might look like.

17 A Correct.

18 Q Now, if Pi'ilani was allowed to move
19 forward by the Land Commission, when could
20 construction begin on, let's start with the
21 infrastructure of this Project?

22 A Well, at present we've already pulled
23 grading permits. Those are valid. Bonds were posted
24 for those permits. So there's a grading bond in place
25 as well. We are basically ready to go. The BMPs are

1 in place. And material has been ordered and placed on
2 skips.

3 Q So would it be correct to say that if this
4 was approved by the LUC and absent any other unforeseen
5 or unknown legal challenges that they would be ready to
6 go in the very immediate future?

7 A That's correct.

8 Q And this infrastructure, that's the same
9 infrastructure that there's a \$22 million cash bond
10 for?

11 A Correct.

12 Q How long would that process take of
13 building that infrastructure?

14 A The contract right now calls for about, I
15 think it's 14 months to build all the infrastructure
16 including the water tank, the Upcountry corridor, and
17 the improvements to Pi'ilani Highway along with the
18 mass grading.

19 Q So that's 14 months worth of construction
20 activity, construction jobs, and so forth?

21 A Correct.

22 Q And once the infrastructure is put in what
23 happens next?

24 A Well, somewhere along that timeframe you
25 would want to start the on-site direct construction

1 which is approximately \$185 million total on both
2 sides. That could start approximately nine months
3 into the site work process.

4 Q That's building what we see in this Exhibit
5 33, is that correct?

6 A That's correct, the retail outlet center.

7 Q Do you have any estimate of how much is
8 going to be spent in that process or maybe in the
9 whole process including infrastructure?

10 A It's approximately 200 million. That would
11 include the 20 million for the current contract bid
12 for the infrastructure, and about 185 million, let's
13 say, in direct construction.

14 Q How long -- if there were no further legal
15 challenges or other unanticipated delays -- how long
16 before you could anticipate the outlet center would
17 be open for business and for retail jobs for the
18 community?

19 A Little over two years.

20 Q And what about timing for construction of
21 the sort of bricks and mortar on the south side?

22 A Well, once again that will be driven by the
23 market and who signs up.

24 Q If there was a market there could
25 construction begin relatively soon?

1 A Yes.

2 Q For either of these sites, for further
3 construction, are there other discretionary approvals
4 needed?

5 A No, there are not.

6 Q Would the construction on the north side of
7 the parcel have any effects regarding marketing on the
8 south side based on your experience?

9 A Would you repeat that.

10 Q Would the completing the construction or
11 beginning -- I guess, completing construction on the
12 north side of the Project, would that have any effect
13 on the market potential for the south side based on
14 your experience?

15 A Based on my experience it would become a
16 driver for the balance of the Project. It would
17 create excitement and need and demand.

18 Q So that might speed up the market there and
19 make it happen quicker.

20 A Correct.

21 Q And could you take a look at Exhibit 10
22 please.

23 A Okay.

24 Q Could you describe what this is.

25 A This is a letter of transmittal to three

1 individuals, including myself, with regard to the
2 Ka'ono'ulu Ranch annual report dated September 26,
3 2005.

4 Q And this transmittal is from R. Clay
5 Southerland. Who's that?

6 A He's an attorney that was working for me.

7 Q For "me" you mean?

8 A Maui Industrial Partners.

9 Q This is transmitting what's beyond --
10 behind that letter of transmittal?

11 A That's correct.

12 Q What's next?

13 A That is a letter from the department of
14 planning to a Mr. Anthony Ching who was the executive
15 officer of the state Land Use Commission, the annual
16 report.

17 Q This is the tenth annual report which was
18 filed by Maui Industrial Partners, correct?

19 A Correct.

20 Q Does this indicate that, in fact, that
21 annual report was submitted to the Land Use
22 Commission?

23 A Seems to me it does, yes.

24 Q And there's been some concern about whether
25 annual reports were submitted by Maui Industrial

1 Partners between -- well, based on our office's search
2 we came up with through the Land Use Commission the
3 first nine annual reports that they had copies of.
4 Then we had the 15th. And then we filed the 16th.
5 Other than this 10th annual report did you attempt to
6 locate the other missing annual reports?

7 A Yes, I did. I had a number of
8 conversations. The attorney for the Ranch was
9 Mr. Martin Luna, who testified earlier in this
10 proceeding. I used him. I also used Mr. Southerland
11 to develop these reports.

12 We have all tried to figure out where those
13 remaining reports are. I remember having the
14 discussions and doing the updates, but I cannot seem
15 to find them.

16 Q Do you recall those reports being done back
17 at the time?

18 A Yes, I do.

19 Q Do you believe that those reports were
20 submitted to the Land Use Commission?

21 A I believe they were.

22 Q But you haven't been able to locate the
23 copies.

24 A No, I can't find them.

25 Q The missing -- the ones we haven't been

1 able to locate, that was when Maui Industrial Partners
2 owned the property, correct?

3 A That's correct.

4 Q Not when Pi'ilani Promenade or Eclipse
5 owned the property, is that correct?

6 A That's correct. Most of the efforts at the
7 time were focused on simply getting the county to
8 review and approve the final subdivision. So there
9 was nothing going on other than that process.

10 Q Also those missing reports weren't when
11 Honua'ula owned the Project, is that correct?

12 A Yes.

13 Q The state Office of Planning in its filings
14 in this proceeding has suggested it would have been
15 better if Pi'ilani had moved to amend the Decision and
16 Order to specifically allow construction at the
17 proposed Project. Why didn't Pi'ilani simply move to
18 amend?

19 CHAIRPERSON CHOCK: I'm sorry.
20 Mr. Steiner, could you please repeat that question.
21 Maybe just slow down just a pinch.

22 Q (By Mr. Steiner): Okay. The state Office
23 of Planning, represented by Mr. Bryan Yee here, in its
24 filings has suggested that it would have been better
25 if Pi'ilani had moved to amend the 1995 Decision and

1 Order to specifically allow construction of the
2 proposed retail Project.

3 Why in this case didn't Pi'ilani simply
4 move to amend?

5 A Well, I think it's -- the obvious answer is
6 that we are now at a point where we have acquired
7 land; we've paid -- the partnership paid \$20 million
8 to acquire this land. They have posted a \$22 million
9 cash bond with the county of Maui.

10 Taking an extended period of time to
11 process the Motion to Amend would simply take the
12 Project out of its marketability and it simply
13 wouldn't work. There wouldn't be any need for it.

14 Q One of the reasons is that it wasn't
15 required, correct?

16 A That's correct. And our position is --

17 MR. PIERCE: Objection. That calls for a
18 legal conclusion. The witness is not -- he's not
19 been -- he's not a legal expert. We ask that that be
20 withdrawn from the record.

21 MR. STEINER: I'll withdraw the question
22 and ask a different question.

23 Q One of the reasons why the developer chose
24 not to file a Motion to Amend is that in its opinion
25 the Motion to Amend wasn't required, is that correct?

1 A That's correct.

2 Q The delay was the second reason that you
3 talked about, right?

4 A Correct.

5 Q If there was such a delay, in your opinion
6 what would happen to the approximately 22 million
7 that's bonded for the proposed infrastructure?

8 A Well, there's a couple of things that could
9 happen. We have a final subdivision map of the bond
10 posted with the county. One of the parcels that was
11 created has been sold to a different party which is
12 Honua'ula Partnership for their affordable housing
13 Project.

14 So that makes dissolution of the final map
15 impractical because you have another ownership. So
16 what would probably happen here is that the map would
17 remain in place, but the bond would also remain in
18 place, or they could replace that bond with a
19 different type of surety that would cost less, they
20 could maybe pay less on that bond and nothing would
21 happen.

22 Q What if the owner chose not to go forward
23 with the subdivision?

24 A Well, once again, he may decide not to go
25 forward with the subdivision improvements and the

1 Project itself. The fact is we have a map in place
2 that has to either be dissolved, and it can't be
3 because we have an independent interest, or he would
4 probably, in my best judgment, try to reduce his cost
5 as much as possible by changing the instrument and
6 just wait and maybe try to sell it.

7 Q Would the initial spur of the Kihei
8 Upcountry Highway be constructed in that instance?

9 A It would not.

10 Q You're also here as a representative of
11 Honua'ula as you stated. What is the current plan as
12 far as when Honua'ula plans to build the affordable
13 housing units?

14 A The affordable housing units by condition
15 have to be completed before any units are completed in
16 the Honua'ula Project itself. Two hundred fifty
17 offsite units required: 125 rental, 125
18 owner-occupied. Given today, where we are today the
19 zoning was approved in 2008 by the Maui county
20 council. Before the ink was dried on the unilateral
21 agreement a lawsuit was filed by parties on Maui
22 alleging that the county violated the Sunshine Law in
23 the approval.

24 Then a lawsuit was filed by an individual
25 in South Maui claiming the county failed to require an

1 EIS for the Project. Both of those lawsuits have
2 since been, I guess you'd say denied in favor of the
3 county of Maui.

4 Shortly thereafter-- during that period of
5 time we initiated an environmental impact study for
6 the Project because we had some triggers after the
7 zoning approval was issued. That took four years.

8 I recently received a Final EIS approval
9 from the Maui planning commission at which time the
10 Sierra Club and Maui United filed a lawsuit claiming
11 that the EIS was inadequate.

12 I'm sitting here today because an Order to
13 Show Cause has been filed against the Promenade and
14 the issue with regard to affordable housing in the
15 Project and the representations made to the
16 Commission.

17 So I think in all of that it's pretty easy
18 to understand why it would be difficult to go to a
19 bank and say, "Would you please fund a \$50 million
20 affordable housing project?" with all that
21 uncertainty. Not to mention the fact that
22 infrastructure is key. There's \$20 million in
23 infrastructure right here for this Project. I cannot
24 allocate another \$80,000 a unit to 250 affordable
25 housing units and still have it make any economic

1 sense. That's impossible.

2 Plus we also have a marketplace for the
3 last number of years has been basically cluttered by a
4 housing market that's comprised basically of REO short
5 sales and foreclosures. So it's difficult for anyone
6 to be expected to build affordable housing that's
7 highly leveraged, highly conditioned, as the workforce
8 housing requirements are, and be competitive in this
9 marketplace. It's impossible.

10 So until all that clears out and we get
11 some clarity here, the affordable housing can't be
12 built, can't be funded.

13 Q So at this point there's a lot of
14 uncertainty as far as when and if this affordable
15 housing is going to be built.

16 A That's correct.

17 Q Has Honua'ula pulled any grading, building
18 or other permits necessary to start construction?

19 A No.

20 Q Are there any immediate -- any plans to
21 apply for any such permits in the near future?

22 A Not given the uncertainty we have.

23 Q Are you aware of any other apartment or
24 multi-family residential projects on Maui which are
25 zoned light industrial and are also designated light

1 industrial on the community plan?

2 MR. PIERCE: Objection. This goes beyond
3 the bounds of what is necessary for the Commission to
4 make a decision.

5 CHAIRPERSON CHOCK: Overruled. Do you
6 know, Mr. Jencks?

7 THE WITNESS: Yes, I do. There's one in
8 particular that I recall in the Wailuku Industrial
9 Park which is community planned light industrial and
10 zoned light industrial.

11 C. Brewer Homes had a fairly substantial
12 affordable housing, I think it was 60 percent
13 affordable housing requirement for their Kealani
14 project district leveraged by the state Land Use
15 Commission.

16 And the 'Iao Parkside Project, which was
17 the first apartment project built in Maui County in a
18 light industrial area. It was constructed in the
19 early '90s by Schuler Homes. So certainly that
20 exists.

21 There's another one on West Maui in a light
22 industrial area calls Opukea which was built by D.R.
23 Horton. And there's a second project which is being
24 constructed by D.R. Horton. I don't know the name.

25 Q (By Mr. Steiner): What about retail

1 developments that are constructed in areas where, that
2 are zoned and community planned light industrial? Do
3 you have any examples of those?

4 MR. PIERCE: We would just raise the same
5 objection.

6 CHAIRPERSON CHOCK: So noted.

7 THE WITNESS: Light industrial in Maui
8 County, when people in government in the planning
9 department, public works, I would say even at the
10 commission, the council, when you talk about light
11 industrial everyone understands what that means. That
12 means land zoned for a combination of uses.

13 The light industrial category in Maui
14 County is the only district where you can effectively
15 combine commercial, industrial uses and residential in
16 one use category to get true multi-use activity.

17 There are a number of projects in Maui
18 County that are zoned light industrial, community
19 planned light industrial, that have transitioned,
20 either were deliberately built as or have transition
21 in the projects that are heavily balanced by
22 commercial activity.

23 Maui Marketplace is a good example on Dairy
24 Road. The Kahului Industrial Complex is another.
25 Lahaina Gateway, which is adjacent to Kahoma Stream is

1 another one. Lahaina Business Park is another.
2 Wailuku Industrial Park is another. The Mill Yard is
3 another.

4 So all these are developed and zoned
5 community planned as light industrial, but everybody
6 understands that these are an opportunity for
7 commercial for housing where appropriate, and
8 industrial activity.

9 Q By "housing" you mean apartment housing.

10 A That's correct.

11 Q Are you aware of other district boundary
12 amendments in the county of Maui, based on your
13 experience as a developer and in the public sector in
14 the county of Maui, that have evolved over time from
15 what was -- from the conceptual plan initially
16 proposed to the Land Use Commission that have evolved
17 over time?

18 A I think, I think all of them have to one
19 degree or another. One in particular that I recently
20 took note of was a project on the west side was
21 represented as a commercial/light industrial project
22 not dissimilar to what we're talking about here today.
23 And in fact it is evolving into a more of a commercial
24 center.

25 One of the things that takes place here in

1 Maui County, and I'm not sure how it's treated on the
2 other counties, but you can take -- if you have X
3 number of lots, 10 lots, let's say, and you choose to
4 consolidate those lots into one parcel, the county of
5 Maui -- just a brief aside.

6 In the early '90s when I was the deputy
7 director I helped author the bill that allowed this to
8 occur -- allows you a one-time option to consolidate
9 your parcels into one larger piece for a whole lot of
10 reasons.

11 Number 1 you just want to consolidate into
12 one big lot. Or let's say you have encroachment
13 issues. Gives you a one-time fast track, expedited
14 review so you can consolidate the parcels.

15 In one project on the west side, for
16 example, this was identified as a commercial/light
17 industrial subdivision. The Mormon Church is building
18 a really large facility in this subdivision. They're
19 consolidating lots. I mean that's evolution.

20 That's availability of land. That's
21 availability of land at the right price for someone to
22 buy, consolidate and build something that wasn't
23 represented in the D&O.

24 MR. PIERCE: Objection. The witness has
25 no -- there's been no foundation that he reviewed the

1 D&O for this. Besides that's a legal conclusion. We
2 would ask that that be stricken.

3 Q (By Mr. Steiner): Did you review the
4 district boundary amendment --

5 MR. PIERCE: Wait. You started your
6 question there's been a ruling on this.

7 CHAIRPERSON CHOCK: I'm so noting your
8 objection. Mr. Jencks has been admitted as an expert
9 in issues of land use and planning to this Commission
10 in the past. I think some of what he's saying is
11 relevant to our proceedings. Please continue.

12 Q (By Mr. Steiner) And for this particular --
13 is this the Lahaina Business Park you're talking
14 about?

15 A Yes.

16 Q And you've reviewed the district boundary
17 amendment for that project.

18 A Yes. I might add there's another use,
19 another consolidation of the Project for an apartment
20 project. Permits were applied for and they are, as I
21 understand, ready to be issued for an apartment
22 project. They're looking for someone to come in and
23 buy that parcel and build the apartments in that
24 project.

25 Q And this is being done without having to

1 come before the Commission seeking an amendment.

2 A As far as I know.

3 Q Sort of to wrap up here. The initial
4 boundary amendment in this case was obtained back in
5 1994. And you were involved in the public sector at
6 that time.

7 Based on your experiences both in the
8 public sector as the deputy director of the Department
9 of Public Works, and the director of the Department
10 Public Works and your time in the private sector as
11 well as on the Land Use Commission, could you describe
12 how the market has changed for this particular
13 Project?

14 A Well, I guess I would start out by saying
15 to you the D&O was issued in '95 I believe for this
16 property. Mr. Rice received his D&O with his
17 conditions of approval. That was in '95. He had to
18 work his way through a community plan amendment.

19 The county at the time was working on the
20 Kihei-Makena community plan update. He went through
21 that process and then finally got his zoning in 1999,
22 making it going from agricultural zoning to light
23 industrial zoning.

24 Even if Mr. Rice wanted to subdivide when
25 he got his D&O he couldn't. He could create an

1 agricultural subdivision, a bunch of 2-acre lots.

2 That's not really what he was intending to do.

3 Let's just say for the moment he gets his
4 zoning in 1999. We have already gone through four
5 years. He gets his zoning in 1999. He then applies
6 for subdivision. And he did -- I'm not sure exactly
7 when he applied -- but he got his preliminary for the
8 4-lot large-lot subdivision that we're talking about
9 today in 2003. Okay.

10 Let's suppose, the only analogue I can
11 offer you, I can offer you, and it's realistic and
12 it's factual, is my experience trying to get a 4-lot
13 subdivision approved through the county of Maui. When
14 picked the property up in 2005 it took me four years
15 to go from a preliminary in hand to working with the
16 state department of transportation and every county
17 agency to get a final -- a bonded final map. It
18 wasn't easy.

19 So let's just say for the sake of
20 conversation here that Mr. Rice gets his preliminary
21 in 2003 and then waits four years, which is not
22 unrealistic, to get a final map. I did it on this
23 same property. That's 2007. I think we all know what
24 happened shortly thereafter. Okay? He missed two
25 economic cycles.

1 So given that timeframe and let's say --
2 and there's been a lot of talk about this 123-lot
3 conceptual plan that was talked about for this Project
4 in '94 and '95, I hate to think how much time it would
5 take to get a 123-lot subdivision approved with all of
6 the details that that would require. You're talking
7 sheets and sheets and sheets.

8 This is a 4-lot with basically water,
9 sewer, electrical power to each lot which is a county
10 requirement. Not 123, just 4-lots.

11 So the point here is he starts out in '95,
12 gets his zoning then subdivision. He's missed two,
13 probably two complete cycles. So the project has got
14 to move off.

15 What he thought about or conceived with
16 Lloyd Sodemani in 1994, even earlier, simply wasn't
17 the same thing as it would be when he got a final map
18 in 2007 or maybe later.

19 Then in 2008, September of 2008 ladies and
20 gentlemen, Lehman Brothers filed bankruptcy. Lehman
21 Brothers was our partner in this Project. Okay. So
22 we had an economic collapse.

23 So who knows where that project would be
24 today if Mr. Rice continued on that logical continuum
25 of processing.

1 The point is it's going to have to change.
2 All these projects are going to have to change over
3 time.

4 Q Is that why when it was submitted, in your
5 opinion that they submitted it as a conceptual plan to
6 be driven by the market?

7 A It had to be.

8 MR. STEINER: I have no further questions.

9 CHAIRPERSON CHOCK: Mr. Kam?

10 MR. KAM: No questions. Thank you, Chair.

11 CHAIRPERSON CHOCK: Maui County?

12 MS. LOVELL: No questions, thank you.

13 CHAIRPERSON CHOCK: State? Bryan, how much
14 time do you need?

15 MR. YEE: Maybe 20 minutes.

16 CHAIRPERSON CHOCK: Holly, how you doing?
17 How about a break?

18 THE REPORTER: I can go on but --

19 CHAIRPERSON CHOCK: We're going to --
20 we'll take a 10-minute break for our court reporter.
21 Thank you.

22 (Recess held)

23 CHAIRPERSON CHOCK: (11:15 gavel.)

24 Mr. Yee, 20 minutes.

25 xx

CROSS-EXAMINATION

BY MR. YEE:

Q Mr. Jencks, I want to start with the commitment for a home improvement center. Is this located anywhere in the written documentation that was submitted in this case?

A The offer I made here this morning?

Q Yes.

A No.

Q So I was listening closely to the wording. I noticed the question was continually: Is there a willingness to commit? Are you committing to having an improvement -- home improvement center within the Petition Area?

A We're representing to this Commission today that we are committed to that use: 125,000 square feet in the proximate 11 and-a-half acre area.

Q The 125,000 square feet would be the area under roof, is that correct?

A That's correct.

Q The 11 acres would account for parking for example.

A Yeah, there's loading areas and parking and walkways, all that, setbacks.

Q In the exhibit, I think it was 31, where

1 you had the layout, the general layout of the
2 property --

3 CHAIRPERSON CHOCK: Hang on. Let's put
4 that exhibit back up for the benefit of the
5 Commission. Exhibit 31, Mr. Yee?

6 MR. YEE: Yes.

7 Q Do any of those buildings constitute
8 125,000 square feet?

9 A May I check?

10 Q Yes.

11 A The building on the lower right is -- the
12 bigger polygon is about 104,000.

13 Q Could you just point it out on the map for
14 the Commission. Okay.

15 A And the smaller polygon is another 28,000.
16 So that's approximately the size we're talking about.

17 Q While I understand you're not committing to
18 particular tenants, you are committing to having, I
19 guess, a substantially similar function as a Home
20 Depot outlet.

21 A A 'home improvement center' would be the
22 proper term of art.

23 Q And that would include wholesale, a
24 wholesale function.

25 A Yes.

1 Q Is there any commitment to a timetable for
2 when this home improvement center would be
3 constructed?

4 A No. But I can say to you that it will be
5 driven to a great extent by the success of getting the
6 retail component underway.

7 Q Would the 125,000 square feet be a typical
8 size for a big box home improvement center?

9 A I would say more or less, yes.

10 Q Is the existence of a big box retailer
11 reflected in the TIAR submitted to the department of
12 transportation?

13 A The square footage is reflected and the
14 retail aspects of that use are reflected.

15 Q Is it your understanding or are you aware
16 that the trip generations from big box proposals
17 differ than the average retail or smaller retail
18 outlets?

19 A I wouldn't know.

20 Q If there is a significant distinction trip
21 generation from big box retailers, would that then be
22 reflected in the TIAR?

23 A It would have to be, yes.

24 Q In the amended TIAR.

25 A Yes.

1 Q With respect to the conversations I guess
2 you had with the county, did you specifically raise
3 with the county whether or not your proposal was
4 consistent with the Land Use Commission's Decision and
5 Order?

6 A No, I did not.

7 Q Did you ever ask the Land Use Commission or
8 the Office of Planning as to whether your proposal was
9 consistent with the Land Use Commission's Decision and
10 Order?

11 A I did not.

12 Q Did the Petitioner or some other
13 representative of the Petitioner have a discussion
14 with the Land Use Commission or the Office of Planning
15 with respect to whether the proposal was consistent
16 with the Land Use Commission's Decision and Order?

17 MR. STEINER: Chair, just for clarification
18 to the Office of Planning, are we talking about the
19 state or the county?

20 MR. YEE: I'm sorry. The state.

21 THE WITNESS: I wouldn't know.

22 Q (By Mr. Yee) When was the first time --
23 strike that. At what point did this commitment for a
24 home improvement center arise as a part of the plan
25 for this Pi'ilani Promenade?

1 A Well, as an element of the Project I can
2 say that with a high degree of certainty that in my
3 initial discussions with Eclipse Development when they
4 acquired the land in 2009, they asked me to assist
5 them. Some of my first questions to them centered
6 around: What kind of uses are we talking about here?

7 So we did talk about the retail component.
8 We did talk about the home improvement concept for
9 this property. So it goes back to maybe 2009.

10 Q So I understand there was a discussion. At
11 what point in that discussion did the home improvement
12 center become a component of the plan itself?

13 A I would say probably -- as a formalized
14 component?

15 Q Yes.

16 A To address a light industrial requirement,
17 probably two months ago, two and-a-half months ago.

18 Q So prior to that time or in the more recent
19 past, at least prior to that time, the plan was for
20 two retail outlets.

21 A The plan was open. There was really no --
22 the thing was moving around. There was talk about,
23 there was some terms of art like 'lifestyle center' --
24 it was very, you know -- let's say 10 years ago there
25 were a dozen people you could talk to with regard

1 buying space and building stores.

2 Today there's half as many because of the
3 economy and the marketplace. So this thing was
4 totally evolving almost constantly. So I wouldn't say
5 there was any specific discussion.

6 Q You mentioned the Lahaina Business Park.
7 Are you familiar with that Land Use case?

8 A Only in the sense that I know the owners
9 and the project is maintained out of my office.

10 Q Do you know the docket number of that case?

11 A No, I don't.

12 Q Do you know when it was approved by the
13 Land Use Commission?

14 A My recollection it was maybe in the mid
15 '90s?

16 Q Are you familiar with the representations
17 that were made in this case before the Land Use
18 Commission?

19 A I read -- what I read -- I reviewed the
20 D&O, the Conclusion of Law, Findings of Fact.

21 Q Has Lahaina Business Park been constructed?

22 A No, not totally.

23 Q What percentage of the park has been
24 constructed?

25 A I would say maybe 50 percent.

1 Q Of that 50 percent is there any part of
2 that which is a light industrial activity?

3 A How would you define "light industrial"?

4 Q Have you seen the Decision and Order in
5 this case?

6 A In "this case" meaning?

7 Q Meaning in Ka'ono'ula.

8 A Yes.

9 Q Have you seen the discussion and definition
10 of light industrial within the Decision and Order?

11 A A definition of light industrial in the
12 Decision and Order?

13 Q Yes.

14 A I don't recall specifically what it said.

15 Q Are you not aware of what, then -- without
16 a specific definition would you not be aware of what
17 light industrial activity would be?

18 MR. STEINER: I'm going to object. As we
19 have heard a lot of testimony there's, light
20 industrial is a designation in the zoning that's M-1
21 an includes B-1, B-2, B-3. So I don't think it's a
22 fair question.

23 CHAIRPERSON CHOCK: I'd like to hear a
24 little bit in terms of what this witness has to say.
25 He did opine earlier on some other land use

1 categories. So proceed.

2 THE WITNESS: What was the question again?
3 I'm sorry.

4 Q (By Mr. Yee) Let's put it this way: What
5 is your definition of light industrial?

6 A Well, my definition of light industrial is
7 a common definition or description in Maui County
8 which would be a combination of industrial types of
9 uses like it could be warehousing/storage. It could
10 be commercial. It could be apartments. It could be a
11 variety of things.

12 Q So your definition of light industrial
13 follows the county zoning definition.

14 A That's correct.

15 Q You read the transcripts for this
16 Ka'ono'ula case, correct?

17 A Yes.

18 Q You saw the discussion in the transcripts
19 about the concern regarding a commercial, an increased
20 commercial retail operations in a light industrial
21 subdivision?

22 A I read Mr. Kajioka's comments and
23 Mr. Sodetani's response.

24 Q And those comments reflected a clear
25 understanding or clear assumption that there was a

1 difference between commercial and light industrial.

2 A There was concern expressed about the
3 amount of commercial that could be in the Project.
4 There was no restrictions. I remember that
5 discussion. There's a difference.

6 Q Between commercial and light industrial?

7 A How one would describe light industrial and
8 how one would describe commercial, yes.

9 Q So given that difference do you have an
10 estimate of the percentage of Lahaina Business Park's
11 light industrial component versus its commercial
12 component.

13 A That's a really interesting question. I'm
14 glad you asked. Because if you go up and you drive
15 through that project what was originally conceived to
16 be a light industrial/commercial project as described
17 in the D&O, what has happened over time is that folks
18 would go in and buy a parcel of land.

19 They would pull a building permit. They
20 would build a, what some would call a warehouse
21 building which would be either maybe a tilt-up or a
22 steel structure like a butler building. The next
23 thing you know is that that structure has demising
24 walls in it and they're all individual retail spaces.

25 So it's conceived as a light industrial

1 building but ends up being commercial space. And that
2 has happened a lot in that project.

3 Q It sounds, the way you've described it,
4 sounds as if they constructed or began as a light
5 industrial building -- a building for a industrial
6 use, is that correct?

7 A Some of them, yes.

8 Q Were they used, then, for light industrial
9 initially?

10 A It's commercial. It was built and then
11 occupied as commercial.

12 Q Then you also mentioned, I think apartments
13 in particular some apartment case. But I never got
14 the name of the apartment. What's the name of the
15 apartment?

16 A I don't know the name of the apartments. I
17 know that the proposal was to consolidate, I think,
18 three lots and then build an apartment complex.

19 Q So if you don't know the names I assume you
20 don't know the docket number.

21 A The docket number of what?

22 Q Of the Land Use Commission's Decision
23 urbanizing that apartment complex.

24 A No.

25 Q Are you familiar with any of the other

1 facts regarding the Land Use Commission's proceedings
2 in that case?

3 A That was all in the context of the Lahaina
4 Business Park.

5 Q You also talk about the greenway along
6 Pi'ilani Highway. I was just curious to know who was
7 it with the department -- well, did you say that the
8 state department of transportation said that you
9 should not have a greenway along Pi'ilani Highway?

10 A They said they didn't want meandering bike
11 path and the shoulder along the highway.

12 Q Was that within the state right-of-way or
13 solely within the Petitioner's property outside of the
14 state right-of-way?

15 A In the state right-of-way.

16 Q So department of transportation expressed
17 no opinion about any activity outside of the state
18 right-of-way, correct?

19 A No, just in the state right-of-way.

20 Q Who did you talk to at the department of
21 transportation?

22 A Well, there were two individuals. One is a
23 Mr. Freddie Cajugal who is, I think he's their
24 supervisor here on Maui in the state DOT office and
25 then Ms. Charlene Shibuya.

1 Q So the opinion is from them.

2 A There was another gentleman. I'm sorry, I
3 don't recall his name. He was a staff engineer,
4 worked for Warren Unemuri's office and went to the
5 state. I don't think he's there anymore.

6 Q You mentioned also in your testimony about
7 electrical substation. Do you know how large that
8 electrical substation is?

9 A I think I said it was about an acre
10 and-a-half.

11 Q You heard the testimony with Mr. Rowell and
12 Mr. Tatsuguchi earlier regarding traffic?

13 A I was here.

14 Q You heard the testimony that there is no
15 need for a frontage road along Pi'ilani Highway?

16 A Yes.

17 Q Are you intending to construct a frontage
18 road along Pi'ilani Highway?

19 A No.

20 Q With respect to Honua'ula Apartments are
21 there -- you've already testified there were no
22 additional discretionary permits for the Pi'ilani
23 Promenade construction; correct?

24 A Correct.

25 Q Are there any discretionary permits needed

1 for the Honua'ula Apartments construction?

2 A Not that I'm aware of.

3 Q You're aware that Honua'ula Apartments
4 originally filed a Motion to Bifurcate with the
5 representation that there would be no construction
6 until a Motion to Amend was granted? You're aware of
7 that?

8 A I recall.

9 Q You're also aware that that Motion to
10 Bifurcate was withdrawn.

11 A That's correct.

12 Q Within that Motion to Bifurcate was that
13 representation that I referred to, correct?

14 A Regarding?

15 Q Regarding that they would not construct
16 until a Motion to Amend was granted.

17 A That's correct.

18 Q Is the withdrawal of the Motion to
19 Bifurcate also a withdrawal of that commitment?

20 A No.

21 Q Is there a --

22 MR. STEINER: I'm going to object. That
23 calls for a legal conclusion.

24 CHAIRPERSON CHOCK: Sustained.

25 MR. YEE: Okay.

1 MR. STEINER: And I would represent that
2 that withdrawal was a withdrawal of the commitment to
3 move to amend.

4 Q (By Mr. Yee): Okay. Is there a commitment
5 from Honua'ula Apartments that it will not construct
6 until a Motion to Amend is granted?

7 A Not now.

8 Q So at this time, although you've described
9 the economic challenges of moving forward with
10 Honua'ula Apartments, is it your position that -- or
11 the Petitioner's position that you may proceed with
12 the construction of Honua'ula Apartments without any
13 further discretionary permits and without any Motion
14 to Amend granted by the Land Use Commission?

15 A Yes.

16 Q And it is also your representation that
17 there's no commitment to wait on construction until a
18 Motion to Amend is granted.

19 A Correct.

20 Q So when you argue to the Commission
21 about -- let me rephrase.

22 So if the Commission does not deal with
23 this question of Honua'ula Apartments as to whether or
24 not its construction is consistent with the Decision
25 and Order when should it deal with that question?

1 A If it doesn't deal with it?

2 Q If it doesn't deal with it now.

3 A Does that mean that it concurs it's an
4 allowed use?

5 Q If it makes no decision on the question?

6 A What does that mean?

7 CHAIRPERSON CHOCK: Mr. Yee, can you
8 restate --

9 MR. YEE: Sure.

10 CHAIRPERSON CHOCK: -- with some level of
11 clarity, please? (laughter)

12 MR. YEE: Sorry.

13 Q Well, you're aware that one of the
14 arguments you made is that the Commission should not
15 issue a decision on that because Honua'ula Apartments
16 has not yet done anything.

17 MR. STEINER: I'm going to object. This is
18 going to legal arguments that are being made by
19 counsel as opposed to Mr. Jencks' capacity as a
20 witness. I think they can be addressed in legal
21 arguments as opposed to what the percipient witness's
22 impression on what may or may not --

23 CHAIRPERSON CHOCK: You want to rephrase
24 your question?

25 MR. YEE: That's a fair comment.

1 THE WITNESS: It's above my pay grade.

2 MR. YEE: Well, that's pretty high.

3 THE WITNESS: You may think so.

4 (laughter)

5 Q (By Mr. Yee) Before I forget, your role in
6 this, you're representing both Honua'ula Apartments
7 and Pi'ilani Promenade, correct?

8 A I'm representing Honua'ula Partners.

9 Q Partners.

10 A And Pi'ilani Promenade North and South.

11 Q Is your role in this purely as a consultant
12 paid on an hourly basis? Or are you more of an
13 investor who's paid depending on the financial success
14 of the Project?

15 A I'm under contract with Honua'ula Partners
16 as their owner's representative. And I am the owner's
17 representative for Pi'ilani Promenade North and South.

18 Q I guess is your compensation dependent upon
19 the financial success, or some portion of your
20 compensation dependent on the financial success of the
21 Project?

22 A No.

23 Q So it's just a monetary compensation?

24 A I'm a work'n guy.

25 Q Okay. Thank you. Do you think -- you

1 testified about the possibility that the subdivision
2 map may need to be amended at some point. Do you
3 remember that?

4 A Subdivision map would need to be amended?

5 Q Yes.

6 A In what context?

7 Q You testified about that there're currently
8 a 4-lot subdivision.

9 A Correct.

10 Q And you talked about how long it would
11 take, it took to get the 4-lot subdivision final
12 approval, correct?

13 A Correct.

14 Q You talked at some point about how -- and
15 this is the reason I'm asking -- you said something
16 about the subdivision map could be amended in the
17 future.

18 A Perhaps in the context if you take one of
19 those lots you want to re-subdivide it, yes, that was
20 what I was talking about.

21 Q I guess my question was is there any
22 particular reason why the subdivision map in this case
23 would need to be amended?

24 A I was thinking I was speaking in the
25 context of, let's say, Mr. Rice getting his large lot,

1 selling one of those large lots and having that entity
2 re-subdivide that parcel.

3 Q As we stand today is there any particular
4 reason why you will need a further subdivision or
5 amendment of the subdivision map?

6 A No.

7 Q I just misunderstood.

8 MR. YEE: Thank you very much.

9 THE WITNESS: You're welcome.

10 MR. YEE: Nothing further.

11 CHAIRPERSON CHOCK: That wasn't quite 20
12 minutes, Mr. Yee. We're not used to you leaving time
13 on the table. (Laughter). I think what we're going
14 to do we're going to break for lunch now. So we'll
15 give you some time, Mr. Pierce, to sharpen up your
16 knives.

17 MR. PIERCE: Thank you. (laughter)

18 CHAIRPERSON CHOCK: Let's reconvene at
19 1:30.

20 MR. PIERCE: Okay. Thank you, Mr. Chair.
21 (11:55 recess)

22 CHAIRPERSON CHOCK: (1:30 gavel) Okay.
23 We're back on the record. Mr. Pierce, ready to go?

24 MR. PIERCE: Ready.

25 CHAIRPERSON CHOCK: Mr. Jencks, ready to

1 go?

2 MR. JENCKS: I'm ready to go, Chair Chock.

3 CHAIRPERSON CHOCK: All yours.

4 MR. PIERCE: Mr. Chair, we had made some
5 binders with tab copies of the Intervenors' exhibits
6 but I just realized before break that the one that
7 came over back from O'ahu was not tabbed. So I tried
8 to tab the appropriate sections.

9 I understand that there's possibly, if Mr.
10 Jencks is comfortable using it when we get into the
11 exhibits and I'll try to keep them as minimal as I
12 can, if Mr. Jencks is comfortable with it there's an
13 iPad that has the exhibits on it that he could use I
14 understand.

15 THE WITNESS: That's fine.

16 MR. PIERCE: That's fine? Okay. So can we
17 make that available for Mr. Jencks and if you could
18 just show him how to use it. That way we've got both
19 options available.

20 CHAIRPERSON CHOCK: All right. Very good.
21 I'm liking this cooperation. Very good.

22 THE WITNESS: I don't know how to use an
23 iPad.

24 MR. PIERCE: Okay. All right. So if it
25 doesn't work I think I've tabbed most of the

1 appropriate spots there in the Intervenor's exhibits.

2 MR. STEINER: So, Tom, you have the paper
3 but you also have an iPad, is that right?

4 MR. PIERCE: The Commission has all of the
5 exhibits on their website apparently. So this is just
6 going straight to the website.

7 MR. STEINER: But you've got paper copies
8 there if needed.

9 MR. PIERCE: Then there's a paper copy as
10 well, correct. Okay.

11 CROSS-EXAMINATION

12 BY MR. PIERCE:

13 Q Mr. Jencks, you and I know how to cooperate
14 because we used to work together back in 1988, right?

15 A Yes, sir.

16 Q Under Mayor Lingle. So we'll try to keep
17 it as cooperative all the way through. I'll do my
18 part on that. I just want to go back through some of
19 the questions that you were asked by Mr. Steiner.

20 Now, at the very beginning did I hear your
21 testimony correctly that it was Ka'ono'ulu Ranch's
22 original proposal to do a 4-lot subdivision?

23 A Their initial subdivision request was a
24 4-lot large-lot subdivision.

25 Q So they submitted a -- they literally

1 submitted a request for a 4-lot subdivision to the
2 county of Maui.

3 A Yes, sir, they did.

4 Q But that changed, didn't it? Sometime in
5 2005 there was a request by Maui Industrial Partners
6 for a 56-lot subdivision?

7 A No. The 4-lot subdivision that they
8 originally filed and received preliminary approval on
9 in 2003, I think I'm correct, in 2003, is still the
10 same basic 4-lot, large-lot subdivision we're dealing
11 with today.

12 Q So we are going to have to look at these
13 Intervenor exhibits here initially. If you can select
14 I-17 of the Intervenors' exhibits.

15 A I-17. I've got it.

16 Q Okay. Take a look just through that. That
17 consists of four pages.

18 A Yes.

19 Q This was entered into evidence on our first
20 day. Do you recognize your signature on the last
21 page?

22 A Yes, I do.

23 Q Do you recognize the subdivision
24 application form?

25 A Yes, I do.

1 Q Why don't you just describe it for us.

2 A This is a subdivision application form made
3 out to the Development Services Administration, the
4 Department of Public Works for a subdivision. It's a
5 standard form that's used to apply for a subdivision
6 application.

7 Q If you go to page three, which is called
8 "supplementary information" do you see that?

9 A Yes, I do.

10 Q There's four numbers on that page.

11 A Yes.

12 Q The first one says, "What research was done
13 to prepare the preliminary plat?"

14 "It went through several iterations of
15 layouts before settling on a 56-lot layout."

16 A Correct.

17 Q Can you explain that for us in light of
18 your earlier testimony?

19 A Sure. This subdivision application was
20 made, Mr. Pierce, I believe the date is August 21st,
21 2006 which is approximately a year after we acquired
22 the property. The large lot map that Mr. Rice filed
23 was filed in 2003.

24 This subdivision was for two parcels, the
25 two mauka-most parcels on the property, the 13-acre

1 piece and I think it's a 19-acre piece on the south
2 side of the Upcountry Road corridor.

3 The sole purpose of this was to file a map
4 to see what the yield could be and get the comments
5 back from the county on a light industrial
6 subdivision.

7 Q In fact it says No. 2 "to provide much
8 needed industrial lots in South Maui"?

9 A Justification for the subdivision
10 application is all it is.

11 Q Okay. Then it also says in No. 3
12 "construction plans for Ka'ono'ula Marketplace
13 backbone improvements have been submitted for review"?

14 A That's correct.

15 Q And that those construction plans were
16 related to a 56-lot layout?

17 A No. Those construction plans -- the
18 reference "construction plans" are related to the
19 4-lot subdivision.

20 Q So do I understand correctly that the
21 56-lot layout is for the same piece of property that
22 we're dealing with here today, portions of the same
23 piece of property?

24 A Two of the lots, that's correct.

25 Q Two of the lots. And we're talking about

1 the two mauka lots?

2 A Yes, we are.

3 Q The one that would have been or that is
4 currently owned by Honua'ula?

5 A That's correct.

6 Q The other one is by Pi'ilani Promenade...?

7 A South.

8 Q South. Okay. So after submitting this, so
9 did you have two subdivision applications pending at
10 the time?

11 A Yes.

12 Q You had one for a 4-lot subdivision and
13 this one here for the 56 lots.

14 A That's correct. As I described earlier
15 this morning it's common once you have a large lot
16 subdivision in process you have a potential buyer or
17 you decide you want to build it. You apply for a
18 subdivision for that large lot parcel.

19 That's exactly what we did here, just to
20 see what the yield would be, what the comments would
21 be as a way to stay ahead of where the market could
22 potentially go.

23 Q So you were checking things out with the
24 county in terms of how they felt about a 4-lot
25 subdivision and also possibly a 56-lot subdivision.

1 A Yeah. I had the preliminary comments on
2 the 4-lot. And this, the result of this process were
3 the preliminary comments on a 56-lot subdivision.

4 Q And this was in 2006, right?

5 A The last sheet page four says, "8-21-06."

6 Q All right. No. 4 on the last page, this is
7 called an "owners acknowledgment/authorization to
8 subdivide". And you signed on behalf of the owner
9 Maui Industrial Partners, right?

10 A That's correct.

11 Q And No. 4, I'm just going to read it here.
12 It says, "I confirm that I have uncontested legal
13 ownership," of course, they mean Maui Industrial
14 Partners there, right?

15 A Correct.

16 Q "I confirm that I have uncontested legal
17 ownership of the subject property without any
18 outstanding rights, reservations, or encumbrances
19 which could nullify the intended development and use
20 of this subdivision."

21 A Correct.

22 Q But you didn't check with the Land Use
23 Commission in 2005 or in 2006 to see what their
24 position was on that, did you?

25 A No.

1 Q Also early in your testimony you mentioned
2 that your brother worked for PBR.

3 A PBR Hawai'i.

4 Q What is PBR?

5 A Phillips, Brandt & Redick. It is a
6 landscape, architecture, planning, environmental
7 consulting firm in Honolulu.

8 Q Does he still work for PBR?

9 A No, he does not.

10 Q You also mentioned in 2006 that you went
11 arranged a meeting with the mayor and with Mr. Foley,
12 Mr. Couch and Mr. Yoshida. I believe those were the
13 folks in the room with you.

14 A That's correct.

15 Q Now, no one in that room guaranteed you any
16 entitlements, did they?

17 A Guaranteed me any entitlements? What do
18 you mean by that exactly?

19 Q That no one said, "I promise you you can go
20 do this"?

21 A No.

22 Q And at that time you didn't take that
23 proposal to the Land Use Commission, did you?

24 A I did not.

25 Q Now, if you'll go back to Pi'ilani Exhibit

1 18 -- this is Pi'ilani's exhibits now, not the
2 Intervenor. Sorry about that.

3 A So I'm over here.

4 CHAIRPERSON CHOCK: Exhibit 18?

5 MR. PIERCE: Exhibit 18, correct.

6 THE WITNESS: Okay.

7 Q (By Mr. Pierce) This was a -- essentially
8 you testified that these are the bonded subdivision
9 improvements. Do I have that accurate?

10 A That's correct.

11 Q Now, some of these would have been
12 necessary for any type of development using a majority
13 of the property. Wouldn't that be accurate?

14 A Yes.

15 Q Including if Ka'ono'ulu Ranch or if Maui
16 Industrial Partners had decided to go forward with the
17 123-lot subdivision, some of these same requirements
18 would be applicable.

19 A Some of them.

20 Q Some of those requirements are -- there's a
21 nexus going back to the entitlement process with the
22 county, right?

23 A Would you repeat that, please.

24 Q Yes. Some of those are required by county
25 or just basically county requirements, some of those

1 subdivision requirements.

2 A I think most of these came -- the county
3 and the state department of transportation.

4 Q And were any of them voluntary?

5 A I think actually the water tank was a
6 proposal that we made to the county -- that
7 Mr. Unemori made to the county prior to my involvement
8 as a way to satisfy the water source.

9 Q So, in fact, some of these improvements may
10 have been less or there may have been less -- the
11 requirements may have been different in that they may
12 have been less costly if you had gone forward with the
13 123-lot subdivision process?

14 A I don't think that's true.

15 Q Okay. Now, you said -- you testified that
16 in 2009 there was -- you notified the Land Use
17 Commission. And there was a discussion about -- in
18 fact I think there was an exhibit -- strike that.
19 In 2009 you said that you informed the Land Use
20 Commission.

21 A Regarding what?

22 Q That's what I would like to remind you of.
23 What my recollection is that you informed them that
24 there was a change in ownership?

25 A As I said earlier I was asked the question

1 whether or not the Commission was advised. And I said
2 my understanding is the Commission was advised through
3 letters from the corporate office in L.A. on the sales
4 of property.

5 Q Have you actually seen those letters?

6 A I have not.

7 Q How do you know that they actually
8 occurred?

9 A Because the attorney I was working with at
10 the time that was working on both transactions,
11 Mr. Douglas Fry, we talked about 'em as being a
12 requirement.

13 Q Okay. So, but that was not part of an
14 annual report. That was a separate letter that was
15 given.

16 A That's correct.

17 Q And then you mentioned that after 2009 you
18 believe that annual reports were filed.

19 A Yes.

20 Q And your belief is based upon -- you
21 mentioned that Clay Southerland was your attorney or
22 Maui Industrial Partners' attorney, is that right?

23 A I had two attorneys. I had Mr. Martin Luna
24 who had done work for Mr. Rice and had done all the
25 previous reports. So I was talking to Mr. Luna. Then

1 I engaged Mr. Southerland to take over the reports.

2 Q Neither of those attorneys has produced the
3 missing reports, have they?

4 A No.

5 Q You mentioned that most of the tenants for,
6 I believe this is for the outlet side, are coming,
7 potential tenants are from the mainland?

8 A It could be a combination of tenants from
9 off-island, from O'ahu, out of the state and on Maui.

10 Q Is that true of both the shopping center
11 uses on the south side and the outlet uses? Or is
12 that true of one more than the other?

13 A It's probably in terms of number of tenants
14 certainly the retail side. On the south side you
15 could have folks that are already here taking down
16 those spaces on the south side.

17 Q Are you familiar with the Outlets of Maui?
18 The Outlets of Maui?

19 A I think that's this Project, is it not?

20 Q You're calling that the Outlets of Maui?

21 A This has been called a Maui Outlet, yeah.

22 Q Are you aware that there's also, then, a
23 Outlets of Maui in Lahaina?

24 A I've heard there's a rumor, yeah.

25 Q Are you aware that you're competing for the

1 same tenants?

2 A I certainly am.

3 Q In fact some of the tenants are choosing to
4 wait to see what happens with your project because
5 they are attracted to your property?

6 A Yep. So let's speed it up. (Laughter)

7 Q So, but they're not interested in leasing
8 at both locations, are they? They're choosing between
9 the two.

10 A You have to ask them that question. I
11 can't answer for that.

12 Q That's a property that's located in the
13 city center of Lahaina, right?

14 A It's located at the north end of the
15 commercial district at the intersection of Papalaui
16 Street and Front Street.

17 Q It composes about 11 acres of land, right?

18 A I couldn't -- I don't know.

19 Q Are you aware it has 10 buildings?

20 A It has a lot of buildings on it.

21 Q It has 144,000 square feet of rental space?

22 A Could very well be true.

23 Q And it's being refurbished and will go on
24 line again in midyear next year?

25 A I wish 'em luck.

1 Q You mentioned that -- you testified that
2 the owners are committed to having some type of use
3 similar to Home Depot.

4 A A home improvement center.

5 Q Home improvement center. And that that
6 would consist of -- the commitment would be for at
7 least 11 acres of land?

8 A 11 and-a-half acres is what I represent.

9 Q And a portion of that would be parking and
10 what I heard was about 125,000 gross square feet would
11 be committed to the actual buildings?

12 A That's what I said.

13 Q Okay. So the commitment is for not even
14 one-third of the 88 acres to be used for those types
15 of uses. Is that a fair statement?

16 A Okay.

17 Q Is it your position that Home Depot is a
18 light industrial use?

19 A Yes, it's my position.

20 Q Are you aware that Home Depot advertises
21 themselves as the world's largest home improvement
22 retailer?

23 A Fair enough.

24 Q And they also advertise themselves as the
25 fourth largest retailer in the United States?

1 A Okay.

2 Q And the fifth largest retailer in the
3 world?

4 A Okay.

5 Q They go on -- would Lowe's be another one
6 of the categories that you consider to be similar to
7 Home Depot in terms of use?

8 A Yes.

9 Q Are you aware they advertise themselves
10 this way on their website "Lowe's has grown from a
11 small hardware store to the second largest home
12 improvement retailer worldwide"?

13 A Okay.

14 Q You went over the concept drawings with the
15 Commissioners before. I'd like for you to turn back
16 to Pi'ilani Exhibit 32. Do you have a -- is that one
17 of the board drawings that you have?

18 A Yes sir, it is.

19 Q Would you mind putting one up for us,
20 please for Exhibit 32?

21 A No problem.

22 CHAIRPERSON CHOCK: Exhibit 32 for the
23 record.

24 THE WITNESS: Got it. That's it,
25 Mr. Pierce.

1 MR. PIERCE: Thank you.

2 Q Now, you mentioned that the landowners are
3 constrained by what the department of transportation
4 wants with respect to bikeways, is that correct?

5 A That's correct.

6 Q At the bottom of your Exhibit 32 you can
7 actually look at it there behind you, do you see that
8 red, the red legend?

9 A This?

10 Q Right. To the right there's a legend.

11 A Yes.

12 Q And that says "bike paths", right?

13 A That's correct.

14 Q In fact there's red on the concept drawing
15 showing where a biker is. Do you see that?

16 A Yes, I do.

17 Q Can you describe for the Commission what
18 the lane is to the right of the biker? That says
19 "northbound lane" doesn't it? And I have to put my
20 glasses on for that as well.

21 A Yes, you're correct.

22 Q So that's the northbound lane of traffic
23 for Pi'ilani Highway.

24 A Okay.

25 Q Then to the left of that biker doesn't it

1 say "acceleration lane"?

2 A That's correct.

3 Q So right now is the department of
4 transportation's best wisdom to sandwich bikers
5 between a northbound land of traffic and an
6 acceleration lane. Is that your understanding?

7 A Can I give you some clarification on it?

8 Q Sure.

9 A If you drive Pi'ilani Highway today you'll
10 drive down the highway. On both sides you'll have two
11 lanes of traffic. You'll have a center double stripe,
12 two lanes of traffic and a shoulder. That shoulder is
13 striped and has a sign that says, "bike path" or
14 "bikeway" on it.

15 When we sat down with DOT to talk about
16 this Project specifically and the issue with regard to
17 the bikeway, State DOT said, "We don't want you to
18 separate this bikeway from the paved section because
19 it in many ways gives an individual on the bicycle a
20 false sense of security because he's basically off the
21 roadway.

22 "When he comes back on he's got to think
23 about where he is and what he's doing. It's better to
24 keep the bike path in the same alignment on the paved
25 section."

1 So my question was, "What about the
2 intersections? I would rather move that bike path
3 around the intersection to the crosswalks so the
4 bicyclist could cross at the crosswalks."

5 No, no, no, no. As this section shows as
6 you drive Pi'ilani Highway today the bike path is on
7 the shoulder. And when you get to an intersection
8 where you have the right turn deceleration lane,
9 there's a dashed line, then the bikeway picks up
10 again and the bicyclist continues straight on to the
11 intersection.

12 So in that configuration you have a
13 bicyclist and to his right a deceleration lane.
14 That's what the State wanted. We went around and
15 around and around, but that's what the State wanted.

16 Q Thank you for that. And we will not debate
17 the State's wisdom or the department of
18 transportation's wisdom on that one right now.

19 But the point is that you're asking for
20 this Project to proceed without the Land Use
21 Commission having an opportunity to opine on that,
22 aren't you.

23 A On the bicycle path location?

24 Q Correct.

25 A Yes.

1 Q You also testified earlier that the
2 Pi'ilani landowners are ready to go. They're poised
3 and prepared to begin work.

4 A They'd like to start work.

5 Q In fact are you aware that work is actually
6 occurring on the property today? And I mean literally
7 today.

8 A There shouldn't be any work occurring on
9 the property today.

10 Q Okay. And you testified there would about
11 14 months to complete the infrastructure if everything
12 goes we'll and you're able to start, for example,
13 tomorrow?

14 A Yes.

15 Q Now, those improvements that you're talking
16 about are the ones that were bonded through that
17 subdivision approval process, correct?

18 A Correct.

19 Q Those improvements are being carried out by
20 the Pi'ilani landowners, right?

21 A Correct.

22 Q Those improvements cover the entire 88-acre
23 parcel, don't they?

24 A There's a mass grading. I think there are
25 two mass grading permits plus the civil construction

1 of roadways and the water tank. So, yes.

2 Q Once that infrastructure is complete
3 Honua'ula is in a position to request a building
4 permit immediately, is that correct?

5 A I would request a building permit if I
6 could find somebody to fund the Project.

7 Q We'll get to that in a moment. But
8 assuming they had the financing they could request a
9 building permit to initiate construction, right?

10 A Assuming all the lawsuits are settled and
11 everybody will fund the Project, sure.

12 Q So Pi'ilani is essentially carrying out the
13 work that Honua'ula needs to request a building
14 permit. Isn't that a fair statement?

15 A I don't know what the relationship is
16 contractually between Honua'ula Partners and Promenade
17 in terms of who's doing what. So I don't know if I
18 can answer that.

19 Q You've been representing Pi'ilani for how
20 long, Mr. Jencks?

21 A Well, I started on the Project in 2005.

22 Q Were you representing Pi'ilani at the time?

23 A I represented Maui Industrial Partners up
24 to the time that Eclipse purchased the land in, I
25 think, in August or September of 2009.

1 Q Were you representing Pi'ilani in 2009 when
2 they purchased the land or Eclipse Development?

3 A Not before the purchase.

4 Q Okay. So you start representing them after
5 the purchase.

6 A That's correct.

7 Q You were representing Honua'ula before
8 2009, correct?

9 A Yes.

10 Q Before 2005?

11 A Yes.

12 Q So did you assist in the relationship in
13 any of the negotiations between Honua'ula?

14 A Not at all.

15 Q And Pi'ilani?

16 A Not at all.

17 Q Do you have any reason to believe that
18 Pi'ilani is not carrying out this work for Honua'ula?
19 They're not going to only improve, say, some of this
20 bonded work, they're not going to stop -- let's, for
21 example, take the electrical. They're not going to
22 stop and not do the electrical over on Honua'ula's
23 property, are they?

24 A No.

25 Q They're going to do that, stub out --

1 A Sure.

2 Q -- that kind of thing, right? So is it
3 fair to say that the property's going to be all ready
4 for Honua'ula at the conclusion of the infrastructure
5 improvements?

6 A The minimum requirements to satisfy the
7 subdivision will be implemented. That means utilities
8 and roadway service to the lot.

9 Q And you're aware of the fact that the
10 Motion to Bifurcate was withdrawn, the Motion to
11 Bifurcate that was filed by Honua'ula?

12 A That's what I understand, yes.

13 Q And originally they were proposing: Look,
14 let's just have everything wait for approximately 14
15 months and then we'll file a request to amend?

16 A Well, I'm not familiar with what went on
17 between the attorneys and the partnership.

18 Q I'm talking about one of the documents that
19 was filed here. You never read the Motion to
20 Bifurcate?

21 A I didn't get into it.

22 Q Do you have any reason to believe that the
23 way I just described it is incorrect?

24 A I didn't read that document so I can't talk
25 to them.

1 Q You also talked about all of the
2 complications that your clients have had getting
3 through the entitlement process. You mentioned
4 lawsuits, those kinds of things. Do you recall that?

5 A Yes, I do.

6 Q And you also mentioned that a 4-lot
7 subdivision was significantly more simple than if your
8 clients had attempted to apply for a 123-lot
9 subdivision, right?

10 A Correct.

11 Q Now, you also mentioned a couple other
12 projects that have been built that look quite a bit
13 like the Ka'ono'ulu Ranch proposal. For example, the
14 Wailuku Mill-yard would be one, right?

15 A No.

16 Q You disagree with that?

17 A Okay. You're comparing the mill-yard to
18 the original conceptual plan that Mr. Rice proposed.

19 Q Right.

20 A They're similar in that they're both light
21 industrial subdivisions.

22 Q You're not aware of any lawsuits or
23 long-term entitlement problems with *that* project, are
24 you?

25 A I'm not.

1 Q Now, you also mentioned that Honua'ula
2 can't find funding to, or someone who's willing to
3 finance the 250 units?

4 MR. STEINER: Objection. Misstates the
5 witness's testimony.

6 MR. PIERCE: I'll withdraw that question.
7 We'll actually come back to that.

8 Q You testified about some other projects on
9 Maui that are zoned M-1 light industrial and have been
10 able to have a variety of uses including apartment
11 uses and retail uses. Is that a fair generalization
12 of the earlier testimony?

13 A Yes.

14 Q But you haven't looked underneath each one
15 of those to see what the land use conditions were, if
16 any, have you?

17 A I've looked at a couple of 'em.

18 Q Okay. But not all of them.

19 A No.

20 Q And you also haven't looked to see what the
21 limitations, if any, were in the community plans for
22 those various projects, have you?

23 A Limitations in the community plans?

24 Q Correct. With respect to the specific
25 property if there were any.

1 A I looked at --

2 MR. STEINER: I have an objection. He said
3 "with respect to that specific property". And no
4 specific property has been identified.

5 Q (By Mr. Pierce): With respect to the ones
6 that you testified to earlier that you identified.

7 A I looked at the community plans to see if
8 there were any conflicting issues in the plan.

9 Q You didn't look for limitations.

10 A No.

11 Q Okay. And, of course, just because
12 something gets actually constructed, as you testified
13 has occurred, doesn't necessarily mean that it could
14 not have been challenged.

15 A That's true. That's a true statement.

16 MR. PIERCE: Mr. Chair, I talked to
17 Mr. Steiner before. And I understand Mr. Jencks is
18 available today. I think that actually most of my
19 continued cross will be within the realm of the
20 earlier discussion.

21 However, we had also identified him as an
22 adverse witness. And we would like to continue in
23 that direction with our questioning.

24 CHAIRPERSON CHOCK: Parties, any
25 objections?

1 MR. STEINER: No objection.

2 MR. KAM: No objection.

3 MR. YEE: No objection.

4 MS. LOVELL: No objection.

5 CHAIRPERSON CHOCK: Proceed, Mr. Pierce.

6 Q (By Mr. Pierce) Okay. Mr. Jencks, if you
7 could pull Intervenors' Exhibit 28. You've got it?

8 A Yes.

9 Q This is the Sixteenth Annual Report of the
10 Honua'ula Partners, LLC Successor Petitioner to
11 Ka'ono'ulu Ranch. That's how it's titled, right?

12 A That's correct.

13 Q This was filed on October 10, 2012.

14 A Okay. I see that.

15 Q And were you -- this is signed by your
16 attorneys. But were you -- did you assist in the
17 preparation of this report?

18 A Yes, I did. I sent them prior reports and
19 some background information.

20 Q So you understand what's in this report.

21 A Yeah. Yeah, I would say yes.

22 MR. PIERCE: Mr. Chair, I don't think this
23 in evidence yet. I'd ask that it accepted in evidence
24 or admitted into evidence, rather.

25 CHAIRPERSON CHOCK: What's the document or

1 the exhibit?

2 MR. PIERCE: This is the Exhibit I-28,
3 Sixteenth Annual Report of Honua'ula Partners, LLC
4 Successor Petitioner to Ka'ono'ulu Ranch.

5 CHAIRPERSON CHOCK: Hang on for a second.

6 MS. LOVELL: For the record I have that as
7 having been admitted in evidence on November 1st.

8 MR. PIERCE: I apologize. I think we're
9 in. I'm sorry about that.

10 CHAIRPERSON CHOCK: Okay. We're okay? All
11 right.

12 Q (By Mr. Pierce): Mr. Jencks, if you would
13 turn to the second page of Exhibit 28.

14 A Okay.

15 Q And there's a discussion of some of the
16 background activities here. And let's look at the
17 second paragraph. It talks about the 250-unit
18 workforce affordable housing units. It starts off as
19 required by Condition No. 5 of the county of Maui
20 ordinance No. 3554. Do you see that?

21 A Yes, sir, I do.

22 Q Let's just to expedite things, there's a
23 Condition 5 that required the workforce housing to be
24 built on the 13 acres on our subject property here
25 today, right?

1 A That's correct.

2 Q That's the mauka left-hand or the northern
3 corner, right?

4 A Correct.

5 Q That was actually a result of your client's
6 or your client Honua'ula, proposing that to the
7 council back in 2005, right?

8 A That's correct.

9 Q I'm sorry. I think I misspoke. 2007?

10 A Yeah, I think it started about that time.

11 Q Okay. It says, "Construction of this
12 workforce housing project is dependent upon and must
13 follow the installation of certain infrastructure for
14 the Project to be developed on the Pi'ilani parcels."
15 Do you see that?

16 A Yes, I do.

17 Q But we know from the earlier discussion
18 that you and I had that actually can occur and will
19 occur by the Pi'ilani owners, correct?

20 A They will be doing the work.

21 Q So do you recall back -- actually I have
22 the letter here -- back in July of 2007 you wrote to
23 Danny Matteo who's a councilmember or was at the time.
24 And you proposed the idea of building 250 units on the
25 property, the 88-acre property?

1 A You have a signed letter that I signed?

2 Q Yes, I do.

3 A Then I guess I did.

4 Q You're happy to take a look at it if you'd
5 like.

6 A I'd love to take a look at it.

7 MR. PIERCE: Mr. Chair, may I approach the
8 witness?

9 CHAIRPERSON CHOCK: Sure.

10 MR. STEINER: I'm going to object. This is
11 a document that apparently is not a document which was
12 an exhibit in this case. We had deadlines for
13 submission of exhibits. This is being offered as part
14 of his direct examination of Mr. Jencks, not as
15 impeachment or rebuttal or anything like that. So I
16 would object to this late exhibit.

17 MR. PIERCE: Mr. Chair, if I may respond.

18 CHAIRPERSON CHOCK: Hang on, Mr. Pierce.
19 (pause) Go ahead.

20 MR. PIERCE: This is not being asked to be
21 offered in evidence. The witness is asked for his
22 memory to be refreshed. And that is permitted under
23 the judicial rules and certainly should be permitted
24 here.

25 It does not have to be presented into

1 evidence. And there needs to be no initial warning to
2 the other parties. But if it turns into a big deal I
3 can deal with it another way.

4 CHAIRPERSON CHOCK: Mr. Pierce, can we take
5 a look at that document?

6 MR. PIERCE: You may.

7 MR. STEINER: Is this the only copy?

8 MR. PIERCE: Yes.

9 (Document handed to Chair Chock)

10 CHAIRPERSON CHOCK: Give us a one minute
11 recess in place to kind of sort this out.

12 MR. PIERCE: You know, Mr. Chair, let me
13 see if we can work with Mr. Jencks without us dealing
14 with the exhibit. Let's try that first.

15 CHAIRPERSON CHOCK: It seems pretty
16 relevant to most of the testimony that's been
17 provided.

18 MR. STEINER: My other concern is the fact
19 that he's going to ask him questions about it and I
20 don't have a copy of the letter. I'm sure that's a
21 concern.

22 Q (By Mr. Pierce): Let's try this another
23 way, Mr. Jencks. 2007 were you engaging in
24 conversations with the County with respect to
25 proposing 13 acres or some amount that would handle

1 250 units? And you were proposing this lot that's the
2 subject of our case today, right?

3 A Correct.

4 Q That was in 2007.

5 A I was in the land use committee of the
6 council in discussions on the conditional zoning for
7 the Honua'ula Wailea 670 project.

8 Q Now, you were proposing this on behalf of
9 Honua'ula.

10 A Correct.

11 Q Because they were going through the change
12 in zoning, right?

13 A That's correct.

14 Q But at the time you were also representing
15 Maui Industrial Partners, right?

16 A That's correct.

17 Q Did -- Maui Industrial Partners did not
18 inform the Land Use Commission that there was a
19 potential buyer that was being considered for that
20 13 acres, correct?

21 A Not to my knowledge.

22 Q Have you read all of the Decision and Order
23 that was filed in 1995 by Ka'ono'ulu Ranch?

24 A Yes.

25 Q Would you agree that Condition 16 requires

1 the landowner to inform the Land Use Commission of
2 proposed or possible buyers?

3 A I don't know if that's 16 or what condition
4 it is. I don't have it in front of me.

5 Q Let me read it to you. Condition 16 says,
6 "Petitioner shall give notice to the Commission of any
7 intent to sell, lease, assign, place in trust or
8 otherwise voluntarily alter the ownership interests in
9 the property prior to development of the property."

10 MR. STEINER: I'm gonna object to the
11 extent that this condition was not one of the
12 conditions that was raised in the Motion for the Order
13 to Show Cause. I don't believe that it's been
14 breached, but I think we're getting pretty far afield
15 here.

16 CHAIRPERSON CHOCK: Sustained.

17 MR. PIERCE: Mr. Chair, may I make an offer
18 of proof on that and have a reconsideration? The
19 Order to Show Cause was not limited to any specific
20 conditions. It was a request of whether there was a
21 violation of the Order.

22 CHAIRPERSON CHOCK: Mr. Steiner, to your
23 knowledge does the Order specify any condition on the
24 Show Cause?

25 MR. STEINER: As far as I know it does not.

1 Our understanding was that the Commission wanted
2 relevant evidence. I think when you add, one, the
3 fact that this is based on an exhibit that isn't --
4 he's asking about an exhibit that wasn't presented
5 before.

6 So we didn't have any notice that this
7 condition was alleged to have been violated, and it
8 wasn't raised in the motion. I just think it's
9 prejudicial and unfair. But, again, I don't think
10 it's been violated anyway.

11 CHAIRPERSON CHOCK: So noted. I'm going to
12 be give you a little latitude, Mr. Pierce.

13 MR. PIERCE: Thank you.

14 CHAIRPERSON CHOCK: It wasn't admitted,
15 but it seems pretty relevant to what your witness has
16 been testifying to this morning. So proceed.

17 Q (By Mr. Pierce): So in 2007, Mr. Jencks,
18 you're engaged with the county of Maui land use
19 commission in discussing this possibility of bringing
20 the 250 units on the 13 acres, right?

21 A Correct.

22 Q And you received -- or your client
23 Honua'ula received conditional zoning approval in
24 2008, March of 2008?

25 A Correct.

1 Q That is where Condition 5 is embodied is in
2 that conditional zoning, right?

3 A Correct.

4 Q What they call their Condition 5. I'm
5 going to take us to it real quickly. This is, if you
6 want to read along, is Intervenor's Exhibit 27. Let
7 me know when you're there.

8 A I'm there.

9 Q We do not have the entire exhibit here. We
10 have the first page.

11 MS. LOVELL: Excuse me, Mr. Pierce. I'm
12 sorry to interrupt, but according to my records
13 Exhibit I-27 is not in evidence. It was objected to
14 by the County.

15 MR. PIERCE: Well, I'm laying a foundation
16 for its admission then. Mr. Chair, by the way, this
17 is a legislative act. It's a bit odd that the County
18 would have asked for the Commission to have taken
19 administrative notice or official notice of many other
20 legislative acts but not this particular one.

21 MS. LOVELL: I believe our objection was
22 that even though it is a legislative act and could be
23 judicially noticed or officially noticed by this
24 Commission, it deals with a different project.

25 CHAIRPERSON CHOCK: County, I think we

1 noted your objection at the time this exhibit was
2 based by Intervenor.

3 MS. LOVELL: Yes. And at least according
4 to my records there was no decision whether to admit.

5 CHAIRPERSON CHOCK: Mr. Pierce, this
6 exhibit was not admitted at this point.

7 MS. LOVELL: Therefore we request that it
8 not be read or displayed or anything until that
9 question of its admissibility is decided. Thank you.

10 CHAIRPERSON CHOCK: Got it. Denied.

11 Q (By Mr. Pierce): Mr. Jencks, let me start
12 at this spot which is: Have you ever seen this
13 ordinance before?

14 A Yes.

15 Q Probably more than you would like it sounds
16 like.

17 A That's probably true.

18 Q If you will flip to the very last -- I'm
19 sorry it's not the very last page -- but if you'll
20 flip four pages in.

21 A Page 3?

22 Q It'd be the fourth page, the one that says,
23 "Unilateral agreement and declaration for conditional
24 zoning."

25 A Yes.

1 Q So you see that there's a Bureau of
2 Conveyances stamp at the top?

3 A Yes, sir.

4 Q And it says, "Document 2008-036711."

5 A Correct.

6 Q And the date is March 10, 2008?

7 A Correct.

8 Q Is this when this was recorded against
9 Honua'ula's Wailea 670 property? If you look at the
10 bottom of that page there's a TMK.

11 A Yes.

12 Q This unilateral agreement is part of what
13 is required under the ordinance 3554, right?

14 A I believe this was recorded and the mayor
15 signed the bill I think April 8th.

16 Q Okay. Do you see any reason to think that
17 there's anything wrong here with the authenticity of
18 this document?

19 A No.

20 MS. LOVELL: For the record we are not
21 objecting to authenticity. We are objecting to
22 admissibility on relevance grounds. It's a completely
23 separate legal concept.

24 MR. PIERCE: So, Mr. Chair, I'm first
25 laying the foundation. I'm going to ask for it to be

1 admitted. Then we can get to Ms. Lovell's objection.

2 MR. YEE: Chair, if I could just note.

3 With respect, I think this is a copy of OP Exhibit 4
4 in which I believe was admitted. OP Exhibit 4
5 contains, I believe, the full ordinance with all the
6 exhibits and pages in it.

7 CHAIRPERSON CHOCK: County, is that your
8 understanding?

9 MS. LOVELL: Let me look. (pause) Yes.
10 According to our records it was submitted with OP's
11 Supplemental Response on July 27, 2012.

12 CHAIRPERSON CHOCK: Did you object to OP's
13 exhibit?

14 MS. LOVELL: No, we did not object to their
15 supplemental response.

16 CHAIRPERSON CHOCK: Thank you. Mr. Pierce,
17 go ahead.

18 MR. PIERCE: Thank you. So we're asking
19 that Intervenor's Exhibit I7 be admitted into
20 evidence.

21 CHAIRPERSON CHOCK: Chair's going to admit
22 the exhibit.

23 MR. PIERCE: Thank you.

24 Q Mr. Jencks, on the very last page of
25 Exhibit I-27 is that your signature? I'm sorry. The

1 second-to-last page.

2 A Yes, it is.

3 Q Now, Condition 5 is a few pages just before
4 that. I'm sorry. Let's strike that. If you start at
5 the beginning of the exhibits and you go in three
6 pages, it's marked as page, it will be four pages,
7 marked as page 3. And it says -- it's numbered 5 at
8 the stop. Do you see that?

9 A Yes, I do.

10 Q All right. So I'm going to just read from
11 a portion of it. There's a discussion of the
12 residential workforce housing. And there's a
13 requirement that Honua'ula Partners quote, "shall
14 provide workforce housing" quote, then it goes on to
15 identify the bill or the county ordinance that they're
16 required to do it by.

17 And it says, quote "...shall be located at
18 the Ka'ono'ula Light Industrial Subdivision and
19 completed prior to any market rate unit. That 125 of
20 those workforce housing units shall be ownership
21 units; and that 125 of those units shall be rental
22 units." Do you see that?

23 A Yes, sir.

24 Q Then it goes on to say quote, "In addition,
25 construction of those workforce housing units shall be

1 commenced within two years provided all necessary
2 permits can be obtained within that timeframe." Do
3 you see that?

4 A Yes, sir, I do.

5 Q And that's part of Condition 5, right?

6 A That's correct.

7 Q So obviously you've identified some reasons
8 why it has not been able to proceed yet. But this is
9 an obligation on Honua'ula Partners, correct?

10 A Yes.

11 Q The only way that they can get out of this
12 objection -- or out of this condition, is to go back
13 and request a change in zoning, right?

14 MR. STEINER: Objection. Calls for a legal
15 conclusion.

16 MR. PIERCE: The witness has answered.

17 THE REPORTER: What was your answer?

18 CHAIRPERSON CHOCK: Did you say "yes"?

19 THE WITNESS: Correct.

20 Q (By Mr. Pierce): Now, the date of the
21 recording date on this was -- we said was...

22 A 2008.

23 Q 2008. Now, going back to the summer of
24 2007 when this was first discussed, did Maui
25 Industrial Partners, who owned the property, who you

1 represented who was one of your clients, did they
2 inform the Land Use Commission --

3 MR. KAM: I'm gonna --

4 MR. PIERCE: I haven't finished my question
5 yet.

6 MR. KAM: Go ahead.

7 MR. PIERCE: Had Maui Industrial Partners
8 or did they -- did Maui Industrial Partners inform the
9 Land Use Commission that there was an intent to change
10 or to enter into a very different use, 250 affordable
11 housing units on the property?

12 A In 2007?

13 Q 2007, excuse me.

14 A No. Because I didn't know where it was
15 going to go.

16 Q But in 2008 we had -- the ordinance was
17 filed against the property, right? It became a
18 condition.

19 A Right.

20 Q Maui Industrial Partners at that point also
21 did not inform the Land Use Commission, correct?

22 A We were working with the Maui planning
23 department.

24 Q That's not the Land Use Commission, right?

25 A That's correct.

1 Q If you'll turn to -- well, let me just ask
2 you this. Maybe we can avoid this. Would you agree
3 that Maui Industrial Partners conveyed the 13 acres to
4 Honua'ula Partners on August 20th, 2009?

5 A I believe that's correct.

6 Q Maui Industrial Partners did not inform the
7 Land Use Commission in 2009, did they, of that change
8 in ownership?

9 A My understanding is that they provided
10 Notice to the Commission out of the L.A. office.

11 Q But that's the letter you haven't seen.

12 A That's correct.

13 Q And it's not been admitted into evidence
14 here today.

15 A I can't speak to that.

16 Q I guess it was also your testimony that
17 they may have done it in 2010 but no one has a copy of
18 that document of an annual report that was filed in
19 2010?

20 MR. STEINER: I'm going to object. There
21 was, in fact, and I believe it's in evidence, a 15th
22 annual report for 2000 -- well, I guess I need to
23 check whether it's 2010 or 2011. But I believe after
24 they purchased there was, in fact, an annual report
25 that is in the record.

1 MR. PIERCE: Let me strike that.

2 Q Mr. Jencks, until that 16th annual report,
3 the one that was filed a couple months ago in October,
4 until that was filed none of the landowners of that
5 13 acres, Maui Industrial Partners first, Honua'ula
6 second, none of them ever informed the Land Use
7 Commission that they were going to use the property
8 for 250 units for housing, did they?

9 A No.

10 Q Would you agree, Mr. Jencks, based upon
11 your experience, that there are impacts whether they
12 be environmental, social, economic, et cetera, that
13 are associated with constructing infrastructure?

14 MS. LOVELL: I object to the form of the
15 question as both compound and unintelligible.

16 CHAIRPERSON CHOCK: You can repeat the
17 question, Mr. Pierce.

18 Q (By Mr. Pierce): When you're building
19 infrastructure there are impacts associated with it
20 sometimes, right?

21 A Sure.

22 Q Those could be environmental impacts,
23 right?

24 A They could be dust, noise, variety of
25 things.

1 Q Thank you for giving me those compound
2 parts. It also could be economic? There could be
3 impacts that are economic?

4 A I suppose.

5 Q Well, isn't that, in fact, what a lot of
6 your testimony was earlier about all the wonderful
7 things that are going to occur from the infrastructure
8 that the landowners are proposing to build?

9 A Well, they're economic benefits resulting
10 from the construction activities, certainly.

11 Q And social benefits?

12 A Yeah.

13 Q Would you also agree that there are impacts
14 associated with constructing 250 housing units?

15 A Sure.

16 Q Now, you testified earlier that Wailea 670
17 just obtained a Final EIS, right?

18 A That's correct.

19 Q Now, you were, according to the Final EIS
20 which you signed, you said "It was prepared under my
21 direction or supervision and the information submitted
22 to the best of my knowledge fully addresses document
23 content requirements as set forth in section 11-200-17
24 Hawai'i Administrative Rules."

25 Do you recall declaring that when you

1 signed the Final EIS in June of 2012?

2 MR. KAM: I'm going to object. This seems
3 like -- what are we talking about? Are we talking
4 about Wailea 670 EIS now? It seems like we're getting
5 pretty far off track here.

6 MR. PIERCE: Mr. Chair, I'll connect it up
7 very quickly in the next couple questions.

8 CHAIRPERSON CHOCK: Very quickly.

9 Q (By Mr. Pierce): All right. Mr. Jencks,
10 if you go to Intervenor's I-30. Let me know when
11 you're there.

12 A I only have up to I-29 here, Mr. Pierce.
13 What am I looking for?

14 MR. STEINER: I would also note for the
15 record that this is an exhibit that we objected to and
16 has not been admitted into evidence.

17 MS. LOVELL: I join.

18 MR. PIERCE: Let me do this way,
19 Mr. Jencks.

20 Q Do you recall --

21 CHAIRPERSON CHOCK: I-30's not in yet,
22 Mr. Pierce.

23 MR. PIERCE: All right. That's fine.

24 Q Do you recall, Mr. Jencks, working with PBR
25 on a response to the Hawai'i Environmental Center with

1 respect to their concerns -- let me strike that. Let
2 me start it this way.

3 Do you recall a letter written from Hawai'i
4 Environmental Center to you expressing concerns that
5 the EIS failed to address the impacts of the 250
6 units?

7 A I remember getting a letter.

8 Q Do you recall --

9 A A comment letter.

10 Q -- and do you recall that PBR responded to
11 that letter as part of the comments process?

12 A Yes.

13 Q In the EIS. Do you recall that they said
14 that -- they first said that, "We don't need to deal
15 with it here because it's -- does not trigger -- you
16 said "providing workforce affordable homes at
17 Ka'ono'ula Light Industrial Subdivision does not
18 trigger the need for an Environmental Assessment or
19 Environmental Impact Statement under Chapter 343." Do
20 you remember that part?

21 MS. LOVELL: I object to this question.
22 It's reading from a document that's not in evidence.
23 It's an EIS. It's a portion of an EIS for a different
24 project. The comments, the comment letters on that
25 project and the responses thereto are a part of the

1 document that is not yet in evidence and is, frankly,
2 irrelevant.

3 MR. STEINER: In addition we would join in
4 that objection. It's irrelevant. It's getting into
5 the adequacy of the EIS which is the subject matter of
6 another lawsuit that Mr. Pierce is involved with. It's
7 not relevant.

8 I haven't seen any showing. We're getting
9 a lot of evidence in with no showing of how this
10 connects up to this property.

11 MR. PIERCE: Mr. Chair, it's not being
12 offered --

13 CHAIRPERSON CHOCK: We're going to take a
14 one minute recess in place.

15 MR. PIERCE: Let me just give my offer of
16 proof.

17 CHAIRPERSON CHOCK: We're going to take a
18 1-minute recess in place. (pause) Back on the record.
19 Mr. Pierce, how is this FEIS for Honua'ula relevant to
20 this particular show cause hearing?

21 MR. PIERCE: The very next part of my
22 questioning, which is the PBR's relationship back to
23 the 1994 transcript and 1995 Order in which the -- in
24 which the PBR on behalf of Honua'ula stated that the
25 impacts were addressed in 1994 for the 250 units of

1 housing.

2 (Commissioner Makua departing the hearing).

3 CHAIRPERSON CHOCK: What page in this EIS
4 are you specifically referencing?

5 MR. PIERCE: This would be of the exhibit,
6 it would be the final page of the exhibit, the very
7 top paragraph, the first sentence of that paragraph.

8 CHAIRPERSON CHOCK: Mr. Pierce, I'm going
9 to ask you to move on. I don't see how -- this
10 exhibit has not been admitted and I don't see its
11 relevance to what we're talking about.

12 MR. PIERCE: Okay. Thank you.

13 Q Mr. Jencks, turning your attention to
14 Exhibit I-29, Intervenors' Exhibit I-29.

15 A Okay.

16 Q This is the 16 annual report. But now not
17 for Honua'ula, instead for the Pi'ilani Promenade
18 landowners. Do you see that?

19 A Yes, sir. I do.

20 Q This was admitted in evidence. Now, if you
21 would go to page 3, the first full paragraph there.

22 A Beginning with?

23 Q Do you see the second sentence there? And
24 I'm going to read from it. It says, "Because the
25 conceptual plan is" and it has it underlined

1 conceptual" end of underlining, "in nature, the
2 precise configuration of the onsite improvements to be
3 constructed and the mix of tenants will depend upon
4 and be largely determined by the commercial real
5 estate market after infrastructure for the Pi'ilani
6 Promenade is completed and all necessary building
7 permits and approvals for Pi'ilani Promenade have been
8 obtained." Do you see that?

9 A Yes, sir, I do.

10 Q So it's not so conceptual, is it,
11 Mr. Jencks that you're not able to attract tenants,
12 right?

13 CHAIRPERSON CHOCK: Can you restate that
14 question?

15 Q (By Mr. Pierce): Mr. Jencks, you testified
16 earlier that, in fact, the Project is attracting
17 tenants currently.

18 A They're using the information they've
19 developed that you see on this exhibit in a conceptual
20 nature to talk to tenants.

21 Q Turn to Exhibit I-19 please. Let me first
22 ask you before you review it. Have you worked with
23 Eclipse Development or have you ever seen any of
24 Eclipse Development's websites with respect to their
25 outlets or their shopping center advertising?

1 A When I first learned of Eclipse's interest
2 in the property I went to their website and looked at
3 it.

4 Q So have you seen any of the advertising
5 that Eclipse has put up with respect to the shopping
6 center?

7 A To this specific one?

8 Q Yes.

9 A Yes.

10 Q And the outlet mall?

11 A Yes.

12 Q Those are intended to attract tenants,
13 correct?

14 A Correct.

15 Q In fact there's, one of the website pages
16 says that they're offered for lease, right?

17 A Hmm-hmm.

18 Q So are you able to sign a lease right now?

19 A You're talking to the wrong guy with regard
20 to lease, who they talked to, what the process is.
21 I'm not involved in that process.

22 Q Are you able to -- do you know if there's
23 been any leases that have been signed?

24 A My understanding is leases have been
25 signed.

1 Q Do you know how many?

2 A I understand it's about 50 percent.

3 Q Have those tenants been allocated a certain
4 amount of square footage?

5 A I would assume they're signing up for
6 something.

7 MR. STEINER: I'm going to object and
8 instruct the witness not to speculate. It sounds like
9 he's speculating. If you know the answer you can --

10 CHAIRPERSON CHOCK: If you know you know.
11 If you don't know you don't know.

12 THE WITNESS: It's out of my bailiwick. I
13 am speculating.

14 CHAIRPERSON CHOCK: If it's leased you
15 gotta assume that they're leasing it for a certain
16 amount of square footage.

17 Q (By Mr. Pierce): So it's not so conceptual
18 that Eclipse isn't able to market it, correct?

19 A Correct.

20 Q And assign leases.

21 A Correct.

22 Q Let's ask about this now. It's not so
23 conceptual that it couldn't -- could it be turned back
24 into a 123-lot subdivision now?

25 A That's not a question I can -- I can't

1 answer that question. I don't know.

2 Q Well, you said that you were engaged in
3 looking at the 16 annual reports and assisting with
4 the preparation of those, right?

5 A Hmm-hmm. Yes.

6 Q So it says in there that they're conceptual
7 in nature right now, the designs?

8 A That's correct.

9 Q Okay. But it would not return to a 123-lot
10 subdivision, would it?

11 MR. STEINER: I'm going to object. This
12 question is vague. I'm not sure what it's asking,
13 whether entitled it could be re-subdivided? It's
14 really unclear as far as what's being asked here.

15 Q (By Mr. Pierce): Eclipse has made certain
16 promises here today. It would not return this to 123
17 lots at this stage, would it?

18 MR. STEINER: "Made promises here today"?
19 I'm sorry I don't understand that either. I'm going
20 to object.

21 Q (By Mr. Pierce) Mr. Jencks, earlier today
22 there was a representation made by, I think you and
23 then Mr. Steiner, that there was going to be a
24 commitment to do Home Depot uses or a Home Depot type
25 of use, right?

1 A Home improvement type of use.

2 Q Right. So we had a commitment for a
3 certain amount of gross square footage for that,
4 right?

5 A That's correct.

6 Q It won't be greater than that, will it?

7 A Whether it's that exact number I can't tell
8 you. And that would be a minimum.

9 Q Now, when Maui Industrial Partners bought
10 the property back in 2005, it owned it for a few years
11 before it sold it, right?

12 A Correct.

13 Q You were representing Maui Industrial
14 Partners during that entire period of time, right?

15 A From 2005 yes.

16 Q During that entire time the Land Use
17 Commission Order was encumbering the property, right?

18 A Correct.

19 Q And it continues to encumber the subdivided
20 properties today, right?

21 A It's recorded against the land, that's
22 correct.

23 Q Maui Industrial Partners didn't make any
24 guarantees to the current owners as to what they could
25 use that property for, did they?

1 A They did their own due diligence.

2 Q If you'll turn to Intervenor's Exhibit I-2
3 which is the Decision and Order. Do you have that?

4 A Yes, sir, I do.

5 Q All right. If you'll turn to Findings of
6 Fact 21?

7 A Page 6?

8 Q Page 6, correct. Findings of fact 21
9 starts this way "Petitioner proposes to develop the
10 property as the Ka'ono'ula Industrial Park, a 123-lot
11 commercial and light industrial subdivision." Do you
12 see that?

13 A Yes I do.

14 Q Do you see the record "conceptual" there at
15 all?

16 A It's not there, no.

17 Q Now, go to Finding of Fact 38 which is on
18 page 10. Are you there?

19 A Yes, sir, I am.

20 Q So the second sentence of Finding of Fact
21 38 says this: "The 88-acre Petition Area would be
22 subdivided and sold as individual parcels providing
23 businesses with the opportunity to purchase lots in
24 fee simple and to build their own structures." Do you
25 see that?

1 A Yes.

2 Q It doesn't say anything about that being
3 conceptual there, does it?

4 A No, it doesn't.

5 Q Now, let's go to finding of fact -- let's
6 go to page 7 of the Findings of Fact in the 1995
7 Order. We are still referring to Intervenor's Exhibit
8 I-2.

9 A Page 7 you said?

10 Q Yes.

11 A Okay.

12 Q Now, to speed things along I'll make a
13 representation to you here, but you're welcome to read
14 it, Findings of Fact 27 through 32 are specific
15 information about the property and the uses and how
16 they relate to the Kihei Makena community plan. Do
17 you see that?

18 A Yes, I do.

19 Q And you mentioned that you were familiar
20 with the Kihei community plan in a couple of the
21 different positions that you've held, right?

22 A Generally, yes.

23 Q One was as Public Works Director.

24 A Correct.

25 Q Then another one you actually advised or

1 served with respect to the community plan amendment
2 process? Did I hear that correctly?

3 A As a deputy director and the director of --
4 as a deputy director of Public Works and director of
5 Public Works I participated in the development of the
6 Kihei-Makena community plan that was adopted in 1998.

7 Q All right. Now Finding of Fact 32, I'm
8 going to read it to you. It says, "The Project would
9 conform with the proposed light industrial designation
10 for the property." Then it goes to say, "Light
11 industrial uses include warehousing, light assembly
12 and service and craft type industrial operations." Do
13 you see that?

14 A Yes, I do.

15 Q It doesn't have retail in there, does it?

16 A It does not.

17 Q And it doesn't have housing in there, does
18 it?

19 A It does not.

20 Q All right. Are you familiar enough with
21 the Kihei-Makena community plan to know what, how this
22 property, the subject property, is designated in the
23 Kihei community plan?

24 A It's designated as light industrial.

25 Q Have you paid attention to how, exactly how

1 it's designated, what the wording is?

2 MS. LOVELL: Could we have a clarification
3 please? We are talking about the community plan that
4 was in effect at the time that this D&O was entered in
5 1995, is that correct?

6 MR. PIERCE: Mr. Chair --

7 CHAIRPERSON CHOCK: Can you clarify that,
8 Mr. Pierce? Are we talking about the community plan
9 that was in effect at the time of this D&O and the
10 findings of fact?

11 MR. PIERCE: I will do that. I was trying
12 to speed along.

13 CHAIRPERSON CHOCK: Thank you.

14 MR. PIERCE: Let's step back for a moment.

15 CHAIRPERSON CHOCK: Mahalo.

16 MR. PIERCE: And I apologize.

17 Q Mr. Jencks, we're going to have to take you
18 back for a moment to the Findings of Fact 27 through
19 32. I want to try to give you a summary of these and
20 we'll see if whether I get an objection. But what was
21 happening here was that the Findings of Fact
22 contemplate that there was ongoing discussions with
23 the citizen advisory committee.

24 And the citizen advisory committee is a
25 group that advises on how things are going to happen

1 at the community plan stage, right?

2 A Correct.

3 Q All right. So what I'm representing that
4 happened here, and you're welcome to read this on your
5 own, was that there are several Findings of Fact
6 identifying the work that went on.

7 Brian Miskae, who was the director at the
8 time, so the planning director proposed that it be
9 placed in the light industrial. Feel free to read
10 that if you like. But does that sound familiar?
11 Maybe you recall this.

12 A I recall reading that in meeting minutes.

13 Q Okay. Let's actually go to paragraph -- go
14 to page 24 Finding of Fact 98.

15 A 98 did you say?

16 Q Right. And I want to read it for you. Let
17 me know when you're there. Are you there?

18 A Yes.

19 Q "The Project is consistent with the current
20 urban designation of the property in the Kihei-Makena
21 community plan and their planning directors and Maui
22 planning commission's light industrial urban
23 designation in the recommended update of the
24 Kihei-Makena community plan." Do you see that?

25 A Yes, I do.

1 Q That recommend update ultimately became
2 what is the Kihei-Makena community plan dated 1998,
3 correct?

4 MS. LOVELL: I object to the question.
5 There's no foundation laid that this witnesses has the
6 proper knowledge to answer that question. There's
7 been no foundation laid that what is referred to in
8 paragraph 98 in fact later became the 1998
9 Kihei-Makena community plan in its entirety.

10 CHAIRPERSON CHOCK: Mr. Pierce, maybe you
11 can clarify your question. We're looking at paragraph
12 98 of the findings of fact. I think the witness
13 should answer the question, but if you can clarify.

14 MR. PIERCE: Sure.

15 Q Mr. Jencks, you've testified that you're
16 familiar with the Kihei-Makena community plan as well
17 as the amendment process that occurred in the '90s, is
18 that right?

19 A Yes.

20 Q Are you familiar enough to know whether the
21 1998 -- excuse me -- whether the Kihei-Makena
22 community plan was amended during the '90s?

23 A Yes.

24 Q Do you know what the date of that amendment
25 was when it actually was enacted by the county

1 council?

2 A 1998.

3 Q Do you have any reason to believe, based
4 upon your review of the findings of fact I've given
5 you that they're referring to a different Kihei-Makena
6 community plan in this Land Use Commission Order?

7 A Meaning the recommended update of the
8 Kihei-Makena community plan?

9 Q Correct.

10 A Correct.

11 Q All right. Now, if you'll turn to
12 Intervenor's Exhibit I-9.

13 A I don't have it marked here, Mr. Pierce.

14 Q I can come help you if you need it.

15 A What is it I'm looking for?

16 Q It'll actually show Kihei-Makena community
17 plan on the first page. It's going to be about
18 one-third of the way through.

19 CHAIRPERSON CHOCK: What date was that
20 document produced?

21 MS. LOVELL: Chair, I-9 is the Kihei-Makena
22 community plan adopted in 1992 to which the County
23 objected on grounds of relevance. We also had a
24 motion on this.

25 MR. PIERCE: Right. Of course, Mr. Chair,

1 you haven't ruled on that. This, of course, is the
2 time for us to get into that.

3 CHAIRPERSON CHOCK: Chair's going to admit
4 the exhibit.

5 MR. PIERCE: Thank you.

6 Q Are you there?

7 A Yes.

8 Q Thank you, Mr. Jencks. Sorry about that.
9 All right. So have you seen this Kihei-Makena
10 community plan Exhibit 4? Take a look at it.

11 A Is this the '98?

12 Q Correct. I'll make that representation for
13 you.

14 A Yes.

15 Q And we've not given you the entire
16 community plan because it's quite large. But I'd like
17 to first turn your attention to the very last page of
18 that exhibit, which is a map. Do you see that?

19 A I'm gettin' there. Okay. I'm here.

20 Q Do you see the subject property located on
21 that community plan?

22 A Yes, I do.

23 Q What is the designation within -- let me
24 step back for a second. All of these properties on
25 this map have different identifying marks on them.

1 Some of them say a-g. What does that stand for?

2 A Ag.

3 Q Thank you.

4 CHAIRPERSON CHOCK: Mr. Pierce, for the
5 benefit of this Commission where is their parcel in
6 relation to this map?

7 MR. PIERCE: Okay.

8 Q Mr. Jencks, do you see the parcel there?

9 A Yes, I do.

10 Q And it's marked with an LI, correct?

11 A That's correct.

12 Q All right. And it's right to the right of
13 the existing mauka industrial park, correct?

14 THE WITNESS: Mr. Chair: (Witness pulling
15 up diagram).

16 CHAIRPERSON CHOCK: Got it.

17 Q (By Mr. Pierce): So the property is
18 identified, that 88 acres, all the 88 acres is
19 identified in the Kihei community plan, isn't it?

20 A That's correct.

21 Q And is identified as LI.

22 A Correct.

23 Q Which stands for?

24 A Light industrial.

25 Q All right. Now, if you'll turn back three

1 pages please. It's page No. 55.

2 A Okay.

3 Q There's a definition for light industrial.
4 It says, "This is for warehousing, light assembly,
5 service and craft type industrial operations." Do you
6 see that?

7 A Yes.

8 Q It's been a while but do you recall that
9 this is exactly the same verbiage that was used in the
10 findings of fact? I can take you back to that if you
11 need to see it again.

12 A It sounds close.

13 Q All right. Let's go two pages further back
14 towards the front. Do you see this is what's
15 identified as page 18?

16 A Yes.

17 Q Do you see paragraph K?

18 A Yes, I do.

19 MR. STEINER: I'd like to note an objection
20 on this line of questioning. This line of questioning
21 appears to address the issue of whether or not the
22 proposed Project is compliant with the light
23 industrial subdivision designation, which is by law a
24 determination to be made by the county, not by the
25 LUC. So I think it's irrelevant to this proceeding.

1 CHAIRPERSON CHOCK: So noted but overruled.

2 Q (By Mr. Pierce): Mr. Jencks, on that note
3 let's go back for a moment. Well, I don't want you to
4 lose your place. Let me just finish reading this and
5 we'll take you back to the Order.

6 So Exhibit K. You see where it says at the
7 very beginning, "Provide for a limited expansion of
8 light industrial services in the area south of the
9 Ohukai and mauka of Pi'ilani Highway"?

10 A Yes.

11 Q Do you have any reason to believe that
12 they're not referring to the 88-acre parcel there?

13 MS. LOVELL: Again I renew my objection on
14 grounds of relevance in that this language was not
15 even adopted in 1995.

16 MR. STEINER: In addition, I would also
17 note that unlike the other language on page 55 that
18 Mr. Pierce referred to, this language it's not been
19 established that it was referred to in any way in the
20 Decision and Order which is before the LUC.

21 CHAIRPERSON CHOCK: Mr. Pierce, is this
22 language in the original D&O?

23 MR. PIERCE: Mr. Chair, the offer of proof
24 is this: Condition number 1 of the Order --

25 CHAIRPERSON CHOCK: Mr. Pierce, was this

1 language in the original D&O?

2 MR. PIERCE: No, but that's not the offer
3 of proof, Mr. Chair. The offer of proof is that
4 Condition 1 requires the Petitioner to get a community
5 plan amendment change. And the only reason that a
6 community plan amendment change would be relevant is
7 if the Land Use Commission back in 1995 was concerned
8 that the Project be consistent.

9 CHAIRPERSON CHOCK: Are community
10 amendments processed at the LUC or at the county?

11 MR. PIERCE: They're processed at the
12 county level, but there's a specific Order by the
13 Commission in 1995 to require consistency with the
14 community plan. So that's our offer of proof.

15 MR. STEINER: I would object to that. It
16 doesn't require consistency with the community plan.
17 It states that a community plan amendment will be
18 obtained.

19 MR. PIERCE: Mr. Chair, that would be
20 utterly a senseless condition if consistency was not a
21 necessary condition precedent.

22 MR. STEINER: And the point here that I'm
23 making is that the amendment was made, whether it's
24 consistent with the designation or not by law under
25 the Lana'i City Case is to be determined by the county

1 not by the Land Use Commission.

2 So for this Commission to find a violation
3 on the basis of inconsistency would be going beyond
4 the scope of this Commission's jurisdiction.

5 MS. LOVELL: Yes, and I would also like to
6 add --

7 MR. PIERCE: Wait, wait, wait. Mr.
8 Chair --

9 CHAIRPERSON CHOCK: Hang on. Hang on.
10 Hang on. Mr. Pierce, it seems as if the background in
11 paragraph K that you're questioning this witness on,
12 we have it right in front of us. I'm not sure what
13 more you need for us to see or read here.

14 MR. PIERCE: Thank you. I can move on.

15 MS. LOVELL: Chair, could I just --

16 CHAIRPERSON CHOCK: Move on, please. Thank
17 you.

18 MS. LOVELL: Chair, could I just note an
19 objection for the record?

20 CHAIRPERSON CHOCK: So noted. Move on.

21 Q (By Mr. Pierce): Mr. Jencks, your clients
22 aren't applying for an amendment to the community
23 plan, the Kihei-Makena community plan, are they?

24 THE WITNESS: No. Because the Project
25 is --

1 Q Mr. Jencks, you answered my question.

2 A No.

3 MS. LOVELL: Wait. Wait. Wait.

4 MR. PIERCE: It did not require an
5 explanation.

6 MS. LOVELL: Wait. Wait. Excuse me, but I
7 think we went over this the last time. We agreed --

8 MR. PIERCE: What is the evidentiary
9 objection, Counsel?

10 MS. LOVELL: Interrupting, interrupting.

11 CHAIRPERSON CHOCK: You guys are all
12 interrupting *me*.

13 MS. LOVELL: Sorry.

14 CHAIRPERSON CHOCK: We're trying to get
15 through this thing and you guys are talking over each
16 other. Mr. Pierce, were you in the process of asking
17 a question to this witness? If so proceed.

18 MR. PIERCE: Thank you.

19 CHAIRPERSON CHOCK: Let him finish and then
20 object.

21 Q (By Mr. Pierce) Mr. Jencks, you're going to
22 have an opportunity to have your witness -- excuse
23 me -- your attorney ask you as many questions as they
24 want on redirect.

25 A Fine.

1 Q I will attempt to give you questions that
2 don't require an explanation. Is that fair?

3 A So far so good.

4 Q All right. So I think you testified before
5 that your clients are not obtaining or requesting or
6 applying for a community plan amendment, is that
7 correct?

8 A Correct.

9 Q Thank you. If they did apply they would be
10 required to get an environmental assessment, wouldn't
11 they?

12 MR. STEINER: Objection. Calls for
13 speculation and calls for a legal conclusion. This
14 witness is not a lawyer.

15 CHAIRPERSON CHOCK: He can't testify to
16 what his client's going to do? Are going to get an
17 EA? Yes or no?

18 MR. STEINER: He asked him if he did apply.
19 He's already said that they're not going to. Then he
20 asked: Well, if he did they'd be required to get X,Y
21 and Z which calls for speculation 'cause they haven't
22 applied. He said they're not going to. And it also
23 requires a legal conclusion.

24 CHAIRPERSON CHOCK: Want to restate your
25 question?

1 MR. PIERCE: I can do it this way
2 Mr. Chair.

3 Q Mr. Jencks, you testified earlier that you
4 have a *great* deal of entitlement experience, correct?

5 A I wouldn't say a *great* deal. Enough.
6 (Laughter)

7 Q Would you have enough to where, in fact,
8 this is not an esoteric concept, is it? Developers
9 need to know when an EA is going to be triggered,
10 don't they?

11 A Yes.

12 Q In fact we talked earlier about that
13 exhibit which shall not be named, but you in fact were
14 the head person on a much more complex, very complex
15 EIS, right?

16 A That's a question to me?

17 Q Yes.

18 A Yes.

19 Q And you understand the EIS law sufficiently
20 to know what some of the triggers are, right?

21 A Yes.

22 Q Would a request for a change in the
23 community plan made by a landowner trigger an
24 environmental assessment under Chapter 343?

25 MR. STEINER: Objection. Calls for legal

1 conclusion. If he knows he can answer.

2 CHAIRPERSON CHOCK: Do you know?

3 THE WITNESS: Yes.

4 Q (By Mr. Pierce): And what's the answer?

5 A Yes.

6 Q It does trigger an EA.

7 A The 343, yes.

8 Q Now, you didn't advise your clients that
9 they didn't need a change, did you?

10 A No.

11 Q Mr. Jencks, the Kihei community plan that
12 we've just looked at, your Project's inconsistent with
13 it, isn't it?

14 A No.

15 MR. PIERCE: Thank you. No further
16 questions, Mr. Chair.

17 CHAIRPERSON CHOCK: Holly, how you doing?

18 THE REPORTER: Break?

19 CHAIRPERSON CHOCK: Sounds like about that
20 time. Okay 10-minute break.

21 (Recess was held.)

22 CHAIRPERSON CHOCK: (Gavel) Redirect?

23 xx

24 xx

25 REDIRECT-EXAMINATION

1 BY MR. STEINER:

2 Q Mr. Jencks, you were asked by the attorney
3 for the Office of State Planning and by Mr. Pierce for
4 Maui Tomorrow and his other clients, regarding the
5 fact that you did not go back to the Land Use
6 Commission to inform them of the fact that there was,
7 that you -- there was an intention by Honua'ula to
8 build affordable housing on one part of the property.
9 And the fact that there was an intention to build a
10 retail by Pi'ilani Promenade.

11 Do you recall when you were asked those
12 questions?

13 A Yes.

14 Q Why didn't you go back to the LUC to ask
15 about that?

16 A Well, my first response is number one,
17 based on the simple reading, and I think I described
18 this earlier today based upon the simple reading of
19 the D&O it seemed to me, based upon the common
20 interpretations of the use descriptors in the D&O and
21 the community plan zoning that we were entitled to
22 build the uses we were proposing, that being the
23 housing and the retail center.

24 The second response is that I took the time
25 to look at the community plan and the D&O and the

1 zoning and deliberately scheduled meetings with the
2 mayor, the director of planning, the deputy director
3 of planning to discuss what it is we were proposing.

4 And made specific reference to the sections
5 of the community plan that Mr. Pierce brought out, and
6 to ask a specific question. "Is this something that
7 comports with your interpretation of these documents?"

8 And the response was "yes it does."

9 So it's always been my impression that the
10 county of Maui makes the final determination on issues
11 in the D&O. For example the director of planning
12 would make the decisions on what would explicitly be
13 permitted in interpreting a D&O in land use. So I
14 went to the areas where I should go to make that
15 determination.

16 Q Who, if you know, who is responsible for
17 enforcing the zoning in Maui?

18 A Be the director of planning.

19 Q Of the county of Maui?

20 A The department of planning, director of
21 planning, county of Maui.

22 Q And who is responsible for enforcing the
23 community plan?

24 A The same. It'd be the department of
25 planning, planning director.

1 Q Who, if you know, is responsible for
2 enforcing if there's an alleged -- or who would be
3 responsible for enforcing a violation of a district
4 boundary amendment?

5 A My understanding it would be the director
6 of planning.

7 Q Of the county of Maui?

8 A The county of Maui.

9 Q Mr. Pierce asked you some questions. He
10 sort of paraphrased paragraphs 27 through 32 of
11 Intervenor's Exhibit 2. Could you get that in front
12 of you again?

13 A Intervenor's Exhibit 2?

14 Q Yes, which is the Decision and Order in
15 this case. You see that?

16 A Okay.

17 Q And he asked you some questions
18 regarding -- he sort of paraphrased paragraphs 27
19 through 32 which talked about the adoption of a new
20 community plan. Do you remember that?

21 A Yes.

22 Q Could you take a look at -- or following
23 that paragraph 34 of the Decision and Order. Do you
24 see that paragraph?

25 A Yes, I do.

1 Q Could you read that?

2 A "The Maui County planning department
3 represented that they will request that the Maui
4 county council condition any change in zoning with the
5 appropriate limitations on commercial uses allowable
6 under the county light industrial zoning ordinance as
7 was done with the Kahului Industrial Park."

8 Q So would this indicate that it appears that
9 there was going to be some, acknowledge there's going
10 to be some commercial use of this property.

11 A Yes.

12 Q This came right after they talked about
13 community planning it light industrial, right?

14 A That's correct.

15 Q In your experience when you were on the
16 Land Use Commission as well as your other experience,
17 the representations that are made to the Land Use
18 Commission are those contained solely within the
19 Decision and Order that is adopted by the Land Use
20 Commission?

21 A No. I think it's the entire record.

22 Q Would that include the Petition and the
23 documents submitted with it?

24 A Yes, absolutely. Technical reports, the
25 meeting minutes. Everything that's submitted is a

1 part of the record.

2 Q Would it also include things that are said
3 to the Commission at the hearings?

4 A Absolutely.

5 MR. STEINER: I have nothing further.

6 CHAIRPERSON CHOCK: Commissioners,
7 questions? Commissioner Teves.

8 COMMISSIONER TEVES: Thank you, Chair.
9 Good afternoon, Mr. Jencks. I have some clarification
10 on the affordable housing. Can we go to Exhibit, I
11 think it's 31? Yeah, that's the one. Can you point
12 out to me where the affordable housing is going to go?
13 Is that in the upper left-hand corner?

14 MR. JENCKS: Yes. The 13-acre parcel is
15 right up here.

16 COMMISSIONER TEVES: That's 13 acres right
17 there.

18 MR. JENCKS: Yes.

19 COMMISSIONER TEVES: Okay. How many units?
20 Is that 250 units?

21 MR. JENCKS: It's 250. 125 -- by condition
22 125 are rental and 125 owner occupied.

23 COMMISSIONER TEVES: That's good. When
24 will it be built? Along what phase?

25 MR. JENCKS: Well, what phase in this --

1 it's a separate ownership so it would run at a
2 different -- it would run at a different schedule than
3 the balance of the Project.

4 It would be built as soon as funding is
5 available, we get through all these legal challenges,
6 and there's some certainty in the marketplace.

7 COMMISSIONER TEVES: Could it be possible
8 that owner could come back to the LUC for the
9 13 acres to the county and request that be changed to
10 retail or industrial instead of housing?

11 MR. JENCKS: No. I have a specific
12 condition in my unilateral agreement for Honua'ula
13 that says affordable housing gets built right there.
14 And I'm not going to back down.

15 COMMISSIONER TEVES: So that's set in
16 stone.

17 MR. JENCKS: That's set in stone.

18 COMMISSIONER TEVES: Okay. Great. What
19 about access to that residential? Can they use the
20 new roads?

21 MR. JENCKS: Absolutely. Absolutely.

22 COMMISSIONER TEVES: Is there any other
23 roads that would be available to them besides this
24 access road?

25 MR. JENCKS: There was, if I may, when

1 Mr. Rice was getting his entitlement for this property
2 there is -- we do have an easement from this corner of
3 the property out to Ohukai Road. It could be used for
4 emergency, egress/ingress. It's a utility easement.

5 The county's 36-inch main distribution line
6 comes right along this easement at this point and
7 crosses the property. There is an alternative access
8 but I've made the commitment to the community that we
9 wouldn't be using that because it goes to Ohukai and
10 all the traffic's coming down here.

11 COMMISSIONER TEVES: So you could never --
12 you could never stop the residential tenants from
13 using the interior roads then, your roads, your
14 interior roads.

15 MR. JENCKS: Correct.

16 COMMISSIONER TEVES: There wouldn't be any
17 restrictions on that.

18 MR. JENCKS: No, no.

19 COMMISSIONER TEVES: Okay. Thank you.

20 MR. JENCKS: You're welcome.

21 CHAIRPERSON CHOCK: Commissioner McDonald.

22 COMMISSIONER McDONALD: Good afternoon,
23 Mr. Jencks.

24 MR. JENCKS: Good afternoon.

25 COMMISSIONER McDONALD: Just a couple, I

1 guess, clarifications. You mentioned that a Motion to
2 Amend the Petition would cause undue delay to the
3 Project. Why would you suspect a Motion to Amend
4 would delay your Project?

5 MR. JENCKS: Well, I've never processed a
6 Motion to Amend with the Commission. I don't know
7 anybody that has. But there are some analogs out
8 there. I have taken a look at them just so I would
9 understand what it would take. I would say to you
10 that it would probably take close to a year to just
11 develop the technical reports. You're basically doing
12 a full disclosure environmental document.

13 It's a very complex document. A lot of
14 technical studies that would have to be done, time
15 spent. So it would take time just to get that done,
16 just the technical sides done. So overall you're
17 talking a couple years here by the time you get
18 through the process.

19 COMMISSIONER McDONALD: Second question is
20 I believe it's Pi'ilani's Exhibit 19, the approval of
21 the construction plans.

22 MR. JENCKS: Okay.

23 COMMISSIONER McDONALD: Okay. I believe
24 the previous witness, Phillip Rowell, had noted that
25 the TIAR is still under review with the DOT.

1 MR. JENCKS: That's correct.

2 COMMISSIONER McDONALD: Has not been
3 accepted. I'm just curious as to how the department
4 of transportation actually ended up signing off on
5 these construction drawings.

6 MR. JENCKS: That's a really good question.
7 We had engaged Mr. Rowell to do a TIAR for this large
8 lot subdivision which is the subject of these plans
9 that he signed off. We had to make some assumptions
10 on traffic and on land use and those kinds of things.

11 So putting this in context this is
12 pre-2000, August of 2009. So we did have a TIAR that
13 had gone through a number of reviews with State DOT.
14 They wouldn't have signed off on this unless they were
15 comfortable with the TIAR that was done at the time.

16 So we had one and they reviewed it. We
17 went back and forth. It was accepted by them. And
18 that's why they signed off on the plan. Otherwise
19 they wouldn't have signed off.

20 COMMISSIONER McDONALD: And there's a
21 little note, looks like "Freddie" signed off on this
22 thing. There's a note below his signature, if I can
23 read it, "For added State DOT conditions outlined on
24 above referenced letter." What are those conditions
25 in reference to?

1 MR. JENCKS: I had -- this process --this
2 is a major highway that the State is interested in,
3 the Upcountry Highway. We worked long and hard
4 getting the State to agree to the design parameters
5 that we have here on these plans. And even as they
6 were signing these plans, this is kind of one of those
7 deals where it's like I'm not quite going, you know
8 (witness motioning with documents.)

9 So I had to -- I had to commit to Freddie
10 that if they had any additional changes on these plans
11 they would be incorporated, made as a part of the
12 Project before I could occupy. And I said, "Fine."
13 He wanted to make sure that he was covered. I said,
14 "That's not a problem for us."

15 COMMISSIONER McDONALD: You know what,
16 Chair, if I may. You know, could we get a copy of
17 that letter that Freddie is referring to as far as the
18 DOT conditions unless it's already in evidence.

19 MR. STEINER: To be honest I don't know
20 whether it is in evidence. If the Commission would
21 like a copy of that letter, Charley, do you have a
22 copy of that letter?

23 MR. JENCKS: If it's in my office I can
24 find it, sure.

25 MR. STEINER: As long as everyone is

1 agreeable we'd be happy to provide a copy of that
2 letter.

3 COMMISSIONER McDONALD: Chair, I'd
4 appreciate it.

5 MR. JENCKS: That's fine.

6 CHAIRPERSON CHOCK: How about tomorrow
7 morning, Charley?

8 MR. JENCKS: Sure.

9 CHAIRPERSON CHOCK: Thank you.
10 Commissioners, any other questions? Commissioner
11 Biga.

12 COMMISSIONER BIGA: Charley, just one. If
13 this Project does go through and proceed, as far as
14 contractors, you'll guarantee the local contractors
15 here in Hawai'i would be able to work on this site.

16 MR. JENCKS: Yes. We've already got a
17 contract with Goodfellow Brothers, Incorporated.

18 COMMISSIONER BIGA: Thank you.

19 CHAIRPERSON CHOCK: Commissioner Matsumura.

20 COMMISSIONER MATSUMURA: Do you have any
21 program where you give a discount to the local
22 businesses like kama'aina rates and the rentals?

23 MR. JENCKS: The subject of making sure
24 that the retail mix incorporated local folks came up
25 in a discussion that we had with Mayor Alan Arakawa

1 because he was keen on that and we committed to that.

2 I can't tell you that it's defined and
3 refined to the point where we have a document at this
4 point in time but we did commit to that to help out.

5 COMMISSIONER MATSUMURA: Okay.

6 CHAIRPERSON CHOCK: Commissioner Inouye.

7 COMMISSIONER INOUE: Thank you, Chair.

8 Thank you for your testimony, Mr. Jencks. I believe
9 you testified that you had a hand in preparing the
10 16th annual reports for both Pi'ilani and Honua'ula.

11 MR. JENCKS: Correct.

12 COMMISSIONER INOUE: Okay. Did you
13 prepare the response to Condition 15 for Honua'ula or
14 did somebody else prepare it at your...?

15 MR. JENCKS: It was prepared by the Project
16 attorney.

17 COMMISSIONER INOUE: Oh, okay. But you
18 are representing Honua'ula as well as Pi'ilani South
19 and North?

20 MR. JENCKS: That's correct.

21 COMMISSIONER INOUE: In it -- and this
22 report was sent in, I believe, in October after the
23 Motion to Bifurcate was submitted. But it says
24 basically that Honua'ula is going to come in with a
25 Motion to Amend, not -- yeah a Motion to Amend. I've

1 heard testimony back and forth about that being
2 withdrawn with the bifurcation. Is this statement
3 incorrect in the 16th annual report?

4 MR. JENCKS: That's a legal issue. I
5 wouldn't be comfortable answering that.

6 COMMISSIONER INOUE: Okay. That's why I
7 asked.

8 MR. STEINER: I'd be happy to respond if
9 you'd like me to.

10 COMMISSIONER INOUE: Okay, if you can.

11 MR. STEINER: Yes. Circumstances changed
12 and that the determination to file the motion was made
13 that we were not going to be filing a Motion to Amend.
14 Therefore the bifurcation motion on that grounds was
15 withdrawn.

16 Therefore, the statement that we are going
17 to be moving to amend is no longer valid. If, you
18 know, I'm stating that for the Commission. But if the
19 Commission would like we could submit an update to
20 that sixteenth annual report if that would be
21 preferable.

22 COMMISSIONER INOUE: No, I'm not insisting
23 on it. But I just wanted to make a clarification.

24 MR. STEINER: I wanted to be clear. We are
25 not at this point intending to move to amend.

1 COMMISSIONER INOUE: Thank you.

2 CHAIRPERSON CHOCK: Commissioners, any
3 other questions for this witness? Thank you for your
4 testimony, Mr. Jencks.

5 MR. JENCKS: You're welcome.

6 CHAIRPERSON CHOCK: Mr. Steiner, do you
7 have another witness?

8 MR. STEINER: No. No further witnesses.

9 CHAIRPERSON CHOCK: Mr. Kam.

10 MR. KAM: No. No witnesses.

11 CHAIRPERSON CHOCK: County?

12 MS. LOVELL: Thank you, Chair. The county
13 of Maui calls Will Spence our planning director.

14 WILLIAM SPENCE

15 being first duly sworn to tell the truth, was examined
16 and testified as follows:

17 THE WITNESS: I do.

18 CHAIRPERSON CHOCK: Name and address.

19 THE WITNESS: My name is William Spence.
20 My business address 250 South High Street, Wailuku.

21 CHAIRPERSON CHOCK: Proceed.

22 DIRECT EXAMINATION

23 BY MS. LOVELL:

24 Q Thank you, Chair. Good afternoon,
25 Mr. Spence. Would you please state for the record

1 your current position with the county of Maui?

2 A I'm the planning director for the county.

3 Q Would you please summarize briefly your
4 background, training experience and education in the
5 field of planning.

6 A I have an undergraduate degree in urban and
7 regional planning from Polytechnic in Pomona. A
8 number of people have said that's hard to say. I
9 worked in Los Angeles doing technical EIS work in air
10 quality issues.

11 When I moved to Maui I spent 10 years as a
12 staff planner where I worked on community plans. I
13 did a number of special projects like comprehensive
14 zoning for interim zoned properties.

15 I also processed the gamut of discretionary
16 permits, SMA permits, changes in zoning which would be
17 legislative, special use permits, those kinds of
18 things.

19 Q When you say "staff planner" you mean for
20 the county of Maui's planning department?

21 A Yes.

22 Q Are your qualifications and background, by
23 the way, set forth in Exhibit 3, the County's
24 Exhibit 3?

25 A I believe that would be my resumé.

1 Q Thank you. Would you please continue.

2 A Okay. From 2002 to 2010 I was a private
3 consultant where I represented landowners in either
4 discretionary or legislative approvals before the
5 county. Then in 2012, excuse me, 2011 when the
6 current mayor was re-elected to office, he appointed
7 me as the planning director.

8 Q And you have served as the planning
9 director since that time.

10 A Yes, for almost two years now.

11 MS. LOVELL: At this time we offer
12 Mr. Spence as an expert in the field of planning.

13 CHAIRPERSON CHOCK: Parties, any
14 objections?

15 MR. STEINER: No objection.

16 MR. KAM: No objection.

17 MR. YEE: No objection.

18 MR. PIERCE: No objection.

19 CHAIRPERSON CHOCK: Proceed.

20 Q (By Ms. Lovell): Mr. Spence, at the
21 beginning of these proceedings there was, I believe,
22 an objection by the Intervenors to your
23 qualifications. I believe the objection was you that
24 had stated you were not an expert in the Land Use
25 Commission. Could you clarify for the Commission,

1 please, what you meant by that.

2 A The proceedings before the Land Use
3 Commission, I mean just procedural issues, are
4 somewhat different than, say, either of our three
5 planning commissions or other boards that our office
6 staffs.

7 For instance, the Chair has the authority
8 to dispose of motions, which in any of our commissions
9 the chair does not have that kind of authority.

10 So those kinds of things, you know, I can't
11 give you the background on why the chair can do that
12 or not. So that part is unfamiliar to me.

13 The planning issues of the four state
14 districts, conditions on permits or on entitlements or
15 procedures or legal, you know, the legality of the
16 Commission's authority, those things are very familiar
17 to me.

18 Q You didn't mean to imply that you don't
19 believe that you're an expert in the field of
20 planning, did you?

21 A No. Absolutely not.

22 Q Next I would like to ask you to summarize
23 briefly your written testimony. But, Chair, I will
24 note that our written testimony, which is the County's
25 Exhibit 1, has been objected to. So I renew my offer

1 of the written testimony in evidence at this time.

2 CHAIRPERSON CHOCK: Chair's going to admit
3 the exhibit.

4 MS. LOVELL: Thank you.

5 Q Do you have County's Exhibit 1 in front of
6 you, Mr. Spence?

7 A Yes, I do.

8 Q Would you please summarize your testimony
9 to the Commission.

10 A I'd like to sort of give a really brief
11 summary, then go into a little bit of the details of
12 why I believe of the evidence here. First off it's
13 the County's position that there has been no breach of
14 any of the conditions of the Commission's Decision and
15 Order.

16 Q Could I stop you right there.

17 A Yes.

18 Q How did you reach that conclusion?

19 A When I reviewed the Decision and Order I
20 look for -- and the assertion is that this was
21 supposed to be a light industrial development. And
22 when I look at the Decision and Order I see no such
23 specific condition that says "only light industrial"
24 or a "percentage of light industrial" or, you know,
25 only a certain amount of "commercial". There's no

1 specific condition on that.

2 The assertion is there's a violation of
3 representations made to the Commission. So when I
4 look at the representations made to the Commission,
5 there was quite a bit of discussion of what could be
6 done on the property with, you know, this Commission's
7 approval for urban. Then the Petitioner said: Well,
8 if you grant us urban we're going to ask the Maui
9 county council to zone us light industrial.

10 And then there was discussion on the record
11 through Mr. Sodemani and about what all of those
12 different uses could be. They mention retail, all the
13 uses in B-1, B-2, B-3, all of our, the County's
14 business districts as well as apartments which are
15 allowed as of right in the Light Industrial District.

16 So those things were represented to the
17 Commission in open session similar, I imagine it was a
18 similar session as we're having here.

19 The Commission discussed -- I should rather
20 say the planning director at that time Mr. Brian
21 Miskae, he suggested to the Commission that should you
22 grant the urban designation he was going to request
23 that the county council impose a condition to limit
24 the commercial uses on the property.

25 So there was specific discussion on the

1 record before this Commission that there would be a
2 condition put on or at least requested of the county
3 council.

4 The Commission at that time in 1995, chose
5 not to put a specific condition on this Decision and
6 Order. So even though that was in the Commissioners'
7 mind, the Commission made no such condition on that
8 Decision and Order.

9 So lacking such a condition I can't see how
10 there would be any breach of such a condition.

11 Q Would you please continue with your summary
12 of your written testimony?

13 A Specifically -- the summary picked up most
14 of it. During the hearings before the Commission in
15 '95 that Petition included as a part of the marketing
16 study it included a copy of the County's M-1 Light
17 Industrial District zoning and also included the B-1,
18 B-2 and B-3 business zoning ordinances.

19 Excuse me. That was a part of the market
20 feasibility study and economic report. So that was in
21 the Commission's record at that time. The Project
22 throughout the Decision and Order eight times it
23 refers to a commercial *and* industrial development. So
24 certainly within the Decision and Order there was not
25 a limitation on strictly light industrial.

1 Q Did your review of the record before the
2 Commission in 1995 find anything about apartment uses?

3 A Yes. There was as a part of -- well, as a
4 part of that M-1 light industrial ordinance apartments
5 are listed specifically as a permitted use.

6 Then in discussion in testimony from the
7 market feasibility expert Mr. Lloyd Sodetani, it was
8 Commissioner Kajioka at that time.

9 And the Commissioner asked, "It appears
10 that" -- and I'm reading a section of the transcript
11 "It appears that the terms of the permitted uses
12 within light industrial, it appears to be pretty broad
13 B-1, B-2, B-3 districts permitted uses. Even
14 apartment houses are permitted use in light
15 industrial."

16 Mr. Sodetani responds "Right."

17 "Question: In other words, we could have a
18 preponderance of retail and service type
19 establishments in this."

20 Mr. Sodetani replies, "That's a possibility
21 but I would like to say that the light industrial
22 entities would probably be more likely to be located
23 in a project like this rather than commercial entities
24 as described."

25 "Question: But there's no way you can stop

1 them.

2 "Answer: That's true, but I think the
3 market will dictate that as well."

4 So that was what all the Commissioners
5 heard at that time.

6 Q Then I believe that there was discussion
7 that you briefly mentioned with Director Miskae at the
8 time of what he would do at the Maui county council
9 when it came up for a change in zoning. Could you
10 describe what happened there?

11 A The planning director testified in front of
12 the Commission that there was a broad range of uses
13 allowed by the M-1 industrial zoning, and that he
14 intended to seek a condition when the county council
15 zoned the property to they would limit the amount of
16 light industrial uses.

17 Q That would limit the commercial?

18 A Excuse me. That would limit the commercial
19 uses on the property. This has been a fairly standard
20 practice within Maui County when properties come in
21 and request zoning of the county, especially for light
22 industrial.

23 Sometimes the county council will place
24 conditions on properties and sometimes they will not.
25 In this case, even though requested several times by

1 the planning department, the council chose not to
2 place any conditions to limit the commercial uses on
3 this property.

4 Q Mr. Spence, when there is a change of
5 zoning such as occurred here on this Project, and the
6 planning department advocates for restriction of uses
7 in other words, more restrictive uses than are allowed
8 within our very broad category of light industrial, is
9 that a public proceeding?

10 A Yes, it is.

11 Q Can you describe the procedural path that's
12 taken and the public's participation?

13 A When an Applicant comes in for a change in
14 zoning there are certain notification requirements
15 just for applying.

16 There are notices within the paper, within
17 the newspaper to surrounding landowners. I'd have to
18 look specifically in the code if it's in 500 feet or
19 just adjoining landowners or what.

20 The planning department processes that
21 application which once it hits the planning department
22 is a public document. Anybody can come in and review
23 the file. The planning commission holds a public
24 hearing. That public hearing is advertised in the
25 newspaper. It is -- there's an official notice sent

1 to surrounding landowners within 500 feet. The
2 planning commission conducts a public hearing on that.

3 Once the commission is done with the
4 hearing they make a recommendation to the council --
5 excuse me -- that and the entire record up to that
6 point is sent up to the council. That's referred to
7 committee. The committee then has their own public
8 hearings.

9 Officially the public hearing takes place
10 with the planning commission but, nevertheless, the
11 committee holds a public hearing in which any members
12 of the public can come and testify.

13 Once -- because a change in zoning is
14 legislative it's passed out of committee to the full
15 council for two readings. At either one of those
16 readings there's also opportunity for members of
17 public to testify.

18 Q So with respect to the planning
19 department's recommendation at that time that a
20 specific limitation be put on this Project to describe
21 how much commercial would be allowed versus how much
22 light industrial, the public had four different
23 opportunities to come in and support that
24 recommendation?

25 A That's correct.

1 Q Or to argue against it.

2 A Yes, that's correct.

3 Q What finally happened when the county
4 council took the issue up?

5 A The county council did not adopt any
6 condition that would limit the commercial use on the
7 property.

8 Q Has the county council done that in other
9 instances?

10 A Yes, they have.

11 Q Are you aware of any instances where the
12 Land Use, the state Land Use Commission has placed
13 such limitations?

14 A Yes. I'm aware of Maui Business Park Phase
15 II where -- I have it in my testimony -- in Maui
16 Business Park Phase II that's docket No. A03-739
17 there's an express condition regarding the amount of
18 commercial use. I can read it into the record. It is
19 rather long.

20 It says, "For a period of eight years from
21 the date of the County's approval of zoning for the
22 Project, a total of at least 50 percent of the Project
23 acreage shall be (A) Used and developed by the
24 Petitioner for non-retail light industrial use and/or
25 (B) Sold or leased to and developed and used by a

1 third-party buyer for non-retail light industrial
2 use."

3 Q Then did the condition go on to expressly
4 define the phrase "light industrial" as used in that
5 paragraph?

6 A Yes, it does. It says, "The phrase 'light
7 industrial' as used in this paragraph includes
8 warehousing and distribution type of activity as well
9 as compounding, assembly for treatment of articles or
10 materials with the exception of heavy manufacturing
11 and processing of raw materials."

12 Q As the director of planning for the county
13 why is it important for you to have explicit
14 conditions such as that one in the Land Use Commission
15 Decision and Order?

16 A Because if we do not have explicit
17 conditions we can't tell what the Commission's -- and
18 I'm speaking of your decisions and order -- unless
19 it's explicit like this I can't tell if there's a
20 breach or not.

21 Q All right. Continuing, then, with your
22 summary of your testimony. Your testimony also
23 directs the Commission's attention to certain other
24 projects on the island of Maui that were built with
25 light industrial zoning, correct?

1 A That's correct.

2 Q Could you summarize that part of your
3 testimony, please.

4 A When -- it's very common in Maui County
5 that properties that are zoned light industrial can be
6 used for a wide variety of uses. I think that at one
7 time light industrial was -- this zoning district was
8 adopted roughly in the '60s, early '60s.

9 The economy was very different. It was a
10 largely agrarian kind of economy. The plantations
11 were going full steam ahead. So there was a lot of
12 land zoned light industrial.

13 But that zoning also allowed all these
14 business uses. So over time a lot of properties, as
15 the economy transitioned, so did these properties
16 transition from baseyards or equipment storage or
17 other kinds of industrial uses into commercial uses.

18 Examples would be Maui Mall. That property
19 was a baseyard at one time if you look at the old
20 aerial photos. It's now one of our malls. If you
21 look at Queen Ka'ahumanu Center, which is currently
22 the largest mall on the island, that's zoned heavy
23 industrial.

24 But more recent projects that have been
25 build would be like Lahaina Gateway in Lahaina that I

1 think it's been referred to as Lahaina Industrial
2 Park. That's more recent. There's a large commercial
3 component to that.

4 But I think also apartments are very, are
5 very common. Probably the largest apartment project
6 on the island that both community planned light
7 industrial and zoned light industrial is the 'Iao
8 Parkside where you have 480 apartment units.

9 Opukea on the west side was also community
10 planned light industrial and is zoned light
11 industrial. That's, I believe, 120 units.

12 Q I think on your testimony it says 114 on
13 page seven.

14 A That's correct. And I would note that
15 those were built -- the building permits for those
16 structures were pulled in 2007, so fairly recent
17 construction. This is 'Iao Parkside dates from
18 approximately 1994. Opukea in 2007. There's a number
19 of other apartment units, structures and mixes of uses
20 throughout the county ranging from the '60s up to more
21 recent days.

22 Q Is there anything else you would like to
23 direct the Commission's attention to in your written
24 testimony before I move on to some more specific
25 questions?

1 A Go ahead.

2 Q Okay. I'd like to turn now to the issue of
3 a conceptual plan. We've heard a lot so far in this
4 proceeding about a conceptual plan that was presented
5 to this Commission for a 123-lot subdivision in 1994
6 and 1995.

7 What does the term "conceptual plan" mean
8 to you as a planner?

9 A As a planner who has been doing this on,
10 specifically on Maui Island for 20 years, when I look
11 at a set of plans that is marked 'conceptual', it can
12 mean this is what we could build or what could be the
13 result of the project.

14 But those plans are presented at the very
15 early stage of entitlement process. I would see in a
16 case like this the early stage would be presenting to
17 the Land Use Commission. That's the very first step.
18 If you can get an urban designation on your property
19 you can tell the Commission, "This is what we intend
20 to build."

21 But then you have other steps through that
22 where this project may change. You then have to go to
23 the Maui planning commission and to our county
24 council. And then if you're in the Special Management
25 Area you have to get a special use permit -- excuse

1 me, an SMA permit.

2 The conditions imposed by any of these
3 decision-making bodies along the way can substantially
4 change the project. This Commission may put
5 conditions on or the county council may, which may
6 change that initial concept that was presented at the
7 beginning. And what you may end up with is completely
8 different.

9 A project can also change with the market,
10 you know. There was earlier testimony today and I
11 didn't realize just subdivision took years to do. But
12 through the Land Use Commission and the through the
13 county council it can take five, seven, 10 years to
14 get those entitlements. The entire world economy has
15 changed in the last 10 years.

16 It's difficult to say that "this concept
17 that I'm presenting today is exactly what I'm going to
18 build." State law and county law can change in the
19 meantime. The zoning or the State Land Use laws,
20 environmental laws.

21 Then, finally, once those entitlements are
22 given and 10 years later and conditions are changed
23 there may be other market demand. There may be buyers
24 that are looking for raw land that's entitled, and
25 looking to build something different than that

1 original concept.

2 Q If any kind of commission, whether it be
3 the state Land Use Commission or the Maui planning
4 commission, wanted to hold a developer to a conceptual
5 plan that was presented, are there mechanisms for
6 doing that?

7 A Yes. There would have to be specific
8 conditions on projects either through, say, through
9 this process, through the district boundary amendment
10 process, or change in zoning.

11 We've discussed those kinds of conditions
12 specifying an amount of commercial or specifying a
13 certain layout or any number of conditions related to
14 the project.

15 Q For example, could a commission considering
16 a project attach a conceptual plan as an exhibit and
17 say that the developer had to develop in accordance
18 with that attachment?

19 A Yes, they can. And we have an example with
20 Maui Lani, which is not in evidence here today. But
21 that's like the one zoning ordinance that has a very
22 specific map attached to it. So that's certainly
23 within Maui County's experience.

24 Q But nothing like that was done here.

25 A No.

1 Q Next I'd like to turn to the issue of the
2 County's light industrial zoning. There's been a lot
3 of the discussion about this. And we've heard the
4 terms B-1, B-2, and B-3.

5 Would you explain in a little more depth,
6 please, what business uses are allowed in the M-1
7 light industrial zoning district in the county of Maui
8 and how those uses relate to B-1, B-2 and B-3?

9 A In my earlier testimony, gosh, it was a
10 month ago, I explained a little bit how Maui County
11 zoning code is a Euclidian zoning code. It's a very
12 old style of zoning. It contains tiers. So when you
13 have -- our business districts B-1 is the Neighborhood
14 Business District I mean for uses serving the
15 neighborhood.

16 You have B-2 which is more general. And
17 then you have a B-3 which is a more intensive use
18 which incidentally includes some light industrial
19 kinds of uses.

20 Those things are then considered compatible
21 with light industrial kinds of uses because they're
22 considered not as intense. So the light industrial
23 zoning is supposed to permit the most intensive kinds
24 of uses: Manufacturing, noisy sorts of things,
25 perhaps hazardous materials, baseyards, all these

1 kinds of things. So all those other uses are
2 considered to be a little more benign and therefore
3 allowed within that district.

4 Q That would include retail.

5 A That would include retail, any kinds of
6 retail, any kind of office use, et cetera.

7 Q And apartment buildings?

8 A Apartment buildings are listed in our
9 zoning code specifically as a permitted use within
10 light industrial.

11 Q I believe at one the earlier sessions in
12 this docket there was a question because there
13 appeared to be some ambiguity in the way our M-1
14 zoning ordinance treated dwellings versus apartments.

15 Has that been addressed by the county
16 council?

17 A Yes, it has. And actually they passed the
18 ordinance just last month.

19 Q For the record that's Exhibit 7 to the
20 County's submissions in this docket.

21 A And what the county council did --

22 MR. PIERCE: Mr. Chair, we're going to
23 object to this line of questioning because what we're
24 talking about here is -- well, first it's irrelevant.
25 The M-1 zoning that's at issue was from 1995. The

1 County's already put that into evidence. So we would
2 ask, we would be objecting to the introduction of this
3 testimony and this evidence.

4 CHAIRPERSON CHOCK: Overruled. Proceed.

5 MS. LOVELL: Thank you.

6 THE WITNESS: And actually this property
7 was rezoned in 1999. County zoned. There was an
8 ambiguity within the M-1 Light Industrial District
9 wherein the beginning part of it where it's like the
10 purpose and intent. It said this district is not for
11 residential uses. But then at the very end of the
12 list of permitted uses it said apartments are
13 permitted. So there was an internal conflict in that.

14 So the county council just recently revised
15 this section of our code to say that residential uses
16 are excluded except for dwelling units located above
17 or below the first floor and apartments. So
18 apartments are expressly a permitted use in this
19 section as well as in the permitted uses.

20 Q (By Ms. Lovell) Even before the amendment
21 how did the county zoning authority interpret the M-1
22 zoning with respect to apartments?

23 A The first part of this -- all of our zoning
24 districts are, they have different sections. The
25 first section is -- at least this used to read

1 generally but what it is is a purpose and intent.
2 This is the intent of this zoning district.

3 But then sections further down it will list
4 the actual permitted uses. So you can look at the
5 intent of the zoning district and it'll talk about
6 warehouses or different uses or predominant uses,
7 those kinds of things.

8 But then when you get down to the specific
9 uses, that's not intent anymore. That's this similar
10 specific uses that are permitted by that zoning
11 district. And apartments being listed there we have
12 allowed them.

13 Q Next I would like to turn to the issue of
14 the community plan which I actually had not intended
15 to go into because we had objected to its relevance.
16 But since it came up, let me first ask whether the
17 Decision and Order in this docket required the
18 developer to get a community plan amendment.

19 MR. PIERCE: Objection. That calls for a
20 legal conclusion.

21 MS. LOVELL: I will rephrase the question.

22 CHAIRPERSON CHOCK: Thank you.

23 Q (By Ms. Lovell): Is it your understanding
24 from reading the Decision and Order, Mr. Spence, that
25 the developer was required by the state Land Use

1 Commission to get a community plan amendment?

2 A I'd like to look at the exact...

3 Q I believe it might be Condition No. 1.

4 A Okay. Which page? Proposed Order.

5 Q Of the Decision and Order.

6 A Yes. That condition reads, "Petitioner
7 shall obtain a community plan amendment and change in
8 zoning from the county of Maui." My understanding is
9 without a legal conclusion is the Petitioner would
10 have to do that.

11 Q Did the Petitioner do that?

12 A Yes. They did both of those things.

13 Q So the Petitioner did already get a
14 community plan amendment.

15 A Well, I would say that through the update
16 of the community plan process that area was changed
17 from a project district that was supposed to be
18 residential to a light industrial designation.

19 Q And they also did get a county change in
20 zoning to light industrial, correct?

21 A Yes, they did.

22 Q Now, the 1992 Kihei-Makena community plan
23 was not in effect in 1995, was it?

24 A That's correct.

25 Q Could you just tell us generally what is a

1 community plan?

2 A The community plan is a guide for many
3 different things. Certainly one of those things very
4 important is to guide decision-making on land uses.
5 The community plan in this case eventually through the
6 process was designated light industrial.

7 What that tells the decision-makers, in
8 this case our county council, is this is what you must
9 zone this property.

10 The county council with a light industrial
11 designation the county cannot zone it single family.
12 They cannot zone it hotel. They must follow the
13 community plan which is light industrial.

14 When the council zones light industrial,
15 unless there are specific conditions limiting the uses
16 that light industrial zoning allows everything
17 underneath that's listed in the light industrial
18 ordinance.

19 Q Including, for example, apartments.

20 A Yes. That would be one of the permitted
21 uses.

22 Q Or retail.

23 A Yes. That would be definitely permitted
24 under that zoning district.

25 Q Okay. There was a question raised earlier

1 about whether this proposed Project, proposed by the
2 Pi'ilani Partners, is consistent with the Kihei
3 community plan that was enacted after the Decision and
4 Order in this it docket. Do you have an opinion on
5 that?

6 A This Project is consistent with the
7 Kihei-Makena community plan. The reason I say that,
8 when the county council -- okay, the community plan is
9 a guide towards decision making. So I'll say these
10 community plans show two things. They show existing
11 uses. So they'll show all the residential
12 subdivisions, the other shopping centers, hotels,
13 parks, et cetera. But they also show where future
14 development is going to go.

15 And when the community plan, as in this
16 case is light industrial, like I said the county
17 council is going to zone that light industrial. The
18 council as a matter of law in 19-510 of the Maui
19 county code, says the council has to zone consistently
20 with the community plan.

21 They are -- so in that decision-making they
22 will look at the text of the plan which the issue has
23 been raised and we'll probably get other questions on
24 it too.

25 The questions in the text of that plan are

1 that there shall be predominantly light industrial
2 uses with, you know, the commercial uses only being,
3 you know, there to complement the industrial uses. I
4 believe that's close enough paraphrase.

5 The county council will look at something
6 like that and then they will, and then as we also said
7 listening to the former planning director,
8 recommending a limitation on the zoning. And the
9 county council then makes a decision.

10 Using this guide they can either choose to
11 go with that recommendation to limit the uses or they
12 may decide not to.

13 In this particular case the county council
14 decided not to implement that specific language in the
15 plan and did not place a condition on it. The
16 community plan is not zoning.

17 Q What is the implementing mechanism for the
18 community plan?

19 A The implementing mechanism specifically in
20 this case is the legislative act of zoning the
21 property.

22 Q Next I would like to ask you some questions
23 about the characteristics of light industrial
24 development on Maui. Can you describe how light
25 industrial projects have been developed on Maui?

1 MR. PIERCE: We would object as irrelevant
2 and redundant.

3 CHAIRPERSON CHOCK: Overruled. Continue.

4 THE WITNESS: The light industrial
5 subdivisions on Maui, as this would have been
6 developed as if it had gone through as that particular
7 Project, they're definitely a hodgepodge of different
8 uses.

9 When the property is subdivided into
10 individual lots, property owners, people will come buy
11 those properties either for speculation purposes to
12 build multi-tenant kinds of buildings to house a
13 number of different businesses.

14 You can get larger entities to come in and
15 build very large buildings. I think the term earlier
16 used today was "butler" building. So it's a mishmash
17 of architectural styles.

18 There's construction baseyards, heavy
19 equipment baseyards, the storage of materials. It's
20 overall around Maui county they're very unsightly.

21 But unsightly the purpose of that
22 subdivision is form -- excuse me, function over form.
23 A retail establishment is meant to be attractive to
24 attract retail buyers. A light industrial subdivision
25 development it's functional in nature not meant to be

1 attractive.

2 Q (By Ms. Lovell) Now, we have a couple of
3 fairly recent industrial parks that I believe were
4 mentioned earlier, one on Waiale Road in Wailuku and
5 one in Lahaina. How are the uses -- well, what uses
6 have been allowed in those so-called industrial parks?

7 A The one on Waiale Road, Consolidated
8 Baseyards, and by the way there was specific
9 limitations on that zoning enacted by the council. I
10 believe that was in 2003 or 2004 when Mr. Foley was
11 planning director.

12 That is predominantly industrial. Just per
13 chance, because I knew I'd probably be testifying
14 today, I took a drive around there to see what was
15 there. You have a number of warehouses. You have, as
16 I described, some multi-user tenant buildings. You
17 have construction baseyards which tend to acquire
18 everything under the sun. They're unsightly and just
19 have various parts strewn about the property.

20 Q And that is with a specific limitation.

21 A Yes. That's a very specific limitation.

22 Q What about Lahaina, was there a specific
23 limitation on that industrial property?

24 A That zoning I did not check, but again that
25 is also -- I would say there's probably not a whole

1 lot of limitations on it because we have some, it's a
2 really popular restaurant up in that area, Star
3 Noodle.

4 Q Highly recommended. (laughter)

5 A Highly recommended. Next time the
6 Commission is over on the west side.

7 The various uses: car washes, warehousing
8 uses, again storage yards and all those kinds of uses
9 are intermixed. There's no unifying architectural
10 style.

11 Q What about Wailuku Mill Yard. Can you tell
12 us what some of the uses are in that project?

13 A The union halls, one of the older light
14 industrial parks on Maui. Union halls are in there.
15 I don't know what the proper term is, there's
16 warehousing uses. There's distribution centers.
17 There are professional offices. There are ethnic bars
18 within that development.

19 Again, it's quite a mishmash of uses.
20 There's not -- if you want to use plenaries for that
21 kind of thing. There's no sense of place. There's no
22 -- it looks very unplanned.

23 Q Next, I'd like to turn just to the, briefly
24 to the issue of enforcement. Were you asked by the
25 Intervenors in this case to take any enforcement

1 action against the Pi'ilani Promenade Project?

2 A I was sort of waiting for an objection, but
3 yes, I was.

4 Q What did you do in response to that
5 request?

6 A Gosh, I forget if we wrote a letter or not.
7 There is basically nothing to enforce at this time.

8 Q And why is that?

9 A Well, for a number of reasons. When we
10 have a -- there's no specific use on the property as
11 yet. It's still vacant. They're doing some grading,
12 but two, we have a very vague, at least to me, we have
13 a very vague condition on the Decision and Order as to
14 representations made to the Commission. I can't
15 interpret that.

16 I mean if you had something like a Maui
17 Business Park II, I can start counting, okay this is
18 eight years. This is the percentage of retail or
19 commercial you can have. I can start measuring those
20 things.

21 Representations made to the Commission I
22 don't -- I'm not the one that can determine whether
23 there is a breach of that condition or not. That's
24 what we are here for today. This is a Commission
25 decision, not mine.

1 Q Having looked at the entire record that was
2 before the Commission in 1994 and '95 and having
3 looked at some of the representations that were made
4 at that time, did you form a personal conclusion as to
5 whether there's a violation at this time?

6 MR. YEE: I'm sorry. Can I just clarify?
7 When you asked for a personal conclusion, are you
8 asking, I would have thought you're asking for an
9 opinion of the director rather than the opinion of the
10 individual.

11 MS. LOVELL: Yes. As the director of
12 planning.

13 MR. YEE: Okay. I was just wondering.

14 THE WITNESS: As the director of planning
15 my opinion is there is no violation of the conditions
16 of this Decision and Order.

17 Q (By Ms. Lovell): Did you want to continue
18 or shall we just leave it at that?

19 A No. I would just say again lacking a
20 specific condition.

21 MS. LOVELL: Thank you.

22 CHAIRPERSON CHOCK: Questions, Mr. Steiner?

23 MR. STEINER: Just briefly.

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25 CROSS-EXAMINATION

1 BY MR. STEINER:

2 Q You talked about some of these different
3 industrial uses at some of these different projects.
4 I just want to briefly go over whether certain uses
5 would qualify as a light industrial use as opposed to
6 a business use.

7 For example, a lumber yard, would that be
8 considered a light industrial use?

9 A We would consider that light industrial.

10 Q Okay. And a plumbing supply store would
11 that be considered light industrial?

12 A Yes, it would.

13 Q Would that be considered light industrial
14 even if the public was allowed to come in and buy
15 plumbing supplies there?

16 A Usually those kinds of stores or shops or
17 industrial uses the general public *can* come in and
18 purchase materials.

19 Q Okay. Another example would be an
20 electrical supply store. Would that be light
21 industrial?

22 A That's correct.

23 Q You heard Mr. Jencks testify about a home
24 improvement type of store available to the general
25 public as well as contractors, correct?

1 A That's true.

2 Q That would be something that would combine
3 all these light industrial uses. You talked about the
4 lumber yard, the plumbing, the electrical, correct?

5 A That's correct. These uses standing along
6 a lumber yard would be a light industrial uses. It's
7 more of a warehousing kind of thing.

8 I've been to electrical supply shops where
9 the contractors shop and I can purchase them. You
10 combine them all together into a home improvement
11 thing, the public is still welcome there; the
12 contractors also shop there.

13 Q So would that qualify as light industrial
14 or retail or is it both?

15 A It's a little of both, but because of the
16 nature of what is being sold I would more classify it
17 as light industrial.

18 MR. STEINER: Thank you. Nothing further.

19 CHAIRPERSON CHOCK: Mr. Kam?

20 MR. KAM: Just a few questions, thank you,
21 Chair.

22 CROSS-EXAMINATION

23 BY MR. KAM:

24 Q Dr. Spence, Ms. Lovell was asking you about
25 enforcement. I want to ask you one follow up question

1 about that. As planning director you have the
2 statutory obligation under chapter -- HRS Chapter 205
3 to enforce Land Use Commission Decision and Orders, is
4 that not correct?

5 A That's correct.

6 Q You also talked about, I think you said
7 that without a specific condition in the Decision and
8 Order you cannot tell if there's been a breach or not,
9 is that correct?

10 A That's correct.

11 Q If you, as the officer charged with the
12 statutory obligation to enforce the Decision and
13 Order, if you cannot tell whether there's been a
14 breach, in your opinion is it reasonable to expect a
15 subsequent landowner to be able to tell whether
16 there's been a breach if there's no specific condition
17 in the Decision and Order?

18 MR. PIERCE: Objection. That calls for a
19 legal conclusion. It requires the witness to
20 speculate. In addition -- well, I'll leave it at
21 that.

22 CHAIRPERSON CHOCK: Can you rephrase your
23 question, Mr. Kam.

24 Q (By Mr. Kam): Director Spence, in your
25 opinion would a prohibition or a restriction against

1 apartment use or retail use on the subject property
2 that is not specified in the Order be reasonably
3 ascertainable?

4 A Sorry. I just want to be clear. I was
5 thinking more of an answer than as you were asking.

6 Q In your opinion would a prohibition or a
7 restriction against apartment use be reasonably
8 ascertainable to a landowner if it's not specified in
9 the Decision and Order?

10 A No. If it's not specified it would not be
11 ascertainable.

12 Q In your opinion would a prohibition or
13 restriction against retail use be reasonably
14 ascertainable to a landowner if it is not specified in
15 the Decision and Order.

16 A If it's not specified I don't see how you
17 can ascertain.

18 MR. KAM: Thank you, Chair Chock.

19 CHAIRPERSON CHOCK: State.

20 CROSS-EXAMINATION

21 BY MR. YEE:

22 Q Director Spence, you had testified
23 regarding the various definitions of light industrial
24 under county zoning, correct?

25 A Correct.

1 Q And you were asked a question by
2 Mr. Steiner about whether a home improvement center
3 and its various functions would constitute a light
4 industrial use. When you answered those questions
5 were you using the term "light industrial" from a
6 planning definition rather than a zoning definition?

7 A I'm not sure that they're really different.

8 Q Let me rephrase then. You had testified
9 that retail is a light industrial use under county
10 zoning, correct?

11 A I testified that retail uses are allowed in
12 light industrial zoning.

13 Q When you were answering Mr. Steiner's
14 question were you thinking that these home improvement
15 center functions were retail uses and therefore
16 qualified as light industrial uses?

17 A No.

18 Q You were applying a different definition of
19 light industrial in his question, in the context of
20 his question, is that right?

21 A Yes. What I was -- if I need to clarify.
22 You have all these light industrial uses that normally
23 would be found in a light industrial park except in
24 this case they're combined under one roof.

25 So I would classify that use as more

1 industrial in nature than it would be retail in
2 nature. And in both cases whether it's a stand alone
3 chop or a lumber yard, members of the public can still
4 go into those particular shops and purchase items.
5 Just because it's combined under one roof I don't see
6 how that changes.

7 Q Well, and I guess the distinction I'm
8 trying to draw is under zoning you can have a
9 restaurant that's permitted under the light industrial
10 zoning, correct?

11 A That's correct.

12 Q But a restaurant would not be considered a
13 light industrial use as you answered Mr. Steiner's
14 question.

15 A That's correct.

16 Q Would an apartment use be a light
17 industrial use in the same context as you would answer
18 Mr. Steiner's question?

19 A No, it would not.

20 Q You answered or you responded to a variety
21 of questions -- I'm sorry, let me rephrase. You
22 explained how conceptual plans change over time as
23 markets change, different approving agencies review
24 conceptual plans. Do you remember that?

25 A Yes.

1 Q As you reviewed this record has the plan
2 for this property changed since 1994?

3 A Yes, it has.

4 MR. YEE: Nothing further, thank you.

5 CHAIRPERSON CHOCK: Mr. Pierce, how much
6 time do you think you might need for this witness?

7 MR. PIERCE: I'm going to guess over a half
8 hour.

9 THE WITNESS: Oh, my goodness. (laughter)

10 CHAIRPERSON CHOCK: I think he's being
11 brief. (laughter)

12 MR. PIERCE: My guess may be off.

13 CHAIRPERSON CHOCK: I think we're going to,
14 on that note, recess until tomorrow morning 8:00.
15 He's your witness when we resume. Okay. Adjourned.
16 (gavel)

17 (The proceedings were adjourned at 4:34 p.m.)

18 --oo00oo--

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C E R T I F I C A T E

I, HOLLY HACKETT, CSR, RPR, in and for the State of Hawai'i, do hereby certify;

That I was acting as court reporter in the foregoing LUC matter on the 15th day of November 2012;

That the proceedings were taken down in computerized machine shorthand by me and were thereafter reduced to print by me;

That the foregoing represents, to the best of my ability, a true and correct transcript of the proceedings had in the foregoing matter.

DATED: This_____ day of_____2012

HOLLY M. HACKETT, HI CSR #130, RPR
Certified Shorthand Reporter